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EDITOR
RAKESH KAINTHLA
Director,
H.P. Judicial Academy,
Shimla.

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dismissed – held, that an application for extension of time was filed, which was dismissed, this shows the liability to pay the amount – however, the general power of attorney admitted in subsequent rent petition that the tenant had paid the rent – the objections were wrongly dismissed by the Executing Court- revision allowed – order of the Rent Controller set aside.

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Code of Civil Procedure, 1908- Section 96- Plaintiff pleaded that he was assaulted and humiliated by the defendant No.1 in the presence of many people – the defendants subsequently gave him beatings- the Trial Court awarded the compensation of Rs. 22,000/- along with interest @ 9% per annum – held in appeal that witnesses of the plaintiff proved the case of the plaintiff – an FIR was registered regarding the incident – one defendant was convicted by the Juvenile Justice Board – MLC proved the injuries suffered by the plaintiff – compensation of Rs.22,000/- is inadequate and is enhanced to Rs.1 lac – appeal partly allowed.

Title: Vishal Puri and others Vs. Yashpal Singh Page-1582

Code of Civil Procedure, 1908- Section 100- Contract for extraction of resin was awarded to the defendant – plaintiff pleaded that the target for extraction was 137.75 quintals, whereas, the defendant had extracted 94.11 quintals resin– the defendant is liable to pay compensation/damages for the difference of resin i.e. 43.64 quintals @ Rs.3,100 per quintals- the defendant pleaded that incessant rains during the pre-monsoon period dried the blazes and the trees fell due to high velocity winds – the requests were made to fix the blazes after excluding dried up blazes from which no extraction was possible – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held, that plaintiff had not led any evidence to prove the case – the defendant had denied his liability to pay the amount- the onus was upon the plaintiff to prove the case and in absence of evidence, Court had rightly held that case was not proved – there is no infirmity in the judgment passed by the Court – appeal dismissed – direction issued to initiate disciplinary proceedings against the concerned officer of the Forest Corporation.

Title: H.P. State Forest CorporationVs.NasibSingh Page-893

Code of Civil Procedure, 1908- Section 100- Father of the plaintiff was murdered by the defendant- an injury was also caused to the plaintiff- plaintiff had become handicapped and was unable to work - a sum of Rs.1 lac was sought as damages – the suit was partly decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that version of the plaintiff was duly proved by his witnesses while the version of the defendant was not proved- a sum of Rs.50,000/- was rightly awarded as damages- judgment in the criminal case is relevant for establishing that defendant was convicted by the Criminal Court- appeal dismissed.

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Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for the recovery of Rs.27,000/- pleading that the defendant had offered to purchase apple crop of the orchard of the plaintiff for a sum of Rs.1,01,000/- - defendant paid Rs.76,000/- and remaining amount of

Rs.25,000/- was to be made after the sale of the apple- the amount was not paid – hence, the suit was filed – the suit was decreed by the Trial Court – an appeal was filed, which was dismissed- held in second appeal that the plaintiff examined himself and two witnesses to prove his version- oral evidence was corroborated by documents – the defendant denied the version of the plaintiff but did not lead any evidence to prove his version – the evidence was correctly appreciated- appeal dismissed.

Title: Kewal Ram Vs. Murat Singh Page-1751

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for recovery pleading that contract for transportation of rectified spirit was awarded to it – some amount remained unpaid – hence, the suit was filed for recovery – the defendant pleaded that defective spirit was supplied and the amount was adjusted against the losses caused by the plaintiff – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- it was contended in second appeal that the suit was not maintainable as the plaintiff had failed to plead that partnership was registered- held, that no objection was taken regarding maintainability- it was specifically asserted in the plaint that plaintiff was a partnership concern – registration of the partnership firm was proved- the plea that suit was barred by limitation was also not established- appeal dismissed.

Title: Himachal Pradesh General Industries Corporation Ltd. Vs. M/s Hari Singh Harpal Singh Page-303

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Code of Civil procedure, 1908- Section 100- Plaintiffs pleaded that their land was acquired for the construction of Chamera Hydro Electric Project Stage-II (NHPC) – Government decided to award Rs.2,50,000/- to the affected families, who were not given employment as per the agreement entered at the times of acquisition – employment or the compensation was not paid to the plaintiffs – hence, the suit was filed for the recovery of compensation- defendants denied the claim of the plaintiffs and asserted that requisite compensation was paid to the plaintiffs – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed and the judgement and decree passed by the Trial Court were set aside – held in second appeal that acquisition was not disputed – it was also not disputed that one member of the family of the ousted person was to be provided employment and in the alternative compensation – it is admitted that plaintiffs had received compensation of Rs.2,50,000/- regarding 3-2 bighas of land – plaintiff asserted that they are entitled to financial package regarding 17 biswas of land– record shows that 17 biswas of land was not independent but part of the acquired land – financial package was received by all the legal representatives of P, the previous owner- plaintiffs are not entitled to separate compensation – appeal dismissed.

Title: Parkash Chand & Others Vs. State of H.P. & Others Page-1758

Code of Civil Procedure, 1908- Section 115- A civil suit for recovery of Rs.25,000/- was decreed by the Trial Court- decree was modified in appeal and the petitioners were held entitled to Rs. 10,000/- - it was contended that no second appeal is maintainable under law – held, that where the second appeal is barred by the statute, the provisions under Article 227 of the Constitution of India cannot be used to circumvent the bar of filing an appeal – however, where the judgment is

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Code of Civil Procedure, 1908- Section 151- Order 8 Rule 6-A- A counter- claim was filed by the defendants No. 2 to 5- an application was filed by defendant No. 1 for excluding the counter-claim, which was dismissed – held, that if a counter-claim is directed against the plaintiff, a defendant can seek relief against the co-defendant – the counter-claim filed by the defendants No. 2 to 5 was not solely directed against defendant No. 1 but was also directed against the plaintiff – therefore, the Trial Court had rightly dismissed the application for excluding the counter-claim-petition dismissed.

Title: Rakesh Kumar s/o Sh. Bansi Lal Vs. Suman Sharma d/o Sh.Bansi Lal & Others Page-733

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that applicant is co-owner of the suit land and is not in a position to alienate her share in view of the injunction granted by the Court- the application was allowed by the Trial Court- held in revision that applicant is recorded to be the co-owner of the property – suit has been filed for declaration – all the co-owners are necessary parties in a suit for declaration- her interest would be directly affected by the declaration- the Court had rightly allowed the application- revision dismissed.

Title: Sunil Kumar s/o Sh. Sanjay Kumar and others Vs. SudeshKumari w/o Sh. Satish Kumar and others Page-1316

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed, which was allowed by the trial Court- held, that the interest of the applicant is involved in the present suit and applicant is a necessary party – therefore, the application was rightly allowed by the Trial Court – revision dismissed.

Title: Suresh Kumar & others Vs. M/s Sunnox International & anr. Page-1247

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that the applicant had entered into an agreement to purchase the suit land and is a necessary party – the application was dismissed by the trial Court- held in revision that plaintiff had not sought any relief against the applicant – applicant has already filed a civil suit, which is pending before High Court- an agreement to sell does not create any right in the property – the order of the trial Court is not perverse and cannot be interfered in exercise of the revisional jurisdiction.

Title :Chander Sen Thakur son of Shri Tikkam Ram Thakur Vs. JiwaNand son of late Shri Ram Chand & others Page-465

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that the applicant had entered into an agreement to purchase the suit land and is a necessary party – the application was dismissed by the trial Court- held in revision that plaintiff had not sought any relief against the applicant – applicant has already filed a civil suit, which is pending before High Court- an agreement to sell does not create any right in the property – the order of the trial Court is not perverse and cannot be interfered in exercise of the revisional jurisdiction.

Title: Chander Sen Thakur son of Shri Tikkam Ram Thakur Vs. JiwaNand son of late Shri Ram Chand & others (Civil Revision No. 150 of 2014) Page-468

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

Title: Inderjit Singh Bawa Vs. Dr. Vani Sharma Page-660

Code of Civil Procedure, 1908- Order 7 Rule 11- A civil suit for declaration was filed challenging the election of various office bearers of the society – an application for rejection of the plaint was filed, which was dismissed – held, that the application was filed belatedly – the time for which the office bearers were elected has lapsed but that is not sufficient to dismiss the suit – the Court has already framed issue regarding the maintainability which is yet to be adjudicated- petition dismissed.

Title: Kewal Ram Siranta & Ors.Vs. HP Voluntary Health Association & Anr. Page-578

Code of Civil Procedure, 1908- Order 7 Rule 11- An application for rejection of the plaint filed by defendant No.4 pleading that plaint does not disclose any cause of action against defendant No.4 **-** defendant No.4 had taken action in discharge of his official duties and is not liable – held, that defendant No.4 has been arrayed as party because he remained the Managing Director of the Bank – acts done in discharge of official duty are protected and immune from prosecution, provided they are done in good faith and without malafide – malafide means that the act is not done for the proposed purpose – malafide should be pleaded by specific allegations – merely by saying that action was not justified and was out of bias will not amount to plea of malafide- general and vague allegations of malafide have been levelled – no evidence can be led regarding a plea not asserted in the plaint- application allowed and plaint ordered to be rejected against the defendant No.4.

Title: Narotam Dutt Sharma Vs. H.P.State Co-operative Bank Ltd. and others Page-1785

Code of Civil Procedure, 1908- Order 7 Rule 14- Plaintiff filed a civil suit for declaration challenging the revenue entries and the entry of date of birth of defendant No.3 – plaintiff filed an application seeking permission to place on record the date of birth certificate, which was dismissed – plaintiff filed a similar application in the suit after it was remanded by the appellate court, which was dismissed- plaintiff was fully aware of the date of birth of defendant No.3 – birth certificate is a public document and could have been obtained or proved without any difficulty- obtaining a certified copy is not the discovery of a new fact- plaintiff failed to prove as to why he had not placed the document on record with the plaint –no error was committed by the Court in dismissing the application- petition dismissed.

Title: Piar Chand Vs. Deepika& others (D.B.) Page-1190

Code of Civil Procedure, 1908- Order 8 Rule 9- Plaintiff amended the plaint – L.Rs. Of defendant No. 1 filed an amended written statement- plaintiff filed an application for rejection of the amended written statement on the ground that it was beyond the scope of amendment - held, that defendant can amend the written statement to the extent of amendment in the plaint – if the

defendant wants to amend the written statement, he has to seek permission from the Court – L.Rs had amended the written statement beyond the scope of the amendment- L.Rs. can file written statement appropriate to their character as L.Rs. but they have to seek permission from the Court before filing additional written statement – the order passed by trial Court set aside and amended written statement filed by the L.Rs. ordered to be rejected.

Title: Ram SwarupVs. Lila Wati& Others Page-957

Code of Civil Procedure, 1908- Order 9 Rule 13- Applicant filed an application for setting aside ex-parte decree on the ground that she was not properly served – the application was dismissed by the Trial Court- an appeal was filed, which was also dismissed – held, that process server had made the endorsement on the back of the summons regarding the personal service along with the copy of plaint – the endorsement was not proved to be false – the service was properly effected – appeal dismissed.

Title: Ganga Devi Vs. Om Prakash Page-1050

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

Title: Dinesh Kumar Vs. Jyoti Prakash and others Page-414

Code of Civil Procedure, 1908- Order 17 Rule 1- Five adjournments were granted to the petitioner – he could not produce the evidence on the date fixed as his mother fell ill – his evidence was closed by the order of the Court- held, that time and place of illness cannot be predicted – adjournment was sought on the ground of unavoidable reason – the Court should have been more compassionate - the fact that five adjournments had already been granted should not have been the sole ground to decline the adjournment – petition allowed- the order set aside on the payment of cost of Rs. 5,000/-.

Title: Karam Chand Vs. Prem Sagar Marwah Page-307

Code of Civil Procedure, 1908- Order 21 Rule 1- It was contended that respondents have not complied with the directions passed by the Court – a contempt petition was filed, in which time was granted to comply with the direction contained in the judgment – respondents directed to file a detailed status report indicating the compliance of direction.

Title: Suman Kumari Vs. State of Himachal Pradesh & another (D.B.) Page-462

Code of Civil Procedure, 1908- Order 21 Rule 1- Section 47- Objections were filed to the execution petition, which were dismissed by the Executing Court – held in revision that Executing Court cannot go behind the decree – plea that provisions of Section 118 of H.P. Tenancy and Land Reforms Act were violated could have been taken in a suit but was not taken – this objection cannot be taken before the Executing Court – Court cannot disturb finding of fact in exercise of revisional jurisdiction- revision dismissed.

Title: Rajiv Bansal son of late Shri Mohinder Kumar Bansal Vs. Mange Ram Chaudhary son of Shri Prittam Singh & others Page-566

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed for restraining the defendants from causing any obstruction upon the path

existing in the suit land- an application for execution was filed, which was dismissed by the Court- held, that the decree had obtained finality – an oral prayer was made during the pendency of suit and appeal that the defendant had encroached upon the suit land and a decree of mandatory injunction be passed – however, the prayer was declined in absence of the pleadings – a fresh suit would be barred by the principle of res-judicata- the Executing Court had wrongly dismissed the Execution Petition and the decree holder was deprived of the fruits of the decree obtained by him- petition allowed and order of Executing Court set aside – Executing Court directed to decide the same afresh.

Title: Tek Chand and another Vs. Karam Singh & others Page-1450

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

Title: Tara Singh Vs. Govind Singh (deceased) through LRs. Page-888

Code of Civil Procedure, 1908- Order 21 Rule 32- An execution petition was filed, which was dismissed by the Executing Court – held in revision that witnesses of decree holder had deposed that no construction was raised after passing of decree- J.D. No.7 had died and cause of action came to an end on his death- High Court cannot reverse the finding of facts unless the same is perverse- no illegality was committed by the trial Court- revision dismissed.

Title: Lajja Devi wife of ShBhagat Ram Vs. Kanshi Ram son of Sh. Gurbax and others Page-616

Code of Civil Procedure, 1908- Order 21 Rule 32- Civil suit was decreed for specific performance of the agreement – the decree was put to execution – Court ordered the execution of the sale deed and directed the vendee to join J.D. for completing the sale – held, that decree was passed for specific performance of the agreement relating to Khasra No.508 – the Court had directed the execution of the sale deed in respect of Khasra No.508/8- the Executing Court cannot go behind the decree – revision allowed and the Court directed to execute the sale deed in accordance with the decree.

Title: Ganga Ram Vs. Prakash Verma Page-1322

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

Title: Roshan Lal son of Shri Nandu and others Vs. Nika Ram son of Budhu& others Page-452

Code of Civil Procedure, 1908- Order 21 Rule 32- Section 47- A petition was filed for the execution of the decree of specific performance – the petitioner filed objections pleading that the decree is unexecutable as she is not in possession of the flat – the bank had taken possession of

the flat and had auctioned it to N- objections were dismissed by the Trial Court- held, that any right created during the pendency of the suit will not affect the decree holder in view of the doctrine of lis pendens – this doctrine is also applicable to the Court sales – the petitioner had prolonged the proceedings for 3½ years after obtaining ex-parte stay order – petition dismissed with the cost of Rs.30,000/-.

Title: Raksha Devi Vs. Uma and others Page-1653

Code of Civil Procedure, 1908- Order 21 Rule 97 read with Section 151- An order of eviction was passed – an application for its execution was filed –the objector filed objections, which were dismissed- held, that the order was passed against the brother of the objector – no application for impleadment was filed by the objector during the main petition, which means that the objector had acquiesced in the passing of the order- the objections were filed to delay the execution – there was no requirement of framing the issues and recording the evidence- petition dismissed.

Title: Vikas Kapila & another Vs. Ashok Sood & another Page-1453

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

Title: Deepika Vashisht Vs. Rakesh Singh Page-300

Code of Civil Procedure, 1908- Order 33 Rule 2- Plaintiff filed a suit for compensation of Rs.2 lacs for electrocution due to the negligence of the defendants – the defendants denied the claim of the plaintiff – suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the suit was decreed for recovery of Rs.1,66,000/- along with interest @ 6% per annum- held in second appeal that Plaintiff had examined himself and two witnesses to prove his version- documentary evidence also proved his version – there was no distance between the roof of the house of the plaintiff and the HT line, whereas distance of 12 feet is required to be maintained as per rules – thus, the negligence was duly proved.

Title: HPSEB & Another Vs. Babu Ram Page-1745

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Petitioner was appointed as beldar – he was promoted and trained to operate the hydra crane – he was being transferred to the Mining Department without any training- a civil suit was filed along with an application for seeking ad-interim injunction- the injunction was granted by the Trial Court- an appeal was filed, which was allowed- held in revision that the petitioner was transferred to the Mining Department and was asked to undergo training in dumper operation, which the petitioner refused – the petitioner was transferred to crusher section and was advised to report to HOD crusher – the petitioner refused and was charge-sheeted – an employee can be posted anywhere to subserve the administration – the petitioner is not interested to undergo the training but wants to continue only on one machine – he cannot deny the order of superior – no prima facie case exists in favour of the petitioner – the injunction was rightly denied to the petitioner- revision dismissed.

Title: Subhash Chand Vs. Rajinder Thakur &others Page-1599

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit seeking relief of permanent prohibitory injunction- an application seeking interim relief was filed, which was

dismissed by the trial Court- an appeal was filed, which was partly allowed and parties were directed to maintain status quo- held in revision that previous suit was dismissed in default and principle of res-judicata was not applicable- dismissal will not affect the present suit- the order of status quo is necessary to preserve the property during the pendency of the suit – revision dismissed.

Title: Ajit Singh son of Sh. Bidhi Chand Vs. Mukhtiar Singh son of Sh. Bidhi Chand

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Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff/applicant filed an application seeking an ad interim injunction, which was partly allowed by the Trial Court and the defendant/respondent was restrained from mortgaging or creating charge over the suit land – however, relief of injunction for restraining the defendant/respondent from interfering with the suit land was declined on the ground that defendant/respondent was in possession of the suit land - an appeal was filed, which was allowed and the defendant/respondent was restrained from interfering with the suit land – held, that the Appellate Court had not upset the findings recorded by the Trial Court that defendant/respondent was in possession and therefore, could not have granted injunction for restraining the defendant/respondent from interfering with the suit land – petition allowed and order of Appellate Court set aside.

Title:Meemo Devi Vs. Saroj Kumari Page-1681

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a civil suit pleading that suit land is owned and possessed by them – partition was ordered by AC 1st Grade but the order was set aside in appeal – the defendants were interfering with the suit land – an application for interim injunction for restraining the defendants was filed, which was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held, that power under Article 227 of the Constitution of India is to be exercised sparingly and in appropriate cases for keeping Subordinate Courts within the bounds of their authority – the defendants are recorded owners in possession of the suit land- plaintiffs are not recorded to be the owners in possession of the suit land – in case injunction prayed for is granted, the defendants will suffer – the Courts had not committed any jurisdictional error while dismissing the application- petition dismissed.

Title: Karam Chand and others Vs. Manjeet Singh and another Page-1825

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a suit for declaration and injunction- an application for interim relief was also filed, which was allowed and parties were directed to maintain status quo qua the nature, user, possession, construction and alienation – an appeal was filed, which was allowed and the application was dismissed – held, that the finding regarding the execution of the Will cannot be given while deciding the application for interim relief – both the parties are asserting their title and possession- hence, the status quo order is necessary to protect the rights of the parties – revision allowed, order of the Appellate Court set aside and the order of the Trial Court restored.

Title: Santosh w/o Sh. Tara Dutt& Another Vs. Sanjeev Kumar s/o Sh. Bal Krishan & Others

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Code of Civil Procedure, 1908- Order 41 Rule 1- Section 11- Plaintiff filed a civil suit for recovery- the defendant filed a counter-claim – the suit was partly decreed while the counter-claim was dismissed- an appeal was filed by the defendant against the judgement and decree – no separate appeals were filed regarding partly decreeing the suit and dismissing the counter- claim- the Appellate Court reversed the judgment and decree and allowed the counter-claim- held in second appeal that non-filing of appeal against the judgment and decree means that it has become final – the dismissal of counter-claim leads to finality of the controversy and even if the decree has not been drawn, it will not take away the effect of the dismissal – the defendant should

have filed two appeals and relief could not have been granted to him in one appeal – otherwise the decree in one suit will operate as res-judicata vis-à-vis the other – appeal allowed and the judgment of the Appellate Court set aside.

Title: H.P. State Forest Corporation through its Divisional Manager Vs. Kahan Singh since deceased through his LRs Partap Singh and others Page-1137

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

Title: Babu Ram Vs. Santokh Singh & another Page-388

Code of Civil Procedure, 1908- Order 41 Rule 25- Matter was remanded by the Appellate Court after framing issues – the order is challenged before the High Court- held, that the Court had not considered the provisions of Order 41 Rule 25 of C.P.C – the Court had erred in framing the issues – the case was pertaining to the execution of the Will and the burden is always on the propounder to establish the same – the order of the Appellate Court set aside and the matter remanded to the Appellate Court for a fresh decision.

Title: Ranjeet Singh Vs. Prithvi Singh &others Page-623

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

Title: Jagdish Raj and another Vs. Dhali Devi Page-261

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

Title: M/s United Electronics (India) Ltd. and another Vs. Ajay Kumar and others (D.B.) Page-425

Code of Criminal Procedure, 1973- Section 125- L and her son filed petition seeking maintenance pleading that husband of L started harassing and abusing her – he also demanded Rs. 30,000/- as dowry - L and her son were turned out of the house- the Trial Court granted

maintenance of Rs. 1200/- per month to each of the petitioner- a revision was filed, which was dismissed- held, that husband did not appear in the witness box and an adverse inference has to be drawn – L specifically stated that income of the husband is Rs. 12,000/- per month- no evidence was led in rebuttal – the maintenance of Rs. 1200/- per month each cannot be said to be excessive – evidence of the petitioner proved the ill-treatment and that wife is unable to maintain herself - petition dismissed.

Title: Bhag Singh s/o Sh. Mahantu Ram Vs. Lalita Devi w/o Sh. Bhag Singh and another Page-841

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

Title: Suresh Kumar Vs. Mamta Rani Page-528

Code of Criminal Procedure, 1973- Section 127- S was married to G – G started maltreating S and ousted her from her matrimonial home – she filed a petition for maintenance and maintenance of Rs.500/- per month was granted to him on 19.6.2207- S filed a petition for enhancement of maintenance from Rs.500/- to Rs.5,000/-- Session Judge, Mandi enhanced the maintenance allowance toRs.2,000/- per month from the date of the order- held, that keeping in view the price index and the fact that one daughter is residing with S, it is not expedient to interfere with the order of Sessions Judge, Mandi – the husband is duty bound to maintain his wife – rise in prices is a changed circumstance and the petition for enhancement can be filed on this ground – petition dismissed.

Title: Girdhari Lal son of Shri Sher Singh Vs. Shashi Kumari wife of Shri GirdhariLal Page-1220

Code of Criminal Procedure, 1973-Section 133- Petitioner is co-owner in possession of the land – the villagers requested the petitioner to allow them to construct the road – petitioner gave an undertaking to provide land for the construction of the road – the retaining wall was damaged during the construction of the road – when Gram Panchayat did not construct the wall, the petitioner himself erected the same – it was claimed that the obstruction was caused to the road- proceedings were initiated against the petitioner and notice was issued to him- held, that obstruction has been caused to the road –SDM had rightly passed the order after visiting the spot and verifying the facts- petition dismissed.

Title: Sudershan Singh Vs. State of Himachal Pradesh &ors. Page-1704

Code of Criminal Procedure, 1973- Section 133- The petitioner filed an application pleading that respondent No. 1 had blocked flow of rainy and domestic water - respondent No.1 pleaded that civil litigation was going between the parties – no water was blocked by him and false application was filed – SDM dismissed the application by holding that there was no nuisance and general public was not involved in the dispute- a revision was filed before Additional Sessions Judge, which was dismissed- held, that power under Article 227 of the Constitution of India is tobe used sparingly for keeping the Subordinate Courts within the bounds of their authority and not for correcting mere errors – it was not disputed that a civil suit was pending between the parties regarding the subject matter – there was no public nuisance as it was not established that drain was being used by public at large – filing of an application before Criminal Court to settle

the civil dispute amounted to abuse of the process of the Court – petition dismissed with cost of Rs.10,000/- .
Title: Kashetar Pal Singh alias Kripal Singh Vs. Harpal Singh and another Page- 1782

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

Code of Criminal Procedure, 1973- Section 377- Accused was convicted by the Trial Court and sentenced to undergo imprisonment for a period of 6 months- an appeal was filed, which was partly allowed and the sentence of imprisonment was modified – the accused was sentenced to undergo imprisonment till the rising of the Court - an appeal has been filed against the sentence imposed pleading that the sentence is inadequate – held, that only the sentence imposed by the Trial Court can be enhanced under Section 377 of Cr.P.C– in this case sentence was imposed by the appellate court- hence, appeal is not maintainable – permission granted to file a revision petition.
Title: State of H.P. Vs. Prem Chand Page-1491

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Sections 341, 323, 325, 307 and 506 of I.P.C – the petitioners sought bail – held, that there are two versions regarding the manner of incident- the injuries do not show that they could have been caused by stick, kicks or fist blows – petition allowed- petitioners ordered to be released on bail of Rs.25,000/-.
Title: Sohan Lal Vs. State of H.P. Page-1367

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

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

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 147, 148, 149, 307, 323 and 506 of I.P.C – the petitioners are students, who had assaulted the members of rival students' union – held, that the violence in the University campus has become a permanent feature due to frequent fights between the members of rival unions- the petitioners have committed heinous offences and stringent conditions are required to be imposed to ensure cordial atmosphere – the petitioners are the permanent residents of Himachal Pradesh- hence, they are ordered to be released subject to conditions.

Title: Amrish Kamal & another Vs. State of Himachal Pradesh Page-1096

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 332, 353, 452, 342 and 504 read with Section 34 of I.P.C – the petitioner pleaded that he has been falsely implicated – informant had given beatings to the petitioner – held, that keeping in view the fact that simple injuries were sustained by the petitioner, the petitioner is permanent resident of the place and is not in a position to flee from justice or to temper with the prosecution evidence; bail application allowed subject to conditions.

Title: Ashok Kumar Vs. State of Himachal Pradesh Page-1585

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 302 of I.P.C – the petitioner applied for bail- the petitioner was last seen by the witnesses with the deceased – therefore, it is not a fit case, where judicial discretion to admit the petitioner on bail is required to be exercised -petition dismissed.

Title: Rajeev Kumar Vs. State of Himachal Pradesh Page-397

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

Title: Narain Dass ChauhanVs. State of H.P. Page- 450

Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offences punishable under Sections 500, 501, 502, 503, 504, 505, 506 read with Section 177, 182 and 186 of I.P.C.- the Magistrate found that a prima facie case was made for the commission of offences punishable under Sections 500, 504 and 506 of I.P.C but no case was made for the commission of other offences- a revision was preferred, which was partly allowed and it was held that prima facie case was made out for the commission of offence punishable under Section 500- held, that the statements and the documents prove that there are sufficient ground to proceed against the accused for the commission of offence punishable under Section 500 of I.P.C – the Court has to prima facie satisfy itself that there are sufficient grounds for proceeding against the accused at the stage of summoning of the accused - mere pendency of the civil suit is not sufficient to dismiss the criminal complaint – petition dismissed.

Title: Mohinder Nath Sofat son of Shri Ram Krishan Sofat Vs. Dr. Rajeev Bindal Ex-Health Minister of H.P. Page-1326

Code of Criminal Procedure, 1973- Section 482- Accused V met with an accident and was in a coma for one month – Medical Board concluded that he was unable to defend himself – trial was

ordered to be stayed – it was ordered that the accused be examined every three months-aggrieved from the order, father of the accused filed a petition – held, that as per Medical Board V is not showing any sign of improvement – the petitioner submitted that he is incurring expenses on bringing V to the Medical Officer after three months- direction issued to the trial judge to re-consider the period of three months.

Title: Krishan Lal KhimtaVs. State of Himachal Pradesh Page-561

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Sections 447 and 506 read with Section 34 of I.P.C – petitioners have sought the quashing of FIR on the ground that the disputed land is located adjacent to the land of the petitioners – the land is in possession of the petitioners – held, that Civil Court had also found the petitioners to be in possession- continuation of criminal proceedings will be abuse of the process of the Court – petition allowed, FIR and consequential proceedings quashed.

Title: Neeraj Naiyar and others Vs. State of H.P. and another Page-1341

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 498-A and 506 read with Section 34 of I.P.C – the police sought cancellation of FIR – the Court ordered the cancellation of the FIR with liberty to file a private complaint- held, that after the cancellation of FIR, filing of criminal complaint would amount to abuse of the process of the Court – order set aside and case remanded to the Trial Court with a direction to decide the same afresh.

Title: NishuVs. State of Himachal Pradesh Page-1086

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Section 376 and 417 of I.P.C against the petitioner- petitioner and second respondent were training together and were having a live in relationship – the petitioner had promised to marry the second respondent but had married elsewhere – FIR was registered against the petitioner at the instance of the second respondent – it was pleaded that no offence has been made out against the petitioner and FIR be quashed – held, that it was established that the petitioner did not have the intention to marry the second respondent from the inception- second respondent had surrendered her mind, body and soul only because of the promise that petitioner would marry her – whether the physical contact was established between the parties with consent and without commitment of marriage would be seen during the course of trial – petition dismissed.

Title: Vikas Sharma Vs. State of Himachal Pradesh Page-1534

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

Title: Surinder Kumar son of Shri Shesh Ram Vs. State of H.P. and another Page-770

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

peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions.
Title: Santosh Kumar s/o Sh. Dharam Singh Vs. State of H.P. Page-878

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

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions.
Title:Aadesh Kumar s/o Sh. Rambir Singh Vs. State of H.P. Page-853

Code of Criminal Procedure, 1973- Section 482 and 320- Petition has been filed for quashing of the FIR registered for the commission of offences punishable under Sections 498-A, 406 and 109 of I.P.C. – it has been pleaded that matter has been compromised between the parties and permission be granted to compound the matter - since parties have voluntarily compromised the matter; therefore, permission granted- FIR and consequent proceedings ordered to be quashed.
Title: Ricky Sharma s/o Sh. Raman Sharma &OthersVs. State of H.P. and others
Page-1765

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

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

Code of Criminal Procedure, 1973- Section 482- Present petition has been filed for quashing the FIR registered for the commission of offences punishable under Sections 336, 337, 427 read with Section 34 of I.P.C- held, that the complicated questions of facts cannot be determined in the proceedings relating to quashing of FIR – the document and the evidence show that there are sufficient grounds to proceed for the commission of offences punishable under Sections 336, 337, 427 read with Section 34 of I.P.C- petition dismissed.

Title: Kuldeep son of late Sh. Ram Lal Vs. State of HP and others Page-834

Code of Criminal Procedure, 1973- Section 482- The revisionist was convicted for the commission of offences punishable under Sections 447, 427, 504 and 506 of I.P.C – an application has been filed for seeking composition of the offence in view of the compromise between the parties – since, the matter has been compromised, therefore, permission granted and the accused acquitted.

Title: Babu Ram Vs. State of Himachal Pradesh Page-801

Code of Criminal Procedure, 1973- Section 498- An FIR was registered for the commission of offences punishable under Section 498-A and 406 read with Section 34 of Indian Penal Code – the matter has been compromised between the parties- hence, the prayer was made for quashing the proceedings- held that criminal proceedings can be quashed to meet ends of justice - where the Court is satisfied that parties have settled the dispute amicably, FIR, complaint and subsequent proceedings can be quashed – petition allowed -FIR and subsequent proceedings quashed.

Title: Jagdish Chand and others Vs. State of Himachal Pradesh and another Page-556

Constitution of India, 1950- Article 226 - A lease was granted in favour of the petitioner – the petitioner approached the respondents for renewal of lease – respondents renewed the lease for part of the land – the petitioner failed to get the lease renewed – proceedings were initiated under H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971, which resulted in eviction of petitioner – appeal was dismissed – a writ petition was filed in which a liberty was granted to initiate the fresh proceedings – fresh proceedings resulted in the eviction of the petitioner – an appeal was filed, which was dismissed- matter was remanded to the Appellate Court in the writ petition- writ petitioner contended that arguments were not marshaled and appreciated by the Appellate Court- held, that Appellate Court had properly appreciated the matter – the petitioner had failed to get the lease renewed and he was in unauthorized possession- the writ Court can only interfere if Appellate Court has wrongly appreciated the facts and evidence or the judgment is illegal - the Appellate Court had thrashed all the facts and the judgment cannot be said to be illegal- appeal dismissed.

Title: Prem Prakash Gupta Vs. State of HP and others Page-759

Constitution of India, 1950- Article 226- Land of the petitioner was used for the construction of the road without acquisition - assurance was made to acquire the land but no steps were taken for acquisition – the respondent stated that the road was constructed on the persistent demand of the Villagers- it was denied that any objection was raised by the petitioner – held, that the road was constructed in the year 1991 - no document was placed on record to show that the land was donated by the petitioner or that there was implied consent of the petitioner – the petition allowed – respondent directed to pay admissible compensation to the petitioner.

Title: Khuri Vs. State of Himachal Pradesh and another Page-1274

Constitution of India, 1950- Article 226- Petitioner submitted a tender, which was the lowest – however, work was not allotted to the petitioner – the petitioner filed the present petition – held,

that the petitioner was found to be lowest tenderer – the petitioner had submitted experience certificate along with PAN and EPF number - a complaint was received against the petitioner that the experience certificate was fictitious and cannot be taken into consideration- the experience certificate shows that the same was not in favor of the petitioner but in the name of K – there was over writing in the same- since the bidder had failed to fulfill the condition of tender notice; hence, a decision was rightly taken to cancel the tender- the Court cannot sit as an expert – writ petition dismissed.

Title: Krishna Sanitation Society Jatroon Vs. State of Himachal Pradesh and another (D.B.)
Page-1388

Constitution of India, 1950- Article 226- A decision was taken to house the corporate office under one roof- in view of this decision, writ petition is disposed of with liberty to challenge the same, if so advised.

Title: Court on its own motion Vs. The Chief Secretary and others (D.B.) Page-271

Constitution of India, 1950- Article 226- A proposal was prepared to notify Ner Chowk Panchayat as Municipal Corporation – objections were invited from the inhabitants who opposed the formation of municipality – a notification was issued declaring the areas of Ner chowk as Municipal Corporation – present writ petition was filed challenging the decision – respondents replied that Nagar Panchayat fulfilled the criteria required for the constitution of new Municipality – the town was a hub of Industrial and Business activities – there was a considerable floating population of workers in the area which required civic amenities- these amenities could only be provided by a Municipality – the procedure prescribed by the law was followed and it was prayed that writ petition be dismissed – held, that allegations of malafides were made against a member of legislative assembly- it was incumbent to implead that person as a party – the proposal fulfilled the criteria laid down in the Act- objections were invited and considered – the proposal was approved by the Cabinet – mere error in the nomenclature by mentioning Nagar Parishad instead of Nagar Panchayat will not invalidate the notification- no record was produced to show that notification was not in a public interest or was issued with some ulterior motive – the Courts are not to interfere with the legislative function unless the decision was not in public interest but was taken with ulterior motive at the behest of some interested persons – petition dismissed.

Title: YudhChand Saklani Vs. State of Himachal Pradesh and others (D.B.)
Page-1733

Constitution of India, 1950- Article 226- A road was constructed by the State under PMGSY – acquisition proceedings were initiated but were allowed to lapse- State on its own took decision to initiate fresh proceedings for acquisition of the land but did not do anything- held, that no person can be deprived of his property save and except by following due process of law- right to property is not only constitutional or statutory right but also a human right- the petition allowed and the respondents directed to initiate proceedings for acquisition of the land.

Title:Balwant Singh & others Vs. State of Himachal Pradesh & others Page-1384

Constitution of India, 1950- Article 226- A writ petition was filed by the petitioner seeking direction to the University to show the answer sheets/books of the petitioner and the copy of notification of dates of examination – the petition was dismissed – SLP was filed before the Supreme Court, which was also dismissed – a CMP was filed to provide the record kept in the sealed cover –the petitioner was directed to approach the authorities for obtaining the copy of the requisite documents – the petitioner filed the present application pleading that he is not satisfied with the order passed by the authority – held, that the language used by the petitioner is intemperate and contemptuous – the petitioner has attempted to interfere with the due course of judicial proceedings – no licence can be given to the petitioner to commit contempt of Court – however, no action was taken considering the fact that petitioner is a student — further, the writ

petition has been disposed of and the Court has become functus officio - no direction can be issued – petition dismissed.
Title: Lalit Narain Mishra Vs. The State of Himachal Pradesh & others (D.B.) Page-1612

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

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

Constitution of India, 1950- Article 226- Construction work on selected reaches on NH-70 was advertised – two bids were submitted – one was rejected by Tender Evaluation Committee – the Committee decided to cancel the tender process being single tender - the work was re-advertised – six bids were received out of which four were rejected – a complaint was filed regarding concealment of facts by respondent No.5, which was found to be correct on inquiry – another complaint was filed against the petitioner- the tender was again cancelled – the petitioner filed a writ petition challenging the cancellation process- held, that the officer of respondent No.2 was associated at the time of inquiry into complaint made against respondent No.5- he had written a letter subsequently that in case of opening of financial bid, no cognizance will be taken by respondent No.2- this shows lack of coordination between the respondents - the objection of respondent No.5 regarding the fact that technical personnel will not be ready to work with the petitioner is an assumption belied by the documents showing that they had consented to work with the petitioner – petition allowed - letter quashed and set aside - respondents directed to award the work to the petitioner.
Title: Sandeep Chauhan Vs. Union of India and others (D.B.) Page-1631

Constitution of India, 1950- Article 226- Deceased was posted in CRPF – he was found unconscious on his bed and was taken to hospital, where he was declared brought dead due to myocardial infraction- ordinary family pension was sanctioned to his widow- she claimed that her husband had died on account of illness in the snowbound hostile area- cause of death is directly attributable to government service – held, that rules provide that there should be causal

connection between the death and the government service – if the disease is contracted because of continued exposure to a hostile work environment, subjected to extreme weather condition or occupational hazards resulting in death or disability, same are to be accepted as attributable to or aggravated by government service – the deceased was serving in insurgency hit area – he had no prior history of chronic heart disease – his death was caused by multiple factors like hostile work environment and extreme weather condition- writ petition allowed and petitioner held entitled to the benefit of extraordinary pension.

Title: Rajni Devi Sharma Vs. Union of India & Others (D.B.) Page-1484

Constitution of India, 1950- Article 226- DGP was directed to be present in the Court but he did not appear and instead sent ADGP- directions issued to Chief Secretary to ensure that Officers who are required to be present before the Court in terms of the Court's order should remain present.

Title: Court on its own motion Vs. State of H.P. and othersCWPIL No.13 of 2015 (D.B.)
Page-472

Constitution of India, 1950- Article 226- Government issued a notification for opening Government Degree College, which is the subject matter of the writ petition- an application for interim direction was filed, which was allowed and the order was stayed – it was prayed that interim direction be vacated – held, that Government formulates the policy upon number of circumstances based on its resources – it would be dangerous, if the Court is asked to test the utility or beneficial effects of the policy based on the facts set out in affidavit – Court cannot strike down a policy or decision merely because it feels that another decision would have been fairer and more scientific, logical or wiser- the wisdom and advisability are not amenable to judicial review unless the policies are contrary to statutory or constitutional provision or arbitrary or irrational or an abuse of power – the Government has right to frame policy and there is no need to raise any grievance, if the policy is changed- the policy will not be vitiated merely because it has been changed- the Government has discretion to adopt a different policy to make it more effective – the decision to open a new college is not malicious, arbitrary or whimsical – the matter is also pending before Hon'ble Supreme Court of India- the decision to open the college cannot be stayed indefinitely- prayer allowed and the stay order vacated.

Title: Asha Ram and another Vs. State of Himachal Pradesh & others (D.B.)
Page-401

Constitution of India, 1950- Article 226- Government of India introduced ex-servicemen contributory health scheme to provide medicare to ex-servicemen and their dependents- scheme was contributory and the appointment of the staff was contractual- petitioners were appointed on different dates on contractual basis- their services were dispensed with on cessation of the contractual service- the petitioners filed writ petitions against the orders – a division bench dismissed some of the writ petitions while another division bench allowed some of the writ petitions- full bench was constituted to resolve the conflict between the judgments of division benches – held, that the petitioners were not appointed on permanent basis but on contractual basis- once the contract came to an end, the person holding the post can have no right for renewal of contract or continuation as a matter of right- services of a contractual employee cannot be equated with the services of ad hoc employee- the scheme was meant not only to provide medical facilities to the ex-servicemen but to adjust the personnels superannuating from the army for a short period – therefore, the persons who were given appointment cannot claim any right of renewal of the employment after the expiry of contract – the respondents had never represented to the petitioners that their services will continue – writ Court can judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action- judicial review cannot extend to the Court acting as an Appellate Authority sitting in judgment over the decision- the petitioners have failed

to place any material on record to show that the action of the respondents is either unreasonable, unfair, perverse or irrational – petitioners had accepted the terms and conditions of the employment and they cannot claim higher rights ignoring the conditions laid down in the scheme- petitioners have no right to continue beyond the period prescribed in the contract- petitions dismissed.

Title: Pawan Kumar Vs. Union of India and another (F.B.) Page-1181

Constitution of India, 1950- Article 226- Land was allotted in consolidation – aggrieved from the allotment, proceedings were initiated before Consolidation Authority – writ petition was filed against the order passed by Consolidation Authority- held, that the land adjoining to the road is commercial- petitioner is claiming land adjoining to the road – the Consolidation Authorities had not taken commercial nature of the land into consideration while passing the order- writ petition allowed- matter remanded with a direction to re-hear the parties and to decide the same afresh.

Title: Hari Singh Vs. State of H.P. & others Page-419

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

Title: National Insurance Co. Ltd. Vs. State of Himachal Pradesh and Ors. (CWP No. 1283 of 2006) Page-667

Constitution of India, 1950- Article 226- Online item rates/bids were invited from contractor for the various works- the petitioner uploaded his bid before due date – he was found to be the lowest bidder but he was not called for negotiation- held, that the financial bid of the petitioner was opened and he was declared lowest bidder – he should have been called for negotiation before calling the second lowest bidder – however, the bid was rejected on the technical ground and the Court cannot substitute its wisdom for technical opinion of the members of the committee – petition dismissed.

Title: Rahul Pandey Vs. State of Himachal Pradesh and others (D.B.) Page-764

Constitution of India, 1950- Article 226- Petitioner applied for the post of PGT English along with other candidates – respondent No.5 was selected – petitioner claimed that marks were wrongly awarded to respondent No.5 – held, that as per the communication made by Secretary, Gram Panchayat and Revenue Authorities, respondent No.5 is not a permanent resident of patwar circle – 10 marks were wrongly awarded to him- writ petition allowed – appointment of respondent No.5 set aside and respondent/State directed to offer appointment to the petitioner.

Title: Kusum Lata Vs. State of Himachal Pradesh and others Page-1076

Constitution of India, 1950- Article 226- Petitioner applied for the post of drawing master along with other persons- respondent No.6 was selected – petitioner contended that respondent No.6 was not qualified and there were cuttings and over writings in the result sheet- held, that there is no tampering in the result sheet and the marks were awarded as per the notification- two years diploma in Art and Crafts was required – respondent No.6 had obtained the diploma and was eligible – the petitioner had participated in the selection process and could not have challenged the same – writ petition dismissed.

Title: Amit Singh Vs. State of H.P. & others (D.B.) Page-911

Constitution of India, 1950- Article 226- Petitioner applied for establishing green house for growing agriculture and horticulture produce – he was to pay Rs.18 lacs and remaining amount of Rs.30 lacs was to be financed by the Bank- he was entitled to subsidy – the petitioner failed to repay the amount and notice under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was issued – he approached the writ Court, which passed an order for release of subsidy into the account of the petitioner- however, the subsidy was not released – held, that the project was to be implemented within a period of two years – issuance of letter of intent will not enable a person to get the subsidy – subsidy cannot be claimed as a matter of right- the petitioner had failed to furnish the certificate of completion of project and his case was rightly not considered by the respondents- writ petition dismissed.

Title: Partap Singh RauautVs. Union of India & Others (D.B.) Page-989

Constitution of India, 1950- Article 226- Petitioner applied for the post of Part Time Water Carrier on the ground that her father had donated land for the construction of the school in the year 1964 – respondent No.3 was selected by the Government under Rule 12 of Recruitment Scheme for the appointment of Part Time Water Carriers – held, that Rule 12 empowers the State to make the appointment on compassionate ground without following the selection process amongst widow, women deserted by their husbands, or otherwise destitute, handicapped persons, if such candidate falls below the poverty line - the petitioner had applied for recruitment under this Rule – the Rule was subsequently quashed but the appointment was made prior to the quashing – respondent No.3 falls within the criteria laid down in Rule 12 and her appointment cannot be said to be bad – writ petition dismissed.

Title: Anjali Devi Vs. State of H.P. & others Page-1351

Constitution of India, 1950- Article 226- Petitioner applied for fair price shop – however, the shop was allotted to respondent No. 4- the allotment was challenged – held, that the petitioner had not annexed any documents with the application while the respondent No. 4 had annexed the requisite documents – a person has to approach the Court with clean hands – a person making false statement or suppressing material facts is not entitled to any relief- the petition dismissed with the cost of Rs. 25,000/-.

Title: Vikesh Kumar Vs. State of Himachal Pradesh and others (D.B.) Page-851

Constitution of India, 1950- Article 226- Petitioner challenged the appointment of respondent No.6 as Part Time Water Carrier – petitioner claims that she belongs to an IRDP family and has been included in the National Health Insurance Scheme – she had submitted an application and her name was recommended by Gram Panchayat – however, respondent No.6 was appointed – respondents No.1 to 4 stated that approval was granted for appointment of respondent No.6 as Part Time Water Carrier before the consideration of the case of the petitioner - held, that Rule 12 empowers the State to make the appointment on compassionate ground without following the selection process from amongst widow, women deserted by their husbands, or otherwise destitute, handicapped persons if such candidate falls below the poverty line - the petitioner had applied for recruitment under this Rule – the Rule was subsequently quashed but the

appointment was made prior to the quashing- respondent No.6 is a widow and has placed on record BPL certificate – no document establishing the claim of the petitioner was filed – the appointment of respondent No.6 cannot be faulted- writ petition dismissed.

Title: Krishna Devi Vs. State of H.P. &others Page-1074

Constitution of India, 1950- Article 226- Petitioner had applied for sanitation tender at Mahatma Gandhi Medical Services Complex, Khaneri Rampur but ineligible firms were declared qualified in the technical bid- the tender was allotted to respondent no.4 despite the fact that it was not fulfilling terms and conditions of the tender documents- respondent no. 1 stated that the tender was allotted to respondent no.4 as it was found to be the lowest bidder - a writ petition was filed earlier, which was dismissed as not maintainable- respondent no.4 raised an objection that petitioner had not participated in the tender and cannot questionthe process – held, that petitioner had not participated in the tender process and has no locus standi to question the same – ESIC no. was wrongly blocked/cancelled by ESIC, which mistake was rectified by ESIC – no case for judicial review was made out—petition dismissed.

Title: Balwinder Singh Vs. The State of Himachal Pradesh and others (D.B.)

Page-1601

Constitution of India, 1950- Article 226- Petitioner had filed original application, which was disposed of with the direction to give the appointment of T.G.T. (Arts)- petitioner was appointed in the year 1994- his past services were not counted- he filed another writ petition claiming the benefit of past services- held, that the petitioner is caught by the principle of Order 2 Rule 2 and also by the doctrine of estoppel and res-judicata – the writ Court had rightly held that reliefs cannot be granted to the petitioner, when they were not granted earlier- appeal dismissed.

Title: Hem Raj Vs. State of Himachal Pradesh and another (D.B.) Page-273

Constitution of India, 1950- Article 226- Petitioner had identified project site and completed the work in furtherance of a scheme floated by Government of India – however, a new notification was issued bringing the work to "big zero causing it lot of financial loss of energy and time spent as the entire work would be utilized by some other persons"- held, that the plea of the petitioner that because of its members had applied for allotment of project pursuant to the scheme notified by Government of India, State had no authority to come with the amended policy and the projects have to be allotted to its members as a matter of right is without any merit- no material was placed on record to show that sites were got inspected with the consent of Government of Himachal Pradesh- issuance of policy was the domain of the State Government and Union of India has no role in this process- scheme floated by Government of India did not confer any indefeasible right upon the members of association for allotment of the project – no holding out was made that the site selected by the members of the association would be allotted to the petitioner- simply because a pre-feasibility report has been prepared will not confer any right upon the person to get the project – public largesses should be disbursed in a transparent manner by providing an opportunity to all eligible members to participate in the process- mere disappointment of expectation cannot be a ground for interfering with the policy of the State – the legal status of the association was not established – directions issued. (Para-11 to 21)

Title: All Himachal Micro Hydel (100 KW) NGOS and Societies Association through its President Sh. Varinder Thakur Vs. State of H.P. through Principal Secretary, Non-Conventional Energy Sources-cum-Secretary Power, Government of H.P. and others (D.B.) Page-856

Constitution of India, 1950- Article 226- Petitioner had taken loans- loan accounts were declared NPA- notice was issued – proceedings were initiated under Securitization and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 (SARFAESI) Act- possession of the factory land, building, plants, machinery, raw material and finished stocks was taken – held, that the petitioner had not approached the appropriate authority after issuance

of the notice- the jurisdiction of the Court is barred under Section 13(2) of SARFAESI Act- the aggrieved person has to approach Debt Recovery Tribunal for the redressal of his grievance – a complete machinery has been provided under the Act- writ Court has no jurisdiction when the matter is covered under SARFAESI Act- writ petition dismissed.

Title: M/s.Bharat Healthcare Limited and Anr. Vs. Authorized Officer, Punjab National Bank & Others (D.B.) Page-51

Constitution of India, 1950- Article 226- Petitioner is a registered dealer for manufacturing and trading of drugs and medicines – the petitioner has set up a factory for manufacturing drugs at Baddi – a notice was issued to the petitioner – penalty of Rs.84,44,838/- was imposed – an appeal was filed, which was dismissed- the matter was carried before H.P. Tax Tribunal, which set aside the orders passed by Assessing and Appellate Authority but imposed a cost of Rs. 20 lacs for the reason that petitioner could not be permitted to take the benefit of technicalities of law and wrong committed by the Assessing Authority- held, that statutory Tribunals must function within their bound and their decisions should not be arbitrary, fanciful or based on irrelevant consideration- fiscal statute must be strictly interpreted – there is no equity in tax matter – once it was concluded that the orders passed by Assessing and Appellate Authority were not sustainable in the eyes of law, costs could not have been imposed- the purpose of imposing cost is to indemnify the party for the expenses incurred – writ petition allowed and the order passed by the Tribunal set aside.

Title: M/s. Dr. Reddy's Laboratories Ltd. Vs. State of Himachal Pradesh and another (D.B.) Page-1399

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

Title: Shivalik Agro Poly Products Ltd. Vs. Union of India and others (D.B.) Page-713

Constitution of India, 1950- Article 226- Petitioner is the sole surviving daughter of late J, who belonged to ST category – the petitioner performed marriage with the non-tribal – the application for grant of tribal certificate was rejected – aggrieved from the rejection, present writ petition has been filed – held, that in case of inter caste marriage or marriage between a tribal and non-tribal person, the status of children is a question of fact – there can be a presumption that children have the status of the father but the presumption is rebuttable – the children had received middle and higher education at Chamba – they had not suffered the disabilities suffered by other members of the scheduled tribe- the application was rightly rejected- appeal dismissed.

Title: Sreshta Devi Vs. State of Himachal Pradesh and others (D.B.) Page-1303

Constitution of India, 1950- Article 226- Petitioner joined the services of the department as daily waged beldar – he was engaged as a pipe fitter – his case was considered for regularization and he was appointed as a work charge beldar – he joined under protest and filed original application before the Tribunal – a direction was issued to appoint the petitioner to the post of work charge pipe fitter – a corrigendum was issued and the designation of the petitioner was shown as fitter – the petitioner filed an original application claiming the time scale on seniority basis – the application was transferred to the High Court and was dismissed – held in appeal that

the petitioner was directed to be appointed as pipe fitter in the lowest grade with the scale of work charge beldarby the Tribunal – the corrigendum was issued in terms of the direction- the petitioner should have filed a review petition or an appeal, if he was not satisfied with the direction issued by the Tribunal- he cannot claim that he should have been appointed as a daily waged pipe fitter with the time scale – appeal dismissed.

Title: Bhuri Singh Vs. State of Himachal Pradesh and others (D.B.) Page-1603

Constitution of India, 1950- Article 226- Petitioner No. 1 is an educational trust having established a senior secondary public school and is also running B.Ed. college- it had applied to introduce diploma in elementary education- permission was rejected- writ petition was filed, in which a direction was issued – affiliation was not granted- it was contended that all the conditions were met and despite that the permission was not granted – respondents stated that the land is on private lease basis, which is in contravention of the regulation - a complaint was received against the petitioner – held, that the complaint could not have been made basis for rejecting the approval – no inquiry was conducted – copy of complaint was not supplied to the petitioners and opportunity of hearing was not given to them- other institutes were granted 6 months' time to get the land transferred in their names- it was a case of hostile discrimination – even Appellate Authority had granted time of six months to get the land transferred – it was not permissible for the respondents to sit over the orders passed by the Appellate Authority- the petitioners have been compelled to approach the Court repeatedly- petition allowed- permission granted subject to transfer of the land within a period of four weeks.

Title: Shimla Educational Society Trust and Anr. Vs. National Council for Teachers Education &Anr.(D.B.) Page-445

Constitution of India, 1950- Article 226- Petitioner No.1 is an unaided private college established by petitioner No.3 and is a constituent of petitioner No.2- essentiality certificate was issued in favour of the petitioner No.3 by the State Government after which the college was established- Medical Council of India granted letter of intent to petitioner No.3 to open the medical college with certain conditions – State Government notified the procedure for admission and fee structure – State Government issued a notification amending Himachal Pradesh Private Medical Educational Institution (Regulation of Admissions and Fixation of Fee) Act, 2006 – amendment was challenged by the petitioner on the ground of competence of the State Government to carry out the amendments – held, that the Medical College has to apply for permission and to submit consent of affiliation from a recognized University – once recognition is granted, College is required to take affiliation from University – recognition and affiliation are distinct and their purposes are different – role of MCI is confined to recognition whereas affiliation is left to the State Government or the examining University- Himachal Pradesh University Act, 1970 is the parent statute under which all the Universities in the State have to be constituted – the petitioners can have no right to claim that it will be affiliated to the University of its choice – writ petition dismissed.

Title: Maharishi Markandeshwar Medical College and Hospital and others Vs. State of Himachal Pradesh and others (D.B.) Page-1616

Constitution of India, 1950- Article 226- Petitioner No.2 was owner in possession of the land, which was acquired for Chamera Hydro Electric Project Stage-I- he was given compensation and was granted employment as per re-settlement and rehabilitation Scheme- some other land was acquired for the reservoir of Chamera-2- name of petitioner No.1, son of petitioner No.2 was sponsored for employment- however, the employment was not provided – held, that rehabilitation and re-settlement schemes are different for Chamera-1 and Chamera-2 project – schemes provide for employment of the family member of the oustee – names of the petitioners are recorded in the parivar register showing them to be the member of the same family – it was not permissible for the respondent No.6 to ignore the entry unilaterally – the land was purchased prior to the

notification under Section 4 and the petitioners fulfill the criteria laid down in the scheme – writ petition allowed – respondents directed to provide the benefits as per the scheme.
Title: Praveen Singh and another Vs. State of Himachal Pradesh and others
Page-694

Constitution of India, 1950- Article 226- Petitioner participated in tender process for the supply of tools and equipments for vocational laboratories/workshop – petitioner was recommended for grant of contract by Tender Evaluation Committee- however, the tender process was cancelled- respondent pleaded that complaints were received regarding discrepancies in the tendering process- hence, a decision was taken to cancel the whole process- held, that it was not disputed that the petitioner was the lowest tenderer – tender was cancelled on the ground of discrepancies and the shortcomings – all purchases beyondRs.50 lacs were to be carried out by e-tender but in the present case this procedure was not adopted – there was no infirmity in the cancellation of the tender – Court can interfere in the tender or contractual matter only when the process adopted or the decision taken is malafide or intended to favour some persons – no such circumstances were established in the present case- writ petition dismissed.
Title: M/s Quality Industries Corporation Vs. State of Himachal Pradesh and another (D.B.)
Page-1330

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwari worker – she was absorbed as Supervisor - she claimed the benefit of the service rendered by her asanaganwari worker for pensionary benefits - held, that appointment of the petitioner as anganwari worker is not against any civil post and cannot be counted towards the pensionary benefits- petition dismissed.
Title: Madhu Tomar Vs. State of H.P. and another Page-1155

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

Constitution of India, 1950- Article 226- Petitioner was engaged as drawing master – she was subsequently asked not to come on the duty - respondent stated that the permission to fill up the post was withdrawn by respondent No.3 as no criteria was approved by the Government for distribution of marks- held, that the petitioner has scored maximum marks in the interview and her selection was not challenged – action of the respondent of not allowing the petitioner to work is arbitrary- writ petition allowed and respondent directed to permit the petitioner to work.
Title: Babita Vs. State of H.P. & others Page-1586

Constitution of India, 1950- Article 226- Petitioner, a cooperative society filed a writ petition seeking quashing of inspection note and the office order issued on the basis of the inspection note – held, that revisional power has been given to the State Government under Section 94 of H.P. Cooperative Societies Act, 1968, where there is no provision of appeal – the petitioner can approach the competent authority for the redressal of his grievances – the alternative and efficacious remedy is available to the petitioner – petitioner is required to pursue that remedy and not to invoke the writ jurisdiction of the High Court- petition dismissed as not maintainable.

Title: The Tiara Co-operative Agriculture Service Society Ltd. Vs. State of Himachal Pradesh and others (D.B.) Page-1644

Constitution of India, 1950- Article 226- Petitioners are employees of respondent No.1- petitioners claimed that EPF contribution is payable to them in accordance with H.P. University Act, 1970, various statutes, ordinances and regulations as the college is affiliated to H.P. University – held, that as per the ordinance, every college or institute seeking affiliation with the University is required to satisfy the condition laid down in the statute – respondents No.1 and 2 had restricted the contribution to the one prescribed under EPF and MP, 1952, which is not permissible as ordinance has a force of law- no college can take a decision contrary to the provisions of H.P. University Act and Ordinances, Regulations and Statutes – the scheme framed by the Central Government does not prohibit the applicability of any other regulation or the scheme – petition allowed and respondents No.1 and 2 directed to contribute the provident fund in accordance with the Non-Government Affiliated College Teachers Contributory Provident Fund Rules.

Title: Ajay Kumar Sud and others Vs. St. Bede's College and others Page-1249

Constitution of India, 1950- Article 226- Petitioners had been continuously representing to the Government to construct link road- they also donated their lands by executing gift deeds – no objection certificates were issued by various authorities – family of Pardhan objected to the construction of the road- a notification was issued by the Government proposing to acquire the land for the construction of the road through different village – representations were filed but in vain - respondents stated that two factions of the villagers want the road to be constructed from different areas – it would not be proper to construct the road from the place specified by the petitioners- held, that the Government has issued the instructions that road would be constructed only if the land is donated by the Villagers – Government can deviate from the instructions on the basis of valid reasons – the decision to construct road from different place was taken to save the trees from being axed, which is in the larger public interest – family of Pardhan was not arrayed as party and no order can be passed without hearing them- the Court cannot examine the correctness of the decision, unless, it is arbitrary or contrary to the statute – the petition has been filed to satisfy the ego and not in the larger public interest- petition dismissed.

Title: Shiv Singh and others Vs. State of H.P. and others (D.B.) Page-266

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

Title: Neelam Sharma & another Vs. State of Himachal Pradesh & others Page-563

Constitution of India, 1950- Article 226- Petitioners made applications for grant of GNM and B.Sc. (Nursing) at Rohru and Tanda– the approval was granted in favour of respondent No.2- held, that no uniform yardstick was applied while carrying out the inspection- the authorities directed to carry out fresh inspection in terms of guidelines after affording opportunity of being heard to all the applicants.

Title: Jyoti Education Welfare Society Vs. State of H.P. & another (D.B.) Page-980

Constitution of India, 1950- Article 226- Petitioners were appointed as Inspectors Grade-I – a notification was issued on 1.6.1996 merging 147 posts of Inspector Grade-II in the cadre of Inspector Grade-I- the petitioners challenged the tentative seniority list – the writ petition was dismissed on the ground that petitioners were not in service on the date of integration of cadres and had no locus standi to challenge the same- held in appeal that cadres were merged w.e.f. 1.7.1995 but in view of pendency of litigation notification of mergers could be given effect on 9.3.1999 and 17.3.1999 – the date of merger was modified by Administrative Tribunal as 1.8.1995 – a working formula was evolved before the High Court, which was accepted – Rules do not prohibit the merger of the cadres – the petitioner were appointed subsequent to the issuance of notification – retrospective seniority cannot be given to the employees from the date when they were not borne in the cadre- seniority needs to be counted against promotion/appointment from the date of issuance of order of substantive appointment – mere pendency of litigation will not assist the petitioner- merging of cadres is a matter of policy- writ petition dismissed.

Title: Rajesh Jaswal and others Vs. State of Himachal Pradesh and others (D.B.)

Page-1353

Constitution of India, 1950- Article 226- Petitioners were appointed as beldar/plant observers – they were promoted to the post of Field Assistants - post of Field Assistants was merged with the post of horticulture Sub-Inspector by the State Government – petitioners claimed the pay scale of Horticulture Sub-Inspector on the basis of this notification – University claimed that it had its own ordinance and was not bound by the notification issued by the State Government- writ Court held that the University had framed its own recruitment and promotion Rules and had not taken any decision to merge the posts and dismissed the writ petition- held, that University has its own pay scale- no decision was taken to merge the post of Field Assistant with Horticulture Sub-Inspector – therefore, the petitioners cannot claim the pay scale of Horticulture Sub-Inspector – appeal dismissed.

Title: Shankar Lal and others Vs. State of Himachal Pradesh and another (D.B.)

Page-1523

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

Title: State of Himachal Pradesh &Ors.Vs. Amar Chand Thakur & Ors.(D.B.)

Page-720

Constitution of India, 1950- Article 226- Respondent No. 3 permitted to hire accommodation for hostel purposes instead of creating own permanent built up structure – Chief Secretary directed to file a consolidated status report and to take appropriate action from time to time.

Title: Bhawan Avam Sannirman Kamgar Sangh (Regd.) Vs. State of HP and others (D.B.) Page-1260

Constitution of India, 1950- Article 226- Respondents 1 to 12 sought a direction to promote them to the post of technical superintendent – the claim was opposed on the ground that diploma obtained by the respondents is through distance learning and for one year - degree in dairy technology/dairy husbandry or diploma in dairy technology/dairy husbandry is required under Rules – the Tribunal allowed the application - held, that respondents possess essential qualification of five years regular service on the post- they had obtained diploma in dairy technology from IGNOU – once diploma has been awarded by IGNOU, it is not open for the federation to say that the same is not equivalent to the diploma of two years awarded by other institutions – the genuineness of the diploma has not been disputed by any authority- the petition is without any merit and the same is dismissed.

Title: The Himachal Pradesh State Cooperative Milk Producers Federation Limited Vs. Surinder Kumar and others (D.B.) Page-604

Constitution of India, 1950- Article 226- Revision petition has been dismissed by a non-speaking order- no findings were recorded on the grounds raised in the revision petition- recording of reasons is necessary, in case of a decision affecting anyone prejudicially – the order set aside and case remanded to the revisional Court for afresh decision.

Title: Budhi Singh Vs. State of H.P. and others Page-1128

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

Title: Bachittar Singh Vs. Central Bank of India and others Page-743

Constitution of India, 1950- Article 226- Tampering was noticed by Flying Squad of H.P.S.E.B. – criminal proceedings were initiated and electricity connection was disconnected - ombudsman decided the dispute – aggrieved from the order, present writ petition has been filed – held, that ombudsman had decided the dispute only on the basis of acquittal recorded by Criminal Court, which is not correct- no other reason was given by the ombudsman – writ petition allowed and the case remanded to ombudsman for a fresh decision.

Title: Himachal Pradesh State Electricity Board, through its Secretary, Vidyut Bhawan, Shimla, H.P.Vs. M/s Virendra Hotels and Allied Hotels Pvt. Ltd. &anr. Page-1223

Constitution of India, 1950- Article 226- The delimitation process for ZilaParishadTikkar Ward was concluded on 20.8.2015 – petitioner raised objections and delimitation was set aside – a direction was issued to complete the delimitation process in accordance with Rule 9 of H.P. Panchayati Raj (Election) Rules, 1994 – model code of conduct came into force in the meantime – the final order of delimitation was passed – writ petitions were filed, which were dismissed as infructuous – the order passed by Deputy Commissioner completing the process of delimitation was challenged and the appeal was allowed- writ petition was filed challenging the order of election petition and the notification – held, that democracy is a basic feature of the Constitution-

a specific procedure has been prescribed under the Rules and there is no possibility of deviating from the same – the procedure prescribed under the Rules is mandatory and has to be scrupulously followed – proposal regarding delimitation was required to be forwarded to the offices of ZilaParishad, Panchayat Samiti and Gram Panchayat for inviting objections – proposals were to be affixed on the notice board by the Secretaries of respective ZilaParishad, Panchayat Samiti and Gram Panchayat in the presence of two independent witnesses- no such exercise was undertaken – the language of the objections was same – Deputy Commissioner recorded the joint statements of the objectors – objections were not decided specifically – non-consideration of relevant material would make the order perverse and the Court has power to interfere with the same in exercise of judicial review – the authority is bound to given reasons in support of the objections - the order passed by Deputy Commissioner set aside- final order of delimitation also quashed and set aside.

Title: Dr. Sushant Deshta Vs. State of H.P. and others Page-1494

Constitution of India, 1950- Article 226- The trucks owned by the petitioners were ordered to be delisted by H.P. Ex-servicemen Corporation – a writ petition was filed by one B before High Court in which it was found that a few persons were permitted to attach more than one truck – the Court issued various directions – the judgment was accepted and bye-laws were amended – a special leave petition was filed before the Supreme Court, which was dismissed- show cause notices were issued to various persons – separate writ petitions were filed against the notices, which were permitted to be withdrawn – representations were filed, which were rejected- held, that the prayers made in the present petition have already been considered and rejected earlier- amendments were carried out in the bye-laws on the basis of the directions issued by the Court – writ petitioners have no right to seek attachment after the issuance of the direction- writ petition dismissed.

Title: Vinod KumarVs. State of H.P. and others Page-1374

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

Title: The State of H.P. and another Vs. Parveen Kumar Page-207

Constitution of India, 1950- Article 226- Writ petitioner appeared in the teacher eligibility test – the answer key was circulated and objections were invited – the result was declared, keeping in view the report of the expert – the petitioner was declared to be unsuccessful – she challenged the report of the expert- held, that the Courts cannot substitute the expert opinion – the decision of deleting defective/wrong questions and allotting marks on pro-rata basis is legal- the objections were examined by the experts – mistakes were found and thereafter the result was declared – the Court has to respect the opinion of the experts – writ petition dismissed.

Title: Lalita Devi Vs. State of H.P. and another (D.B.) Page-1476

Constitution of India, 1950- Article 226- Writ petitioner No.2 was appointed as anganwari worker – respondent No.5 questioned her appointment and sought cancellation of income certificate – it was found on inquiry that the income shown in the certificate was incorrect and the income certificate was cancelled – appeal was filed, which was dismissed- a writ petition was

filed, which was also dismissed- held in appeal that the question of facts determined by the authority cannot be questioned in the writ petition unless it is shown that the findings recorded are perverse or are based on no evidence or inadmissible evidence – the authorities had thrashed all the facts – the orders are well reasoned and legal, which cannot be said to be erroneous, perverse or suffering from non-application of mind – writ petition was rightly dismissed- appeal dismissed.

Title: Amar Nath and another Vs. State of H.P. and others (D.B.) Page-1256

Constitution of India, 1950- Article 226- Writ Petitioner remained absent and the petition should have been dismissed in default but the Writ Court granted the petition without hearing the petitioner – further, the appointment was quashed after recording the findings that experience certificate does not seem to be genuine- however, no inquiry was conducted to ascertain the facts- hence, appeal allowed, order passed by Writ Court set aside and Case remanded to Administrative Tribunal for a fresh decision.

Title: Uttam Singh Vs. Tej Ram and others (D.B.) Page- 270

Constitution of India, 1950- Article 226- Writ petitioners were regularized as hostel attendants vide different office orders- they claimed that they were discharging the duties of higher post of Hostel Assistants and are entitled to the pay of the same– University had proposed the upgradation of the post but the proposal was returned by the Comptroller - the writ petition was allowed by the Writ Court holding that the University had proposed the upgradation of the post which strengthens the claim of the writ petitioners- held in appeal that University had 11 hostels and only four persons are occupying posts of regular Hostel Assistants – writ Court had rightly held that the writ petitioners are looking after the work of Hostel Assistants – the judgment was based upon correct appreciation of fact and law- however, the petitioners are entitled to the arrears for the period of three years prior to filing of writ petition.

Title: Dr. Y.S. Parmar University of Horticulture and Forestry, Nauni Vs. Satish Chand (D.B.)
Page-1647

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

Title: Charan Dass deceased through LRs Vs. Subhadra Devi and others (D.B.)
Page-746

Contempt of Courts Act, 1971- Section 12- It was pleaded that the Court had directed the respondents to consider the case of the petitioner for placement as S.P.- respondents stated that they had adopted sealed cover procedure and had complied with the directions – held, that the respondents were directed to consider the case of the petitioner for placement as S.P. and release

all consequential benefits - the respondents are in breach – they are directed to comply with the directions and report compliance.

Title: Mahinder Singh Vs. PrabodhSaxena and another (D.B.) Page- 1324

'E'

Employees Compensation Act, 1923- Section 4- Deceased was a conductor in a truck- he died in an accident- compensation of Rs.9,05,520/- was awarded – held in appeal that the monthly wages of the workmen have to be taken as Rs.4,000/- in view of the statutory provisions – the Commissioner had wrongly taken the income as Rs.8,000/- - after deducting 50% amount and taking the factor as 225.22, compensation of Rs.4,50,440/- (2000 x 225.22) awarded- along with interest @ 12% per annum.

Title: United India Insurance Co. Ltd. Vs. Teji Devi & others Page-1319

Employees Compensation Act, 1923- Section 4- Deceased was a driver in a truck – he died in the accident of the truck – compensation of Rs.4,42,740/- was awarded along with interest- held in appeal that the owner had not specifically denied that deceased was employed by him as a driver – it was asserted in the examination-in-chief by the applicant that deceased was working as driver and his wages were Rs.6,000/- per month – respondent No.1 also admitted that deceased was working as a driver and his wages were Rs.5,000/- per month – the fact that the driver was the brother of the owner will not make the case suspect – the provision of Code of Civil Procedure and Evidence Act are not applicable to the proceedings under Workmen Compensation Act – the deceased was having a valid driving licence to drive the vehicle – appeal dismissed.

Title: Oriental Insurance Company Ltd. Vs. HimaVati& another Page-1589

Employees Compensation Act, 1923- Section 4- Deceased was employed as a driver and died in a motor vehicle accident during the course of his employment – a claim petition was filed which was dismissed by the Commissioner for want of proof that the deceased was discharging his duties at the time of accident – held in appeal that the owner had specifically stated that the deceased was employed by him as a driver - it was also proved that he was discharging his duties at the time of accident -a claim petition was filed before MACT which was dismissed- hence, penalty of Rs.1 lac imposed upon the employer.

Title: Devi Dass & others Vs. Prem Chand &another Page-1217

Employees Compensation Act, 1923- Section 4- Deceased was employed as driver- he died during the course of his duties- compensation of Rs.9,97,000/- was awarded by the Commissionerwith interest @12% per annum - funeral expenses of Rs.40,000/- were also awarded- held in appeal that it was not disputed that deceased was driver and he had died during the course of his employment – Commissioner had taken the salary as Rs.10,000/- - the claimant had pleaded that deceased was drawing salary of Rs.7,000/- per month and Rs.120/- per day as daily allowance –compensation of Rs.80,000/- in lump sum is to be awarded when the actual income is not proved – since, in the present case the actual income was proved – therefore, compensation could not have been restricted to Rs.80,000/- in lump sum- Rs.40,000/- could not have been awarded towards funeral expenses in absence of any statutory provisions – interest was payable on the compensation amount after one month of the accident – appeal partly allowed.

Title: United India Insurance Company Ltd. Vs. KhemLata and others Page-941

Employees Compensation Act, 1923- Section 4- Deceased was employed as a driver in a tractor – he died in an accident involving tractor – a claim petition was filed – Commissioner awarded compensation of Rs.2,03,850/- with interest @ 12% per annum- held in appeal that tractor falls

within the definition of light motor vehicle (LMV) –however, it will become commercial vehicle when trolley is attached to it and goods are being carried in the same – the tractor was carrying sand and grit and was being used as a transport vehicle – the accident occurred on 2.6.2000- the licence was valid till 23.10.1997 and no application for renewal was received – there was no valid licence with the driver – the insurer was wrongly saddled with liability – appeal allowed and liability fastened upon the insurer.

Title: Oriental Insurance Company Vs. Kushla Devi &ors. Page-1226

Employees Compensation Act, 1923- Section 12- Deceased was an employee of the contractor- H.P. Housing Board was principal employer- principal employer has to pay compensation at the first instance and it is at liberty to recover the same from the contractor – appeal allowed and order modified accordingly.

Title: H.P. Housing and Urban Development Authority Vs. Giani Devi & others

Page-1136

'H'

H.P. Motor Vehicles Taxation Act, 1972- Section 3- Petitioner had purchased different construction equipment vehicles- respondents have imposed tax on them – the petitioner filed a writ petition pleading that construction equipment vehicles do not fall within the definition of motor vehicle- held, that machinery like excavator, loader, dumpers have been included as construction equipment vehicle and have been termed as non-transport vehicle- therefore, there cannot be any exemption regarding the imposition of tax – petition dismissed.

Title: M/s Italian-Thai Development Public Company Ltd. Vs. State of HP & Others (D.B.)

Page-1289

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

Title: Surinder Singh Vs. State of Himachal Pradesh and others Page-531

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the ground that the tenant is in arrears of rent, premises is in dangerous condition and may collapse at any time, the same is required bona-fide for re-construction, which cannot be carried out without vacating the building - the premises, is required bona-fide for personal use and the same is required for being demolished at the instance of Municipal Committee, Palampur- the petition was allowed by Rent Controller on the ground of non-payment of arrears of rent- an appeal was filed, which was dismissed- held in revision that Rent Controller had recorded that issue No. 3 was not pressed, however, the Statement of Counsel was not recorded to this effect – Appellate

Court held that premises is commercial in nature and cannot be vacated for non-occupation- however, the law was amended during the pendency of the proceedings and this ground became available to the landlord – Revision allowed and the case remanded to the Appellate Authority to decide the same afresh in accordance with law.

Title: Khem Chand son of Shri Jagdish Chand Vs. Kuldeep Chand son of Shri Khem Chand

Page-392

H.P. Urban Rent Control Act, 1987- Section 14- An eviction petition was filed on the grounds of arrears of rent and subletting- the petition was allowed on the grounds of arrears of rent but was dismissed on the ground of subletting- an appeal was filed, which was dismissed- held in revision that relationship of lessor and lessee is to be proved to establish subletting – necessary ingredients to establish subletting were not proved – alleged sub- tenant is the real brother of the tenant who is assisting the tenant in business- this will not fall within the definition of sub-tenant – no official from Sale Tax Office or Labour Department was examined to prove subletting – the petition was rightly dismissed regarding subletting – revision dismissed.

Title: B.R.Sammi son of late Sh Sohan Lal Vs. Narinder Singh son of Niranjan Singh

Page-409

H.P. Urban Rent Control Act, 1987- Section 14- Landlady filed an eviction petition on the ground that tenant had ceased to occupy the premises – eviction petition was dismissed by the Rent Controller – an appeal was filed and the Appellate Authority remanded the case for afresh decision after framing additional issues – held in revision Appellate Authority can make an inquiry either itself or through the Rent Controller – there is no power of remand with the Appellate Authority – revision allowed and the case remanded to the Appellate Authority for afresh decision.

Title: Madan Mohan son of Shri Kailash Chand Vs. Pushpa Devi wife of Shri Amar Chand

Page-1457

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

Title: Banshi Ram Chauhan Vs. State of Himachal Pradesh and others Page-614

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

Title: Rishi Kumar Kapila Vs.Surinder Kumar Sharda (since died) through his LRs and another

Page-837

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

Title: Geeta Devi Vs. State of H.P. & Another Page-90

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

Title: Bhagat Ram Vs. Kanta Devi Page-131

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized on 4.12.1994 – two children were born- the husband assaulted the wife causing her injuries – she was residing with her parents – husband had not made any efforts to take her to matrimonial home- the petition was dismissed by the Trial Court- held in appeal that it was duly proved that husband had subjected the wife to physical cruelty – he had not made any efforts to bring the wife from her parental home- this proved the desertion on the part of the husband – the marital ties had broken down irretrievably – petition allowed and the marriage between the parties ordered to be dissolved.

Title: Anjana Devi Vs. Manjit Singh Page-968

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

Title: Col. Pawan Kumar Sharma Vs. BhavnaSharma Page-134

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized in the year 1997 – the wife used to leave her matrimonial home and reside in her parental home – the wife is totally incapacitated from performing sexual intercourse due to structural defect – the

petition was dismissed by the Trial Court- held in appeal that husband admitted that wife had resided with him for 8 years – the version that the husband found the medical prescription slip was also not established – the petition was rightly dismissed by the Trial Court- appeal dismissed
Title: Dharam Prakash Vs. NeelaDevi Page-803

Hindu Marriage Act, 1955- Section 25- Petitioner had applied for a decree of judicial separation – the parties agreed to dissolve their marriage by a decree of customary divorce – maintenance of Rs.450/- per month was awarded- petition for enhancement was filed, which was dismissed on the ground that maintenance amount was mutually settled by the parties and there was no provision for enhancement – held in appeal that agreement regarding the receipt of Rs.450/- per month as maintenance will not create estoppel to debar the petitioner from seeking enhancement of the amount of alimony in the changed circumstances- husband admitted that his salary was Rs.3,300/- per month when he had agreed to pay Rs.450/- as maintenance -he further admitted that his salary was Rs.16,000/- per month at the time of retirement – his total salary was Rs.23,204/- per month as per salary certificate – husband is getting handsome amount from pension – hence, maintenance enhanced to Rs.2,500/- per month.
Title: Kubja Devi Vs. Ishwar Dass Page-983

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

'I'

Income Tax Act, 1961- Section 147 and 148- Petitioner filed a return showing the income from salary and house property- a notice was issued by the Income Tax Authorities – the petitioner filed a fresh return – proceedings were initiated against the petitioner under Section 147 of the Act- a survey was conducted with respect to the affairs of V and it was found that he had given loan to the petitioner, which was held to be unexplained credit in the hands of the petitioner- the petitioner filed a reply stating that the amount was re-paid with interest – the notice was the result of non-application of mind and there was no dispute regarding the identity of the person, genuineness of the transaction or creditworthiness of the loaner- held in the writ petition that the objections were rejected by the Assessing Officer – Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year and if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax – the original return was not subjected to assessment – however, the Assessing Officer is not precluded to re-open assessment on the basis of his finding of fact so made on the basis of fresh material so discovered in the course of assessment of next assessment year – it is not disputed that investigations were conducted against V and it was found that loan was advanced to the petitioner and his family members – the petitioner and family members admitted the receipt of money in response to the notice- the order rejecting objection was not cryptic – the objections were considered and rejected – the action is not ex-facie illegal – it is not a case of lack of jurisdiction – the Writ Court is not a fact finding authority- writ petition dismissed.
Title: Virbhadra Singh Vs. Deputy Commissioner, Circle Shimla, Income Tax Office & others (D.B.) Page-1714

Income Tax Act, 1961- Section 147 and 148- Petitioner filed a return showing the income from rent, salary and interest from deposits- a notice was issued by the Income Tax Authorities – the petitioner tried to explain the source of investment as being agricultural income from Hindu undivided family- proceedings were initiated against the petitioner under Section 147 of the Act- held in the writ petition that the assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year and if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax – the original return was not subjected to assessment – however, the Assessing Officer is not precluded to re-open assessment on the basis of his finding of fact so made on the basis of fresh material so discovered in the course of assessment of next assessment year –the order rejecting objections was not cryptic – the objections were considered and rejected – the action is not ex-facie illegal – it is not a case of lack of jurisdiction – the Writ Court is not a fact finding authority- writ petition dismissed.

Title: Pratibha Singh Vs. Deputy Commissioner, Circle Shimla, Income Tax Office & another (D.B.) Page-1685

Indian Forest Act, 1927- Section 41 and 42- **Himachal Pradesh Forest Produce Transit (Land Routes) Rules, 1978**- Rule 20- Accused were found transporting 37 wooden frames of different sizes without any valid permit – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- the Court can interfere in exercise of revisional jurisdiction only if the findings are perverse, untenable in law, grossly erroneous, glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously- the prosecution case was for non- cognizable offence- however, police conducted investigations without an order of the Magistrate – Courts below failed to appreciate that police officer could not have investigated the case against the accused in absence of the order of the Magistrate and entire proceedings were vitiated – further, there was no reference in the notice of accusation to the Rule 20 of H.P. Produce Transit (Land Routes) Rules, 1978 and the same was defective- revision allowed and the accused acquitted.

Title: Fateh Singh and others Vs. State of H.P. Page-875

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

Title: Mukesh Kumar Vs. State of Himachal Pradesh Page-506

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a bus in a rash and negligent manner and caused death of B – he was tried and acquitted by the trial Court- held in appeal that P was a passenger in the bus**-** she was getting down from the bus, when the bus was started by the accused – all the eye witnesses except PW-8 resiled from their earlier testimonies –

record shows that P had tried to get down the bus at a place, which was not a bus stop- thus, the prosecution version that the bus was stopped and thereafter started suddenly is doubtful- trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal PradeshVs.Ashwani Kumar Page-376

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

Title: Karam Chand Vs. State of H.P. Page- 128

Indian Penal Code, 1860- Section 279 and 337- Accused was driving the car rashly and negligently, which hit the informant causing injuries to her – accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held in appeal that the medical evidence does not establish the prosecution version – material witness was not examined – the Appellate Court had rightly acquitted the accused, in these circumstances - appeal dismissed.

Title: State of H.P.Vs. Khem Chand Page-456

Indian Penal Code, 1860- Section 279 and 337- HRTC bus and a private bus were in competition- the accused was driving the private bus in a rash and negligent manner and hit HRTC bus – the accused was tried and acquitted by the Trial Court- held in appeal that the rashness and negligence should be more than carelessness or error of judgment – prosecution is required to prove that the act on the part of the accused was responsible for the accident - PW-9 did not state that accused was driving the bus in a rash and negligent manner- PW-11 stated in cross-examination that accident had taken place due to the breakage of patta (leaf) of the bus – the prosecution case was contradictory and vague – the accused was rightly acquitted- appeal dismissed.

Title: State of Himachal Pradesh Vs. MohinderSingh Page-947

Indian Penal Code, 1860- Section 279 and 337- **Motor Vehicles Act, 1988-** Section 187- Accused was driving a vehicle in a rash and negligent manner- the vehicle hit the informant and caused injuries to him- the accused was tried and acquitted by the Trial Court- held in appeal that testimonies of the prosecution witnesses corroborated each other – medical evidence also corroborated their version – the identity of the accused was also established – minor contradictions in the testimonies of witnesses are not sufficient to doubt them- appeal allowed- accused convicted of the commission of offences punishable under Sections 279 and 337 of I.P.C. and 187 of M.V. Act.

Title: State of H.P. Vs. Ashwani Kumar Page-1433

Indian Penal Code, 1860- Section 279 and 506 – **Motor Vehicles Act, 1988-** Section 181, 184 and 196- Accused was driving a scooter in a rash and negligent manner- he drove the scooter upon the informant by taking it to the wrong side - when the accused was called to stop the scooter, he abused the informant and B, an intervenor- the accused was tried and acquitted by the trial Court- held, that PW-1 and PW-4 had feigned ignorance regarding the identity of the accused and the registration number plate – police station was at a distance of 15 meters from

the place of incident- however, investigating officer visited the site of the occurrence after one day - the site plan prepared by him cannot be relied upon - the Trial Court had rightly acquitted the accused- appeal dismissed.

Title: State of H.P. Vs. Ashwani Kumar Page-473

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

Title: Amar Dev Vs. State of Himachal Pradesh Page-609

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a van in a rash and negligent manner- Van hit the informant and caused him injuries – the accused was tried and acquitted by the Trial Court- held in appeal that the informant had suddenly appeared before the vehicle - the contents of the FIR were not readover and explained to the informant – one prosecution witness had not supported the prosecution version- the accused was rightly acquitted by the Trial Court- appeal dismissed.

Title: State of H.P. Vs. Balvinder Kumar Page-1235

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving the bus in a rash and negligent manner- bus rolled down in a gorge and the passengers sustained injuries – accused was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held in revision that accident was not disputed – it was also not disputed that the accused was driving the bus – only one witness had supported the prosecution version – he admitted in cross-examination that it took about 50-55 minutes for the bus to cover the distance of 12 kilometers, which shows that bus was being driven in a normal speed- rash and negligence driving was not proved, in these circumstances- the accused was wrongly convicted by the Courts- appeal allowed- judgments of the trial Court and Appellate Court set aside and accused acquitted.

Title: Hemant Kumar Vs. State of Himachal Pradesh Page-1267

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

Title: State of H.P. Vs. Ravinder Kumar Page-477

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

Title: State of H.P. Vs. Kheera Mani Page-475

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a truck in a rash and negligent manner- Truck went off the road and fell into the gorge - the occupants sustained injuries and some of them died – the accused was tried and convicted by the Trial court- an appeal was preferred, which was dismissed- held, that accused has not disputed the accident or the fact that he was driving the truck – the material prosecution witnesses turned hostile – the truck was carrying 80-90 peoples, which by itself is an act of negligence especially when the truck is not meant to carry the passengers – benefit of Probation of Offenders Act cannot be granted in a case of rash and negligent driving- however, keeping in view the time elapsed since the incident, sentence modified.

Title: KalimudeenVs. State of H.P Page-1015

Indian Penal Code, 1860- Section 292- **IndianCopy Right Act, 1957**- Section 68-A- Accused was found in possession of pornographic VCDs –he was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed – held in revision that seizure memo contains FIR number along with the sections under which the FIR was registered in the same ink, same pen, same flow and same handwriting as the remaining contents - FIR number has also been mentioned in the statements of the witnesses recorded under Section 161 Cr.P.C. – these documents were prepared prior to sending of ruqua and it was not possible to record the FIR number at that time – this falsifies the version of the prosecution and makes it difficult to rely upon the statements of official witnesses especially when independent witnesses have turned hostile – further independent witnesses were not associated from the locality and were taken by the I.O. with him – there was no compliance of Section 65-B of Indian Evidence Act- appeal allowed – judgment of Trial Court and Appellate Court set aside.

Title: Subhash Chand Vs. State of H.P. Page-1815

Indian Penal Code, 1860- Section 302 and 201- A dead body was found on which FIR was registered – it was found on investigation that accused had consumed liquor with the deceased and had murdered him- the accused was tried and acquitted by the Trial Court- held in appeal that PW-1 (brother of the deceased) had not suspected the involvement of the accused and had stated that deceased was crushed under the vehicle by someone – motive for crime was also not established – K was present in the company of the deceased – the disclosure statement was not made in the presence of independent witnesses- the deceased was heavily intoxicated and possibility of sustaining injuries under the influence of alcohol cannot be ruled out- report of FSL did not connect the accused with the commission of crime- chain of circumstances does not lead to the guilt of the accused- accused was rightly acquitted by the Trial Court- appeal dismissed.

Title: State of H.P. Vs. Narender Kumar (D.B.) Page-1469

Indian Penal Code, 1860- Section 302 and 392 read with Section 34- An information was received that a woman had been stabbed by some unknown persons – dead body of woman was found – her husband reported that two persons had injured the woman and had stolen the cash lying in the cash box – the accused were arrested- recoveries were effected on the basis of disclosure statements made by them- the accused were tried and convicted by the trial Court- held in appeal that the evidence of the witnesses cannot be discarded on the ground that they are

related to each other, if their testimonies are found to be truthful and reliable - the presence of the accused was established by the statements of the witnesses- all the witnesses to the incident are not to be examined – mere failure to conduct test identification parade will not result in the acquittal- minor discrepancies need not be given undue importance- the accused had given beatings to PW-6 and had snatched his mobile – mobile was sold to PW-21- testimony of hostile witness cannot be discarded on the ground that he has turned hostile – the prosecution case was proved beyond reasonable doubt and the accused were rightly convicted- appeal dismissed.

Title: Gaurav Rana Vs. State of Himachal Pradesh Page- 317

Indian Penal Code, 1860- Section 302- Deceased was married to the accused- two children were born – accused killed the deceased – he was tried and convicted by the Trial Court – held in appeal that daughter of the accused had witnessed the incident – the weapon of offence was got recovered by the accused – blood stains were found on the same – medical evidence showed that the injuries could have been caused with the weapon of offence- it was duly proved that there was altercation between the accused and the deceased after which the accused had killed the deceased – the oral and circumstantial evidence proved the guilt of the accused- appeal dismissed.

Title: Rakesh Kumar Vs. State of Himachal Pradesh (D.B.) Page-1841

Indian Penal Code, 1860- Section 302 read with Section 34- Accused murdered A – they were convicted for the commission of offence punishable under Section 304(II) of I.P.C – held in appeal that the eye-witness had not disclosed the incident to the police at the first opportunity – the testimony of eye-witness was contradicted by other witnesses –persons who took the deceased to the hospital were not examined – the incident had taken place during the darkness and it was difficult to identify the assailants- recovery of clothes did not establish the prosecution version as blood stains on the clothes were not connected to the deceased – the prosecution version was not proved beyond reasonable doubt- appeal allowed and accused acquitted.

Title: Aniln Katoch & another Vs. State of H.P. (D.B.) Page-1002

Indian Penal Code, 1860- Section 306 and 498-A- Deceased was married to the accused – one daughter was born – the accused started beating the deceased under the influence of liquor- she complained that her husband used to beat her and he had also tried to kill her – she committed suicide by consuming poison- the accused was tried and acquitted by the Trial Court - held in appeal that marriage of the deceased with the accused was not disputed – it was also not disputed that deceased had consumed poison – the allegations made by the deceased are nothing but normal wear and tear of normal married life – they do not amount to such willful conduct, which would have driven the deceased to commit suicide – the instances of maltreatment and cruelty pertain to 1-2 years prior to the commission of suicide – there is no evidence that deceased was subjected to cruelty prior to commission of suicide – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Labh Singh (D.B.) Page-1809

Indian Penal Code, 1860- Section 323, 325 and 506 read with Section 34- Informant was in her house with her son – the accused came and made inquiry from the informant about her son- accused pulled the arm of the shirt worn by the informant and tore it from arm and neck – son of the informant came, who was beaten by the accused along with other co-accused – the accused were tried and acquitted by the Trial Court- held in appeal that the presence of accused K and A was not disputed in the cross-examination –the grievous hurt was not established as x-ray was not connected to the MLC- recovery of the torn short was proved, which corroborated the prosecution version - no person had deposed about the role of J- hence, he was rightly acquitted-

appeal partly allowed and accused A and K convicted of the commission of offences punishable under Sections 451, 323 and 506 read with Section 34 of I.P.C.

Title: State of H.P. Vs. Ashok Kumar and others Page-1040

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

Title: Des Raj @ Raj Kumar Vs. State of Himachal Pradesh Page-314

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

Title: State of H.P. Vs. Rajesh Kumar @ Bati Page-290

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

Title: State of H.P. Vs. Piar Chand & another Page-626

Indian Penal Code, 1860- Section 341,323 and 325 readwith Section 34- Accused B gave blow of chain on the nose of the informant due to which he suffered injuries on his eyes- accused S caught hold of the informant from his neck- the accused were tried and acquitted by the Trial Court – held in appeal that PW-1 had improved upon his previous version- the person who had rescued the informant from the accused was not examined – there are contradictions in the testimony of PW-3- the blood on the clothes was not connected to the informant – the Trial Court had rightly acquitted the accused- appeal dismissed.

Title: State of H.P. Vs. Sant Ram & another Page-1119

Indian Penal Code, 1860- Section 341, 323, 326, 504 and 506- Wife of the accused knocked at the door of the informant saying that accused was beating her -when the informant and his wife went to the house of the accused, the accused abused them- he inflicted a blow withdanda on her head – the accused inflicted a blow by darat on the left wrist of the informant – the accused was tried and convicted by the trial Court- an appeal was filed, which was dismissed- held in revision that parties were in litigation for 18-19 years – all the material witnesses had turned hostile – the defence version was rejected without any justification- there are material contradictions in the testimonies of the witnesses- there was insufficient evidence to prove the prosecution case- revision allowed and accused acquitted.

Title: Lal Chand Vs. State of HP Page-1026

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

Title: State of Himachal Pradesh Vs. Paramjeet Singh @ Bangu (D.B.) Page-379

Indian Penal Code, 1860- Section 341, 325, 323 and 506read with Section 34- Accused restrained the informant and caused simple and grievous hurt to her and simple hurt to her daughter- the accused were tried and acquitted by the trial Court- held in appeal that informant admitted the pendency of the Civil litigation - PW-2confined the incriminatory role to accused T only –PW-3 improved upon his version – the prosecution version was not proved beyond reasonable doubt - appeal dismissed.

Title: State of H.P. Vs. Tej Ram & others Page-186

Indian Penal Code, 1860- Section 353 and 332- Informant was posted as a clerk in Rural Hospital, Chowari and accused was posted as staff nurse in the same hospital- the accused gave beating to the informant while he was discharging his duties – the accused was tried and convicted by the Trial Court- an appeal was filed, which was partly allowed and the sentence was modified – held in revision that cross complaints were filed by the accused and the informant against each other – both the parties were convicted by the trial Court- however, the informant was acquitted by the Appellate Court – statements of witnesses show that accused was asking for certain papers belonging to her – no person stated that accused had prevented the informant from discharging his duties – it was not proved that intention of the accused was to deter the informant from discharging the duties – the judgment passed by the Court set aside and the accused acquitted.

Title: Bharti Rana Vs. State of Himachal Pradesh Page-950

Indian Penal Code, 1860- Section 353 and 333 read with Section 34- Accused assaulted and used criminal force to deter the informant posted as AddaIncharge, HRTC from discharging his duties - they were convicted by the Trial Court- held in appeal that the genesis of the occurrence is change of route of bus- it can be believed that accused being Pardhan of Gram Panchayat may have questioned working of HRTC functionary – the accused P had also sustained injuries- the possibility of informant and other staff members being assailants cannot be ruled out- there is contradiction regarding the name of accused who inflicted injuries – the witnesses had

contradicted themselves regarding other aspects of prosecution case – appeal allowed and accused acquitted.

Title: Punnu Ram &ors. Vs. State of Himachal Pradesh Page-1429

Indian Penal Code, 1860- Section 363, 366 and 376(I)- Prosecutrix was studying in class 8th – she had gone to school with her sister – the accused took the prosecutrix away forcibly on a bike – the matter was reported to police- the father of the accused produced the prosecutrix and the accused in the police Station- the accused was tried and acquitted by the Trial Court- held in appeal that the Medical Officer issued MLC stating that prosecutrix was habitual of sexual intercourse and it was not possible to assess the time of first sexual intercourse- no injury was found on the body of the prosecutrix – father of the prosecutrix was not examined as a witness – the prosecutrix and accused had travelled in a taxi – no complaint was made to the taxi driver – the prosecutrix had not made any efforts to resist and to raise alarm when she was taken from the school – prosecutrix had not complained to any person regarding her kidnapping – prosecutrix was not proved to be a minor – her radiological age was found to be between 15½ - 19 years – the prosecutrix was a consenting party and the accused was rightly acquitted by the Trial Court- appeal dismissed.

Title: State of Himachal Pradesh Vs. Ram Chander (D.B.) Page-895

Indian Penal Code, 1860- Section 363, 366-A, 376, 506 and 120-B- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Prosecutrix was taken to Beas and thereafter to Baba Bakala – she was subjected to sexual intercourse by accused No.1 without her consent – accused were tried and acquitted by the Trial Court- held in appeal that the age of the prosecutrix was stated to be below 16 years – reliance was placed on the parivar register but the parivar register is not a legal or acceptable piece of evidence to determine the age of person – it was not proved at whose instance the entries were recorded in the register on the basis of which birth certificate was issued – the prosecutrixwas admitted in the school at the age of 6 years – she had failed twice or thrice – she was studying in class 10th at the time of incident- therefore, she was aged (10+6+2/3) =18-19 years at the time of incident- the prosecutrix had accompanied the accused voluntarily and had stayed without lodging any protest –the prosecution version was not proved beyond reasonable doubt – accused were rightly acquitted by the Trial Court- appeal dismissed.

Title: State of Himachal Pradesh Vs. Rajeev Kumar and others (D.B.) Page-996

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

Title: State of Himachal Pradesh Vs. Vijay Kumar (D.B.) Page-479

Indian Penal Code, 1860- Section 376- Accused had subjected the prosecutrix to sexual assault – the accused was tried and acquitted by the Trial Court- held in appeal that testimony of the prosecutrix if found credible does not require any corroboration - the Court may look for corroboration in case of child witness to satisfy its conscience – Court should have no hesitation in accepting the testimony of the prosecutrix – minor discrepancy or variation in the statement of witness will not be fatal, whereas, contradiction will be – the prosecutrix was minor on the date of incident- the accused was on visiting terms with the family of the prosecutrix and is a close relative – the father of the prosecutrix was not at home and the accused had visited the house of the prosecutrix to spend the night – the prosecutrix supported the prosecution version – her credit was not impeached in cross-examination- absence of blood, rashes, sperms or bruises on the vital part of the prosecutrix is not sufficient to disbelieve her testimony – her version was corroborated by her mother – the matter was reported to police immediately- the prosecution version was proved beyond reasonable doubt and the Trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offence punishable under Section 376 of I.P.C.

Title: State of Himachal Pradesh Vs. Nanha(D.B.) Page-1238

Indian Penal Code, 1860- Section 376- Prosecutrix was grazing her goats in a jungle- juvenile came and raped her – he was tried and acquitted by Juvenile Justice Board- held in appeal that the prosecutrix had stated that she had no knowledge about the identity of the person – eye witness did not corroborate the testimony of the prosecutrix- in these circumstances, juvenile was rightly acquitted – revision dismissed.

Title: State of H.P. Vs. Sandeep Kumar Page-308

Indian Penal Code, 1860- Section 379 read with Section 34- Accused were found in possession of small pieces of aluminum wire, 6 blades, two hacksaw blades, bundle of aluminum wire and small pieces of ladder – they failed to account for the same- informant filed an application stating that one ladder was stolen – he identified the ladder as his own – the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused were acquitted – held in appeal that the copy of seizure memo was not supplied to the accused- testimony of PW-8 was contrary to the contents of the seizure memo- the theft was reported by the informant after delay for which no explanation was given - the Appellate Court had rightly acquitted the accused- appeal dismissed.

Title: State of H.P. Vs. Kishori Lal & another Page-1116

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

Title: State of H.P. Vs. Parveen Kumar and another Page-459

Indian Penal code, 1860- Section 409, 420, 467, 46 and 471- PW-7 had invested a sum of Rs. 40,000/- for a period of three years in TD Account and entrusted this amount to the accused who was posted as Branch Post Manager (BPM)- PW-7 produced the pass-book before PW-1 who found on verification that pass-book was issued against vague and fictitious amount- no opening form was filled nor any receipt was issued – the accused was tried and acquitted by the Trial Court- held in appeal that PW-7 had not supported the prosecution version regarding

entrustment of money to the accused in the month of July, 2002- he did not support the prosecution version that pass-book was handed over by the accused to him- the specimen handwriting was obtained during the investigation and not during the trial – therefore, the same is not admissible – the Trial Court had rightly acquitted the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Devi Lal (D.B.) Page-310

Indian Penal Code, 1860- Section 420- **Prevention of Corruption Act, 1988-** Section 13(d)(ii)- The land belonging to accused No. 4 and D (since deceased) relatives of accused No. 3 got washed away – they applied for grant of two Biswas of land – accused No. 3 was posted as patwari/nautor clerk and he got manipulated a false report from accused No. 1 and 2 – two Biswas of land was allotted in favour of accused No. 4 and D -subsequently order was reviewed and FIR was registered- the accused No. 4 was convicted while other accused were acquitted- held in appeal that accused No. 4 had not prepared any document or report – he was not a recommending authority – recommendations were made by the Competent Authority on the basis of reports prepared by accused No. 1 and 2- PW-13 had made an improvement in her statement- recommending authority was Tehsildar a Gazetted Officer who remains uninfluenced by the fact that accused No. 4 and D were close relatives of accused No. 3 – sanctioning authority was Deputy Commissioner who had applied his mind prior to the sanction of nautor – no person had deposed that accused No. 3 had influenced the sanctioning of the land – the Trial Court had wrongly convicted the accused- appeal allowed – judgment of the Trial Court set aside.

Title: Pavinder Singh Vs. State of Himachal Pradesh Page-620

Indian Penal Code, 1860- Section 436 and 427- Informant was watching television – he heard murmuring of the persons on the backside – he came out and saw G and accused T – informant went inside – his wife came and noticed that cow shed was put on fire – domestic bitch died in the fire – the accused was tried and convicted by the Trial Court- held in appeal that the witnesses had improved upon their versions making their testimonies doubtful – G was not cited as a witness and adverse inference has to be drawn against the prosecution- the prosecution version was not proved beyond reasonable doubt and the Court had wrongly convicted the accused- appeal allowed- judgment passed by the Trial Court set aside.

Title: Tej Singh Vs. State of H.P. Page-1447

Indian Penal Code, 1860- Section 447, 323, 342, 506-II and 367 read with Section 34- Complainant had given the contract of construction of his house to the accused S- the accused had used his shuttering material as well as the material of the complainant- the accused started carrying the shuttering material of the complainant to which the complainant objected- accused M and J arrived at the spot- all the accused gave beatings to the complainant- complaint and charge-sheet were filed before the Court – the accused were tried and acquitted of the commission of offences punishable under Sections 447, 342, 506 and 367 read with Section 34 of I.P.C but were convicted and sentenced to pay Rs.1,000/- each as fine for the commission of offence punishable under Section 323 of I.P.C- held in appeal that testimonies of the witnesses only lead to the conclusion that some scuffle had taken place between the complainant and the accused S – subsequently, accused J and accused M joined the scuffle – it was not explained as to who was the aggressor – simple injuries were found on the person of the complainant, whereas, no such injuries were found on the person of accused – however, it was duly proved that the accused had administered beatings to the complainant- hence, the accused were rightly convicted by the trial Court- appeal dismissed.

Title: Dinesh Chander Sharma Vs. Swaran Singh and others (D.B.) Page-1123

Indian penal Code, 1860- Section 451, 352 and 506 read with Section 34- Informant had gone to attend a local fair, where she was abused by the accused- the accused gave beatings to her on

her return- the accused were tried and acquitted by the Trial Court- held in appeal that testimony of the informant is corroborated by PW-2 and PW-3- there is nothing in their cross-examination to show that they were making incorrect statements – delay in reporting the matter was satisfactorily explained- appeal allowed- accused convicted of the commission of offences punishable under Sections 451, 352 and 506 read with Section 34 of I.P.C.

Title: State of H.P. Vs. Suman Sharma and others Page-965

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

Title: Manju @ Maju Vs. State of H.P. Page-72

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

Tiitle: Satnam @ TituVs.State of H.P. Page-74

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused No.1- accused No.2 was mother-in-law of the deceased – the accused started maltreating the deceased for bringing insufficient dowry – they used to beat the deceased – the deceased committed suicide by consuming poison – the accused were tried and acquitted by the Trial Court- held in appeal that PW-1 admitted in cross-examination that accused had not demanded dowry at the time of marriage or till the death of deceased- statement of PW-4 is general in nature and no specific instance was given by her- material witness was not examined- the complaint stated to have been written by the deceased was suspicious – the FIR was lodged after three years and no explanation for the same was provided – the prosecution version was not proved beyond reasonable doubt and the accused were rightly acquitted by the Trial Court- appeal dismissed.

Title: State of Himachal Pradesh Vs. Ajay Kumar & Another (D.B.) Page-1658

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

Title: Chaman Lal and others Vs. State of H.P. Page- 157

Indian Penal Code, 1860- Section 498-A and 307- The marriage between the deceased and accused No. 1 was solemnized in the year 2007 –accused used to harass her for not bringing

sufficient dowry – accused No. 1 pushed her in the well – the accused were tried and acquitted by the Trial Court- held in appeal that the testimonies of prosecution witnesses are contradicting each other – PW-1 to PW-4 are closely related to each other - the Trial Court had recorded the finding of the acquittal after taking into consideration all the facts- the view taken by the Trial Court was a reasonable view- appeal dismissed.

Title: State of Himachal Pradesh Vs. Firoj Khan and another (D.B.) Page-844

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

Title: State of H.P. Vs. Sukh Dev Page-398

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

Title: Dr. Dev Raj Vs. Sandhya Sharma Page-188

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

Title: Soma Devi Vs. Mast Ram Page-596

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit claiming that he is the owner in possession on the basis of the Will executed by G – the Will propounded by defendant No. 1 is the result of mis-representation, deception, undue influence and fraud – the revenue entries on the basis of the same are illegal, null and void- the suit was dismissed by the trial Court- an

appeal was preferred, which was dismissed – held in second appeal that the Will propounded by the plaintiff was held to be shrouded in suspicious circumstances – plaintiff was not able to dispel those circumstances – the defendant No. 1 was able to prove the execution of the Will by the deceased- no fault can be found with the judgment of Appellate Court- appeal dismissed.

Title: Revti Devi Vs. Hari Singh &Anr. Page-176

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

Title: Chhabi Ram since deceased through LRs Vs. Narudhma Devi and others Page-498

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that N was owner of the suit land, who had executed a Will in favour of the plaintiff – mutation was wrongly sanctioned in favour of the defendants- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that the finding of Trial Court that N was not proved to be the owner and he could not have bequeathed the suit land was not examined by the Appellate Court- Appellate Court examined the veracity of the Will, which was not permissible – appeal allowed – judgment of the Appellate Court set aside- case remanded for fresh adjudication.

Title: Jamuna Devi Vs. Arjun and others Page- 1799

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that suit land was earlier owned by his mother V – she had executed a Will in favour of the plaintiff and defendant No.1- the other land was given to proforma defendants No. 2 and 3- defendant taking advantage of the absence of the plaintiff got executed a gift deed – the suit land was ancestral in the hands of V – the defendant pleaded that the Will and gift deed were executed in a free and disposing state of mind – the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that the execution of the Will was not disputed – the gift deed was executed after the execution of the Will- the gift deed was registered and there is presumption of its due execution – however, it was recorded by the revenue officer that possession was delivered after receiving an amount of Rs.5,000/- - therefore, it has not been proved that the gift was executed without any consideration- the donee had failed to prove that no undue influence was exercised by him upon the donor – further, the scribe and the witnesses were common – the Sub Registrar was also not examined – the Courts had not properly appreciated the evidence – appeal allowed- judgments of the Courts below set aside and the suit of the plaintiff decreed.

Title: Satish Chander Vs. Jagdish and others Page-143

Indian Succession Act, 1925- Section 63- Plaintiffs pleaded that J was the owner of the suit land who died intestate - Will propounded by the defendants is wrong – the defendants pleaded that J had executed a Will in favour of defendants No. 1 and 2 in his sound disposing state of mind – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that finger print expert had stated that the thumb impression on the Will was different from the admitted thumb impression of the deceased – the Appellate Court had rightly allowed the appeal- appeal dismissed.

Title: Des Raj and another Vs. Krishan Lal and others Page-730

Indian Succession Act, 1925- Section 63- The Land was owned by L – he died in the month of June, 1988- mutations were attested on the basis of the Will – the deceased was not competent to execute the Will as he remained ill at the time of the execution of the Will – the suit was decreed by the Trial Court – an appeal was preferred, which was allowed- held, that original Will was not produced before the Court – defendant has not stated anything about the scribe of the Will or the marginal witnesses – the marginal witness failed to identify his signatures on the Will due to poor eye-sight – the execution of the Will was not proved – appeal allowed – judgment and decree passed by the Appellate Court set aside while judgment and decree passed by the Trial Court restored.

Title: Premvati and others Vs. Vasu Dev Page-911

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

Title: State of H.P. and another Vs. Rakesh Kumar (D.B.) Page- 569

Industrial Disputes Act, 1947- Section 17-B- A writ petition was filed assailing the award passed by Industrial Tribunal-cum-Labour Court, Shimla- an application was filed by the workman- held, that Section 17-B has been enacted by the parliament to give relief to a workman who has been ordered to be reinstated under the award of Labour Court or Industrial Tribunal- the object of this provision is to relief the hardship caused to the workman due to delay in implementing the award- workman is entitled to the payment of full wages last drawn as subsistence allowance – employer directed to pay wages from the date of filing of the application.

Title: M/s Federal Mogul Bearing India Ltd. Vs. Brij Lal Page-1163

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged on daily wage basis- his services were terminated- he filed original application before Administrative Tribunal, which was allowed – the services of the petitioner were disengaged without following the procedure – the Labour Court dismissed the reference – held, that the petitioner had worked for three days in July, 2001- the plea of the petitioner that he had completed 240 days and his services were illegally terminated was not proved – the Labour Court had rightly dismissed the reference – writ petition dismissed.

Title: Narain Singh Vs. State of Himachal Pradesh and others Page-1080

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged by the respondent as Beldar- his services were terminated without assigning any reason- the Tribunal allowed the reference and the petitioner was ordered to be reinstated with seniority but without back wages- held, that the plea of the petitioner was not supported by documents- the plea of the respondent that the petitioner had left the job on his own was not supported by the repeated requests for re-engagement- the case was dismissed in default and the workman had not taken steps to get the same restored- the order was passed rightly by the Industrial Tribunal-cum-Labour Court- appeal dismissed.

Title: Udham Singh Vs. Himachal Pradesh State Electricity Board Limited and others Page-574

Industrial Disputes Act, 1947- Section 25- The petitioner was appointed as Librarian – his services were terminated after an inquiry, which was not proper – the Labour Court rejected the claim of the petitioner – held, that no objection was raised to the appointment of the Inquiry

Officer – petitioner was unable to prove that he was deprived of an opportunity to examine the witnesses- serious allegations were made against the petitioner and the inquiry was rightly held to verify those allegations – the Writ Court will not act as a Court of appeal to disturb the findings of fact- writ petition dismissed.

Title: Som Dutt Sharma Vs. The Presiding Judge, Industrial Tribunal-cum-Labour Court and another Page-1637

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

Title: M/s.Cosmo Ferrites Ltd. Vs. State of H.P. & Others Page-98

Industrial Disputes Act, 1947- Section 25- The workman was appointed as a driver – his services were terminated orally without issuance of notice – a reference was made, which was allowed by the Labour Court- held, that the management had not challenged the award – the Industrial Tribunal had wrongly denied the benefit of backwages especially when continuity in service and seniority were granted – Writ Court does not have jurisdiction to re-appreciate the facts- however, Tribunal had failed to exercise the jurisdiction by denying the back wages – writ petition allowed and workman held entitled to 50% of back wages from the date of retrenchment till passing of award.

Title: Kulvinder Singh Vs. The Managing Partner, M/S Cousins GunVs. Manufactures Mandi Page-1606

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

Title: The Executive Engineer, HPSEB Electrical Division, Joginder Nagar Vs. Jagdish Chand Page-571

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that

employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.

Title: State of Himachal Pradesh & another Vs. Ashok Kumar Page-1306

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.

Title: State of Himachal Pradesh & another Vs. InderSingh Page-1311

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.

Title: State of Himachal Pradesh & another Vs. BhuriSingh Page-1309

Industrial Disputes Act, 1947- Section 25-F- P was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that plea of the employer that P had abandoned the service has not been established- merely because a workman had not reported for duty cannot lead to an inference of abandonment- a disciplinary inquiry should have been initiated against the workman for abandoning the service, which was not done- fresh hands were engaged and employer had not complied with the provision of Section 25-H –there is no limitation for making the reference- the award was rightly passed – petition dismissed.

Title: State of Himachal Pradesh & another Vs. Partap Singh Page-1314

'L'

Land Acquisition Act, 1894- Section 18- Land Acquisition Collector had awarded compensation on the basis of the settlement –held, that statutory benefits payable under the Act cannot be waived by the Land Owners – there can be no estoppel against the law- the benefits were rightly granted by the Reference Court – appeal dismissed.

Title: The State of Himachal Pradesh & others Vs. Bhagat Ram & others Page-1532

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for the construction of Karara-Chandi Road – land Acquisition Collector assessed the value of cultivable land as Rs.4,000/- per biswa and value of ghasni land as Rs. 500/- per biswa- a reference was made and the compensation was enhanced to Rs.10,000/- per biswa- held in appeal that the exemplar sale deed showed that one biswa of land was alienated for Rs.6,000/- large piece of land was acquired, whereas, exemplar sale deed was regarding one biswa of land, therefore, 20% deduction has to be made from the sale consideration shown in the exemplar sale deed – appeal partly allowed and the value assessed as Rs.6,000/- per biswairrespective of the category of the land-20% amount ordered to be deducted from this amount.

Title: State of H.P. & another Vs. Shanti Devi & others Page-1205

Land Acquisition Act, 1894- Section 18- Reference petition was ordered to be dismissed in default- held, that the reference petition cannot be dismissed in default and the reference Court had wrongly ordered the dismissal – direction issued to restore the reference petition to its original number and to decide the same in accordance with law.

Title:Vinod Kumar and others Vs. State of H.P. and others Page-1679

Land Acquisition Act, 1894- Section 18- The award pronounced by Reference Court was assailed before the High Court – appeal was disposed of in RFA no.44 of 2009- the award in the present case has arisen from the common notification- the award was common in the present appeal and in RFA no.44 of 2009- therefore, the present appeal disposed of in terms of RFA No.44 of 2009.

Title: The Secretary (PWD) to the Government of Himachal Pradesh and another Vs. Chaman Lal Page-1211

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam – Land Acquisition Collector determined the compensation @Rs.4,69,955/- for cultivated land and Rs.1,04,416/- for uncultivable land – Reference petition was filed and the Reference Court determined the market value @ Rs.4,69,955/- per bigha – held in appeal that sale deeds were tendered in evidence but in absence of evidence regarding the similarity of the acquired land with exemplar sale deed, the deeds cannot be taken into consideration to determine the market value of the acquired land –the sale deed pertained to two different villages and very small chunk of lands - the reference Court had rightly declined to take exemplar sale transactions into consideration- appeal dismissed.

Title: NTPC Ltd.(Kol Dam) Vs. Sukh Ram & others Page-1520

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam- Land Acquisition Collector awarded the compensation at different rates- reference was made – exemplar sale deeds were produced, which were subsequent to initiation of acquisition proceedings- no material was placed on record to establish its similarity of potential, use, kind and nature with the acquired land – the Court has awarded compensation in respect of other acquired land of the same Tehsil on uniform basis irrespective of classification, nature and category of land- Reference Court awarded compensation on uniform basis by taking the highest rate so determined by the Collector himself after relying upon several decisions of the Apex Court – the Reference Court had rightly determined the compensation- appeal dismissed.

Title: NTPC Ltd., Kol Dam Vs. Balam Singh & another Page-1481

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam- Reference Court re-determined the market value @ Rs.5 lacs per bigha after relying upon exemplar sale deed and exemplar award –held in appeal that claimants had claimed compensation @ Rs.15 lacs per bigha category/classification wise- the Reference Court is bound to determine market value, which is just fair and reasonable- Collector determined the market value at different rates – exemplar sale deeds were duly proved- similarity of the acquired land with exemplar sale deeds was established- the market value in exemplar sale deeds worked out to be Rs.7,50,000/- per bigha but allowing deduction up to 33.13%, the fair market value was found to be 5 lacs per bigha – similarity of the land in previous award was established with the acquired land – award has attained finality –sale deeds relied upon by the respondents could not form the basis for determining market value as the similarity between the lands was not established – appeal dismissed.

Title: NTPC Limited Vs. Amar Singh & another Page-1462

Land Acquisition Act, 1894- Section 18- The land was acquired for the extension of Airport, Gaggal – the land owners sought reference and the Reference Court enhanced the compensation – aggrieved from the order, the present appeal was filed – held in appeal that exemplar sale deed was executed subsequent to the date of notification and cannot be relied upon - the benefit of 20% increase was also not permissible – appeal allowed- award of the reference Court set aside and that of the Land Acquisition Collector restored.

Title: Sub Division Officer (Civil)-cum-Land Acquisition Collector Vs. Harbhagwant Singh Page-1045

Limitation Act, 1963- Section 5- An appeal was filed against the award of Workmen Compensation Commissioner, which was barred by limitation – an application for condonation of delay in filing the appeal filed- held that appellant had deposited the amount before the Commissioner on 24.1.2011, which shows that it had notice regarding the award – the appeal was filed in the year 2015- no satisfactory explanation for the delay has been given – delay cannot be condoned- application dismissed.

Title: ICICI Lombard General Insurance Company Ltd. Vs. Leela Devi & others Page-1073

Limitation Act, 1963- Section 5- An application for condonation of delay of 256 days was filed pleading that the matter remained pending before various authorities in the department – held, that the memo of appeal was returned by Assistant Solicitor General of India in the month of May, 2014 for signatures and was filed in the month of January, 2015 – no explanation for the delay was given – no sufficient cause exists for condonation of delay- application dismissed.

Title: Union of India Vs. Vivek Bhardwaj & Another Page-1122

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

Title: Aruna BediVs. Subhash Kapil and others Page-742

Limitation Act, 1963- Section 5- There was delay of 125 days in filing the appeal – an application for condonation of delay was filed, which was dismissed – held, that the counsel for the applicant had not obtained the copy from the copying agency – there is no requirement of intimating the counsel on the preparation of the copy – the time till the collection of the copy cannot be deducted – the delay was not explained properly- appeal dismissed.

Title: Employees Provident Fund Organization and another Vs. Gian Chand and another Page-1134

'M'

Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased was travelling in the vehicle after loading the goods – this fact was not denied in the reply- the plea taken by the insurer that the deceased was travelling in the vehicle as a gratuitous passenger was not proved- the insurer was rightly saddled with liability- appeal dismissed.

Title:Bajaj Allianz General Insurance Company Ltd. Vs. Ram Kali and others Page-1383

Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased had gone with his truck for carrying the cement - this fact was not denied by the respondents- the deceased was travelling in the vehicle as a gratuitous passenger and not as the employee of the owner- the insured had committed the breach of the terms and conditions of the insurance policy and insurer was rightly absolved of its liability – however, rate of interest reduced to 7.5% from 9%.

Title: Oriental Insurance Company Ltd. Vs. Bhuvneshwari Devi and others Page-692

Motor Vehicles Act, 1988- Section 149- Driver had a valid licence to drive a light motor vehicle – it was nowhere provided that the driver was not competent to drive a motorcycle or a scooter – the Tribunal had fallen into error in holding that the driver did not have a valid and effective driving licence to drive the vehicle – it was for the insurer to prove the breach of the terms and conditions of the policy and mere plea is not sufficient to seek exoneration.

Title: Hari Chand and another Vs. Chaya Kumari and others Page-1552

Motor Vehicles Act, 1988- Section 149- Driver had a valid licence to drive light motor vehicle – offending vehicle was a tempo, which falls within the definition of Light Motor Vehicle – the Tribunal had wrongly held that driver did not possess a valid licence – the deceased was a photographer, who had gone to a Mela and was returning in the offending vehicle – he was rightly held to be a gratuitous passenger- the insurer directed to satisfy the award with the right to recovery.

Title: Kashmiri Lal Vs. Rajni Devi and others Page-355

Motor Vehicles Act, 1988- Section 149- Driver had two licences at the time of accident- however, it is not the case that driver was not having a valid and effective licence at the time of accident- insurer had not proved that insured had committed willful breach of the terms and conditions of the policy – insurer was rightly saddled with liability – appeal dismissed.

Title: United India Insurance Co. Vs. Lokeshawar Narah and others Page-699

Motor Vehicles Act, 1988- Section 149- Driver was driving a tipper un-laden weight of which is 2800 kg. – it falls within definition of light motor vehicle – the driver had a licence to drive light motor vehicle- no endorsement of PSV was required – the driver had a valid licence at the time of accident – the Tribunal wrongly discharged the insurer from liability- appeal allowed and insurer directed to satisfy the award.

Title: GautamNath and another Vs. Duni Chand and others Page-1546

Motor Vehicles Act, 1988- Section 149- Driver was having a license to drive light motor vehicle – he was driving a three wheelers, which falls within the definition of light motor vehicle- no endorsement of PSV was required- the Tribunal fell in error in concluding that the Driver did not have a valid licence at the time of accident- appeal allowed – award modified and the insurer saddled with liability.

Title: Inder Kaur & others Vs. Shanti Devi &others Page-656

Motor Vehicles Act, 1988- Section 149- Insurance is not disputed- claimant is a third party – her claim cannot be rejected on flimsy ground – insurer has to prove the breach of the terms and conditions of the policy – Insurer was rightly saddled with liability.

Title: National Insurance Company Ltd. Vs. Mukta Sharma and another Page-513

Motor Vehicles Act, 1988- Section 149- Insurer was directed to satisfy the award with the right to recovery- held, that insurer has to satisfy the award with the right to recovery from the owner/insured – appeal dismissed.

Title: United India Insurance Co. Ltd. Vs. Sita Devi and others Page-824

Motor Vehicles Act, 1988- Section 149- Interrogatories were sent to District Judge, Mathura, who had sent the report to the Tribunal showing that the original licence was not issued in the name of the driver Shakti Chand – however, the insurer had not proved the said report – the licence was renewed at Kangra and the renewal was not fake – the burden was upon the insurer to establish that the insurer had committed willful breach of the terms and conditions of the policy, which was not proved – insurer was rightly saddled with liability- however, the rate of interest reduced to 7.5% per annum.

Title: National Insurance Company Ltd.Vs. Pawan Kumar and others Page-1560

Motor Vehicles Act, 1988- Section 149- It was contended that the driver was under the influence of liquor and insurer is not liable – held, that the insurer had not led any evidence to prove this plea- the insurance policy does not contain any such clause – insurer cannot escape from liability on this ground.

Title: The New India Assurance Company Ltd.Vs. Kirna & others Page-1575

Motor Vehicles Act, 1988- Section 149- It was contended that the driver did not have a valid and effective driving licence at the time of accident- Insurer had not led any evidence to prove this plea- the burden of proving the breach of the terms and conditions of the policy was upon the insurer- the insurer was rightly saddled with liability, in these circumstances - appeal dismissed.

Title: Oriental Insurance Company Ltd. Vs. Jai Kumar and others Page-361

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

Title: The New India Assurance Company Vs. Urmila Devi and others Page-385

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that driver was not having a valid and effective driving licence and the owner had committed willful breach- no evidence was led to prove that deceased were gratuitous passengers – in these circumstances, the insurer was rightly held liable.

Title: Oriental Insurance Co. Ltd. Vs. Savitra Devi and others Page- 686

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

Title: Rajinder Singh Vs. Kirpal Singh and others Page-811

Motor Vehicles Act, 1988- Section 149- No evidence was led by the respondents and the evidence led by the claimant remained unrebutted – it was for the insurer to plead and prove that the insured had committed willful breach of the terms and conditions of policy – drivinglicence was exhibited and no objection was raised at the time of exhibition – the issues were rightly decided against the insurer – appeal dismissed.

Title: The New India Assurance Company Limited Vs. Resha Devi and others Page-547

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

Title: Jagmohan Singh and another Vs. Meera Devi and others Page-806

Motor Vehicles Act, 1988- Section 149- Offending vehicle was a tipper, the un-ladenweight of which is 3680 k.g. and it falls within the definition of light motor vehicle – copy of licence shows that driver was having a valid and effective driving licence at the time of accident – it was for the insurer to plead and prove that the owner had committed willful breach of the terms and conditions of the policy- insurer is to be saddled with liability – thus, the Tribunal had rightly saddled the insurer with liability – however, rate of interest reduced from 9 % to 7.5% per annum.

Title: ICICI, Lombard General Insurance Co. Ltd. Vs. Gian Chand & others Page-1149

Motor Vehicles Act, 1988- Section 149- Tribunal held that driver was not having a valid and effective licence at the time of accident – licence was in the name of J and not in the name of S – there was no evidence that the owner had taken due care and caution while engaging the driver – held, that Tribunal had rightly recorded the findings- the driver was not having a valid and effective drivinglicence at the time of accident and the owner insured had committed willful breach- appeal dismissed.

Title: Avtar Singh Vs. Tilak Raj & another Page-486

Motor Vehicles Act, 1988- Section 149- Tribunal saddled the owner with liability – held, that the driver was having a valid and effective driving licence, which was also renewed- even otherwise, it was for the insurer to plead and prove that the driver was not having a valid licence and the owner had committed willful breach – the insurance was admitted and the insurer has to satisfy the award- appeal allowed.

Title: Navdeep Singh and another Vs. Inder Singh and another Page-1405

Motor Vehicles Act, 1988- Section 163-A and 167- Deceased was in the employment of owner/insured – claimants have right to claim compensation in terms of Workmen Compensation Act- they had an option to file the claim petition either before the Commissioner or MACT – the claim petition was maintainable- however, the driving licence is not on record – case remanded for adjudication of the dispute afresh.

Title: Rameshwar and another Vs. Reshmi Devi and another Page-364

Motor Vehicles Act, 1988- Section 163-A- Deceased was the son of owner/insured, who died in the accident - the owner had specifically stated in the reply that the vehicle was parked in the

garage due to some mechanical defect- the deceased had taken the vehicle in the absence of the owner – the deceased was not engaged as a driver but was driving the vehicle in the capacity of the son of the insured and will step into the shoes of the owner – the insured had paid extra premium insuring the owner to the extent of Rs.2 lacs - representative of the deceased are entitled to the compensation of Rs.2 lacs with interest @ 7.5% per annum.

Title: ICICI Lombard General Insurance Company Limited Vs. Parul Sharma and others

Page-1144

Motor Vehicles Act, 1988- Section 163-A- It was contended that claim petition was not maintainable as the claimants had claimed the income of the deceased to be Rs.8,000/- per month- held, that the claim petition under Section 163-A was not maintainable as the income was more than Rs.40,000/- per annum- however, the claim petition can be treated to be filed under Section 166- the deceased was driving the vehicle himself as per the FIR- 50% of the amount has been released to the claimants with interest – therefore, the same ordered not to be recovered from them in the interest of justice- appeal disposed of.

Title: United India Insurance Company Limited Vs. Mohan Lal and others

Page-704

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

Title: Rajinder Singh Vs. Kirpal Singh and others Page-811

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 30% permanent disability- his right leg has been shortened – he cannot drive the vehicle the way he was driving before the accident – accident has affected earning capacity to the extent of 50% - monthly income of the claimant was Rs. 7,800/- per month and loss of earning will be Rs. 3,900/- per month– the claimant was 34 years at the time of accident and multiplier of 15 is applicable- thus, the loss of income is Rs. 3,900 x 12 x 15= Rs. 7,02,000/- - compensation of Rs. 50,000/- under the head pain and suffering during treatment, Rs. 50,000/- under the head loss of enjoyment of life, Rs. 60,000/- under the head loss of earning capacity during treatment, Rs. 83,000/- under the head special diet and attendant charges do not need any interference- claimant is entitled to Rs. 9,70,000/- as compensation – rate of interest reduced from 9% to 7.5% per annum.

Title: Oriental Insurance Company Vs. Roop Singh and others Page-1837

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 50% disability, which is permanent in nature and is in regard to whole body- the claimant was an advocate by profession – the disability suffered by him has shattered his physical frame- he would not be in position to do the job of an advocate as he was doing prior to the accident- his income can be taken as Rs.10,000/- per month – considering the permanent disability, it can be safely held that the claimant had lost 20% earning capacity and loss of earning capacity will be Rs.2,000/- per month – the age of the claimant was 49 years and multiplier of 13 is applicable – thus, the claimant is entitled to Rs.2000 x12 x 13= Rs. 3,12,000/- under the head loss of earning capacity – the claimant remained admitted for over one month in the hospital and he would have taken

some time in recuperation – hence, the loss of income can be assessed as Rs. 10,000 x 6= Rs. 60,000/- Rs. 50,000/- each awarded under heads painand suffering and loss of amenities of life – the claimant would have spent Rs.100/- per day or Rs.3,000/- per month on account of special diet- hence, the claimant is held entitled to Rs.3000 x6= Rs.18,000/- under the head special diet – Rs.20,000/- awarded under the medical expenses and Rs.10,000/- awarded under the head future medical treatment – the attendant charges for six months come to Rs.18,000/-- the claimant is held entitled to Rs.3000/- under the head transportation charges- the claimant was occupant of the car and the insurance policy shows the sitting capacity as 1 + 3- no breach of terms and conditions was proved – hence, insurer directed to satisfy the award.

Title: Desh Raj Sharma Vs. Chitra Rai and others Page-640

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

Title: ICICI Lombard General Insurance Co. Ltd. Vs. Ram Prakash and others
Page-650

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injury in a motor vehicle accident- he was aged 27 years at the time of accident- he remained in hospital for a period of about 2 months- he was coming up for follow up after every 4-6 weeks – he is having difficulty in walking and speaking and he has lost all charms of life- he had spent Rs.1,94,428/- on his treatment- the Tribunal had rightly awarded the compensation- appeal dismissed.

Title: H.R.T.C. through its Managing Director and another Vs. Sanjay Kumar and another
Page-648

Motor Vehicles Act, 1988- Section 166- claimant is a house wife – her income can be taken as Rs.6,000/- per month- the loss of income has to be taken as Rs.3,600/- per month in view of the disability sustained by her - applying the multiplier of 11, loss of future income will be Rs.4,75,200/- - the claimant will face difficulty in movement – hence, in addition to Rs.20,000/- spent during the treatment, Rs.10,000/- granted for future expenses towards movement , Rs.30,000/- awarded towards loss of amenities - Rs.20,000/- awarded for future treatment – total amount of Rs.7,45,200/- awarded as compensation with interest @ 9% per annum- cost of Rs.10,000/- also awarded.

Title: ICICI Lombard General Insurance Co. Vs. Bimla Devi and others Page- 923

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that accident was caused by the negligence of the driver of the vehicle – FIR was registered against the claimant – acquittal was recorded on the ground that case was not proved beyond reasonable doubt and not on the ground that the accident was caused by the negligence of other driver- the statement of PW-1 was shattered in the cross-examination – negligence was not proved and the claim petition was rightly dismissed- appeal dismissed.

Title: Ram Lal Vs. Bishan Singh and others Page-1432

Motor Vehicles Act, 1988- Section 166- Claimant specifically pleaded that accident was outcome of contributory negligence – challan was filed against the driver of the truck as well as motorcyclist – drivers of both vehicles had driven the vehicles rashly and negligently and it was a case of contributory negligence – the deceased was bachelor and 50% amount was to be deducted towards personal expenses- the deceased was 21 years of age and multiplier of 15 was applicable – however, multiplier of 16 was applied by the Tribunal, which is maintained – appeal dismissed.

Title: Prit Pal Singh Vs. Radha Devi and others Page-1193

Motor Vehicles Act, 1988- Section 166- Claimant suffered permanent disability to the extent of 55% - medical evidence proved that the injured was victim of the motor vehicle accident and had sustained 55% disability – he remained undertreatment for about 3 months – hence, by guess work, Rs.2 lacs awarded in lump sum under the heads 'pain and sufferings', 'loss of amenities' and 'medical expenses' with interest @ 7.5% per annum.

Title: Manoj Kumar Vs. Himachal Road Transport Corporation & others Page-1158

Motor Vehicles Act, 1988- Section 166- Claimant sustained 40% disability qua his left leg- he remained admitted in the hospital w.e.f. 30.9.2008 till 20.11.2008 – claimant was 10 years of age at the time of incident – he will not be able to seek appointment in the Armed Forces or get the job of his choice after attaining the age of majority – the claimant would have been earning not less than Rs.5,000/- per month after attaining majority- considering the disability, the claimant had suffered Rs.2,000/- per month as loss of income – multiplier of 18 will be applicable – thus, compensation of Rs.2000 x 12 x 18= Rs.4,32,000/- awarded towards loss of future income – Rs.42,805/- awarded under the head medical expenses and Rs.12,000/- awarded under the head transportation charges- compensation of Rs.1 lac each awarded under the heads pain and suffering and loss of amenities of life- thus, total compensation of Rs. 6,86,805/- awarded with interest @ 7.5% per annum.

Title: Mahesh Vs. Prince and others Page-1396

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

Title: Balkar Singh Vs. Babar and others Page-217

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that driver Sunil Kumar was driving the vehicle rashly and negligently- Tribunals held that Sunil Kumar had caused the accident while driving the vehicle rashly and negligently – Rajesh Kumar was convicted by the Criminal Court for driving the vehicle in a rash and negligent manner – this judgment was set aside in appeal and it was held that Sunil Kumar was driving the vehicle - the judgment of the Appellate Court has attained finality – Tribunals had rightly held that accident was caused by the rash and the negligent driving of Sunil Kumar – seating capacity of the vehicle is 42 and 30 claim petitions were filed - the risk of all the claimants is covered – the insurer was rightly saddled with liability- appeals dismissed.

Title: New India Assurance Company Limited Vs. Fata Chand & others Page-1411

Motor Vehicles Act, 1988- Section 166- Claimants specifically pleaded that deceased was working as labourer in the offending vehicle and was travelling in the same as a labourer at the

time of accident- this fact was admitted in the reply – sitting capacity of the vehicle was 3+1 – premium was paid for the employee - the claimants are 7 in number and 1/5th amount was rightly deducted towards personal expenses- the deceased was 31 years of age at the time of accident and multiplier of 15 is just and appropriate – the amount cannot be said to be excessive – appeal dismissed.

Title: Oriental Insurance Company Ltd. Vs. Sumitra Devi and others Page-1177

Motor Vehicles Act, 1988- Section 166- Claimants specifically stated in the claim petition that deceased was driving the vehicle at the time of accident – owner also admitted this fact in the reply - it was specifically stated in the FIR that accident had taken place due to rash and negligent driving by the deceased- thus, it can be safely said that accident had taken place due to the negligence of the deceased – rashness and negligence have to be proved to get compensation under Section 166- the claim petition was therefore, not maintainable under Section 166 – since, the income of the deceased was proved to be Rs. 23,791/- per month; therefore, claim petition cannot be treated under Section 163-A – appeal allowed- award set aside.

Title: Oriental Insurance Company Ltd. Vs. Brahmi and others Page-1830

Motor Vehicles Act, 1988- Section 166- Compensation of Rs. 87,200/- was awarded along with interest @ 7.5% per annum- a sum of Rs. 1 lac awarded in lump sum in addition to the amount already awarded by the Tribunal with the right to recovery.

Title: Manoj Kumar Vs.Ghanshayam Thakur and others Page-811

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

Title: National Insurance Company Ltd. Vs. Mukta Sharma and another Page-513

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

Title: Devinder Singh Vs. Geetan Devi and others Page-646

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

Title: ICICI Lombard General Insurance Co. Ltd. Vs. Satya Devi and others

Page-342

Motor Vehicles Act, 1988- Section 166- Deceased was a house wife – her monthly income cannot be less than Rs.6,000/- / 1/3rd is required to be deducted towards personal expenses of the deceased and claimant has lost source of dependency of Rs.4,000/- per month- multiplier of 15 is applicable and claimant is entitled to compensation of Rs.4000 x 12 x 15= Rs. 7,20,000/- under the head loss of dependency – claimants is also entitled to Rs.10,000/- each under the heads loss of love and affection and funeral expenses- thus, total compensation of Rs.7,20,000 + 20,000= Rs.7,40,000/- awarded along with interest @ 7.5% per annum from the date of filing of the claim petition till realization.

Title: Master Nitish Kumar (Minor) Vs. Managing Director & another Page-1161

Motor Vehicles Act, 1988- Section 166- Deceased was a pillion rider of the motorcycle which met with an accident due to the rash and negligent driving of the driver of the bus- it was contended that accident was the result of the contributory negligence of the driver of the motorcycle – held, that in claim petition prima facie proof is required and not strict pleadings and proof - both the drivers had not taken due care and caution while driving their respective vehicles- when two drivers do not take due care and caution while driving their respective vehicles and contribute in causing accident, it is a case of contributory negligence – appellate directed to deposit 50% amount while the insurer of the other vehicle directed to deposit 50% of the amount.

Title: Oriental Insurance Company Ltd. Vs. Daljeet Kaur and others Page-1173

Motor Vehicles Act, 1988- Section 166- Deceased was a TGT and was drawing gross salary of Rs. 27,000/- per month- he was to retire at the age of 58 years and was aged 56 years at the time of accident – 1/4th amount is to be deducted towards personal expenses- claimants have lost source of dependency of Rs. 20,000/- per month – the compensation has to be determined keeping in view the fact that deceased was to retire within two years and that thereafter he was to get pension for the rest of the life- keeping in view the age of the deceased, multiplier of 7 is applicable out of which multiplier of 2 has to be applied for assessing loss of salary and multiplier of 5 has to be applied for assessing loss of pension – claimants are entitled to Rs. 20,000 x 12 x 2= Rs. 4,80,000/- under the head loss of salary – the deceased would not have taken pension less than Rs. 12,000/- per month out of which 1/4th is to be deducted towards personal expenses and the loss of dependency will be Rs. 9,000/- per month – claimants are entitled to Rs. 9,000 x 12 x

5= Rs. 5,40,000/- under the head loss of pension- claimants are also entitled to Rs. 10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses – claimants are entitled to total compensation of Rs. 4,80,000 + 5,40,000 + 40,000= Rs. 10,60,000/- with interest @ 7.5% per annum.

Title: Darshan Kaur & another Vs. Vidya Thakur & others Page-1822

Motor Vehicles Act, 1988- Section 166- Deceased was drawing Rs.13,064/- per month as salary- he was 37 years of age at the time of accident – multiplier of 15 was rightly applied – claimants are four in numbers and 1/4th amount was rightly deducted from the monthly income the deceased- the driver had a valid driving licence and insurer was rightly saddled with liability- appeal dismissed.

Title: Dolma Devi and others vs. Mohinder Kumar Goel and others Page-1387

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

Title: United India Insurance Co. Vs. LokeshawarNarah and others Page-699

Motor Vehicles Act, 1988- Section 166- Deceased was hit by a car – he fell down upon the motorcycle – the driver and pillion rider also sustained injuries – a claim petition was filed for seeking compensation of Rs.6,12,000/- - the Tribunal dismissed the petition – held in appeal that PW-2 specifically stated that accident was caused due to the negligence of the driver – his testimony was corroborated by the report of post-mortem – thus, rashness and negligence were duly proved – monthly income of the deceased can be taken as Rs.3,000/-- 1/3rd amount is to be deducted towards personal expenses and loss of dependency will be Rs.2,000/- per month- the age of the deceased was 56 years and multiplier of 8 is applicable – compensation of Rs.1,92,000/- (2000 x 12 x 8) awarded towards loss of dependency- compensation of Rs.10,000/- each awarded under the heads funeral expenses, loss of love and affection and loss of consortium – thus, total compensation of Rs.2,22,000/- awarded with interest @ 9 % per annum.

Title: Savitri Devi widow of late Shri Balwant Singh Vs. Mohinder Pal son of Shri Ram Lal & others Page-1594

Motor Vehicles Act, 1988- Section 166- Deceased was running a tea shop and was earning Rs.8,000/- per month – however, no documentary proof was filed – the income of the deceased can be taken as Rs.6,000/- per month or Rs.200/- per day- after deducting 1/3rd amount towards the personal income, loss of source of dependency will be Rs.4,000/- per month – the deceased was 55 years of age and multiplier of 10 is applicable- thus, the claimants are entitled to Rs.4,000 x 12 x 10= Rs.4,80,000/- under the head loss of source of dependency – claimants are also entitled to Rs.10,000/- each under the heads loss of estate, loss of love and affection, loss of consortium and funeral expenses – the deceased remained admitted in the hospital w.e.f. 14th May, 2011 till 21st May, 2011 and must have spent some amount on the treatment – compensation of Rs.50,000/- awarded under the head treatment- claimants are entitled to Rs.4,80,000 + 40,000+ 50,000= Rs.5,70,000/- along with interest @ 7.5% per annum.

Title: Hari Chand and another Vs. Chaya Kumari and others Page-1552

Motor Vehicles Act, 1988- Section 166- Deceased was travelling as a labourer while deceased N was traveling as owner of goods –they died in an accident- the fact that the deceased were travelling as labourer and owner, respectively was admitted in the reply- it was also proved by PW-4, occupant of the vehicle- the delay is not sufficient to dismiss the petition- the compensation was rightly assessed- the rate of interest were wrongly granted as 9% and 7% - rate of interest modified to 7.5% per annum.

Title: Divisional Manager, Oriental Insurance Co. Ltd. Vs. Ram Kali & others

Page-1129

Motor Vehicles Act, 1988- Section 166- Deceased was travelling in the vehicle with the goods – vehicle fell down due to the rashness and negligence of the driver – deceased sustained grievous injuries and died – compensation of Rs. 3 lacs was awarded by the Tribunal- held, that income of the deceased was rightly taken to be Rs. 3,500/- per month and compensation was rightly assessed as Rs. 3 lacs- there was no proof that accident had taken place due to the mechanical defect – the deceased was owner of goods and insurance company cannot escape from liability – appeal dismissed.

Title: The New India Insurance Company, through its Divisional Manager Vs. Hiravati Sharma and others Page-1711

Motor Vehicles Act, 1988- Section 166- Deceased was travelling with N on motorcycle – a truck being driven by respondent No.1 in a rash and negligent manner came from the opposite side and hit the motorcycle – the deceased and pillion rider fell down and sustained multiple injuries – deceased was taken to hospital but succumbed to the injuries – compensation of Rs.6,01,000/- was awarded by the Tribunal jointly and severally along with interest @ 7% per annum- held in appeal that monthly income was assessed as Rs.3,600/- per month- 1/3rd amount was to be deducted towards personal expenses – the loss of dependency would come out as Rs.2,400/- per month- the age of the deceased was 24 years and Tribunal had applied multiplier of 17 – the burden to prove the breach of the terms and conditions of the policy was upon the insurance company- no evidence was led by the insurer to discharge the burden- the Insurance Company was rightly held liable to indemnify the insured- appeal dismissed.

Title: National Insurance Company Ltd. through its Divisional Manager Vs. Rajveer Kaur d/o Sh. Major Singh and others Page-1661

Motor Vehicles Act, 1988- Section 166- Injured remained admitted in the hospital at Bilaspurw.e.f. 13th April, 2002 till 17th April, 2002 and thereafter at IGMC w.e.f. 9th May, 2002 till 17th May, 2002- the compensation has to be awarded under pecuniary and non-pecuniary heads by making guess work in case of injuries - the claimant pleaded that he was earning Rs.6,000/- per month as cleaner of the vehicle- however, by guess work, it can safely be held that he would have been earning not less than Rs.3,000/- per month – injured had suffered 45% permanent disability and loss of income will be Rs.1,500/- per month – age of the claimant was 24 years at the time of accident and multiplier of 15 is applicable- claimant has lost source of income of Rs.2,70,000/- (1500 x 12 x 15) – claimant has placed on record cash payment/medical bills amounting to Rs.13,909.64/- and is entitled to Rs.13,910/- under the head medical expenses – the claimant has placed on record taxi bills/bus tickets to the tune of Rs.35,443/- and is entitled to Rs.35,500/- under the head transportation charges – compensation of Rs.50,000/- each awarded under the heads pain and suffering and loss of amenities of life- thus, total compensation of Rs.4,19,410/- awarded with interest @ 7.5% per annum from the date of the award.

Title: Umed Singh Vs. Sohan Singh and others Page-1577

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

Title: ICICI Lombard General Insurance Company Ltd. Vs. Rakesh Kumar @ Suresh Kumar &others Page-654

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

Title: Daulat Ram Vs. KrishanLal and others Page-502

Motor Vehicles Act, 1988- Section 166- Monthly income of the claimant was Rs.5,000/- - claimant had sustained 25% permanent disability- claimant was 35 years at the time of accident – Tribunal had erred in applying the multiplier of 16- multiplier of 14 is applicable- thus, the claimant is entitled to Rs.1250 x 12 x 14= Rs.2,10,000/- - amount awarded under other head is maintained and total compensation of Rs.3,34,000/- awarded with interest @ 7.5% per annum- the claim of third party cannot be defeated on the ground of breach of the terms and conditions of the policy – the insurer saddled with liability with the right to recovery.

Title: Avtar Singh Vs. Tilak Raj &another Page-927

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs.4,500/- 1/3rd was to be deducted towards personal expenses and loss of source of dependency would be Rs.3,000/- per month- multiplier of 12 is applicable – thus, claimants are entitled to Rs.3000 x 12 x 12= Rs.4,32,000/- under the head loss of dependency- claimants are also entitled to Rs.25,000/- under the head 'loss of consortium and Rs.25,000/- under the head 'loss of love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs.4,82,000/- along with interest @ 7.5% per annum.

Title: Reliance General Insurance Company Ltd. Vs. Shiv Rajia& others Page-1203

Motor Vehicles Act, 1988- Section 166- Number of claimants are three, therefore, 1/3rd was to be deducted from the monthly income towards personal expenses – Tribunal had fallen in error in deducting 1/4th – monthly income of the deceased was Rs.4,000/- and after deducting 1/3rd loss of dependency comes to Rs.2700/- per month – total loss of source of dependency is Rs.2700 x 12 x 16= Rs.5,18,400/-.

Title: National Insurance Co. Ltd. Vs. SarojKumari and others Page- 512

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

Title: Raksha Devi Vs. Pradeep Kumar & others Page-817

Motor Vehicles Act, 1988- Section 166- The salary of the deceased was Rs.8,700/- per month – 1/3rd amount was to be deducted towards personal expenses – thus, the claimants have lost source of dependency to the tune of Rs.6,000/- per month- the age of the deceased was 30 years at the time of accident and multiplier of 16 is applicable – thus, claimants are entitled to Rs.6,000 x 12 x 16= Rs.11,52,000/- under the head loss of dependency – the claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses- thus, total compensation of Rs.11,52,00 + 40,000/- =Rs.11,92,000/- awarded along with interest. (Para-8 to 14) Title: The New India Assurance Company Ltd. Vs. Kirna& others Page-1575

Motor Vehicles Act, 1988- Section 166- The vehicle fell down on the house of the claimant and caused damage to the same – MACT awarded compensation – it was pleaded that liability of the insurance company is restricted to Rs. 6,000/- and no extra premium was paid – compensation is excessive- held, that damages sustained by the petitioner were not specified in the valuation report- photographs do not show damage to the residential house – the report Ex.RW-1/A shows the damage to the extent of Rs. 17,200/- - this report was prepared by an independent person/expert – compensation was rightly assessed by the MACT- appeal dismissed.

Title: Gian Chand & ors. Vs. M/s Mohan Transport Company and others Page-1682

Motor Vehicles Act, 1988- Section 166- Tribunal awarded compensation of Rs.86,000/- with interest – claimant had stated in the claim petition that he was sitting in the tractor as Labourer with the contractor but it was stated in the affidavit that the claimant was hit by the Tractor on the road – hence, the award set aside – however, Rs.25,000/- awarded under no fault liability.

Title: National Insurance Company Ltd. Vs. Nand Lal & another Page-1403

Motor Vehicles Act, 1988- Section 166- Tribunal dismissed the claim petition on the ground that the driver was acquitted by the criminal Court- held, that mere acquittal in the criminal case is not sufficient to dismiss the claim petition- a claim petition has to be prima facie proved while criminal case has to be proved beyond reasonable doubt - the deceased was a green grocer and was also selling milk – hence, his income cannot be less than Rs.6,000/- per month- the claimants are three in number and 1/3rd was to be deducted towards personal expenses- multiplier of 15 is applicable and claimants are entitled to Rs.4,000 x 12 x 15= Rs.7,20,000/- under the head loss of dependency- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of estate, funeral expenses and loss of consortium- thus, claimants are entitled to total compensation of Rs.7,60,000/- along with interest @ 7.5% per annum.

Title: Vikky Devi and others Vs. Kuldeep Bhatia and others Page- 1212

Motor Vehicles Act, 1988- Section 168- A claim petition was filed, which was allowed subject to the production of disability certificate, which was not produced – claimant filed an execution petition, which was also dismissed – he filed a fresh claim petition, which was allowed – held, that

second claim petition is not maintainable in view of bar of res-judicata – however with the consent of the parties compensation of Rs. 2 lacs awarded in favour of the claimant.

Title: United India Insurance Company Ltd. Vs. Lal Chand & others Page-825

Motor Vehicles Act, 1988- Section 173- Deceased was travelling in the vehicle, which rolled down in the rivulet – MACT awarded the compensation of Rs.6,51,000/- along with interest- aggrieved from the award, insurer preferred the present appeal- held, that insurer had not examined any person to prove that the driver did not have a valid driving licence or other documents – the insurer was bound to indemnify the insured and was rightly saddled with liability – compensation was awarded in accordance with law- appeal dismissed.

Title: Oriental Insurance Company Ltd. Vs. Sandeep Sharma son of Sh Kuram Chand Page-1570

Motor Vehicles Act, 1988- Section 173- Insurer contended that the accident was not caused by the driver of the offending vehicle but by the deceased himself – however, the owner/insured and the driver have not questioned these findings and the insurer has no locus to question the same – insurer does not have the right to challenge the adequacy of compensation as it had not obtained the permission under Section 170 of Motor Vehicles Act- however, the Appellate Court is to do complete justice between the parties – the income of the deceased was Rs. 15,630/- per month- the deceased was bachelor and 50% of the amount has to be deducted towards personal expenses – claimants have lost dependency of Rs.7,800/- per month- the age of the deceased was 23 years and multiplier of 15 was applicable – Tribunal had wrongly applied the multiplier of 18- claimants have lost source of dependency to the tune of Rs.7,800 x 12 x 15= Rs.14,04,000/- - claimants are entitled to the compensation of Rs.10,000/- each under the heads loss of love and affection, loss of estate and funeral expenses- total compensation of Rs.14,34,000/- awarded along with interest @ 7.5% per annum.

Title: Cholamandlam MS General Insurance Company Limited Vs. Shakuntla Devi and others Page- 1537

Motor Vehicles Act, 1988- Section 173- Insurer contended that the vehicle was being driven by S and not by M – held, that the insurer had not taken permission to contest the claim on all grounds and cannot question the adequacy of compensation – moreover, the MACT had rightly made the discussion and no interference is required with the same- however, the rate of interest reduced to 7.5% per annum from 9%.

Title: Oriental Insurance Company Vs. Santosh w/o Late Sh. Lekh Ram &Ors. Page-520

Motor Vehicles Act, 1988- Section 173- Insurer had limited grounds available to file an appeal – it can seek permission to contest the claim petition on all the grounds after seeking permission under Section 170 of the Act- no such permission was obtained by the Insurer and appeal cannot be filed on the ground of adequacy of compensation.

Title: The New India Assurance Co. Ltd. Vs. Kamlesh Kumari and others Page-383

Motor Vehicles Act, 1988- Section 173- Insurer had not sought permission under Section 170 and it cannot question the award on the ground of adequacy of compensation- however, the Appellate Court can pass an order, which should have been passed by the Tribunal, even without any appeal/cross-objections- the age of the deceased was 47 years at the time of accident- monthly income of the deceased was Rs.31,510/- as per the salary certificate – after deducting the contribution towards income tax the annual income of the deceased is Rs.3,50,000/- - claimants are seven in numbers and 1/5th amount was to be deducted towards personal

expenses – thus, the claimants have lost Rs.2,80,000/- towards source of income – multiplier of 11 is applicable and claimants have lost Rs.2,80,000 x 11= Rs.30,80,000/- towards the source of the income- compensation of Rs.20,000/- awarded under the heads funeral expenses, loss of love and affection and loss of consortium - the claimants are entitled to the compensation of Rs.30,80,000 + 20,000= Rs.31,00,000/- with interest @ 7.5% per annum.

Title: Oriental Insurance Company Limited Vs. Krishna Kumari and others Page-1420

Motor Vehicles Act, 1988- Section 173- The insurer challenged the award on the quantum of compensation – held, that Insurer has to seek the permission to contest the claim petition on all the grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on the ground of adequacy of compensation – it can challenge the award only on the grounds, which are available to it- no permission was sought to contest the claim petition on all grounds and therefore the appeal by the insurer is not maintainable -otherwise also, the compensation is meager and the same has not been questioned by the claimants- hence, the same is reluctantly upheld.

Title: Oriental Insurance Company Limited Vs. DilaKumari& others Page-688

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

Title: State of Himachal Pradesh Vs. Kamlesh Kumar & others (D.B.) Page-198

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1 kg. 550 grams charas- the accused was tried and acquitted by the Trial Court- held in appeal that the accused was travelling in the bus, however, no independent witness was associated- one police official was not examined – there are material contradictions in the testimonies of police witnesses – the testimonies of the police officials are not cogent or trustworthy and cannot be made basis for convicting the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Ram Kishan (D.B.) Page-1346

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.540 kg. charas – he was tried and acquitted by the Trial Court- held in appeal that the prosecution version that accused was apprised of his right to be searched before a Magistrate or a Gazetted Officer was not proved – no independent witness was associated – there are contradictions in the statements of other prosecution witnesses – the Trial Court had rightly acquitted the accused- appeal dismissed.

Title: State of Himachal Pradesh Vs. Darshan Lal (D.B.) Page-1666

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 505 grams charas- he was tried and acquitted by the Trial Court- held in appeal that the independent witness has not supported the prosecution version – other independent witness was given up by the prosecution – there are contradictions in the statements of official witnesses – the trial Court had rightly refused to rely upon the testimonies of the official witnesses – appeal dismissed.
Title: State of Himachal Pradesh Vs. Pawan Kumar and others (D.B.) Page-1675

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

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

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1 kg. charas- he was tried and convicted by the trial Court- held, in appeal that prosecution version regarding the recovery was duly proved by oral testimonies and the documents – minor contradictions in the testimonies of the prosecution witnesses are not sufficient to discard them- link evidence is also established – recovery was effected without any prior information and provision of Section 42 is not applicable – charas was found to be 920 grams in the FSL, which is less than commercial quantity – sentence modified – proceedings ordered to be initiated against the conductor for making a false statement in the Court.
Title: Arun Kumar Vs. State of Himachal Pradesh (D.B.) Page-117

N.D.P.S. Act, 1985- Section 21- Accused was found in possession of 14 grams of heroin – accused was tried and acquitted by the trial Court- held in appeal that independent witness had not supported the prosecution version but he had admitted the signatures on the memos – the fact that the documents were signed without any pressure show that witness was not stating the truth before the Court – police officials proved the prosecution version – the findings recorded by the Trial Court that accused was not found in possession of contraband are not correct – appeal allowed and the accused convicted of the commission of offence punishable under Section 21 of N.D.P.S. Act- notice issued to the witness as to why proceedings be not initiated against him for making a false statement.
Title: State of Himachal Pradesh Vs. Kamlesh alias Kaka (D.B.) Page-1804

N.D.P.S. Act, 1985-Section 18 and 20- A motorcycle being driven by accused M and occupied by accused K was intercepted by the police- accused K was found in the possession of 800 grams charas and 150 grams opium- accused M was found to be driving the motorcycle without any permit – the accused were tried and acquitted by the Trial Court- held in appeal that independent witnesses have not supported the prosecution version – timing in the ruqua was changed from 18.30 hours (6:30 P.M.) to 10:00 P.M. - no explanation for the same was given – there was contradiction regarding the person, who had carried out the search and seizure- the testimonies of the prosecution witnesses are contradictory – the Trial Court had rightly refused to place reliance on their testimonies – appeal dismissed.
Title: State of Himachal Pradesh Vs. Krishna (D.B.) Page-1442

Negotiable Instruments Act, 1881- Section 138- A complaint was filed alleging that accused had borrowed sum of Rs.40,000/- from the complainant – accused issued a cheque of Rs.40,000/- for re-payment of the amount, which was dis-honoured with the endorsement insufficient funds – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed on the ground that cheque was presented twice but the notice was issued only once- held in revision that cheque could have been presented many times during the period of validity- the notice was issued only second time – there was holiday on the last day of presentation and the cheque was presented on the next working day- Appellate Court had wrongly set aside the judgment of Trial Court- revision allowed and judgment of Appellate Court set aside while that of the Trial Court restored.
Title: Ram Chand Vs. Sunita Abrol Page-905

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque, which was dishonoured on presentation- the accused pleaded guilty and was convicted by the Trial Court- sentence of fine equivalent to the amount mentioned in the cheque was imposed - held, that the accused can be sentenced to an imprisonment for a term, which may extend upto two years and fine which may extend to double the cheque amount – however, discretion has been conferred upon the Magistrate to impose appropriate sentence – the fact that the accused has pleaded guilty was a relevant fact to be taken into consideration while imposing sentence – the complainant has suffered no inconvenience by the sentence- petition dismissed.
Title: M/s Techno Plastic Industries Vs. M/S Kiran General store and another
Page-1519

Negotiable Instruments Act, 1881- Section 138- Accused issued two cheques of Rs.4 lacs and Rs.3 lacs for carrying out construction of a set on the slab purchased by the accused- cheques were dishonoured with the remarks 'insufficient funds' – the accused failed to make payment despite the receipt of the notice – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was also dismissed- held in revision that the complainant had not produced the earlier cheques issued by the accused and had not given their serial numbers- he had not produced the bills of the material used by him to complete the construction of the flat- statement of wife of the complainant also made the version of the complainant doubtful - revision allowed- judgments of the trial Court and Appellate Court set aside and the accused acquitted of the commission of offence punishable under Section 138 of N.I. Act.
Title: Neelam Sharma Vs. Ved Prakash Page-1408

'P'

Partition Act,**1893**- Section 4- A Local Commissioner was appointed to partition the property in accordance with the preliminary decree- another Local Commissioner was appointed to sell the property – Local Commissioner sold the property but the parties were not willing to pay 50% increase – property in Himachal could not be partitioned due to non-corporative attitude of the parties- a fresh Local Commissioner was appointed – objections were filed to his appointment-

objections dismissed as baseless – Local Commissioner directed to partition the property in accordance with the preliminary decree.

Title: Rajinder Kumar VermaVs. Anita Verma &ors. Page-440

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- Sample of Vanaspati was taken, which was found to be adulterated on analysis- the accused was tried and acquitted by the trial Court- held in appeal that the sample was analyzed by Central Food Laboratory after three years- mere failure to pass Baudouin test is not sufficient to convict a person – appeal dismissed.

Title: State of H.P Vs. Maharaj Kumar and others Page-1436

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

Title: State of H.P. Vs. Chaman Lal and another Page-182

Probation of Offenders Act, 1958- Section 6 read with Section 11- Applicants pleaded that accused were less than 21 years of age at the time of their conviction and it was mandatory for the Court to grant the benefit of Probation Of Offenders Act- held, that the Trial Court had considered the question, whether the benefit of Probation of Offenders was to be granted to the accused or not and taking into consideration the nature of the offence, the Trial Court had decided not to extend the benefit – this decision was not challenged in appeal or revision- a discretion has been vested in the Trial Court to grant the benefit of Probation or decline the same and the Court cannot be compelled to grant the benefit in all cases – application dismissed.

Title: Mohammad Farman and another Vs. State of H.P. Page-1557

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 5 cartons of Indian made foreign liquor each containing 12 bottles and one carton of country liquor 'Patiala' brand- the accused was tried and acquitted by the Trial Court- held in appeal that independent witnesses were available but were not associated –the link evidence was missing – the case property was not bearing any seal when it was produced before the Court- the view taken by the Trial Court was reasonable- appeal dismissed.

Title: State of H.P. Vs. Subhash Chand Page-1343

Punjab Excise Act, 1914- Section 61(i)(a)- Accused was found in possession of 12 bottles of country liquor – he was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held, that only three bottles were sent for analysis out of which two were found to be country liquor – no permit is required for possessing two bottles and the prosecution version that the accused was found in possession of 12 bottles was not proved- revision petition allowed and judgments of Trial Court and Appellate Court set aside- accused acquitted.

Title: Joginder Singh Vs. State of Himachal Pradesh Page-1777

Punjab Excise Act, 1914- Section 61(i)(a)- Accused were found in possession of 6 bags containing 4 boxes each and one box containing two boxes of country liquor each, box was containing 50 pouches each of 180 ml. liquor- accused were tried and convicted by the trial Court- an appeal was preferred, which was allowed and the accused were acquitted- held in

appeal that the prosecution version was proved by the official witnesses – report of CTL proved that pouches were containing country liquor in them – simply because independent witnesses had not supported the prosecution version is not sufficient to record acquittal especially when he had admitted his signatures on the seizure memo - he was estopped from denying his signatures in view of bar contained in Sections 91 and 92 of Indian Evidence Act – Appellate Court had wrongly acquitted the accused- appeal allowed- judgment of Appellate Court set aside and that of the Trial Court restored.

Title: State of H.P. Vs. Sanjeev Kumar Page-821

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

Title: Girdhari Lal Vs. State of H.P. Page-75

'S'

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

Title: M/s.Byford Private Ltd.& Others Vs. Ajit Lajwanti Gujral Trust & Another Page-6

Specific Relief Act, 1963- Section 5- Plaintiff pleaded that he is owner of the suit land- water pipe lines were laid through his land despite his objection – Officers of the State assured to acquire the land and to give employment to the son of the plaintiff - these promises were not fulfilled and the plaintiff instituted a suit for mandatory injunction- the job was provided to the son of the plaintiff and plaintiff got the suit dismissed in default- however, son of the plaintiff was removed from service- hence, the suit was filed for seeking possession- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held, that earlier suit was dismissed in default for non-appearance – plaintiff failed to prove that assurances were made to him at the time of laying pipe lines – circumstances show that pipe line was laid with the consent of the plaintiff- the suit was rightly dismissed by the Court- appeal dismissed.

Title: Rameshwar Dass (Deceased) through LR Bhushan Lal Vs. State of Himachal Pradesh and others Page-1298

Specific Relief Act, 1963- Section 5- Plaintiffs filed civil suit pleading that they are owners in possession of the shop – predecessor-in-interest of the defendants had asked the plaintiffs for one room – plaintiffs had permitted him to keep the material – he had not vacated the room – hence, the suit was filed seeking possession – the defendants pleaded that shop was joint family property and was allotted to the predecessor of the defendants – the suit was dismissed by the Trial Court – an appeal was filed, which was also dismissed- held in second appeal that the suit land is recorded to be in the joint ownership of the parties in the revenue record - the land was not partitioned by metes and bounds – Hindi translation of the document in Urdu was not proved and reliance could not have been placed upon the same – however, in absence of partition, plaintiffs were not entitled for any relief – appeal dismissed.

Title: Pushpa Devi & others Vs. AmroDevi and others Page-1197

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

Title: Bimla and others Vs. Saroj Rani Page- 488

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

Title: State of H.P. Vs. Santosh Kumar Page-550

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

Title: Paras Ram alias Govind Vs. Jasmati and others Page-194

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking the specific performance of the agreement to sell the suit land – the defendant denied the claim of the plaintiff- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that plaintiff has to prove his continuous readiness and willingness to perform the contract from the date of agreement till hearing – plaintiff had pleaded that he was ready and willing to perform his part of the contract, to pay remaining consideration and to bear the expenditure of execution and registration of the sale deed, which is not in accordance with Form

47 and Order 6 Rule 3 of C.P.C – plaintiff had only paid Rs.50,000/- out of Rs.4 lacs agreed to be paid – it was not proved that plaintiff was possessed of balance consideration and was ready to pay the same to the defendant- it was mentioned in the agreement that entire consideration was paid, which is not correct - plaintiff cannot be faulted for not executing the sale deed, in these circumstances – appeal allowed and the suit dismissed with the cost of Rs.20,000/- each.

Title: ChanderLekha Vs. PurshotamDutt and others Page-1261

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit for specific performance and in the alternative for damages – it was pleaded that plaintiff had entered into an agreement to purchase the suit land for a consideration of Rs.98,000/- - a sum of Rs.70,000/- was paid as earnest money- the balance was to be paid at the time of the execution of the sale deed – the defendants failed to execute the sale deed- hence, the suit was filed – the suit was dismissed by the Trial Court- an appeal was preferred, which was partly allowed- held in second appeal that both the Courts found that agreement to sell was executed between the parties – sum of Rs.70,000/- was paid as earnest money- - Courts also found that Rs.28,000/- was not paid by the plaintiff on or before the due date – a substantial amount was paid to the defendants at the time of execution of the agreement – the suit should have been decreed by the Courts for specific performance – appeal allowed and the suit of the plaintiff decreed for the specific performance of the agreement.

Title: Om Parkash Vs. MadhuChandel and another Page-1565

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

Title: Bhawani Devi Vs. Deo, S/o Gainda and others Page-869

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that they were co-owners in possession of the suit land – D had executed sale of his share but mutation could not be attested- the sale deed was mistakenly executed regarding the whole land, which was not permissible- revenue entries were not correctly recorded- defendants started digging the suit land to raise structure over the same- suit was decreed by the trial Court- an appeal was filed, which was allowed- held in second appeal that copy of jamabandi shows that D was co-sharer to the extent of 1/4th share – revenue record does not substantiate the fact that entire land was exclusively owned and possessed by D- therefore, he could not have parted with more land than was owned by him- the plea that defendants had become owners by way of adverse possession was not proved as no evidence was led that D was in possession of the entire land to the exclusion of the other co-owners - it was also not proved that D had denied the title of the other co-owners – appeal allowed- judgment and decree passed by District Judge set aside.

Title: Pratap Singh and others Vs. Ram Rattan, son of Shri Lachhmi Singh

Page- 166

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs pleaded that revenue entries were changed in their absence – a sale deed was executed and a mutation was attested on the basis of the wrong entries- plaintiffs sought declaration and injunction – the suit was decreed by the trial Court- an appeal was filed, which was dismissed – held, in second appeal that the plaintiffs are the legal heirs of deceased R, who was the previous owner of the property – succession certificate was also granted in their favour – the plea of adverse possession was not established – the suit was rightly decreed by the Courts- appeal dismissed.

Title: Shankar Lal (through LRs) Vs. Ramesh Chander (through LRs) and others

Page-736

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

Title: State of Himachal Pradesh and another Vs. Shakuntla Devi and others

Page-883

Specific Relief Act, 1963- Section 34- P was owner in possession of the suit land – plaintiff, defendant No.1 and father of defendants No.6 and 7 are the sons of P, who constituted a joint Hindu Family- P had 1/5th share – he is stated to have executed a Will – defendant No.2 executed a gift deed in favour of defendants No.5 to 12, which is impermissible- hence, a suit was filed for seeking declaration – the suit was partly decreed- an appeal was preferred, which was dismissed- held in second appeal that suit land located in C was proved to be coparcenary property- suit land located in L and H was not proved to be coparcenary property – it was not proved that land in L and H was acquired from the usufructs of land located in C- the Courts had rightly appreciated the evidence- appeal dismissed.

Title: Harnam Dass Vs. Jagdish and others Page-976

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that he had become the owner of the suit land by abandonment or in the alternative by adverse possession- defendant denied the claim of the plaintiff and set up a counter-claim- the suit was dismissed by the Trial Court and counter-claim was decreed – plaintiff filed an appeal, which was dismissed – held in second appeal thatthe suit was dismissed and counter claim was decreed – a decree of possession was passed in favour of the defendants – appeal was filed against the dismissal of the suit and decree of the counter claim – counter claim is treated as suit for all intents and purposes – separate appeal was required to be filed regarding the decree of the counter-claim – a single appeal was not maintainable – appeal dismissed.

Title: Surinder Kumar & Others Vs. Sumati Kumari Joshi & Others Page-1767

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration that shamlat land was allotted to him – the allotment was cancelled but the order of cancellation was set aside in the civil suit- an appeal was filed, which was dismissed-representation was made subsequently by the residents of the area on which the allotment was cancelled – the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that

cancellation was set aside in the previous suit on the ground that Sub Divisional Magistrate had no jurisdiction to cancel the allotment and only Commissioner was empowered to do so – subsequent cancellation was made by the Commissioner – the land was never possessed by the plaintiff and the allotment was rightly set aside- appeal dismissed.

Title: Rattan Chand Sharma Vs. State of Himachal Pradesh through Collector, Kangra at Dharamshala, H.P. Page-1231

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

Title: Tikka Maheshwar Chand Vs. Ripudaman Singh Page-214

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

Title: Dola Ram & others Vs. Ganga Singh & others Page-220

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

Title: KartaraVs.Sinno Devi & Others Page-346

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

Title: Khem Chand Vs. Gopal Singh Page-772

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that D was the owner of the suit land- suit land was acquired by the plaintiff and the proforma defendants by way of gift- it was given to R for the purpose of living on Dharmarth – defendant No.1 and 2 got a Will executed by R – R had no right in the suit land – the defendants pleaded that D had executed a gift in favour of RS, who was tenant of D – his widow R remained in possession of the property as owner- she executed a Will in favour of the defendants No.1 and 2- they filed a counter claim seeking declaration – suit was dismissed by the Trial Court and counter claim was decreed- an appeal was filed, which was dismissed- held in second appeal that Trial Court had dismissed the suit and had decreed the counter-claim – one appeal was filed for setting aside the decree passed in the civil suit- no prayer was made for setting aside the decree in the counter-claim- counter-claim is a suit for all intents and purposes – separate appeals were required to be filed against the dismissal of the suit and decree of the counter-claim – once the defendants have been declared to be the owners while decreeing their counter-claim, relief could not have been granted to the plaintiff without setting aside the decree in the counter-claim- composite appeal was not maintainable- appeal dismissed.

Title: Mohan Singh Vs. Inder Singh & Others Page-1279

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that he is owner in possession of the suit land with his sister – defendant applied for partition- plaintiff raised objection but partition was ordered ignoring the objections raised by the plaintiff- plaintiff sought declaration that order of the partition is null and void – the suit was dismissed by the trial Court as barred by Section **171(xvii)** of H.P. Land Revenue Act- an appeal was preferred, which was also dismissed- held in second appeal that when the Court had concluded that it had no jurisdiction, it should have returned the plaint for presentation before appropriate forum – the plaintiff was to file an appeal/revision before Revenue authorities – hence, the plaintiff permitted to withdraw the suit with liberty to take appropriate proceedings in the forum having jurisdiction.

Title: Label Chand alias Albel Chand Vs. Sita Devi &ors. Page-945

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that she is owner in possession of the suit land – defendant has no right over the same - previous owner K had not executed any Will – the defendant pleaded that K had executed a Will in favour of the defendant and he has become the owner after the death of K – suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that plaintiff had not appeared in the witness box to prove that Will was a forged document and adverse inference has to be drawn against her – the deceased had put her thumb impression on the Will and plaintiff had not sought the comparison of the thumb impression to determine the genuineness of the same – the execution of the Will was proved by the defendant by leading cogent and convincing evidence – the Appellate Court had rightly held that the execution of the Will was proved – appeal dismissed.

Title: Brij Lal (since deceased) through his LRs Manohar Lal &Ors. Vs. Shakti Chand Page-930

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

Title: Vidya Devi Vs. Hem Raj Page-1

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that suit land was jointly owned and possessed by the parties – mutation wrongly attested in favour of defendant No.1 exclusively - the defendant No.1 pleaded that land belonged to H who had sold some portion of the suit land and had executed a Will in her favour – the suit was decreed by the Trial Court – an appeal was preferred, which was dismissed- held in second appeal that no attesting witness was examined to prove the execution of the Will- however, the execution of the sale deed was duly proved – the Courts had correctly appreciated the evidence and no interference was warranted with the same – appeal dismissed.

Title: Raj Kumari Vs. Sheela Devi & Others Page-1088

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

Title: Sita Devi and others Vs. Lekh Ram and others Page-149

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

Title: Piar Chand & Others Vs. Ranjeet Singh & Others Page-34

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit pleading that the possession of plaintiffs over the suit land is open, peaceful, hostile, continuous **and** without interruption to the knowledge of the defendants from January, 1960 which has matured into title- plaintiffs have

become the owners by way of adverse possession – defendants No.1 and 2 had obtained a collusive judgment from Assistant Collector, Sarakaghat which does not affect the right of the plaintiffs- the suit was decreed by the Trial Court- an appeal was preferred, which was partly allowed- held in second appeal that proceedings were initiated by Assistant Collector for evicting the deceased defendant – the bartandarans were not impleaded and the suit was decreed in their absence- this shows that the judgment was passed by A.C. 1st Grade collusively and without following the principle of natural justice- the Courts below had passed the judgments rightly – appeal dismissed.

Title: Roop Singh (since dead) through LRs &Ors.Vs. Prabha Ram &Ors.

Page-591

Specific Relief Act, 1963- Section 34- Plaintiffs sought declaration that they are owners in possession of the suit land and the entry showing the defendant to be the owner is wrong, illegal, null and void as the defendant was never inducted as a tenant – the defendant pleaded that he was inducted as a tenant on the payment of gallabatai and has become the owner on the commencement of H.P. Tenancy and Land Reforms Act- the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that the plaintiffs had purchased the land in the year 1966 from predecessor-in-interest of the defendant- defendant was a co-owner and therefore cannot be a tenant – the version the defendant was paying gallabatai was not proved – the order was passed in the absence of the plaintiffs and would not bind them – the suit was rightly decreed- appeal dismissed.

Title: Subhash Chand Vs. Bhim Sen and another Page-1206

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

Title: Shambhu Ram Vs. Lakhu and others Page-65

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

Title: Chattar Singh Vs. Gauri Singh and others Page-492

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendants threatened to take forcible possession of the same – the suit was opposed by the defendants by pleading that a portion of the suit land was purchased by defendant No.1 vide agreement dated 14.11.1984- defendant No.1 is in possession of the portion of the suit land and has become owner by adverse possession- the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed – held in second appeal that the agreement shows that the

father of the minor plaintiff had agreed to sell the suit land to the defendant No.1 for a sale consideration of Rs.2,000/- - the father of the plaintiff was not competent to alienate the property of the plaintiff and the agreement will not bind the plaintiff- Besides, it was established by the Revenue Record that plaintiff is in possession – defendants had not led sufficient evidence to rebut the presumption of the correctness attached to the revenue record- the suit was rightly decreed by the Appellate Court- appeal dismissed.

Title: Rattan Chand (since dead) through LRs &Anr. Vs. Julfi Ram Page-1200

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is co-owner of the suit land – the defendants threatened to raise construction over the same- the defendants denied that suit land is owned jointly by the parties and claimed that an old abadi existed over the suit land- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that it was admitted that suit land is abadideh and has not been partitioned by metes and bounds – defendant No.1 had purchased a specific portion of abadi from defendant No. 2 and became a co-sharer – he was raising new construction by demolishing the old one – plaintiff has failed to prove his possession over abadi and is not entitled to the injunction – appeal dismissed.

Title: Surinder Mohan Vs. Ramesh Kumar &Anr. Page-899

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendant is stranger who is interfering with the suit land without any right to do so- the defendant pleaded that suit land was exchanged by father of plaintiff with G – G had given the suit land to the defendant – defendant had raised construction of three shops and one house over the suit land – the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that the Courts had rejected the exchange deed on the ground that it was not registered and no specific area was mentioned in the same – father of the plaintiff had not raised any objection when the construction was raised by the defendant, which means that he had agreed to the same – no objection was raised at the time of exhibition of deed of exchange – non-registration will not affect the part performance- the Courts had not properly appreciated the evidence – appeal allowed and suit of the plaintiff dismissed.

Title: Tek Chand Vs. Govind Kumar Page-1369

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – the defendants have encroached upon a portion of the suit land – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the demarcation proved the encroachment – there was no infirmity in the process of demarcation – an owner has a right to claim possession of the encroached land- the suit was rightly decreed by the Courts- appeal dismissed.

Title: Ashok Kumar and another Vs. Amrit Lal and others Page-971

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is co-owner in possession of the suit land – defendants were threatening to interfere in the ownership and possession of the plaintiff and to discharge the water of their taps and rainy water in the suit land and to create passage over the same – they had encroached upon part of the suit land- the defendants denied the claim of the plaintiff- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that the demarcation was obtained during the pendency of the suit- no objection was filed to the report of demarcation – the report was duly proved – the demarcation was conducted in accordance with law – the right of passage was not established by the defendants- the Courts had rightly appreciated the evidence.

Title: Ramesh Chand & Others Vs. Roop Singh (since deceased) Through his LRs. Smt. Pushpa Devi &Ors. Page-1109

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – defendants threatened to interfere in the suit land and to demolish the Chhapar situated over the same without any right to do so – defendants pleaded that they were licencees and had constructed a chhapar under the licence – suit was decreed by the trial Court – an appeal was preferred, which was allowed- held in second appeal that findings were recorded by Appellate Court on the basis of conjectures and not on the basis of the facts- the Court can record the findings on the basis of the facts and not on the basis of presumption- it was obligatory for the Appellate Court to take into consideration the reasoning of the trial Court and thereafter to record its own findings- appeal allowed – case remanded to the Appellate Court for a fresh decision.
Title: Kewal Krishan and others Vs. Surjeet Singh and another Page-161

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

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

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they are recorded as gairmaurusi tenants and had become the owners after the commencement of H.P. Tenancy and Land Reforms Act – the defendant threatened to encroach upon the land – the defendant pleaded that revenue entries in favour of the plaintiffs were wrong – a counter-claim was also filed by the defendant – the Trial Court decreed the suit and dismissed the counter-claim – an appeal was filed, which was dismissed – held in second appeal that the original owner had not challenged the revenue entries – it was duly proved that plaintiffs were recorded as tenants, who had become the owner on the commencement of H.P. Tenancy and Land Reforms Act- separate appeals should have been filed against the decree of the suit and dismissal of the counter-claim- appeal dismissed.
Title: Baldev Singh Vs. Chet Ram & Ors. Page- 1100

'T'

Transfer of Property Act, 1882- Section 60- Plaintiff pleaded that he is mortgagor of the shop, which was redeemed in favour of the defendant on the payment of Rs.5,000/-- he requested the defendant to receive the money and to redeem the property but defendant refused- defendant denied the relationship of mortgage and mortgagee and pleaded that he was inducted as tenant

on the rent of Rs.200/- per month – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed – held in second appeal that plaintiff had proved the mortgage – the execution of the mortgage deed was admitted by the defendant in cross-examination – mortgage was duly recorded in the rapatroznamcha – the Courts had rightly decreed the suit- appeal dismissed.

Title: Om Prakash Chand Vs. Parkash Chand Page-46

Transfer of Property Act, 1882- Section 60- Plaintiffs filed a civil suit for redemption of mortgage pleading that the land was mortgaged for Rs.240/- defendants pleaded that mortgagor had lost the right of redemption – the suit was dismissed by the Trial Court – an appeal was filed, which was allowed – held in second appeal that the land was mortgaged in the year 1930 and the period of redemption expired in 1971- however, Debt Redemption Act, 1976 furnished a fresh opportunity for getting the relief – mere expiry of 30 years from the date of mortgage does not extinguish the right of mortgagor- appeal dismissed.

Title: Hem Ram & Another Vs. Bhagwan Dass & Others Page-1052

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

Title: Braham Dev Sood Vs. Jugal Kishore Page-636

'W'

Workmen Compensation Act, 1923- Section 4- Claimant was engaged as driver – he sustained 40% disability when the truck being driven by him met with an accident – the claim petition was dismissed by Workmen Compensation Commissioner- held, that the claimant had sustained injuries in an accident - disability certificate shows 40% disability of right ankle due to which he would not be able to work as driver – disability certificate was prepared after five years of the incident – the Doctor who issued the MLC was also not examined – the claim petition was rightly dismissed, in these circumstances- appeal dismissed.

Title: Surinder Singh Vs. New India Assurance Company Ltd. and another Page-294

Workmen Compensation Act, 1923- Section 4- Deceased died during the course of the duties- a claim petition was filed, which was allowed – held, that Workmen Compensation Commissioner had taken the wages of the deceased as Rs.7,000/- - the employer did not file the wages register to prove the exact income – insurance cover was not adduced in the evidence – however, the penalty reduced from 25% to 5% of the compensation amount- appeal partly allowed.

Title: Oriental Insurance Company Vs. Ram Prashad & Anr. Page-295

Workmen Compensation Act, 1923- Section 4- Deceased was a driver who died in an accident – compensation was awarded by the Commissioner- it was contended that the deceased was son of the owner and therefore it cannot be accepted that the deceased was employed by the owner – held, that there is no principle of law that a father cannot employ his son as a driver – it was duly proved that the owner had employed the deceased as driver on a monthly salary of Rs.2,600/- per month- receipts were also produced to this effect- therefore, Commissioner had

rightly awarded the compensation- however, the interest was to be levied from the one month after the accident.

Title: New India Assurance Company Ltd. Vs. Lakshmi Devi & Others Page-359

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

Title: Vijaya Devi and others Vs. Resident Engineer Page-463

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

Title: National Insurance Company Ltd.Vs. Puran Dei and others Page-140

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

Title: United India Insurance Company Vs. Dhananjoy Dass and others Page-630

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Visveswaraya Iron and Steel Ltd. vs. M. Chandrappa (1994) 84 FJR 46

'W'

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'Y'

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Yashihey Yobin and another V. Department of Customs, Shillong (2014) 13 Supreme Court Cases 344

Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312

Yunis Ali (Dead) Thru his L.Rs. versus Khursheed Akram, 2008 AIR SCW 4372

Yogesh Verma and others vs. State of H.P. and others, 2004 (1) Shim. L.C. 16

Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58

'Z'

Zenit Mataplast Private Limited Versus State of Maharashtra and others, (2009) 10 Supreme Court Cases 388

Zuari Cement Ltd vs. Regional Director, ESIC, Hyderabad & Ors., AIR 2015, SC 2764

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

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

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

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

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

The following judgment of the Court was delivered:

Sandeep Sharma, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

M/s.Byford Private Ltd.& Others ....Appellants-Defendants

Versus

Ajit Lajwanti Gujral Trust & Another ....Respondents-Plaintiffs

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

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

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

Cases referred:

Srinivas vs. Narayanan, AIR 1954 SC 379

Tirumala Tirupati Devathanams vs. K.M. Krishnaiah, AIR 1998 SC 1132

R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami V.P. Temple and another, AIR 2003 SC 4548

S.P.E. Madras vs. K.V. Sundaravelu, AIR 1978 SC 1017

State of Bihar and others vs. Sri Radha Krishna Singh and others, AIR 1983 SC 684

Rajan Rai vs. State of Bihar, (2006)1 SCC 191

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

The following judgment of the Court was delivered:

Sandeep Sharma, J.

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

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

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

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

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

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

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

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

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

3. *Whether a judgment, which is not inter-se between the parties, can form basis of a decree on the ground of resjudicata?"*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Preliminary Objections:-

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

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

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

Written Statement on Merits:-

1. *Contents of para No.1 of the plaint, as stated, are incorrect and, therefore, the same are denied by the replying defendants. To the best of the information of the replying defendants late Sardar Ajit Singh s/o Sardar Sobha Singh, husband of Smt.Laj Wanti, was the absolute owner of the property in question. He had granted life estate in favour of Smt.Laj Wanti with right of maintenance etc. during her life time from the suit property and as per his Will Shri Ajit Singh had created a trust and after the death of Smt.Laj Wanti the trust was to be dissolved and the entire property owned by him was to be donated to a Charitable Institution. So far as Smt.Lajwanti is concerned, she did not have ownership rights in the suit property. She had only a life estate in the said property and could create lease for her maintenance. She could not alienate or dispose of the suit property.*

2. *Contents of para No.2 of the plaint, as stated, are absolutely wrong, false and baseless to the very knowledge of the plaintiffs and, therefore, denied by the replying defendants. It is denied that Smt.Lajwanti was the sole owner of the property. It is also denied that after her death the property has allegedly devolved upon the plaintiff No.2. It is also denied that Smt.Lajwanti executed any so-called Will on 2.2.68 or on any other date in favour of plaintiff No.2. To the best of the information of the replying defendants, she did not execute any alleged Will. Moreover, as submitted above Smt.Lajwanti could not make any Will as she did not have any such right to make any disposition or alienation of the suit property by Will. In fact, the legality and validity of so-called Will of Smt.Lajwanti which is the basis of suit is being hotly contested in the High Court of Himachal Pradesh, Shimla, in Civil Suit No.13 of 81 and Civil Suit No.44 of 83. The present suit is also not competent and maintainable unless and until the plaintiffs obtain probate or letters of administration with respect to alleged Will u/s 214 of the Indian Succession Act or until and unless they establish their title to the suit property in a competent court of law.*

3. *Contents of para No.3 of the plaint are absolutely wrong, false and baseless to the very knowledge of the plaintiffs and as such the same are emphatically denied and repudiated by the replying defendants. Title to the property of late Shri Ajit Singh s/o Shri Sobha Singh is under dispute in the aforesaid two civil suits pending in the Hon'ble High Court of Himachal Pradesh, Shimla. It is denied that the plaintiff No2 has been coming in actual possession of any part of the property of late Ajit Singh. In case he is in possession of any property of late Sardar Ajit Singh, the same is unlawful and as a trespasser and usurper.*

4. *Contents of para No.4 of the plaint, as stated, are wrong, and therefore, the same are denied by the replying defendants. The question of transfer of properties mentioned in para No.4 of the plaint in favour of so-called plaintiff No.1 trust does*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Question No.3:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Such judgment, order or decree is conclusive proof—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> *"8. Coming to the first submission very strenuously canvassed by Shri Mishra, it would be necessary to refer to the provisions of Sections 40 to 44 of the Indian Evidence Act, 1872 (in short `the Evidence Act) which are under the heading "Judgments of Courts of justice when relevant", and in the aforesaid Sections the circumstances under which previous judgments are relevant in civil and criminal cases have been enumerated. Section 40 states the circumstances in which a previous judgment may be relevant to bar a second suit or trial and has no application to the present case for the obvious reasons that no judgment order or decree is said to be in existence in this case which could in law be said to prevent the Sessions Court from holding the trial. Section 41 deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction and is equally inapplicable. Section 42 refers to the relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41 in so far as they relate to matters of a public nature, and is again inapplicable to the present case. Then comes Section 43 which clearly lays down that judgments, order or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Evidence Act. As it has not been shown that the judgment of acquittal rendered by the High Court in appeals arising out of earlier sessions trial could be said to be relevant under the other provisions of the Evidence Act, it was clearly "irrelevant" and could not have been taken into consideration by the High Court while passing the impugned judgment. The remaining Section 44 deals with fraud or collusion in obtaining a judgment, or incompetency of a court which delivered it, and can possibly have no application in the present case. It would thus appear that the High Court was quite justified in ignoring the judgment of acquittal rendered by it which was clearly irrelevant.*
>
> *10. A three Judges' Bench of this Court had occasion to consider the same very question in the case of Karan Singh vs. The State of Madhya Pradesh, AIR 1965 SC 1037, in which there were in all 8 accused persons out of whom accused Ram Hans absconded, as such trial of seven accused persons, including accused Karan Singh, who was appellant before this Court, proceeded and the trial court although acquitted other six accused persons, convicted the seventh accused, i.e., Karan Singh under Section 302 read with Section 149 IPC. Against his conviction, Karan Singh preferred an appeal before the High Court. During the pendency of his appeal, accused Ram Hans was apprehended and put on trial and upon its conclusion, the trial court recorded order of his acquittal, which attained finality, no appeal having been preferred against the same. Thereafter, when the appeal of accused Karan Singh was taken up for hearing, it was submitted that in view of the judgment of acquittal rendered in the trial of accused Ram Hans, the conviction of accused Karan Singh under Section 302 read with Section 149 IPC could not be sustained, more so when other six accused persons, who were tried with Karan Singh, were acquitted by the trial court and the judgment of acquittal attained finality. Repelling the contention, the High Court after considering the evidence*

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

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

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

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

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

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

Questions No.1 and 2:

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

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

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

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

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

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

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

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

Piar Chand & Others ..Appellants-Plaintiffs

Versus

Ranjeet Singh & Others ..Respondents-Defendants

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

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

Cases referred:

Rajni Rani and Another vs. Khairati Lal and Others, (2015)2 SCC 682

Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11

Satya Devi vs. Partap Singh and others, (2006)1 SCC 312

For the Appellants: Mr.B.P. Sharma, Senior Advocate with Mr.Arun Kumar, Advocate.

For Respondents No.1(a) to 1(d) & 2 to 4. Mr.Neeraj Gupta, Advocate.

For Respondent No.7: Ex-parte

The following judgment of the Court was delivered:

Sandeep Sharma,J.

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

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

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

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

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

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

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

"1. Whether the plaintiffs are the owners in possession of the suit land? OPP.

2. Whether the defendants are entitled to be declared as owner in possession of the suit land? OPP.

3. Relief."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

****

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

Om Prakash Chand ....Appellant-Defendant

Versus

Parkash Chand ...Respondent-Plaintiff

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

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

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

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

The following judgment of the Court was delivered:

Sandeep Sharma, J.

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

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

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

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

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

"1. Whether the plaintiff has mortgaged the suit premises to the defendant? OPP

2. Whether the plaintiff is entitled for the redemption of the suit premises as alleged? OPP.

3. Whether the defendant is the tenant of the plaintiff as alleged? OPD.

4. Whether the suit is not maintainable? OPD.

5. Whether the plaintiff is estopped to file this suit by his own act and conduct? OPD.

6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, if so, its correct valuation ? OP Parties.

7. Whether the plaintiff has no cause of action to file this suit? OPD.

8. Relief."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

M/s.Bharat Healthcare Limited and Anr. ....Petitioners

Versus

Authorized Officer, Punjab National Bank & Others ....Respondents

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

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

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

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

The following judgment of the Court was delivered:

Sandeep Sharma, J.

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

> *"i) That records of the case may kindly be called from the respondent bank and District Magistrate;*
>
> *ii) That writ in the nature of certiorari may kindly be issued quashing action of respondents in taking possession of the factory land, building, plant and machinery, raw materials, finished stocks of the petitioners;*
>
> *iii) That writ in the nature of mandamus may kindly be issued directing the respondents to restore possession of the factory land, building, plant and machinery, raw materials, finished stocks to the petitioners;*
>
> *iv) That appropriate writ, order or direction may kindly be issued in the facts and circumstances of the case for staying further proceeding or process by the respondents for sale of assets of the petitioners taken in possession by respondents;*
>
> *v) That writ, order or direction may kindly be issued to the respondents with direction to compensate the petitioners on account of loss suffered due to expiry/perishing of raw materials, ready stocks of medicines and wastage on account of medicines under process of manufacturing etc."*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> *"Some facts which need to be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the Governments in creating Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned are desired to move faster. In the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field, namely, the Recovery of Debts Due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another Expert Committee was constituted, then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.*
>
> *In its Second Report, the Narasimham Committee observed that NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed:*
>
> > *"8.1. A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

****

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

Shambhu Ram .....Appellant

Versus

Lakhu and others .....Respondents

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

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

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

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

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

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

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

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

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

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

"1. Whether the plaintiff is entitled for the decree of permanent and prohibitory injunction, as prayed for? OPP

2. Whether the suit of the plaintiff is not maintainable, in the present form? OPD

3. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD

4. Whether the plaintiff has no cause of action to file the present suit? OPD

5. Whether the suit of the plaintiff is bad for non-joinder/mis-joinder of necessary parties? OPD

6. Relief."

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

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

"1. Whether the learned Appellate Court has erred in holding that public path exists on suit land in absence of any revenue record to this effect on record.

2. That whether defendants have any right of path over suit land in view of the fact that they failed to establish any such right on record."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26. Substantial questions of law are answered accordingly.

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

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

Manju @ Maju .....Petitioner

Versus

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

Criminal Revision No.204 of 2016
Decided on : 26.9.2016

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

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

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge *(Oral)*

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

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

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

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

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

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

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

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

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

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

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

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

Criminal Revision No. 205 of 2016
Decided on :26.9.2016

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

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

The following order of the Court was delivered:

Vivek Singh Thakur, Judge *(Oral)*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

M/s.GH Hydro Power Ventures Pvt.Ltd. ...Petitioner

Versus

State of H.P. & Others ...Respondents

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

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

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

Cases referred:

Tata Cellular vs. Union of India, (1994)6 SCC 651

Raj Kumar vs. State of Himachal Pradesh and Others, 2014(2) Him.L.R.(DB) 1217

S.G.Jaisinghani vs. Union of India and Others, AIR 1967 SC 1427

Satwant Singh Sawhney vs. D.Ramarathnam, Assistant Passport Officer, New Delhi and Others, AIR 1967 SC 1836

Namit Gupta vs. State of H.P. and Others, AIR 2014 HP 49

Pritam Singh vs. State of Himachal Pradesh, (2013)1 Him.L.R. 130

Saroj Garg vs. State of H.P. & Ors., AIR 2011 HP 94.

Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27

Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657

Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796

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

The following judgment of the Court was delivered:

Sandeep Sharma, J.

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

> *"(a) Issue writ in the nature of certiorari quashing and set aside the impugned orders dated 24.02.2015 (Ann P-14) as issued by respondent No.1;*
>
> *(b) Issue a writ of mandamus or any other suitable writ, order or direction, directing the respondents not to allot the Self Identified Hydel Project Joiner Top Hydel Project 05.00 MW to any other person including any company, firm, AOP, Society etc.*
>
> *(c) Issue a writ of mandamus or any other suitable writ, order or direction, directing the respondents to allot the Self Identified Hydel Project Joiner Top Hydel Project 05.00 MW to the petitioner in time bound manner."*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. abused its powers.

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

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

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

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

(pp.675 & 677-678)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"The learned Chief Justice said further that there may be cases in which it would be the duty of the court to condemn by-laws made under such authority as these were made (by a county council) as invalid because unreasonable. But unreasonable in what sense? If for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this and this sense only, as I conceive, that the question of reasonableness or unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient or because it is not accompanied by an exception which some judges may think ought to be there'.

" We may also refer with advantage to the well-known decision of the Privy Council in Slattery v. Naylor, (1988) 13 AC 446, where it has been laid down that when considering whether a bye-law is reasonable or not, the Court would need a strong case to be made against it and would decline to determine whether it would have been wiser or more prudent to make the bye-law less absolute or will it hold the bye-law to be unreasonable because considerations which the court would itself have regarded in framing such a bye-law have been over looked or reflected by its framers. The principles laid down as aforesaid in Kruse v. Johnson, (1898) 2 QB 91, 98, 99 and Stattery v. Naylor, (1988) 13 AC 446 have been cited with approval and applied by this Court in Trustees of the Port of Madras v. Aminchand Pyarelal & Ors.,(1976) 1 SCR 721, 733."

28. In ***Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657,*** the Hon'ble Supreme Court held:

"14. No doubt, the writ court has adequate power of judicial review in respect of such decisions. However, once it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determine the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives. Once we find that parameters of Article 14 are satisfied; there was due application of mind in arriving at the decision which is backed by cogent material; the decision is not arbitrary or irrational and; it is taken in public interest, the Court has to respect such a decision of the Executive as the policy making is the domain of the Executive and the decision in question has passed the test of the judicial review.

15. In Union of India v. Dinesh Engg. Corpn., (2001)8 SCC 491, this Court delineated the aforesaid principle of judicial review in the following manner: (SCC pp.498-99, para 12)

"12……There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to the policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinize whether the

policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. ….. Any decision be it a simple administrative decision or policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."

16. The power of the Court under writ jurisdiction has been discussed in Asif Hameed. v. State of J&K, 1989 Supp.(2) SCC 364: 1 SCEC 358 in paras 17 and 19, which read as under: (SCC pp. 373-74)

"17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

* * *

19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

17. The aforesaid doctrine of separation of power and limited scope of judicial review in policy matters is reiterated in State of Orissa v. Gopinath Dash, (2005) 13 SCC 495 : (SCC p.497, paras 5-7)

"5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the Constitution does not permit the Court to direct or advise the executive in the matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Asif Hameed v. State of J&K; 1989 Supp (2) SCC 364 and Shri Sitaram Sugar Co. Ltd. v. Union of India;

(1990) 3 SCC 223). The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, it cannot interfere.

6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

7. The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown the courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government."

29. The Hon'ble Apex Court in ***Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796*** held as under:

"23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.

24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision.

25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005)13 SCC 287, wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from

simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held: (SCC pp.288-89, para 5)

> *"In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India, (1989)4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki,1992 Supp(1) SCC 548. In A.K. Roy v. Union of India, (1982)1 SCC 271it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."*

30. Consequently in view of the detailed discussions made hereinabove, we do not see any reason to interfere with the decision taken by the respondents and to invoke extra ordinary jurisdiction as prayed for by the petitioner in the present petition. Accordingly, the writ petition is dismissed.

31. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Geeta Devi ....Petitioner
Versus
State of H.P. & Another ....Respondents

CWP No.6760 of 2010
Judgment Reserved on: 06.09.2016
Date of decision: 07.10.2016

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

Cases referred:

Santosh Malhotra vs. State of H.P. and Others, 2003(3) Shiml. L.C. 342
Som Kirti alias Som K.Nath and Others vs. State of H.P. and Others, Latest HLJ 2013 (HP) 1223

Garikapatti Veeraya vs. N.Subblah Choudhury, 1957 SCR 488
Dhyan Singh vs. State of Himachal Pradesh and Others, 2012 (3) Shim.L.C. 1741

For the Petitioner:	Mr.Sunil Mohan Goel, Advocate.
For the Respondent No.1:	Mr.Rupinder Thakur, Additional Advocate General with Mr.Rajat Chauhan, Law Officer.
For Respondent No.2:	Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of present writ petition filed under Article 226/227 of the Constitution of India, petitioner, who is owner of land in dispute, has laid challenge to the order dated 27.7.2010 passed by Financial Commissioner (Appeals), H.P. in Revision Petition No.132 of 2009, filed under Section 65 read with Section 118 sub-section 3(C) of H.P. Tenancy and Land Reforms Act, 1972 *(hereinafter referred to as the `Act'),* whereby he upheld the order of Divisional Commissioner, Shimla Division, Shimla, affirming the order of Collector, Solan, holding the petitioner herein responsible for violation of Section 118(1) of the `Act' and accordingly ordered for confiscation/vesting of the property in dispute in State of Himachal Pradesh alongwith building constructed thereon free from all encumbrances.

2. The genesis of the entire case is based on the order of Collector, Solan, passed in case No.25/13 of 1999. In nutshell case of respondent-State was that the petitioner herein, resident of village Manjhu, Tehsil Arki, District Solan, H.P., executed an agreement to sell qua the land comprised in Khasra No.531/472/422/389/59, measuring 0-2 Bigha, situated in Mauza Abadi Village Hatkot (Kunihar), Tehsil Arki, District Solan, and put one Shri J.P. Shah in possession of the same in violation of Section 118 of the Act without obtaining prior sanction of the Government, as required under Section 118 of the Act. Respondent-State, before initiating proceedings under Section 118 of the Act, got the matter inquired from Sub Divisional Officer(C), Arki on two occasions, who vide communication dated 27.1.2000 reported to the Deputy Commissioner, Solan that *"in the light of above statements recorded by the undersigned, it is revealed that both Smt.Geeta Devi and J.P. Shah claimed themselves to be owner and tenant of the house under report respectively".* He further reported that, *"no deed has been executed for the transfer of the land as yet, therefore, the case does not fall within the ambit of Section 118 of the Act".* He also reported that, *"the parties have entered into an agreement of Rs.14000/- and they may execute sale deed for which permission is reported to have been sought by Sh.J.P. Shah".* SDO(C) further suggested that, *"when the deed will come for registration before the Sub Registrar, the matter could be examined at that time".* But, it appears that matter was again inquired into by SDO(C), Arki, who vide communication dated 7.4.2000, addressed to the Deputy Commissioner, Solan, reported that in view of contradictory statements of the parties, it emerges that house has been constructed by Shri J.P. Shah and not by Smt.Geeta Devi and as such plea of Shri J.P. Shah's being tenant does not sustain in view of the statement of Shri Radhe Shyam and Shri J.P. Shah himself. Subsequent to aforesaid reports submitted by SDO(C), present petitioner was served with show cause notice calling upon her that why proceedings be not initiated against her under Section 118 of the Act.

3. Perusal of Annexure P-2 suggests that present petitioner filed reply to the notice dated 23.4.1999, wherein she claimed her to be exclusive owner in possession of the land described in the notice. She also claimed that she has raised/constructed a house over the suit land by spending her own money and by taking loans from the others. She also denied that she has sold property to J.P. Shah by way of agreement after receiving consideration. Rather, she stated that J.P. Shah is tenant in the house, existing over the suit land in question, and in no manner any transfer of land having been made by the replying respondent to anyone. To substantiate her aforesaid plea, she also stated that till date she is exclusive owner in possession

of the land and the house in question and as such provisions of Section 118(3) of the Act are not applicable in the present case. However, fact remains that Collector concerned, being not satisfied with the reply submitted by the present petitioner, initiated proceedings under Section 118 of the Act against the present petitioner and vide order dated 31.7.2006 ordered that the land comprised in Khasra No.531/472/422/398/59, measuring 0-2 Bigha, situated in Mauza Abadi Village Hatkot (Kunihar) is hereby confiscated in the State of Himachal Pradesh alongwith building constructed thereon free from all encumbrances.

4. Petitioner, being dissatisfied with the aforesaid order passed by Collector, Solan, filed a Revenue Appeal No.100/2009 under Section 118(3)(b) of the Act, as amended up to 1994, before Divisional Commissioner, Shimla Division, Shimla. However, the same was dismissed on 10.8.2009 by the Divisional Commissioner, Shimla, by holding that fact of possession, having been transferred to Shri J.P. Shah for long time, has not been disputed by the appellant and as such there is a violation of provisions of the Act.

5. Feeling aggrieved and dissatisfied with the aforesaid orders passed by the Collector and Divisional Commissioner, present petitioner filed a Revision Petition under Section 118(3)(C) of the Act, specifically assailing therein order dated 10.8.2009 passed by the Divisional Commissioner, Shimla Division in Revenue Appeal No.100 of 2009, which came to be registered as Revision Petition No.132 of 2009. But learned Financial Commissioner (Appeals) dismissed the revision petition filed by the present petitioner and held that since Shri J.P. Shah, in whose favour present petitioner allegedly made sale, was not an agriculturist, as such, transaction was ab-initio void as per provisions of Section 118(3)(C) and (D) of the Act and as such land alongwith the building will vest in the State.

6. In the aforesaid background, present petitioner, being aggrieved with the orders passed by Financial Commissioner (Appeals) in Revision Petition, referred hereinabove, whereby he, while rejecting the revision petition preferred on behalf of the present petitioner, upheld the orders passed by Divisional Commissioner as well as Collector, wherein they had come to the conclusion that the present petitioner, Smt.Geeta Devi, put Shri J.P. Shah into possession of suit land in violation of provisions of Section 118(3) and as such ordered for confiscation of the property, preferred this writ petition.

7. Mr.Sunil Mohan Goel, learned counsel representing the petitioner, vehemently argued that the impugned order passed by Financial Commissioner (Appeals), whereby he upheld the orders passed by the Divisional Commissioner and Collector, is not sustainable in the eye of law as the same is in grave violation of provisions of the Act. Mr.Goel contended that bare perusal of order passed by Collector itself suggests that it was not proved on record that present petitioner had made any sale in favour of J.P. Shah in violation of Section 118 of the Act, rather property in question was given on monthly rent to Shri J.P Shah. He also contended that at no point of time respondent-State was able to prove on record by leading cogent and convincing evidence that any deed was executed for transfer of land in violation of the provisions of Section 118 of the Act and as such no action could be initiated against the petitioner in terms of Section 118(3) of the Act. To substantiate his aforesaid plea, he invited the attention of this Court to Annexure P-3 i.e. communication dated 27.1.2000, whereby SDO(C) Arki, had submitted his report to Deputy Commissioner, Solan, stating in uncertain terms that no deed has been executed for transfer of land as yet, therefore, the case does not fall within the ambit of Section 118 of the Act.

8. Mr.Goel further argued that if for the sake of arguments, case of the respondent-State is taken to be correct that petitioner Smt.Geeta Devi had executed an agreement to sell in favour of J.P. Shah for sale of suit land, even in that eventuality no action could be taken against present petitioner for violation of Section 118 of the Act because Section 118 of the Act prevalent at the time of alleged execution of agreement did not contemplate any penal action in case land is intended to be sold in favour of non- Himachali by way of agreement. In the aforesaid background, Mr.Goel prayed that impugned orders passed by the Financial Commissioner, Divisional Commissioner and Collector are required to be quashed and set aside.

9. Mr.Goel, while concluding his arguments, invited the attention of this Court to para-13 of the orders passed by the Financial Commissioner (Appeals) in Revision Petition, whereby he allegedly dealt with aforesaid fact of amendment in the Act, to demonstrate that Financial Commissioner below miserably failed to make distinction between the provisions contained in un-amended Section 118 of the Act and subsequent amendment in the Act. Mr.Goel also stated that learned authorities below failed to take note of judgment passed by this Court in ***Smt.Santosh Malhotra vs. State of H.P. and Others, 2003(3) Shiml.L.C. 342,*** wherein, issue, involved in the present case, has been elaborately dealt with by this Court.

10. Mr.Rupinder Singh Thakur, learned Additional Advocate General, argued that impugned orders passed by the Authorities below are based on correct appreciation of evidence available on record as well as law, as such, no interference, whatsoever, of this Court is warranted in the facts and circumstances of the present case. Mr.Thakur vehemently argued that it stands duly proved on record that present petitioner put non-agriculturist into possession of the land in dispute in violation of Section 118 of the Act without taking prior permission from the authorities as envisaged under Section 118 of the Act and as such no illegality and infirmity can be found in the impugned orders passed by the authorities as referred hereinabove. He also invited the attention of this Court to the latest judgment passed by the Division Bench of this Court in ***Som Kirti alias Som K.Nath and Others vs. State of H.P. and Others, Latest HLJ 2013 (HP) 1223 and other connected matters***, whereby validity of Section 118 of the Act has been upheld. In the aforesaid background he prayed for dismissal of instant writ petition.

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

12. Before adverting to the merits of the case, it may be stated that there is no dispute as far as validity of Section 118 of the Act ibid is concerned. Though issue with regard to validity of Section 118 of the Act has been examined by the Division Bench of this Court in many cases, but recently, while dealing with the batch of writ petitions, wherein vires of Section 118 of the Act were challenged by many parties, Division Bench of this Court vide judgment dated Ist October, 2013 passed in ***CWP No.443 of 1995, titled Som Kirti alias Som K.Nath and others vs. State of H.P. and others*** upheld the validity of Section 118 of the Act and as such this Court has no occasion, whatsoever, to examine validity, if any, of Section 118 of the Act.

13. This Court solely with a view to test the correctness and genuineness of arguments having been advanced on behalf of the petitioner that no penal action in terms of Section 118 of the Act could be taken against the present petitioner even if it is presumed that she had executed agreement to sell in favour of J.P. Shah for selling property in terms of un-amended Section 118 of the Act, would be examining issue at hand in light of the Section 118 of the Act.

14. The State of Himachal Pradesh enacted H.P. Tenancy and Land Reforms Act, 1972, Chapter-XI deals with Control on transfer of land, wherein under Section 118 transfer of land to non-agriculturists is prohibited, it would be relevant to reproduce herein below Section 118 amended by amendment Act, 1988:-

> *"118. Transfer of land to Non-agriculturists Barred.- (1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, on transfer of land (including sales in execution of a decree of a civil Court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease, mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.*
>
> *(2). Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of-*
>
> *(a) to (h)……..*

(i) a non-agriculturist with the permission of State Government for the purpose that may be prescribed:

Provided.....

(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 (16 of 1908), shall register any document pertaining to a transfer of land, which is in contravention to sub-section (1) and such transfer shall be void ab initio and the land involved in such transfer, if made in contravention of sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the State Government free from all encumbrances."

15. Perusal of aforesaid amended Act of 1988 provides that no transfer of land by way of sale, gift, Will, exchange, lease, mortgage with possession, creation of tenancy or in any other manner shall be valid in favour of a person who is not an agriculturist.

16. However, proviso to aforesaid provisions suggests that non-agriculturist can purchase land with the prior permission of the State Government. But close scrutiny of aforesaid provisions, as amended; nowhere suggest that there is any bar to transfer the land by way of agreement. But, at this stage, it may be noticed that H.P. Tenancy and Land Reforms (Amendment) Act, 1994 came into force on 22.3.1995, wherein explanation of Section 118(1) of Amendment Act was incorporated as under:

"Explanation.- For the purpose of this sub-section, the expression "transfer of land" shall include:-

(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist, and

(b) an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land."

17. Perusal of aforesaid amendment, which came into force on 22.3.1995, suggests that after amendment no transfer of land could be made by way of Special or General Power of Attorney or by an agreement with the intention to put an non-agriculturist in possession of the land and allow him to deal with the land in like manner as if he is real owner of that land.

18. Perusal of aforesaid explanation, which came into force on 22.3.1995, certainly suggests that after 22.3.1995 no transfer of land could be made by way of agreement also.

19. But in the present case, as clearly emerged, that alleged agreement to sell was entered into by the petitioner herein with J.P.Shah in the year 1990 i.e. admittedly before coming into operation of H.P. Tenancy and Land Reforms (Amendment) Act, 1994, wherein transfer of land was made prohibited even by way of agreement.

20. Hence, in view of aforesaid, this Court sees substantial force in the contention put forth on behalf of the counsel representing the petitioner. This Court, after perusing aforesaid amendment as well as case law referred by petitioner before Commissioner i.e. ***Smt.Santosh Mahlotra vs. State of H.P. and Others, 2003 (3) Shim.L.C. 342***, has no hesitation to conclude that learned Financial Commissioner has fallen in grave error while concluding that *"the amendments to the Act carried out in 1994 (and valid from 4.4.1995) do not come into play; the transaction between the petitioner took place around 1990 and the provisions incorporated by the 1987 amendments (valid from 14.4.1988 onwards) would cover the case fully. Section 118(3) of the amended Act provides for vesting of the land and structures/buildings in the State".* Had Financial Commissioner (Appeals), while examining revision petition preferred on behalf of petitioner herein, bothered/cared to take into consideration the law referred by petitioner in ***Santosh Mahlotra's*** case supra, he would have not passed order which is impugned before this Court by way of present petition.

21. At this stage, this Court deems it necessary to refer to the law made by this Court in the aforesaid case of ***Santosh Mahlotra*****,** where this Court has held as under:-

> *"12. I have duly considered the respective contentions of the learned counsel for the parties. From the perusal of the original record of the Collector, Shimla, it is not in dispute that notices were issued by the collector to Jaidev Malhotra, Sh.B.N. Malhotra, Smt.Santosh Malhotra and Suresh Kumar Shukla under Section 119(1) of 'the Act' and Rule 38(B) of H.P. Tenancy and Land Reforms Rules, 1975. All the parties have appeared before the Collector. Sh.B.N. Malhotra made the specific statement that his son Jaidev Malhotra purchased land in Kachhighati on which building had been constructed Jaidev Malhotra made the statement that the land in dispute belongs o his mother Smt.Santosh Malhotra on which he constructed the building. The Collector Shimla passed the order dated 20.2.1995 (Annexure P-2) in case No.1/94 against Jaidev Malhotra on the basis of the Income-tax returns filed by him before the Income Tax Department for the assessment years 1993-94 and 1994-95 in which he had shown having spent a sum of Rs.1,90,000/- on the construction of the building. The Collector Shimla in his order recorded the findings that as the General Power of Attorney (Anenxure P-1) has been executed by Suresh Kumar Shukla owner of the land in favour of Smt.Santosh Malhotra keeping in view the fact that no sale deed could be executed in favour of Smt.Santosh Kumar Mahlotra as she is not the agriculturist of State of H .P. and Jaidev Malhotra invested a sum of Rs.1,90,000/- for the construction of the building, therefore, the land has been acquired by him in violation of Section 118 of 'the Act'. The order of the Collector has been affirmed both by the Divisional Commissioner and by the Financial Commissioner in appeal.*
>
> *13. The State of Himachal Pradesh enacted the H.P. Tenancy and Land Reforms Act, 1972. Chapter XI deals with Control on transfer of land. Section 118 prohibits the transfer of land to non-agriculturists which reads as under:*
>
> > *"118. Transfer of land to Non-Agriculturists Barred-(1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, on transfer of land (including sales in execution of a decree of a civil court or for recovery of arrears of land revenue), by way of sale, gift, exchange, lease, mortgage with possession or creation of a tenancy shall be valid in favour of a person who is not an agriculturist.*
> >
> > *(2) Nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of—*
> >
> > *(a) to (h).....*
> >
> > *(i) a non-agriculturist with the permission of State Government for the purpose that may be prescribed:*
> >
> > *Provided.....*
> >
> > *(3) No Registrar or the Sub-Registrar appointed under the Indian Registration Act, 1908 (16 of 1908), shall register any document pertaining to a transfer of land, which is in contravention to sub-section (1) and such transfer shall be void ab initio and the land involved in such transfer, if made in contravention of sub-section (1), shall, together with structures, buildings or other attachments, if any, vest in the State Government free from all encumbrances."*
>
> *14. The revenue authorities below have mis-directed themselves in applying the above extracted provisions of Section 118 of the 'Act' in the present case. Suresh Kumar Shukla has not transferred his ownership rights and interest in the property in favour of Smt. Santosh Malhotra by way of General Power of Attorney (Annexure:P1) and the transfer by way of execution of the General Power of*

Attorney is not incorporated in Section 118(1) of the 'Act'. The transfer of land to non-agriculturist is only barred under Section 118(1) if the transfer is by way of sale gift, exchange, lease, mortgage with possession or creation of tenancy including sales in execution of a decree of a Civil Court or for recovery of arrears of Land Revenue. The General Power of Attorney has been executed on 7.11.1991 by Suresh Kumar Shukla the owner of the property in favour of Smt.Santosgh Malhotra in which she has only been authorized to look after, manage, sell or construct the building on the piece of land, to enter into agreement, to sell, to receive the earnest money, to execute or sign on the sale deed etc. etc. On bare reading of the General Power of Attorney it cannot be concluded that Suresh Kumar Shukla has transferred the land by way of sale, gift, etc. etc. envisaged in Section 118(1) of the Act in favour of Smt. Santosh Malhotra or in favour of Jai Dev Malhotra nor it is proved on record that Smt. Santosh Malhotra has sold the land to her son Jaidev Malhotra on the strength of the General Power of Attorney. The reasoning of the Collector that as Jaidev Malhotra had spent a sum of Rs.1,90,000/- on the construction of the building on the land as reflected by him in his Income-tax returns will not be a sufficient proof that Suresh Kumar Shukla has transferred the land to Jaidev Malhotra on the basis of the General Power of Attorney executed in favour of his mother. The H.P. Tenancy and Land Reforms (Amendment) Act, 1994 came into force on 22.3.1995 whereas the General Power of Attorney (Annexure P-1) has been executed on 7.11.1991 as noticed above and the Collector passed the order (Annexure-P2) on 20.2.1995 prior to the date of the enforcement of the amended Act. Explanation of Section 118(1) of the Amendment 'Act' reads as under:

"Explanation – For the purpose of this sub-section, the expression "transfer of land" shall include:-

(a) a benami transaction in which land is transferred to an agriculturist for a consideration paid or provided by a non-agriculturist, and

(b) an authorization made by the owner by way of special or general power of attorney or by an agreement with the intention to put a non-agriculturist in possession of the land and allow him to deal with the land in the like manner as if he is a real owner of that land." (Pp.347,348 & 349)

22. Careful perusal of aforesaid judgment passed by this Court in ***Santosh Mahlotra's*** case *supra* clearly suggest that provisions incorporated in the principal Act by amendment Act 1994, which came into force on 22.3.1995 could not be made applicable in the cases which pertained to years prior to amendment carried out on 22.3.1995. Hence, this Court has no hesitation to conclude that revenue authorities have passed impugned orders against the petitioner herein, contrary to the provisions of Section 118 of 1988 Act, because amendment Act, which came into force on 22.3.1995, could not be made applicable retrospectively in the present case.

23. At this stage, it may be stated that though respondent, while opposing present petition, did not raise issue, if any, of retrospectively as far as amendment Act, 1994 is concerned, which came into force on 22.3.1995, but it is well settled law that in the absence of anything in enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to claim under litigation at the time when the Act was passed ***(See: Garikapatti Veeraya vs. N.Subblah Choudhury, 1957 SCR 488).***

24. Since this Court had an occasion to peruse H.P. Tenancy and Land Reforms (Amendment) Act, 1994, wherein expression 'transfer of land' was amended, but this Court was unable to find any specific clause stating therein that amendment would have retrospective operation and as such it can be inferred that Amendment Act, 1994 was prospective in nature.

25. As clearly emerged from the judgment passed by this Court, referred hereinabove, the issue at hand is not more res intigra, rather pursuant to aforesaid judgment, this Court in number of judgments reiterated the view taken in *Santosh Mahlotra's* case supra.

26. Reliance is placed on the judgment of our own High Court in ***Dhyan Singh vs. State of Himachal Pradesh and Others, 2012 (3) Shim.L.C. 1741,*** wherein this Court, while dealing with the aforesaid aspect of amendment, has also dealt with issue of retrospectivity and as such it would be profitable to refer to para-6 of the judgment:-

> *"6. Learned Counsel also places reliance on the decision of the Supreme Court in Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others, (1999)8 SCC 16. The Court holds:*
>
> *22. In view of the facts and circumstances of the case and in the alternative Mr. Agarwal, the learned counsel for the respondent has urged that the amending Act being substituted legislation would have retrospective effect.*
>
> *23. In Garikapatti Veeraya v. N. Subbiah Choudhury, [1957] SCR 488, Chief Justice S.R. Das speaking for the Court observed as follows :*
>
> *"The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."*
>
> *24. We may also refer to Francis Bennion's Statutory Interpretation, 2nd Edn.,at p. 214 wherein the learned author commented as follows :*
>
> *"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of expost facto law is enshrined in the United States Constitution and in the Constitutions of many American States, which forbid it. The true principle is that Lex prospicit non respicit (law looks forward not back). As Willes, J. said, retrospective legislation is `contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."*
>
> *25. This Court in Hitendra Vishnu Tlutkur and Others v. State of Maharashtra and Others, [1994] 4 SCC 602 has culled out the principles with regard to the ambit and scope of an amending Act and its retrospective operation as follows :*
>
> *(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is tex-tually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.*
>
> *(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.*
>
> *(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.*

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication." [P.25 & 26)

27. After bestowing my thoughtful consideration qua the fact and circumstances of the case, especially proposition of law as discussed in detail hereinabove, I find that case at hand was squarely covered by decision of this Court in ***Santosh Mahlotra's*** case *supra* and as such Financial Commissioner (Appeals) has erred in law while holding that amendments to Act carried on in the year 1994 do not come into play and provisions incorporated in 1987 of the amendment covers the case fully.

28. This Court is of the view that amendment in the Act, made on 22.3.1995 prohibiting transfer of land by way of agreement, is not retrospective and as such agreement to sell made, if any, by present petitioner prior to amendment Act, 1994, cannot be said in violation of provisions of Section 118 of the Act. Accordingly, order of Financial Commissioner, affirming the orders of authorities below, is quashed and set aside. This petition is allowed with no order as to costs.

29. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

****

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

M/s.Cosmo Ferrites Ltd. ....Petitioner

Versus

State of H.P. & Others ....Respondents

CWP No. 5982 of 2010.
Judgment Reserved on: 26.08.2016
Date of decision: 07.10.2016

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

(Para-10 to 43)

Cases referred:

North-East Karnataka Road Transport Corporation vs. M.Nagangouda, (2007)10 SCC 765
Bhuvnesh Kumar Dwivedi vs. M/s.Hindalco Industries Ltd. 2014 AIR SCW 315

South Indian Cashew Factories Workers' Union vs. Kerala State Cashew Development Corpn.Ltd. and Others, (2006) 5 SCC 302
Bharat Petroleum Corporation Ltd. Vs. Maharashtra General Kamgar Union and Others, (1999)1 SCC 626
D.G. Railway Protection Force and Others vs. K.Raghuram Babu, (2008)4 SCC 406
State of Haryana and Another vs. Rattan Singh, (1977)2 SCC 491
Workmen of Balmadies Estates vs. Management, Balmadies Estates and Others, (2008)4 SCC 517
Om Parkash vs. Delhi Transport Corporation, 2016 LLR 683
Divisional Controller, Karnataka State Road Transport Corporation vs. M.G. Vittal Rao, (2012)1 SCC 442
Om Parkash vs. Delhi Transport Corporation, 2016 LLR 683
E.P. Royappa vs. State of Tamil Nadu and Another, (1974)4 SCC 3
Gulam Mustafa and Others vs. The State of Maharashtra and Others, (1976)1 SCC 800
Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and Others, (2001)1 SCC 182
J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, (2007)2 SCC 433
Bhuvnesh Kumar Dwivedi vs. Hindalco Industries Limited, (2014)11 SCC 85
Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015)4 SCC 544
Tota Ram vs. Belliss India (Private) Limited, (2016)6 SCC 406

For the Petitioner:	Mr.Rahul Mahajan, Advocate.
For Respondent No.1:	Mr.Rupinder Singh Thakur, Additional Advocate General with Mr.Rajat Chauhan, Law Officer.
For Respondent No.2:	Mr.Rohit Sharma & Mr.Anuj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of present petition filed under Article 226/227 of the Constitution of India, the petitioner-Company has laid challenge to the award dated 30th June, 2010 passed by Labour Court-cum-Industrial Tribunal, Shimla, H.P. *(for short `Tribunal')* in Ref.No.93 of 2000, whereby the learned Tribunal below, while allowing the claim put forth on behalf of respondent-workman, has held him entitled for reinstatement in service with seniority and continuity alongtwith full back wages from the date of his illegal termination i.e 19th January, 1999.

2. Documents available on record suggest that appropriate government made reference under Section 10(1) of the Industrial Disputes Act, 1947 *(hereinafter referred to as the `Act')* in the following terms:

> *"Whether the termination of services of Shri Om Prakash ex worker by the Management of M/s.Cosmo Ferrities Ltd. Parwanoo, District Solan, HP w.e.f. 19.1.1999, without compliance of section 25F of the Industrial Disputes Act, 1947 by holding the enquiry ex parte without affording the reasonable opportunity of being heard to the worker in consonance with the principles of fair-play and natural justice, is legal and justified? If not to what relief of service benefits and amount of compensation, Shri Om Prakash is entitled to?"*

3. In nutshell, respondent-workman claimed that he had joined services of the petitioner-Company in the month of June, 1989 and continued as such till 19th January, 1999, when his services were dispensed with illegally without resorting to the provisions of the Act. Respondent-workman further set up a case before the learned Tribunal below that the Management of the petitioner-Company always intended to dispense with his services due to his involvement in Trade Unions. Accordingly, Management in pre-planned manner constituted

domestic inquiry against him, which was merely an eyewash. Respondent-workman further contended that even the charge-sheet issued vide letter dated Ist November, 1998 was biased, unfair, vague and defective for the reason that it was in English language and as such, he, being illiterate person, was unable to understand the contents contained in the same. He also claimed that list of witnesses of the Management as well as documents in support of charges were not supplied to him at any point of time by the Management before initiating alleged disciplinary proceedings against him. Respondent-workman further contended that in the charge-sheet, Management itself declared strike to be illegal for the purpose of specifically framing charges against him. Moreover, Management of the petitioner-Company got appointed Senior Manager of the Factory as an Inquiry Officer with a view to get desired results. He further stated that Inquiry Officer conducted the proceedings without settlement of procedure because at no point of time he was made aware that what kind of procedure would be adopted in the disciplinary proceedings initiated against him at the behest of Management. He also alleged that no opportunity of being heard was ever afforded to him because despite his specific request, no Defence Assistant was provided to him. Similarly, he claimed that Management despite knowing fully well that respondent-workman was not conversant with English language, Inquiry Officer conducted the proceedings in English, as a result of which great prejudice is caused to him. Respondent-workman further claimed that Management witnesses were partial and at no point of time independent witnesses were examined and as such inquiry, if any, conducted against him was eyewash and one side story put forth on behalf of the Management of the petitioner-Company.

4. Apart from above, respondent-workman also claimed that he was not afforded proper opportunity to cross-examine witnesses of the Management solely for the reason that he could not have known as to what had been written in the proceedings which were in English. Since inquiry report was also prepared in English, he was not aware with regard to the discussion, if any, qua the version put forth by him during alleged disciplinary proceedings. Respondent-workman claimed that since entire inquiry proceedings were conducted in violation of principle of natural justice, same deserves to be quashed and set aside. Respondent-workman also stated before the Tribunal below that punishment imposed against him by the disciplinary authority is not in consonance with the alleged charges leveled against him and as such dismissal order issued vide order dated 19th September, 1999 deserves to be quashed and set aside and he deserves to be reinstated with seniority, continuity, full back wages and other consequential service benefits by setting aside the inquiry proceedings.

5. Petitioner-Company by way of counter claim/written statement disputed the claim of respondent-workman by raising preliminary objections qua the maintainability of dispute, if any, before the Tribunal. On merits, petitioner-Company while refuting the allegations made in the claim specifically stated that all the relevant material was duly supplied to respondent-workman during the inquiry proceedings conducted by the Inquiry Officer. Petitioner-Company also contended that inquiry proceedings were conducted in most fair and proper manner by following the principles of natural justice and there is no merit in the claim put forth on behalf of respondent-workman. Petitioner-Company specifically stated before the Tribunal below that at no point of time during inquiry, objection, if any, was ever raised by the workman that proceedings should be conducted in Hindi and he be allowed to be represented through authorized representative. Similarly, petitioner-Company stated before Tribunal that no objection was ever raised with regard to appointment of Inquiry Officer and as such at this stage no objection, if any, with regard to appointment of Mr.Yatish Khurana can be raised, who was admittedly Senior Manager in the Company at that relevant time. Petitioner-Company also contended that the petitioner had participated in inquiry proceedings and he was duly supplied show cause notice, charge sheet, list of witnesses and other relevant record in Hindi also and as such it is not justified on his part to allege that he had been condemned unheard, rather record would go to show that fair and reasoned inquiry had been conducted and due and admissible opportunity was afforded to respondent-workman to defend himself. Petitioner-Company specifically contended before Tribunal below that since respondent-workman never objected for holding inquiry in English, there was no occasion for the Management to conduct inquiry

proceedings in Hindi. In the aforesaid back ground petitioner-Company sought dismissal of the claim put forth on behalf of respondent-workman.

6. Respondent-workman, by way of rejoinder, reaffirmed and reiterated his claim by denying the reply filed on behalf of the petitioner-Company. Learned Tribunal on the basis of pleadings available on record framed following issues:-

"1. Whether the termination o the petitioner is illegal and unjustified as alleged?

2. Whether the petition is not maintainable as alleged?

3. Whether termination was ordered by respondent aftr holding a fair and legal enquiry as alleged?

4. Relief."

7. Subsequently, learned Tribunal below vide impugned award dated 30th June, 2010 upheld the claim of the respondent-workman, as a result of which, present petitioner-Company was directed to reinstate respondent-workman in service with seniority and continuity alongwith full back wages from the date of his illegal termination i.e. 19th January, 1999.

8. In the aforesaid background, present petitioner-Company, being aggrieved and dissatisfied with the impugned award, approached this Court by way of present writ petition, praying therein for quashing and setting aside of award dated 30th June, 2010 passed in reference no.93/2000 by learned Tribunal below by issuing writ in the nature of certiorari.

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

10. Close scrutiny of material available on record clearly suggests that respondent-workman was engaged by the petitioner-Company in the month of June, 1989, where he continued to work till 19th January, 1999, when he was ordered to be dismissed from his service, pursuant to disciplinary proceedings initiated against him. It also emerge from the record that since respondent-workman was involved in illegal strike, disciplinary proceedings were initiated against him and on the basis of material adduced therein by the Management, Inquiry Officer held him guilty of misconduct, as a result of which he was awarded penalty of dismissal from service vide order dated 19th January, 1999.

11. Careful perusal of impugned award passed by learned Tribunal below suggests that learned Tribunal below, on the basis of evidence led on record by respective parties, came to the conclusion that petitioner was not afforded any opportunity to get his case defended through Defence Assistant. Learned Tribunal below also came to the conclusion that proper opportunity of cross-examining the witnesses of Management, who were not independent, was also not afforded to respondent-workman. Accordingly, learned Tribunal, while upholding the claim put forth on behalf of the respondent-workman, came to the conclusion that inquiry conducted against respondent-workman cannot be said to have been conducted by following the principle of natural justice. Similarly, learned Tribunal below, while examining the letter dated 26th November, 1998 (Ex.RC), whereby Shri Yatish Khurana was appointed as Inquiry Officer to conduct inquiry into the charges leveled against respondent-workman, observed that since Mr.Yatish Khurana was not examined as witness by the petitioner-Company in support of its contentions, inquiry proceedings, if any, conducted by petitioner-Company cannot be said to have been proved in accordance with law for the reasons that Shri Yatish Khurana, Inquiry Officer, was the best person to depose before the Court that whether proper procedure was followed at the time of inquiry or not.

12. Similarly, Tribunal below came to the conclusion that Inquiry Officer had not made known to respondent-workman as to what procedure he was to follow while conducting the inquiry. In this regard learned Tribunal, on the basis of material made available to it, came to the conclusion that no statement of respondent-workman had been recorded that he did not choose/opt to get the services of Defence Assistant despite the fact that in this regard, request

was made by respondent-workman. Similarly, Tribunal came to the conclusion that there is nothing in the inquiry proceedings that respondent-workman had agreed to get conducted the inquiry proceedings in English, which he was unable to understand. Learned Tribunal below, while placing reliance upon school leaving certificate Ex.P-2, concluded that it stands duly proved on record that the respondent-workman had studied up to 3rd standard and as such it can be safely inferred that he was unable to understand English. Tribunal below, while allowing claim put forth on behalf of the respondent-workman, also came to the conclusion that no counter evidence has been led by petitioner-Company in order to show that respondent-workman was qualified enough to know English language and as such great prejudice was caused to him.

13. At this stage, it may be noticed that petitioner-Company, by way of placing entire inquiry proceedings, made an attempt to prove before Tribunal below that copies of day to day proceedings, including statements of the witnesses, were supplied to the respondent-workman, on which he appended his signatures, but learned Tribunal was of the view that it was obligatory upon the Inquiry Officer to have supplied to the respondent-workman, copies of those proceedings. For the failure of the Inquiry Officer to supply the copies, great prejudice has been caused to the respondent-workman, who was unable to defend himself in the enquiry, which was conducted against him.

14. Similarly, Tribunal concluded that perusal of Ex.PB, copy of charge-sheet, itself suggests that no documents as well as list of witnesses of the Management were supplied to respondent-workman and as such, it cannot be said that due and proper procedure was followed by the petitioner-Company while conducting disciplinary proceedings against respondent-workman. Apart from above, Tribunal also observed that it is revealed from the record that Management examined witnesses i.e. Ashok Dhiman (MRW-1), Ved Ram (MRW-2), Rajinder Tahkur (MRW-3) and Bhim Dutt (MRW-4), during enquiry proceedings. Perusal of their statements clearly shows that the same were recorded in question and answer form, which were in English. Hence, it cannot be said that the respondent-workman was afforded opportunity to cross-examine them in question and answer form, which were admittedly in English.

15. Learned Tribunal, after perusing the inquiry record, also found that one Shri S.C. Katoch, who had conducted inquiry proceedings on behalf of the Management, was also not examined as a witness and as such Management was not able to prove inquiry proceedings, which as per them was conducted in most fair manner after following due procedure. As per Tribunal, had the Management examined Shri S.C. Katoch, Inquiry Officer, it could have been known that whether the Inquiry Officer had followed the proper procedure while conducting the inquiry or not.

16. If the impugned award passed by the learned Tribunal below is read in its entirety, it clearly emerge that following factors weighed heavily with the Tribunal while allowing the claim of the respondent-workman:-

1. Charge sheet served upon the respondent-workman was not accompanied with any document or list of witnesses.
2. Respondent-workman was not informed about the procedure which was to be followed by the Inquiry Officer in order to conduct the inquiry.
3. Inquiry proceedings were conducted in English by Inquiry Officer fully knowing that respondent-workman is only studied up to 3rd standard.
4. Despite there being specific request by the respondent-workman, he was not provided with Defence Assistant during inquiry proceedings.
5. Shri Yatish Khurana, Inquiry Officer was not examined by the petitioner-Company before the Tribunal below, who could prove that inquiry proceedings placed on record by the petitioner-Company was conducted in fair and proper manner by following due procedure as laid down.

6. Lastly petitioner-Company failed to examine Shri S.C. Katoch, representative of the Management, who could depose before the Tribunal below that Inquiry Officer had followed due procedure while conducting inquiry.

7. No proper opportunity was afforded to respondent-workman to cross-examine the witnesses of petitioner-Company since they all were examined and their statements were recorded in question and answer form, which was in English

17. On the aforesaid points, as have been culled out by this Court, after reading award of the Labour Court in its entirety, learned Tribunal below accepted the claim of the respondent-workman and held him entitled for reinstatement with benefit of continuity of service and seniority with full back wages.

18. Now, this Court would be examining the aforesaid illegalities pointed out by Tribunal in the light of the defence taken by the petitioner-Company before learned Tribunal below as well as submissions having been made on behalf of Shri Rahul Mahajan, learned counsel representing the petitioner-Company before this Court.

19. If, in nutshell, written statement of petitioner-Company is perused, it emerge that the petitioner-Company submitted before the Tribunal below that inquiry was conducted in most proper and fair manner and due opportunity of being heard was afforded to the respondent-workman by the Inquiry Officer and as such there is no violation of principle of natural justice. Petitioner-Company also claimed that since charge against the respondent-workman was duly proved and thereafter on having served a notice upon him and receiving reply, his services were discharged by imposing lesser punishment. Petitioner-Company also contended before the Tribunal below that respondent-workman was served with charge-sheet alongwith documents and he was afforded opportunity to examine defence witnesses and further opportunity to cross-examine the witnesses and it cannot be said that Inquiry Officer had not followed the prescribed procedure. Close scrutiny of written statement filed on behalf of petitioner-Company suggests that it stated before the Tribunal that since respondent-workman at no point of time objected during inquiry proceedings before the Inquiry Officer that the same should not be conducted in English. At no point of time he made any request to authorities to conduct inquiry in Hindi and as such there was no occasion for them to conduct the enquiry proceedings in Hindi.

20. Shri Rahul Mahajan, learned counsel representing the petitioner-Company, vehemently argued that bare perusal of impugned award dated 30th June, 2010 suggests that the same is wrong, illegal, bad in law based upon surmises and conjectures, non-appreciation and mis-appreciation of oral and documentary evidence on record and as such same deserves to be quashed and set aside.

21. Mr.Mahajan, further contended that learned Tribunal has miserably failed to appreciate that respondent-workman was issued charge-sheet in respect of misconduct, which was serious in nature of inciting, instigating the workers of the petitioner-Company to restrain from work, abetting, organizing meeting and demonstration inside the petitioner-company/industrial establishment with a view to intimidate the Management so that it concedes to the unreasonable, unjustified demand of the workmen, shouting and slogans against the executive of the company in abusive defamatory language and to resort to illegal tool down/strike and to threaten the workers to stop works, as such he was rightly dismissed from service that too after completion of disciplinary proceedings, which were conducted in most fair and proper manner as is evident from the complete inquiry proceedings placed on record by the petitioner-Company.

22. Mr.Mahajan further contended that once respondent-workman failed to reply to the charge sheet, he was given reminder and ultimately he filed reply, which was found unsatisfactory and therefore domestic inquiry was conducted, wherein charges in respect of the charge-sheet Ex.RB stood duly proved and thereafter 2nd show cause notice was issued and services of respondent-workman were dispensed with after receipt of his reply, which was found unsatisfactory.

23. Mr.Mahajan further contended that learned Tribunal below has fallen in grave error while not appreciating that it had very limited power under the Act to interfere in the matter of punishment imposed upon the delinquent workers as far as penalty qua the major misconduct is concerned. In the present case, it stood duly proved on record that respondent-workman insisted or abetted his fellow workers in the Company against the Management and as such there is no illegality and infirmity in dismissal order issued against him by the Management which was passed after following due procedure of law. While adverting to the findings returned by the Tribunal below that Defence Assistant was not made available to respondent-workman despite his request, Mr.Mahajan strenuously argued that aforesaid finding is contrary to documentary and oral evidence available on record because respondent-workman at no point of time ever asked to be represented through the Defence Assistant. To substantiate his aforesaid arguments, he invited the attention of this Court to the cross-examination conducted on respondent-workman, wherein he specifically admitted that he had not given in writing to the Inquiry Officer to provide a Defence Assistant but orally requested him. Similarly, Mr.Mahajan stated that right to be represented in an inquiry by Defence Assistant is not a statutory right, rather, the same depends upon the Rules and Regulations. Thus, it is evident from the statement of respondent-workman himself, who appeared as PW-1, that at no point of time he ever made any request to be represented through a Defence Assistant and as such learned Tribunal below has fallen in grave error while concluding that no Defence Assistant was made available to respondent-workman on his behalf.

24. Similarly, Mr.Mahajan stated that learned Tribunal failed to appreciate that just, fair and proper domestic inquiry was conducted, wherein day to day inquiry proceedings were duly signed by respondent-workman, the representatives of petitioner-Company and Inquiry Officer. He also invited the specific attention of this Court to the cross-examination conducted on respondent-workman wherein he stated that *"charge sheet was received and reply was given".* In his cross-examination, respondent-workman also admitted that *"when inquiry was started, I signed every day inquiry proceedings and all the proceedings bear my signatures as the Inquiry Officer used to take my signatures in the proceedings every day."* Similarly, Mr.Mahajan invited the attention of this Court to the admission made by respondent-workman in cross-examination, wherein he stated that "*it is correct that he was I was informed by the Management about the Enquiry Officer and I received the letter."*

25. Mr.Mahajan forcefully contended that since respondent-workman in his cross-examination himself admitted his signatures on the cross-examination of the witnesses, Suresh, Mukesh at point B & C, findings returned by the learned Tribunal below cannot be said to be based upon proper appreciation of evidence, wherein it has been concluded that no opportunity of cross-examination was afforded to respondent-workman while cross-examining the witnesses produced on behalf of the petitioner-Company. Mr.Mahajan made this Court to travel through inquiry proceedings Ex.RD-1 to RD-16 to demonstrate that on each and every order respondent-workman has appended his signatures, meaning thereby that he was made aware of each and every order passed on day to day basis during inquiry proceedings.

26. Mr.Mahajan also contended that bare perusal of proceedings, as referred hereinabove, nowhere suggests that at any point of time, objection, if any, was raised by the respondent-workman with regard to conducting of disciplinary proceedings in English.

27. This Court, after hearing aforesaid submissions having been made on behalf o of Mr.Mahajan as well as documents referred by him, is of the view that learned Tribunal has fallen in error while concluding that no fair and proper domestic inquiry was held, wherein day to day inquiry proceedings were not supplied to respondent-workman because this Court had an occasion to peruse Ex.RD-1 to RD-16 i.e. inquiry proceedings, perusal whereof clearly suggests that on each and every day proceedings, respondent-workman had appended his signatures alongwith Inquiry Officer and other relevant persons. Similarly, this Court nowhere finds that at any point of time respondent-workman raised objection with regard to holding of inquiry in English. If respondent-workman had any difficulty in understanding proceedings in English, he

could always lodge his protest in writing to the Inquiry Officer with a request to conduct inquiry in Hindi but same was not done by him. Similarly, careful perusal of cross-examination conducted on this witness itself suggests that when inquiry was started respondent-workman signed everyday inquiry proceedings and he was also informed by the Management with regard to appointment of Inquiry Officer. Respondent-workman categorically admitted in his cross-examination that he received letter in this regard. Hence, in view of candid admission having been made on behalf of respondent-workman, this Court really finds it difficult to accept the conclusion drawn by the learned Tribunal below, while allowing the claim of the respondent-workman, wherein it concluded that inquiry was not conducted in proper and fair manner and no opportunity of being heard was afforded to respondent-workman. Similarly, respondent-workman himself in his cross-examination admitted that at no point of time he i.e. PW-1 made request to be represented through the Defence Assistant. In his cross-examination he specifically admitted that he never made any request in writing but orally he requested the Inquiry Officer, but after perusing the entire evidence and proceedings, this Court really find it difficult to accept the version put forth on behalf of respondent-workman that he had orally asked the Inquiry Officer to provide him Defence Assistant.

28. Mr.Mahajan vehemently argued that the impugned award is not based on the correct appreciation of oral and documentary evidence produced on the record. He also stated that bare perusal of impugned award itself suggests that the same is contrary to the facts as well as material placed on record by the petitioner-Company and as such same deserves to be quashed and set aside. Mr.Mahajan, with a view to demonstrate that learned Tribunal has fallen in grave error while returning the findings contrary to record, invited the attention of this Court to various documents available on record. Apart from above, Mr.Mahjajan made various submissions to prove that the impugned judgment is perverse and is a result of misreading and misinterpretation of facts as well as of law, which are not being reproduced for the sake of brevity and same would be dealt with specifically by this Court while examining the correctness and genuineness of the impugned award passed by the Tribunal below.

29. Mr.Mahajan further argued that respondent-workman was not able to prove on record that he was not gainfully employed during period of termination and as such learned Tribunal below had no reason to grant him full back wages while holding him entitled for reinstatement.

30. Mr. Mahajan stated that respondent-workman himself admitted that during period of termination he was doing agricultural work at home, meaning thereby that he was gainfully employed in terms of the aforesaid judgment.

31. In this regard Mr.Mahajan placed reliance on ***North-East Karnataka Road Transport Corporation vs. M.Nagangouda, (2007)10 SCC 765***, wherein the Hon'ble Supreme Court has held as under:-

> *"17. On the said question, we are unable to accept the reasoning of the Labour Court that the income received by the respondent from agricultural pursuits could not be equated with income from gainful employment in any establishment. In our view, "gainful employment" would also include self- employment wherefrom income is generated. Income either from employment in an establishment or from self-employment merely differentiates the sources from which income is generated, the end use being the same. Since the respondent was earning some amount from his agricultural pursuits to maintain himself, the Labour Court was not justified in holding that merely because the respondent was receiving agricultural income, he could not be treated to be engaged in "gainful employment".*

32. Per contra, Mr.Anuj Gupta vehemently argued that bare perusal of the award passed by Tribunal below itself suggest that same is based upon correct appreciation of the evidence adduced on record by the respective parties and as such no interference, whatsoever, of this Court warranted in the facts and circumstances of the case. While referring to the impugned

award, Mr.Gupta forcefully contended that each and every aspect of the matter has been dealt with meticulously by the Tribunal below while answering the reference referred to by the appropriate Government and as such present petition deserves to be dismissed being devoid of merit. Mr.Gupta also reminded this Court of its limited powers under Article 226 of the Constitution of India to re-appreciate evidence as well as findings of fact recorded by the learned Tribunal below while examining the genuineness and correctness of the petition preferred under Article 226 of the Constitution of India.

33. This Court is conscious of the fact that it has very limited jurisdiction to re-appreciate the findings of fact returned by learned Tribunal below, while exercising its jurisdiction under Article 226 of the Constitution of India, in terms of judgment passed by the Hon'ble Apex Court in ***Bhuvnesh Kumar Dwivedi vs. M/s.Hindalco Industries Ltd. 2014 AIR SCW 315,*** wherein the Court held as under:-

> *"16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. nA error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.*
>
> *17. The judgments mentioned above can be read with the judgment of this Court in Harjinder Singh's case (supra), the relevant paragraph of which reads as under:*
>
> > *21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and / or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare*

of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:

> *10.... The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State.*

18. A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower Courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant."[Emphasis added]

34. However, careful perusal of the aforesaid judgment suggests that if Court, while examining the award, comes to the conclusion that same is perverse and is not based upon the correct appreciation of evidence/material available on record, it can look into the evidence with a view to ensure that the award passed by the Tribunal below is not perverse and same is based upon correct appreciation of evidence. In the present case, this Court, after hearing the submissions having been made on behalf of petitioner-Company and perusing documentary evidence available on record, is of the firm view that learned Tribunal below has fallen in grave error while not appreciating the material evidence adduced on record by the petitioner-Company to substantiate that due and proper procedure was followed by the Management of the petitioner-Company before dismissing respondent-workman.

35. At this stage, this Court solely with a view to examine correctness of the award passed by learned Tribunal below deems it fit to reproduce here-in-below the statement of PW-1 respondent-workman:

> *"I was appointed as Operator in the respondent company since January, 1989, as per my appointment letter Ex.P-1. I was removed from the service on 20.1.1999 after holding the enquiry. I am educated upto 3rd standard, as per my certificate Ex.P-2. Our union was formed in 1997 and I was elected as a Joint Secretary. Again said the union was already existing in the factory prior to my joining. We were demanding the over time as per law as the company was not making the payment as per norms. We have gone with this demand to the Labour Officer who did nothing. The strike was called for non payment of over time. The matter was compromised on 20.11.1998 as per compromise Mark-X. (Objected to). Rs.1500/- were paid to us and we were asked to join the duties. Objected to nothing has been mentioned in the settlement. After two months the re-conciliation enquiry was instituted against me and Factory Manager, Mr.Yatish Khurana was the Inquiry Officer. No procedure of enquiry was explained to me by the Inquiry Officer. No document was given to me by the Inquiry Officer even no document was supplied alongwith the Charge-sheet. No list of witness was supplied to me. No witness was recorded in my presence. I was not afforded any opportunity to examine my witnesses. My statement was not recorded in the enquiry. I am unable to read the enquiry proceedings given to me. No quarrel had taken place during the strike period. I had given application Mark-X-1 to the Inquiry Officer. The Inquiry Officer had not supplied me the hindi version of the show cause notice. I had given the reply of the show cause notice which is the original and is Ex.P-3. Similar charge sheet was given to Pammi Dutt, who was the President of the Union. Pammi Dutt*

was retained after enquiry, but I was removed. Enquiry of Pammi was also conducted. No proper enquiry was conducted against me. All the allegations leveled against me are false. I may be re-instated with all benefits.

Xxxxxxx xxxxxxx xxxxxxx

All the documents Ex.R-1 to Ex.R-14 are received by me and bears my signatures. I was aware about my salary and could read the figure. Volunteered I could not read that what is written in Ex.R-1 to Ex.R-14. It is correct that I received the charge-sheet and given the reply, but it had not written by me that I am unable to read English and I may be given the Hindi version of the document. When the enquiry was started, I signed the every day enquiry proceeding. All the proceedings bear my signatures as the Inquiry Officer was taking the signatures on the proceedings every day. Volunteered I told the Inquiry Officer that it may be written in Hindi, as I could not understand English. There is no document vide which I requested the Inquiry Officer for Hindi version except letters dated 12.1.1999 and 15.1.1999. It is correct that I signed the application in English on 12.1.1999 which is at Point 'A'. It is wrong to suggest that I was asked by the Inquiry Officer for my evidence. It is wrong to suggest that I was given due opportunity to produce my evidence. It is also wrong that I failed to produce my evidence. It is wrong that the management has supplied the list of witnesses to the Inquiry Officer as well as to me. It is correct that I received the 2nd show cause notice dated 6.1.1999 after the conclusion of the enquiry, which is Ex.R-15. I have received the second show cause notice in Hindi when I asked for the same, which is Ex.R-16. It is correct that I was given the termination order in Hindi as well as English, which is Ex.R-17 and Ex.R-18. No enquiry report in Hindi was received, but enquiry report in English was received. My application for appointment is Ex.R-19 which is signed by me. I cannot state that in the settlement, it was decided that only the suspension orders against me and the President Pammi Dutt were reviewed, but the disciplinary enquiry would continue. I had not signed the settlement. No letter was received from Labour Officer regarding illegality of strike. The letter is Mark-RX. It is correct that I was informed by the management about the Inquiry Officer and I received the letter. Suresh and Mukesh witness were not examined in my presence. It is also wrong that the stated before the Inquiry Officer that they were threatened by me. I admit my signatures on the cross-examination of the witnesses at Point 'B' and 'C'. Volunteered that I had not cross-examined the witnesses. I admit my signatures in all the enquiry proceedings. Volunteer that I was signing the documents as and when asked by the Inquiry Officer. I had not given any complaint against the Inquiry Officer and the management to the Labour Officer that my signatures are being taken forcibly by the Inquiry Officer. Leave application Ex.R-20 is signed by me, which is for leave. Volunteer I got the application written from other colleagues. It is correct that I had not mentioned in my petition that I was removed and Pammi Datt was kept in service. My petition is in English, but signed by me, but I do not know what is written in my petition. No suit was filed against me and Pammi Dutt restraining us not to interfering us in the affairs of the workers. Copy of which is Mark RY. It is wrong that at the time of strike I was simply member and not the Joint Secretary. It is wrong to suggest that proper enquiry was conducted against me and proper opportunity to cross-examine the witnesses were given to me. I had not given in writing to the Inquiry Officer to provide me Defence Assistant but orally I requested the Inquiry Officer. It is wrong that I was removed due to my misconduct."

36. Bare perusal of the aforesaid statement of PW-1 itself suggests that learned Tribunal has fallen in grave error while returning findings that irregularities (as have been numbered above) were committed by the Inquiry Officer while conducting disciplinary proceedings. Similarly, this Court after perusing the statement, as referred to above, finds that

respondent-workman never objected to the appointment of Mr.Yatish Khurana as Inquiry Officer. Rather, in cross-examination he himself admitted that he was informed by the Management about the Inquiry Officer and he had received the letter. Had he any objection in the appointment of Yatish Khurana as Inquiry Officer, he could have then and there objected to the same by making written communication to the Management. This Court also finds that respondent-workman participated in each and everyday inquiry and signed each and everyday inquiry proceedings. Vide letter dated 12.1.1999, workman objected to the proceedings conducted by the Inquiry Officer in English but by that time inquiry proceedings had already come to an end. After concluding the inquiry proceedings, respondent-Company had issued second show cause notice dated 6.1.1999 directing therein the respondent-workman to explain that why he be not punished for major mis-conduct as has been concluded by the Inquiry Officer. Issuance of show cause notice dated 6.1.1999 itself suggests that inquiry proceedings had come to an end before 6.1.1999 and as such there was no occasion, whatsoever, for respondent-workman to write letter dated 12.1.1999 requesting therein to conduct inquiry proceedings in English. Rather perusal of letter dated 12.1.1999 compel this Court to infer that it was after thought by the respondent-workman to create evidence in his favour that petitioner-Company purposely to its advantage conducted proceedings in English fully knowing well that respondent-workman does not know English. Similarly, this Court noticed that on letter dated 12.1.1999, respondent-workman has appended his signatures in English. In cross-examination, respondent-workman himself admitted that there is no document vide which he requested the Inquiry Officer to conduct proceedings in Hindi version except letters dated 12.1.1999 and 15.1.1999. This Court has already discussed hereinabove that letter dated 12.1.1999 had no relevance because by that time inquiry proceedings had already been concluded. Similarly, this Court finds that learned Tribunal has fallen in error while concluding that no opportunity of producing evidence was afforded to respondent-workman by the Inquiry Officer. It is not understood that how Inquiry Officer could compel the delinquent employee to produce evidence. It is not the case of the respondent-workman that he was prevented by the Inquiry Officer for leading evidence in his support, rather perusal of record suggests that Inquiry Officer afforded reasonable opportunity to respondent-workman to produce the evidence, which he failed to produce. But delinquent official himself stated that he does not want to produce any evidence.

37. Now, adverting to another illegality having been pointed out by Tribunal that Inquiry Officer was not examined, this Court is of the view that once Management by way of placing on record Ex.RD-1 to RD-16 had made available complete inquiry proceedings before the Tribunal, which was admittedly signed by the respondent-workman, there was no necessity, if any, for Management to site Mr.Yatish Khurana as a witness in the case. Respondent-workman in his statement has categorically admitted that he appended his signatures on each and every day's proceedings and he identified all the signatures of Mr.Yatish Khurana in inquiry proceedings Ex.RD-1 to RD-16 as such there was no question of adverse inference having been drawn against the petitioner-Company for not citing Mr.Yatish Khurana as witness. This Court, while perusing inquiry proceedings, also found that respondent-workman has signed all the exhibits in English. Similarly, leave application (Ex.R-20) sent by petitioner is also written and signed in English and as such this Court finds it difficult to be in agreement with the findings returned by the learned Tribunal below that the petitioner-Company knowing fully well that respondent-workman did not know English, conducted inquiry proceedings in English. Rather, petitioner-Company by placing on record certain documents, especially Ex.R-20 has been able to prove on record that respondent-workman use to write, sign and could read English and was aware about the documents, which were in English and similarly second show cause notice dated 6.1.1999, which was issued to the respondent-workman, was in English. But interestingly at no point of time, during proceedings of the case, respondent-workman raised issue with regard to conducting of proceedings in English or making available the services of Defence Assistant. It stands admitted in his cross-examination by respondent-workman that charge-sheet was received and reply was made by him and he signed every day inquiry proceedings.

38. In view of his specific admission that he had not made any written request to make available the services of Defence Assistant and to conduct inquiry in Hindi, this Court really finds it difficult to accept the findings returned by the learned Tribunal below and this Court after perusing the record made available is of the view that learned Tribunal below has misread and misinterpreted the evidence led on record which was sufficient to conclude that petitioner-Company dismissed the respondent-workman after following due procedure of disciplinary proceedings.

39. This Court, after carefully perusing the evidence available on record as well as submissions having been made on behalf of learned counsel representing the parties, is not in a position to concur with the findings returned by the Tribunal below that Inquiry Officer committed illegalities while conducting disciplinary proceedings because bare perusal of statement made by PW-1 i.e. respondent-workman, itself suggests that at no point of time he raised issue, if any, with regard to holding of inquiry in Hindi during proceedings. He categorically admitted in cross-examination that he had not sent any communication to Inquiry Officer praying therein for providing Defence Assistant as well holding of inquiry proceedings in Hindi and as such this Court is of the view that learned Tribunal below failed to appreciate the evidence on record in its right perspective, rather it drawn its own inferences and conclusions which are admittedly contrary to the records as has been discussed in detail hereinabove.

40. Otherwise also, Defence Assistant cannot be claimed as a matter of right by the delinquent official. Rather, decision, if any, with regard to providing of Defence Assistant depends upon the standing order of a particular organization/management. In the present case, this Court was unable to lay its hands to any document placed on record by respondent-workman suggestive of the fact that management in its standing order had specific provisions of providing Defence Assistant to a delinquent official during disciplinary proceedings. Similarly, in the absence of specific prayer having been made on behalf of delinquent official to conduct proceedings in Hindi, there was no occasion for Inquiry Officer to conduct proceedings in English, on which admittedly respondent-workman appended his signatures daily without any demur. Though respondent-workman raised issue with regard to appointment of Officer of Management as Inquiry Officer but interestingly there is nothing on record suggestive of the fact that delinquent official at no point of time raised issue of malafide, if any, against Inquiry Officer and as such this Court sees no illegality in appointing officer of the Management as an Inquiry Officer.

41. At this stage, this Court, in support of aforesaid reasoning/findings returned by it while holding that impugned award passed by the learned Tribunal is not based upon correct appreciation of facts as well as law, intends to place reliance upon following judgments passed by the Hon'ble Apex Court:-

42. In ***South Indian Cashew Factories Workers' Union vs. Kerala State Cashew Development Corpn.Ltd. and Others, (2006) 5 SCC 302,*** the Hon'ble Apex Court has held as under:-

> *"10. Learned counsel for the appellant submitted that the fact that the enquiry officer was an officer of the management itself affected the fairness of the enquiry. Further his biased approach was evident from the unnecessary observations made by him. He, therefore, contended that the view of the learned Single Judge was the correct one and should be restored. Learned counsel for the respondent No.1 on the other hand supported the impugned order of the High Court.*
>
> *11. In Delhi Cloth and General Mills Co. Ltd. v. Labour Court, (1970) 1 LLJ 23 (SC) this Court has held that merely because the Enquiry Officer is an employee of the Management it cannot lead to the assumption that he is bound to decide the case in favour of the Management.*
>
> *12. In Saran Motors (P) Ltd. v. Vishwanath, (1964)2 LLJ 139 (SC) this Court held as follows: (LLJ p.141)*

"It is well-known that enquiries of this type are generally conducted by officers of the employer companies and in the absence of any special bias attributable of a particular officer, it has never been held that the enquiry is bad just because it is conducted by an officer of the employer."

13. *Therefore, finding of the Labour Court that enquiry was vitiated because it was conducted by an officer of the Management cannot be sustained.*

14. *The only other ground found by the Labour Court against the enquiry officer is that he made some unnecessary observations and, therefore, he was biased. The plea that enquiry officer was biased was not raised during the enquiry or pleadings before the Labour Court or in earlier proceedings before the High Court. The bias of the enquiry officer has to be specifically pleaded and proved before the adjudicator. Such a plea was significantly absent before the Labour Court. We also note that the Labour Court itself found that the enquiry officer relied on the evidence adduced in the enquiry and its findings were not perverse. After such a finding, even if he has stated some unwarranted observations, it cannot be stated that report is baised. In TELCO v. S.C. Prasad, (1969) 3 SCC 372 this Court held that : (SCC pp.380-81, para 13)*

"13. Industrial Tribunals, while considering the findings of domestic enquiries, must bear in mind that persons appointed to hold such enquiries are not lawyers and that such enquiries are of a simple nature where technical rules as to evidence and procedure do not prevail. Such findings are not to be lightly brushed aside merely because the enquiry officers, while writing their reports, have mentioned facts which are not strictly borne out by the evidence before them."

15. *In this case for finding the employee guilty, the enquiry officer relied on the evidence adduced in the enquiry and Labour Court itself found that the findings were not perverse. In such circumstances, the preliminary order of the Labour Court setting aside the enquiry on the ground that enquiry was conducted by an officer of the Management and he had made some observations in the enquiry report which were not warranted in the case is not a vitiating factor and these reasons are not sufficient to set aside the enquiry.*

16. *The Labour Court had earlier held that the enquiry was properly held and there was no violation of the principles of natural justice and that the findings were not perverse. The vitiating facts found by the Labour Court against the enquiry are erroneous and are liable to be set aside. If enquiry is fair and proper, in the absence of any allegations of victimization or unfair labour practice, the Labour Court has no power to interfere with the punishment imposed. Section 11A of the Act gives ample power to the Labour Court to re-appraise the evidence adduced in the enquiry and also sit in appeal over the decision of the employer in imposing punishment. Section 11-A of the Industrial Disputes Act is only applicable in the case of dismissal or discharge of a workman as clearly mentioned in the Section itself. Before the introduction of Section 11-A in Indian Iron and Steel Co. Ltd. Workmen (1958) SCR 667 this Court held that the Tribunal does not act as a Court of appeal and substitute its own judgment for that of the Management and that the Tribunal will interfere only when there is want of good faith, victimisation, unfair labour practice, etc. on the part of the management. There is no allegation of unfair labour practice, victimisation etc. in this case. The powers of the Labour Court in the absence of Section 11-A is illustrated by this Court in Workmen v. Firestone Tyre and Rubber Co.of India (P) Ltd., (1973) 1 SCC 813. When enquiry was conducted fairly and properly, in the absence of any of the allegations of victimisation or malafides or unfair labour practice, Labour Court has no power to interfere with the punishment imposed by the management. Since Section 11-A is*

not applicable, Labour Court has no power to re-appraise the evidence to find out whether the findings of the enquiry officer are correct or not or whether the punishment imposed is adequate or not. Of course, Labour Court can interfere with the findings if the findings are perverse. But, here there is a clear finding that the findings are not perverse and principles of natural justice were complied with while conducting enquiry."

43. Reliance is also been placed upon the judgment of the Hon'ble Supreme Court in ***Bharat Petroleum Corporation Ltd. Vs. Maharashtra General Kamgar Union and Others, (1999)1 SCC 626,*** wherein the Hon'ble Apex Court has held as under:-

"25. Section 10 provides for duration and modification of Model Standing Orders. The Standing Orders finally certified under the Act cannot be modified except on an agreement between the employer and the workmen or a Trade union or other representative body of the workmen until the expiry of six months from the date on which they came into operation.

26. Before coming to the core question, we may first consider the right of an employee to be represented in the disciplinary proceedings and the extent of the right.

27. The basic principle is that an employee has no right representation in the departmental proceedings by another person or a lawyer unless the Service Rules specifically provide for the same. The right to representation is available only to the extent specifically provided for in the Rules. For example, Rule 1712 of the Railway Establishment Code provides as under:

> *"The accused railway servant may present his case with the assistance of any other railway servant employed on the same railway preparatory to retirement) on which he is working.*

28. The right to representation, therefore, has been made available in a restricted way to a delinquent employee. He has a choice to be represented by another railway employee, but the choice is restricted to the Railway on which he himself is working, that is, if he is an employee of the western Railway, his choice would be restricted to the employees working on the Western Railway. The choice cannot be allowed to travel to other Railways.

29. Similarly, a provision has been made in Rule 14(8) of the Central Civil Services (Classification, Control & Appeal) Rules, 1965, where too, an employee has been given the choice of being represented in the disciplinary proceedings through a co-employee.

20. In N.Kalindi v. Tata Locomotive & Engineering Co.Ltd., AIR 1960 SC 914, a Three-Judge Bench observed as under:-

> *"Accustomed as we are to the practice in the courts of law to skilful handling of witnesses by lawyers specially trained in the art of examination and cross-examination of witnesses, or first inclination is to think that a fair enquiry demands that the person accused of an act should have the assistance of some person, who even if not a lawyer may be expected to examine and cross-examine witnesses with a fair amount of skill. We have to remember however in the first place that these are not enquiries in a court of law. It is necessary to remember also that in these enquiries, fairly simple questions of fact as to whether certain acts of misconduct were committed by a workman or not only fall to be considered, and straightforward questioning which a person of fair intelligence and knowledge of conditions prevailing in the industry will be able to do will ordinarily help to elicit the truth. It may often happen that the accused workman will be best suited, and fully able to cross-examine the witnesses who have spoken against him and to examine witnesses in his favour.*

It is helpful to consider in this connection the fact that ordinarily in enquiries before domestic tribunals the person accused of any misconduct conducts his own case. Rules have been framed by Government as regards the procedure to be followed in enquiries against their own employees. No provision is made in these rules that the person against whom an enquiry is held may be represented by anybody else. When the general practices adopted by domestic tribunals is that the person accused conducts his own case, we are unable to accept an argument that natural justice demands that in the case of enquiries into a charge-sheet of misconduct against a workman he should be represented by a member of his Union. Besides it is necessary to remember that if any enquiry is not otherwise fair, the workman concerned can challenge its validity in an industrial dispute.

Our conclusion therefore is that a workman against whom an enquiry is being held by the management has no right to be represented at such enquiry by a representative of his Union: though of course an employer in his discretion can and may allow his employee to avail himself of such assistance."

(Emphasis supplied)

31. In another decision, namely Dunlop Rubber Co. (India) Ltd. v. Workmen, AIR 1965 1392 it was laid down that there was no right to representation in the disciplinary proceedings by another person unless the Service Rules specifically provided for the same."

44. In ***D.G. Railway Protection Force and Others vs. K.Raghuram Babu, (2008)4 SCC 406,*** the Hon'ble Supreme Court has held as under:-

"9. It is well settled that ordinarily in a domestic/departmental inquiry the person accused of misconduct has to conduct his own case vide N. Kalindi v. Tata Locomotive and Engg.Co. Ltd., AIR 1960 SC 914. Such an inquiry is not a suit or criminal trial where a party has a right to be represented by a lawyer. It is only if there is some rule which permits the accused to be represented by someone else, that he can claim to be so represented in an inquiry vide Brook Bond India (P) Ltd. v. Subba Raman, (1961)2) LLJ 417(SC)."

45. In ***State of Haryana and Another vs. Rattan Singh, (1977)2 SCC 491,*** the Hon'ble Apex Court has held as under:-

"4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. Ail materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding,even though of a domestic tribunal, cannot be held good. However, the courts below mis-directed themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The 'residuum' rule to which counsel for the respondent referred, based upon certain passengers from American jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence not in the sense of the technical rules governing

regular court proceedings but in a fair common-sense way as men of understanding and wordly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a ending is certainty available for the court to look into because it amounts to an error of law apparent on the record. We find, in this case, that the evidence of Chamanlal, Inspector of the flying squad, is some evidence which has elevance to the charge leveled against the respondent. Therefore, we are unable to hold that the order is invalid on that ground."

46. In ***Workmen of Balmadies Estates vs. Management, Balmadies Estates and Others, (2008)4 SCC 517,*** the Hon'ble Apex Court held as under:-

"10. It is fairly well settled now that in view of the wide power of the Labour Court it can, in an appropriate case, consider the evidence which has been considered by the domestic Tribunal and in a given case on such consideration arrive at a conclusion different from the one arrived at by the Domestic Tribunal. The assessment of evidence in a domestic enquiry is not required to be made by applying the same yardstick as a Civil Court could do when a lis is brought before it. The Indian Evidence Act, 1872 (in short "the Evidence Act") is not applicable to the proceeding in a domestic enquiry so far as the domestic enquiries are concerned, though principles of fairness are to apply. It is also fairly well settled that in a domestic enquiry guilt may not be established beyond reasonable doubt and the proof of misconduct would be sufficient. In a domestic enquiry all materials which are logically probative including hearsay evidence can be acted upon provided it has a reasonable nexus and credibility."

47. In ***Om Parkash vs. Delhi Transport Corporation, 2016 LLR 683***, the Hon'ble Delhi High Court has held as under:-

"17. The materials on record by way of award show that the Tribunal was unduly influenced only by the evidence of the workman who deposed on oath. Furthermore, the Tribunal doubted the statement on behalf of the DTC by its witness that the checking staff found only 16 passengers in the bus without ticket. These, in the opinion of the Tribunal, were insufficient evidence to establish guilt. The Tribunal also based its findings on the submission of the workman that if he could sign the challan under protest then he could have also put signatures on the statement of the passengers by mentioning that it was "under protest". The absence of these and the fact that the DTC examined only one witness was held to be insufficient to bring home the charge.

18. The management's witness had deposed that the passengers were divided into two groups –as noted earlier. One passenger from each of these groups – 5 and 11 respectively, had stated in writing that money had been collected from the passengers but the appellant did not issue them tickets. Copies of those statements were produced as Ex.AW-1/R1 and AW-1/R2. The challan too was exhibited as Ex.1/19. There were 16 other documents; besides, there were 16 unpunched tickets, Ex.AW-1/1 to exhibit AW-1/16. The checking staff's report dated 14.10.1991 is also on the record. The management witness clearly stated during the course of his deposition before the Tribunal that 16 passengers had boarded the bus from Kalkaji temple and that they had not been issued tickets despite having paid for them. There were two members of the checking staff, i.e. Kishan Lal Saluja, ATI and Om Prakash, ATI (not to be confused with the appellant, who was a conductor). Om Prakash, ATI deposed in the course of the proceedings under Section 33(2)(b).

19. Given the clear enunciation of law in Rattan Singh (supra) that the Court has to be alive to the realities in certain circumstances (and not insist upon the strict rules of evidence and procedure which govern other Court proceedings)the conclusion of the

Tribunal that misconduct had not been proved, in our opinion, could not have been sustained. As held in Vijay Kumar Tiwari (supra), under Section 33(2)(b), the Tribunal could not have insisted on strict proof of facts – much less insisted upon production of the original passengers. The checking staff had clearly deposed in the proceedings and another member of the checking staff had clearly deposed in the domestic enquiry. The appellant did not attribute mala fideson the part of members of the checking staff. Furthermore, this Court notices that the appellant had previously been cautioned repeatedly and even censored. Apparently, on more than one occasion, disciplinary proceedings were initiated for similar charges.

20. Having regard to all these circumstances, this Court is of the opinion that the conclusion of the learned Single Judge that the Tribunal fell into error in refusing the approval, cannot be found fault with. The appeal consequently fails and is dismissed with no order as to costs."

48. In ***Divisional Controller, Karnataka State Road Transport Corporation vs. M.G. Vittal Rao, (2012)1 SCC 442,*** the Hon'ble Apex Court has held as under:-

"LOSS OF CONFIDENCE

25. Once the employer has lost the confidence in the employee and the bona fide loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity, and in a case of loss of confidence, reinstatement cannot be directed. (Vide: Air India Corpn. v. V.A. Ravellow, (1972)1 SCC 814, Francis Kalein & Co. (P) Ltd. v. Workmen, (1972) 4 SCC 569 and BHEL v. M. Chandrashekhar Reddy, (2005)2 SCC 481).

26. In Kanhaiyalal Agrawal v. Gwalior Sugar Co.Ltd., (2001)9 SCC 609, this Court laid down the test for loss of confidence to find out as to whether there was bona fide loss of confidence in the employee, observing that, (SCC p.614, para 9) (i) the workman is holding the position of trust and confidence; (ii) by abusing such position, he commits act which results in forfeiting the same; and (iii) to continue him in service/establishment would be embarrassing and inconvenient to the employer, or would be detrimental to the discipline or security of the establishment. Loss of confidence cannot be subjective, based upon the mind of the management. Objective facts which would lead to a definite inference of apprehension in the mind of the management, regarding trustworthiness or reliability of the employee, must be alleged and proved.

(See also: Sudhir Vishnu Panvalkar v. Bank of India, (1997) 6 SCC 271).

27. In SBI v. Bela Bagchi, (2005)7 SCC 435, this Court repelled the contention that even if by the misconduct of the employee the employer does not suffer any financial loss, he can be removed from service in a case of loss of confidence. While deciding the said case, reliance has been placed upon its earlier judgment in Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik, (1996) 9 SCC 69.

28. An employer is not bound to keep an employee in service with whom relations have reached the point of complete loss of confidence/faith between the two. (Vide: Binny Ltd. v. Workmen, (1972)3 SCC 806; Binny Ltd. v. Workmen, (1974)3 SCC 152; Anil Kumar Chakraborty v. Saraswatipur Tea Co.Ltd., (1982)2 SCC 328; Chandu Lal v. Pan American World Airways Inc., (1985)2 SCC 727; Kamal Kishore Lakshman v. Pan American World Airways Inc., (1987)1 SCC 146 and Pearlite Liners (P) Ltd. v. Manorama Sirsi, (2004)3 SCC 172.

29. In Indian Airlines Ltd. v. Prabha D. Kanan, (2006)11 SCC 67, while dealing with the similar issue this Court held that: (SCC p.90, para 56)

"56.....loss of confidence cannot be subjective but there must be objective facts which would lead to a definite inference of apprehension in the mind of the employer regarding trustworthiness of the employee and which must be alleged and proved."

30. In case of theft, the quantum of theft is not important and what is important is the loss of confidence of employer in employee. (Vide: A.P. SRTC v. Raghuda Shiva Sankar Prasad, (2007)1 SCC 222).

31. The instant case requires to be examined in the light of the aforesaid settled legal proposition and keeping in view that judicial review is concerned primarily with the decision making process and not the decision itself. More so, it is a settled legal proposition that in a case of misconduct of grave nature like corruption, theft, no punishment other than the dismissal may be appropriate. (Vide: Pandiyan Roadways Corpn. Ltd. V. N.Balakrishnan, (2007) 9 SCC 755 and U.P. SRTC v. Suresh Chand Sharma, (2010) 6 SCC 555)."

49. It is well settled that in a domestic inquiry, the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials, which are logically probative for a prudent mind, are permissible. It is trite law that strict rules of evidence are not applicable to the proceedings before the Industrial Tribunal/Labour Court and they are free to devise rules of procedure in accordance with principles of natural justice.

50. In the present case, factum of non-examination of Inquiry Officer by the Management during proceedings before Tribunal has weighed heavily, with the learned Tribunal, as a result of which learned Tribunal while drawing adverse inference, upheld the claim put forth on behalf of the respondent-workman. In an application under Section 33(2)(b) of the Act, it is not the requirement of law that the Tribunal will insist for proof of the inquiry conducted strictly in terms of provisions contained in Indian Evidence Act by examining the Inquiry Officer and exhibiting the report.

51. In this regard reliance is placed on ***Om Parkash vs. Delhi Transport Corporation, 2016 LLR 683,*** wherein the Hon'ble Delhi High Court has held as under:-

"10. The Labour Court, to begin with, is required to enquire if a proper, valid enquiry was conducted: whether order of the dismissal based on legal evidence adduced before domestic tribunal and is not based on extraneous considerations and the order of dismissal is not an act of victimization or unfair labour practice. In order to reach to a conclusion as regards validity of the domestic enquiry, the Labour Court has to analyze the enquiry proceedings placed on record alongwith the application. The insistence on formal proof of enquiry proceedings runs contrary to the rules of evidence governing the proceedings before Labour Courts. The Industrial Disputes Act empowers the Labour Court to formulate its own procedure with the object to do justice. The Labour Court can examine any document produce in this Court without its formal proof (where genuineness of document is not disputed).

11. This Court has also in the case of Vijay Kumar Tiwari v. Lt.Governor & Ors, LPA 394/2002 held as under:-

6. "It is trite law that strict rules of evidence are not applicable to the proceedings before the Industrial Tribunal/Labour Court and they are free to devise rules of procedure in accordance with principles of natural justice. Thus, in an application under Section 33(2)(b) ID Act, it is not the requirement of law that the Tribunal will insist proof of the enquiry conducted in accordance with Indian Evidence Act by examining the Inquiry Officer and exhibiting the report. Suffice it is that the enquiry report and the proceedings conducted by the Inquiry Officer are produced before the Industrial Tribunal/Labour Court. The Constitution Bench in JT 2010 (5) 553 Union of India v. R.Gandhi, President,

Madras Bar Association noting the distinction between a Court and Tribunal held that while Courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of Evidence Act."

(See: E.P. Royappa vs. State of Tamil Nadu and Another, (1974)4 SCC 3, Gulam Mustafa and Others vs. The State of Maharashtra and Others, (1976)1 SCC 800, Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and Others, (2001)1 SCC 182, J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, (2007)2 SCC 433, Bhuvnesh Kumar Dwivedi vs. Hindalco Industries Limited, (2014)11 SCC 85 and ***Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015)4 SCC 544).***

52. Consequently, in view of the detailed discussion made hereinabove, present petition is allowed and the impugned award passed by the learned Tribunal below is quashed and set aside. However, at this stage, it may be noticed that the petitioner-Company in the instant petition has submitted that it had made an alternate submission before the learned Tribunal below that without conceding that the inquiry is just, fair and proper, if Court comes to the conclusion that the inquiry is bad then respondent-workman be given compensation in lieu of reimbursement. Relevant portion of ground (r) of the petition is reproduced hereinbelow:

"(r) ……The petitioner company had also submitted as an alternate arguments before the Industrial Tribunal-Cum-Labour Court that without conceding that the enquiry is just fair and proper but if the court comes to the conclusion the enquiry is bad then petitioner be given compensation in lieu of reimbursement. …."

53. Accordingly, in view of aforesaid, this Court, keeping in view the fact that the respondent-workman has uninterruptedly worked w.e.f. June, 1989 till 19.1.1999 i.e. about 10 years deems it fit to award one time fair compensation amounting to Rs.3.5 lacs in terms of judgment passed by the Hon'ble Apex Court in ***Tota Ram vs. Belliss India (Private) Limited, (2016)6 SCC 406*** case. Accordingly the petitioner-Company is directed to pay an amount of Rs.3.5 lacs to the respondent-workman by way of a fair compensation in lieu of 10 years service rendered by him.

54. All the interim orders are vacated. All miscellaneous applications are disposed of.

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

Arun Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Cr. Appeal No. 181 of 2015
Reserved on : 21.07.2016
Decided on: 21st October, 2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1 kg. charas- he was tried and convicted by the trial Court- held, in appeal that prosecution version regarding the recovery was duly proved by oral testimonies and the documents – minor contradictions in the testimonies of the prosecution witnesses are not sufficient to discard them- link evidence is also established – recovery was effected without any prior information and provision of Section 42 is not applicable – charas was found to be 920 grams in the FSL, which is less than commercial

quantity – sentence modified – proceedings ordered to be initiated against the conductor for making a false statement in the Court.(Para-12 to 24)

Cases referred:

Dharam Pal Singh V. State of Punjab (2010) 9 SCC 608
Jagdish Raj V. State of Punjab (2011) 4 SCC 571
Kulwinder Singh and another V. State of Punjab (2015) 6 SCC 674
State of Rajasthan V. Parmanand and another (2014) 5 SCC 345
Yashihey Yobin and another V. Department of Customs, Shillong (2014) 13 Supreme Court Cases 344
Ratto V. State of H.P. 2003(2) Shim.L.C. 161.

For the appellant: Mr. Anoop Chitkara, Advocate.
For the respondent: Mr. D.S. Nainta, Addl. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Appellant Arun Kumar herein is a convict. He has been convicted by learned Special Judge Mandi, District Mandi under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'NDPS Act' in short) vide judgment dated 17.04.2015 passed in Sessions Trial No. 51/2010 and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay Rs. 1,00,000/- as fine.

2. On 26.04.2010, a Police party comprising lady PSI Reeta Devi, PW-9 ASI Mohan Lal (II), PW-1 Head Constable Kamal Kant, HHC Prakash Chand and Constable Puran Chand of Police Station, Balh District Mandi left towards village Nagchala side at about 3.00 p.m. for laying 'nakka' and conducting traffic checking. Rapat Ext. PW-5/A in this regard was entered in daily diary. They laid 'nakka' at Nagchala and started traffic checking there. Around 4.15 p.m. HRTC bus bearing registration No. HP65-1768 enroute Manali to Delhi reached at the place of 'nakka'. The bus was got stopped at the place of 'nakka'. The police party started checking the bus. The convict allegedly occupying seat No. 36 was found to be holding a black, red and grey coloured rucksack (bag) on his legs. On seeing the police party, he became nervous and behaved in a suspicious manner. Looking such behaviour of the convict, the I.O PW-9 suspected some incriminating substance in his possession. Therefore, his antecedents were inquired into in the presence of Shri Hari Singh, driver of the bus and PW-6 Bakshi Ram its conductor. Thereafter, the police personnel offered their search first, however, nothing incriminating was recovered from their possession. Memo Ext. PW-6/C was prepared in this regard. It is thereafter the rucksack, the convict was holding on his legs was searched and one polythene packet wrapped in a white colour cloth was recovered therefrom. On opening the said packet, charas in the shape of sticks was recovered in presence of S/Shri Hari Singh and Bakshi Ram aforesaid. The recovered charas was weighed and found <u>one kilogram</u>. PW-9 resorted to the sampling and sealing process and sealed the recovered charas in a parcel with 15 impressions of seal 'D'. The sample of seal Ext. PW-9/A was drawn separately. The recovered charas was taken in possession vide seizure memo Ext. PW-6/A. The NCB-I forms Ext. PW-7/E were filled in on the spot in triplicate. The facsimile of seal 'D' was also put on these forms. It is thereafter rukka Ext. PW-7/A was prepared and sent to the Police Station through HC Kamal Kant, PW-1. On the basis of rukka FIR Ext. PW-7/B came to be recorded by PW-7 Surinder Pal, the then Station House Officer, Police Station, Balh. PW-7 had also made endorsement Ext. PW-7/C over the rukka. The case file was taken to the I.O on the spot by PW-1. The I.O. PW-9 had prepared the spot map Ext. PW-8/B. The ticket of bus Ext. PA was recovered from the convict and taken into possession vide memo Ext. PW-6/C. The grounds of arrest were disclosed to the convict vide memo Ext. PW-6/D and he was arrested. The personal search of the convict was also conducted vide memo Ext. PW-6/B.

3. On the completion of investigation at the spot, the convict along with case property was brought to Police Station, Balh. The IO PW-9 has produced the case property along with sample of seal, NCB forms and seizure memo etc., before PW-7 the Station House Officer. Rapat Ext. PW-5/B was entered in this regard in daily diary. PW-7, the Station House Officer has re-sealed the parcels containing the recovered charas with seal 'A'. He has also drawn the sample of seal, which is Ext. PW-7/D. It is thereafter the case property along with sample of seals, NCB forms and seizure memo was handed over to PW-4 Head Constable Prabhakar, the then additional MHC, Police Station, Balh for safe custody in the Malkhana. Rapat Ext. PW-5/C in this regard was also entered in daily diary. A memo Ext. PW-4/A to this effect was also prepared. PW-4 has received the case property and entered the same at Serial No. 116 of the Malkhana register. The extract whereof is Ext. PW-4/B. On 29.04.2010, the parcel containing the case property was sent to State Forensic Science Laboratory, Junga for analysis vide RC No. 100/10, Ext. PW-2/A through PW-2 Constable Vijay Kumar. The special report Ext. PW-8/A was prepared and forwarded to D.S.P. Mandi, the Supervisory Officer. The entry qua receipt of the special report in the office of D.S.P. Mandi in the relevant register is at Serial No. 90, Ext. PW-8/B. The detail of other articles forwarded to the Laboratory along with the parcel containing charas find mention on the reverse of RC Ext. PW-2/A. The case property forwarded to the laboratory vide RC Ext. PW-2/A was received there duly sealed with seals 'D' and 'A', however, when weighed the same was found to be 928grams, whereas, the actual weight of the exhibit was found to be 972grams. The recovered charas was analyzed in the laboratory and as per report Ext. PW-3/A found to be extract of cannabis and as such the sample of charas.

4. On the completion of investigation, report under Section 173 of the Code of Criminal Procedure was filed against the convict in the Court of learned Special Judge, Mandi, Distt. Mandi. Learned Special Judge after observing all the codal formalities and hearing the prosecution as well as learned defence counsel has prima-facie found the involvement of the convict in the commission of an offence punishable under Section 20 of the NDPS Act. The charge against him was, therefore, framed accordingly.

5. The accused on hearing and understanding the charge has not admitted the same to be correct nor pleaded guilty and as such, learned trial Court has proceeded further in the trial by calling upon the prosecution to produce evidence in support of its defence against the convict. The prosecution in turn has examined nine witnesses in all. The material prosecution witnesses are HC Kamal Kant PW-1, Sh. Bakshi Ram, the conductor of the bus PW-6 and the Investigating Officer the then ASI Mohan Lal of Police Station, Balh PW-9. The remaining prosecution witnesses are formal because they remained associated in one way or the other during the investigation of the case. Any how, the evidence as has come on record by way of their testimony can be looked into as link evidence.

6. Learned trial Court after holding full trial and affording opportunity of being heard to the parties on both sides as well as taking into consideration the evidence available on record and also the law applicable has arrived at a conclusion that the charas weighing one kilogram has been recovered from the conscious and physical possession of the convict. He was accordingly convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay Rs. 1,00,000/- as fine.

7. The convict, however, being aggrieved and dissatisfied with the findings of his conviction recorded by learned trial Court has preferred this appeal in this Court with a prayer to quash and set aside the same and to set him free by acquitting from the charge under Section 20 of the NDPS Act.

8. The legality and validity of the impugned judgment though has been questioned on several grounds, however, mainly that it was a case of prior information and the Investigating Officer has failed to report compliance to the provisions contained under Sections 42 of the NDPS Act. The story has been concocted as the police has been doing in such like cases in the State of Himachal Pradesh. The allegations leveled against the convict have been concocted and engineered and the convict was illegally apprehended and searched without there being any

search warrant. Without conceding or admitting the recovery of alleged substance, it is pointed out that same has not been proved to be charas within the meaning of NDPS Act. The chemical examiner's report is in admissible. The findings recorded by learned trial Court are vitiated on account of placing reliance on the testimony of official witnesses. In order to hold the convict guilty, corroboration to the prosecution story from some independent source was required. The proceedings also vitiated on account of non-compliance of Section 50 of the NDPS Act. The link evidence is also missing since the independent witness PW-6 has not supported the prosecution case, therefore, two possible views as emerges on record, the benefit of doubt has erroneously been withheld from the convict. It is also claimed that some incriminating circumstances appearing in the prosecution evidence have not been put to the convict in his statement recorded under Section 313 of the Code of Criminal Procedure. The evidence of official witnesses highly contradictory has erroneously been relied upon to record the findings of conviction. Being so, the impugned judgment has been claimed to be not legally sustainable and as such, sought to be quashed and set aside and in the alternative keeping in view the charas when weighed in the laboratory was found to be 972grams, the quantity thereof being less than commercial quantity, the sentence imposed upon the convict has been sought to be reduced.

9. Mr. Anoop Chitkara, learned counsel representing the appellant-convict has strenuously contended that the present is a case of recovery of contraband allegedly charas below commercial quantity in view of its weight when weighed in the State Forensic Science Laboratory was found to be 972grams. Therefore, according to Mr. Chitkara, the convict could have not been sentenced to undergo rigorous imprisonment for a period of 10 years and pay Rs. 1,00,000/- as fine. The recovery of charas from the exclusive and physical possession of the convict is stated to be not proved because as per the evidence produced by the prosecution itself, few of the passengers ran away from the spot where the bus was stopped. The contradictions qua arrival of the bus at the place of 'nakka' have also been pointed out. It is also contended that when the ticket was issued at 16:07:37 hours (04:07:37), how the bus could have reached at Nagchala at 4.00 p.m. The trend of writing of seizure memo Ext. PW-6/A, memo Ext. PW-6/B qua personal search of the accused, memo Ext. PW-6/C whereby the police officials were searched and arrest memo Ext. PW-6/D has also been pointed out to urge that initially the spacing while writing these memos was quite wide, however, in the end squeezed considerably. According to Mr. Chitkara this shows that the signatures of the witnesses were obtained on blank papers. The version of conductor PW-6 that they were made to sign document, therefore, according to learned counsel is true and correct. The contradictions in the testimony of the I.O. PW-9 and that of HC Kamal Kant PW-1 have also been pointed out. It has, therefore, been urged that no findings of conviction could have been recorded against the convict in this case.

10. On the other hand, Mr. D.S. Nainta, learned Additional Advocate General has pointed out from the record that all the documents bear the signatures of Hari Singh and also that of PW-6 Bakshi Ram. There was no pressure on them of any kind, which according to learned Additional Advocate General shows that the search and seizure has taken place in the manner as claimed by the prosecution. The contradictions as pointed out are stated to be minor in nature and have rightly been ignored. it is also argued that variation in weight of recovered charas seems to have occurred on account of the same when recovered was weighed with a traditional weighing scale and weights, whereas, in the laboratory the same was weighed with electronic scale. Therefore, according to Mr. Nainta, the judgment passed by learned trial Court is absolutely legal and valid, hence calls for no interference.

11. What could be gathered from the grounds of appeal and also the arguments addressed on behalf of the appellant-convict is that the findings of conviction and sentence recorded against the convict are sought to be quashed and set aside allegedly being not legally sustainable for want of cogent and reliable evidence in support of the prosecution case qua recovery of charas weighing one kilogram from the exclusive and physical possession of the convict, for want of compliance of the provisions contained under Sections 42 and 50 of the NDPS Act and that the quantity of charas allegedly recovered being 928grams is not commercial quantity and rather greater than the small quantity and lesser than the commercial quantity.

Being so, the sentence awarded does not commensurate with the offence allegedly committed. The testimony of PW-6 who has not supported the prosecution case and the alleged contradictions in the statements of prosecution witnesses PW-1 and PW-9 have also been pressed in service to assail the impugned judgment.

12. Now if coming to the first point urged on behalf of the appellant-convict, admittedly he was traveling in HRTC bus bearing registration No. HP65-1768 enroute Manali to Delhi. PW-6 Bakshi Ram is the conductor of the bus, whereas, Hari Singh was its driver. As per prosecution case which even has been admitted by the convict also while answering question No. 3 in his statement recorded under Section 313 of the Code of Criminal Procedure, the bus reached at village Nagchala where the police had laid the 'nakka' at 4.15 p.m. No doubt, PW-6 Bakshi Ram who has been associated as an independent witness has stated that the bus reached at the place of 'nakka' i.e. Nagchala at 4.00 p.m., however, when he had already issued the ticket to the convict at 16:07:37 hours (04:07:37 pm) well before the arrival of the bus at Nagchala, as is apparent from the xeroxed copy of the original ticket Ext. PA allowed to be placed on record by learned defence counsel, how the bus could have reached at Nagchala at 4.00 p.m. The ticket has been recovered from the convict vide memo Ext. PW-6/C. PW-6 though has denied this aspect of the prosecution case, however, in the same breath when he has admitted that ticket Ext. PA was issued by him, his testimony to the contrary is absolutely false. It would not be improper to conclude that he has deposed falsely in connivance with the convict may be for some extraneous considerations. The bus was fully packed because as per admitted case of the parties on both sides, some passengers were even standing also in the bus. The prosecution case that during the checking of the bus the convict occupying seat No. 36 was found to be holding a bag on his legs find support from the documentary evidence such as seizure memo Ext. PW-6/A and the rukka Ext. PW-7/A. Such version even finds corroboration from the testimony of PW-1 HC Kamal Kant and the I.O. PW-9. The seizure memo Ext. PW-6/A and other documents such as Ext. PW-6/B, Ext. PW-6/C and Ext. PW-6/D bear signature of Hari Singh, the driver of the bus and its conductor Bakshi Ram PW-6. Bakshi Ram PW-6 has admitted so while in the witness box. Sh. Bakshi Ram in his cross-examination conducted on behalf of the prosecution has stated that the contents of these documents were not gone into by him when put his signatures thereon. He admits that he is matriculate and can read as well as understand Hindi language. He is a conductor, therefore, he is not expected to have signed the documents, that too, in a case of this nature involving the freedom and liberty of an individual without going through the contents thereof. Being so, to our mind he is a liar and to the reasons best known to him, he has concealed the factual position from the Court. Neither in his examination-in-chief nor in his cross-examination conducted on behalf of the prosecution, he has no-where stated that papers on which aforesaid documents i.e. Ext. PW-6/A, Ext. PW-6/B, Ext. PW-6/C and Ext. PW-6/D have been reduced into writing were blank. However, when cross-examined by learned defence counsel, he has come-forward with altogether different story that on the recovery of charas from a bag brought down by the police party from the shelf of the bus, the police inquired as to whom the bag belongs and when all the passengers did not claim the bag to be theirs, the police officials directed the driver of the bus to drive the same to Police Station and on their request that few of the passengers are foreign nationals traveling in the bus had to board flights to their nation, the bus was allowed to be driven from the police station to its destination, however, only after obtaining his signatures and that of driver of the bus Hari Singh on blank papers as well as on piece of cloth. Such plea raised by the convict in his defence is an afterthought because had the signatures of PW-6 Hari Singh been obtained on blank papers, similar suggestions should have also been given to Kamal Kant PW-1. No such suggestions, however, were given to this witness and the suggestions to this effect given to PW-9, however, were denied being wrong. The suggestions that the police directed the driver to drive the bus to police station at such stage when the recovered charas remained unclaimed are contradictory to the suggestions given to PW-1 that when on being signaled the driver stopped the bus at the place of 'nakka', the I.O. PW-9 proclaimed that he had information of illicit trafficking of some drug or narcotic substance in the bus and asked the driver to drive the bus to police station. Also that the I.O. PW-9 had conducted the checking of the bus at the place of 'nakka' for 35-40 minutes. The bus on long

route like Manali Delhi could have not been driven by its driver to the police station without seeking permission from his superiors for the reasons that police station Balh does not situate on Manali Delhi highway but on Ner Chowk-Kalkhar Jahu road at village Ratti i.e. at a distance of about one kilometer from Ner Chowk from where the road bifurcates from the national highway to village Ratti. Therefore, it cannot be believed by any stretch of imagination that search and seizure did not take place at the place of 'nakka' in the presence of PW-6 and rather false case was foisted on the convict by fabricating the documents in the police station. The convict has not produced any evidence to show that there was animosity of the police with him and it is for this reason the charas weighing one kilogram has been falsely planted on him.

13. If coming to the testimony of PW-1 Head Constable Kamal Kant and the I.O. PW-9, they both in one voice tell us that rucksack in which the recovered charas found to be kept in a white coloured polythene bag was being held by the convict on his legs. The suggestions to the contrary put to them in their cross-examination have been denied being wrong. The contradictions that as per I.O. PW-9 by the time the bus in question arrived at the place of 'nakka' the police party had already checked 25-30 vehicles, whereas, as per that of PW-1, only 2-3 vehicles were checked and that as per the testimony of PW-9 the I.O. Ritta Devi the lady PSI was searched by a lady passenger traveling in the bus, whereas, as per that of PW-1 she was searched by a police official are not of such a nature so as to belie the prosecution case qua the recovery of charas from the bag which was being held by the convict. The recovery of charas form the exclusive and physical possession of the convict stands satisfactorily proved from the evidence available on record. Learned trial Judge has, therefore, rightly held that the prosecution in this case has successfully established the culpable mental state of the convict to commit the offence while placing reliance on the judgment of the Hon'ble Apex Court in ***Dharam Pal Singh*** V. ***State of Punjab (2010) 9 SCC 608*** and in ***Jagdish Raj*** V. ***State of Punjab (2011) 4 SCC 571***.

14. The link evidence in this case is also complete because it is satisfactorily proved that the parcel containing the recovered charas was sealed with 15 impressions of seal 'D' by the I.O. PW-9, whereas, re-sealed with 5 impressions of seal 'A' by the Station House Officer, PW-7 from the testimony of PW-1, the I.O. PW-9 and that of the Station House Officer, PW-7 and also the seizure memo Ext. PW-6/A, rapat Ext. PW-5/B, rapat Ext. PW-5/C and the re-seal certificate Ext. PW-4/A. The facsimile of seals 'D' and 'A' have even been put on the NCB forms and the sample thereof Ext. PW-9/A and Ext. PW-7/D have also been drawn. The entries Ext. PW-4/B in the malkhana register reveal that the case property duly sealed with seals 'D' and 'A' was handed over to PW-4, the Moherer Head Constable for safe custody in the malkhana along with sample of seal 'D' and sample of seal 'A' and also the NCB forms in triplicate on 26.04.2010 itself at 7.35 p.m. The case property was sent to Forensic Science Laboratory, Junga on 29.04.2010 through PW-2 Constable Vijay Kumar vide RC Ext. PW-2/A. The docket, samples of seals 'D' and 'A', copy of FIR, copy of seizure memo, re-sealing memo and NCB-I forms in triplicate were also sent to Forensic Science Laboratory. The report of chemical examiner Ext. PW-3/A reveals that the parcel containing recovered charas was duly sealed with seals 'D' and 'A' when received in the laboratory along with NCB-I forms and other documents as aforesaid. The endorsement in the extract of malkhana register Ext. PW-4/B reveals that the parcel containing the case property duly sealed with the seal of laboratory after analysis was returned to the malkhana in safe custody through HHC Pritam Lal, PW-3. The report Ext. PW-3/A reveals that the exhibit (recovered charas) on analysis was found to be the extract of cannabis and being so charas. Not only this but when as per rapat Ext. P-X the case property was produced by HHC Ram Lal in the trial Court, the same was duly sealed with six seals of Forensic Science Laboratory. In this case, the prosecution case qua prepration of special report Ext. PW-8/A and its delivery to the D.S.P. (HQ), Mandi is also proved from the testimony of Narender Kumar, PW-8.

15. Now if coming to the second limb of arguments addressed on behalf of the convict-appellant, the present is not a case of prior information and rather a case of chance recovery because as per the rapat in daily diary Ext. PW-5/A, the police party headed by ASI Mohan La PW-9 and PSI Ritta Devi being on routine traffic checking duty had laid 'nakka' at

village Nagchala. True it is that PW-1 in his examination-in-chief has stated that the I.O. PW-9 had told them that he had information qua trafficking of some narcotic drug and psychotropic substance in the HRTC bus, however, in the very opening sentence in his cross-examination by learned defence counsel he has expressed his inability to tell that the I.O. had told the other police officials that he had prior information qua transportation of contraband in HRTC bus, whereas, as per the version of the I.O. PW-9 in his cross-examination he had no prior information regarding transportation of charas in the bus. No such suggestion was, however, given to Bakshi Ram PW-6. Therefore, the only sentence in the examination-in-chief of PW-1 that the I.O. told the police party about he was having prior information qua charas being carried in the bus cannot be believed as gospel truth to conclude that the I.O. PW-9 had prior information that the charas was being carried by the convict in HRTC bus. Being so, there is no question of violation of the provisions contained under Section 42 of the NDPS Act.

16. Now if coming to the alleged violation of the provisions under Section 50 of the NDPS Act. The plea so raised on behalf of the appellant-convict is again without any substance for the reason that firstly the present is a case of chance recovery and the charas has been recovered from the bag being carried by the convict with him and secondly that charas has not been recovered during personal search of the convict and rather during the search of the bag he was carrying with him. In a case of this nature, the compliance of Section 50 of the NDPS Act is not required. We can draw support in this regard from the judgment of the Hon'ble Apex Court in ***Kulwinder Singh and another*** V. ***State of Punjab (2015) 6 SCC 674***, wherein it has been unequivocally held that Section 50 applies only in a case where the personal search of the accused is required to be conducted for recovery of incriminating circumstance, if any, from him. The same as per ratio of this judgment cannot be extended to the search of a vehicle or container or bag or premises. Since, in the case in hand, it is only the search of rucksack the convict was holding with him has been conducted and the charas recovered therefrom, hence there was no question of compliance of Section 50 of the Act. True it is that personal search of the accused has also been conducted, however, after the recovery of charas from the rucksack he was carrying with him i.e. after his arrest vide memo Ext. PW-6/B. The same was only for the purpose to ascertain the personal belongings with him before lodging him in lockup. The relevant portion of the judgment reads as follows:

> "20. The next contention that has been raised by the learned counsel for the appellants relates to non-compliance of Section 50 of the NDPS Act. It is undisputed that the bags containing poppy husk were seized from the truck. Thus, it is not a case of personal search of a person. In Megh Singh v. State of Punjab, it has been held that Section 50 only applies in case of personal search of a person, but it is not extended to a search of a vehicle or a container or a bag or premises.
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> 21. In *State of H.P. v. Pawan Kumar*, it has been held that:-
>
> > "10. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilised society. Therefore, the most appropriate meaning of the word "person" appears to be — "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear

> also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear.
>
> 11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."

Similar view has been expressed in *Jarnail Singh v. State of Punjab* and *Ram Swaroop v. State* (*Government of NCT of Delhi*)

> 22. In view of the aforesaid, the submission that non-compliance of Section 50 vitiates the conviction, leaves us unimpressed."

17. Similar is the view of the matter taken by the Hon'ble Apex Court in ***State of Rajasthan*** V. ***Parmanand and another (2014) 5 SCC 345*** and in ***Yashihey Yobin and another*** V. ***Department of Customs, Shillong (2014) 13 Supreme Court Cases 344***. The relevant extract of this judgment reads as follows:

> "9. The Trial Court and the High Court while answering the aforesaid issues have concurrently come to the conclusion that accused No.2 was not searched by the custom officers but it was only the bag in possession of A2 containing contraband which was searched and seized. The language employed "any person" under Section 50 of the Act would naturally mean a human being or a living individual unit and not an artificial person. It would not bring within its ambit any non-living creature viz.; bags, containers, briefcase or any such other article. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be a part of the body of a human being. The scope and ambit of Section 50 was examined in considerable detail in the case of State of Haryana v. Suresh, AIR 2007 SC 2245 and in a three judges bench decision in State of Himachal Pradesh v. Pawan Kumar, 2005 4 SCC 350, wherein it is observed that when a person is not searched, only the bag, container or the suitcase is searched, the provisions of Section 50, cannot be pressed into service. The items like bag, briefcase, or any such article or container, etc. are not a part of a human being as it would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. In common parlance it could be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head,

> etc. but it is not possible to include these articles within the ambit of the word "person" defined in Section 50 of the Act.
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> 10. This position in law is settled by the Constitution Bench in the case of State of Punjab v Baldev singh, AIR 1999 SC 2378 and in Megh Singh v State of Punjab, 2003 8 SCC 666, where application of Section 50 is only in case of search of a person as contrasted to search of premises, vehicles or articles. But in cases where the line of separation is thin and fine between search of a person and an artificial object, the test of inextricable connection is to be applied and then conclusion is to be reached as to whether the search was that of a person or not. The above test has been noticed in the case of Namdi Francis Nwazor v. Union of India and Anr.,(1998) 8 SCC 534, wherein it is held that if the search is of a bag which is inextricably connected with the person, Section 50 of the Act will apply, and if it is not so connected, the provisions will not apply. It is when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that the bag was not found on the accused person."

18. We, however, find considerable force in the arguments addressed on behalf of the convict-appellant that quantity of recovered charas is not at all commercial for the reason that the charas when weighed in the laboratory its actual weight was found to be 928grams, whereas, that of the exhibit i.e. the parcel, 972grams. The explanation that the charas when recovered was weighed by the I.O with traditional scale and weights, whereas, in the laboratory with electronic scale is neither reasonable nor plausible for the reason that the I.O. while in the witness box has said that the recovered charas was weighed by him with scale available in the I.O. kit. It cannot be believed by any stretch of imagination that in the I.O kit a traditional scale and weights could have been kept and taken with him by the I.O to the spot. One can understand that with the passage of time on account of the substance get dried, its weight may decrease, however, in the case in hand, the charas which was recovered on 26.04.2010 was dispatched to the laboratory after 2-3 days i.e. on 29.04.2010. The present as such is not a case of recovery of charas weighing commercial quantity and rather the quantity of the recovered charas being less than one kilogram is no doubt greater than small quantity, however, lesser than the commercial quantity. Even if it is believed that the recovered charas was one kilogram, in that event also, in terms of Section 2(viia) of the NDPS Act "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. Now if Notification issued by the Central Government is seen, charas weighing one kilogram has been shown therein as commercial quantity. However, within the meaning of Section 2(viia), in order to constitute the quantity of the recovered charas as commercial, its weight should have been greater than one kilogram. Therefore, on this score also, the recovered charas by any stretch of imagination cannot be termed to be commercial quantity. We find support in this regard from the judgment of a Full Bench of this Court in ***Ratto*** V. ***State of H.P. 2003(2) Shim.L.C. 161***. This judgment reads as follows:

> "***40***. We feel that there is no ambiguity in the language of Section 2(viia), supra. As such, simple and literal meaning has to be given to the words 'quantity greater than', so as to hold what would he the commercial quantity.
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> ***41***. As already noted there is hardly any ambiguity, muchless conflict between Section 2(viia) and the notification as extracted here-in-above for determination of what would be the commercial quantity, By virtue of powers conferred under sub-section (viia) of Section 2, Central Government is authorized to notify as to what would be the commercial quantity. Because the "commercial quantity" on a plain reading of its definition amongst other things has to be "...greater than the quantity specified by the Central Government by notification.....". Under 2001 Act notification supra was issued specifying the quantity for the purpose of

> Section 2(viia) of the Act. A perusal of this notification indicates that quantity specified is one kilogram. Various columns of the notification extracted hereinabove have to be read in conjunction with the substantive provision of Section 2(viia) of the Act. This also puts a harmonious construction on both, notification as well as Section 2(viia). While determining the quantity under this sub-section, it has to be greater than One Kg. There is hardly any doubt regarding either the words one kg.", or the "commercial quantity" which has to be 'greater than", which in our considered view would always mean any quantity more than/bigger than/larger than one kg. We are further of the view that this provision, and for that matter, notification admits of no other interpretation on its reading. Thus, it cannot be said that one Kg. would be the commercial quantity for the purpose of Section 2(viia), as added by 2001 Act.
>
> ***42***. Another reason to take this view is, that substantive and main provision of the Act is Section 2(viia) which is subject matter of the discussion in this judgment. It is also well known and accepted rule of interpretation of statutes that rules, regulations as well as notifications issued thereunder are meant to sub-serve the purpose of main provision of law and not other way round. Notification in the instant case, as extracted hereinabove, is a delegated legislation. Therefore, it can in no case bye-pass or over-ride the substantive provision of law and in case of conflict, delegated legislation has to give way to the main provision of law.
>
> ***43***. In this behalf, we may also observe that legislature in its wisdom has used the words in this sub-section knowing there significance, as well as import and at the cost of repetition, it needs to be noted that when language is clear, then ordinary meaning to the words needs to be given. As such, no aids either internal or external need to be pressed into service as was urged on behalf of the respondent to give another meaning."

19. In view of the above, the appellant-convict could have not been sentenced under Section 20(b)i) of the Act and rather under (ii) of Clause (b) of Section 20 of the Act. We, therefore, are in agreement with Mr. Chitkara, learned counsel representing the appellant-convict that sentence awarded against the convict is required to be reduced. Having regard to the age of the convict i.e. approximately 23 years on 26.04.2010 when he was arrested in connection with the case registered against him under Section 20 of the NDPS Act and also that he remained in custody during the pendency of the trial and after his conviction and sentence is serving out sentence in jail and he is in custody for a period over six years, we find the present a case where the sentence already undergone by the convict would serve the ends of justice. As such, he needs to be set free from the custody forthwith if not required in any other case. So far as the sentence of fine is concerned, in the given facts and circumstances, we reduce the same also to Rs. 10,000/-

20. In view of the findings recorded hereinabove, we sentence the convict to the imprisonment he has already undergone and to pay Rs. 10,000/- as fine. The convict as such be set free and released from custody forthwith, if not required in any other case. However, on his failure to pay the amount of fine, he shall have to undergo rigorous imprisonment for a further period of three months. Accordingly the appeal is partly allowed and stands disposed of.

21. Before parting with the case, we would be failing in our duty, if ignore the manner in which PW-6 Bakshi Ram, the conductor of the bus has conducted himself while in the witness box. Taking note of the statement, he made while in the witness box, we have prima-facie formed an opinion that he is a liar and has not disclosed true facts to the Court. Admittedly, he was on duty as conductor with HRTC bus intercepted by the police at the place of 'nakka' at village Nagchala. As per the prosecution case, during the checking of luggage charas was recovered from the bag which the convict was holding on his legs. As we already observed in earlier part of this judgment, PW-6 is a liar and has deposed falsely to help the convict to the

reasons best known to him, may be for some extraneous considerations. In our opinion, he while in the witness box has made a false statement, most probably, at the behest of the convict. When he has issued the ticket Ext. PA at 16:07:37 hours (04:07:37 pm) i.e. in all probability at Mandi or on the way at a place behind Nagchala, how he could have said while in the witness box that the bus reached at Nagchala at 4.00 p.m. that too, well before the issuance of ticket to the convict. According to him, the charas was recovered from the bag on the spot itself. When no evidence to the contrary that the police had enmity with the convict has come on record, it is proved that the charas was recovered from the bag which the convict was carrying with him. His denial to this part of the prosecution case itself speaks in plenty about his conduct and credibility. In his cross-examination conducted on behalf of the convict, he has introduced a new story that when the bag from which the charas recovered was not claimed by any passenger, the police directed the driver to take the bus to police station. Such plea in his defence raised by the convict is an afterthought because had it been so, he could have examined someone to substantiate this aspect of this matter. Had the bus been taken to police station, some record like entries in the log book of the bus etc., would have been there with the HRTC. Otherwise also, some evidence that permission was sought by the driver to take diversion from Ner Chowk for driving the bus to police station should have been there and produced during the course of trial. He has admitted the issuance of ticket, however, denied the same having been taken into possession in his presence, irrespective of he has admitted his signature on the recovery memo Ext. PW-6/C. It was no-where his version in his examination-in-chief or in his cross-examination conducted on behalf of the prosecution that he along with the driver of bus Hari Singh were made to sign blank papers. Interestingly enough, in his cross-examination conducted on behalf of the prosecution, he has admitted his signature on the seizure memo Ext. PW-6/A, personal search of accused vide memo Ext. PW-6/B, search of police officials given vide memo Ext. PW-6/C and arrest of accused vide memo Ext. PW-6/D. When he tells us that he has not gone through the contents of these documents, it leads to the only conclusion that contents were duly written in these documents. He is a matriculate and as per his version, not only he can read and write Hindi but he can also understand the same. When he is conductor, it cannot be expected that he would have signed blank papers, that too, at the instance of police and in a case of recovery of charas involving the freedom and liberty of an individual. Therefore, to our mind PW-6 has intentionally and deliberately made a false statement with a view to screen the evidence and to save the convict from the prosecution and as such liable himself to be dealt with in accordance with law.

22. Section 340 of the Code of Criminal Procedure takes care of such a situation. The provisions contained under the Section ibid reveal that if on an application made to it or otherwise, the Court is of the opinion that it is expedient and in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code, which appears to have been committed in relation to proceedings of a case in that Court, the Court shall hold a preliminary inquiry and after recording a finding that by producing a document or giving a statement in evidence, an offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code is made out, order to make a complaint in writing to a Magistrate of the first class having jurisdiction over the matter.

23. Section 340 of the Code of Criminal Procedure Code contemplates a preliminary inquiry to be conducted by the Court to form an opinion that it is expedient and in the interest of justice to hold inquiry into the offence which appears to have been committed. It is not mandatory for the trial Court to hold preliminary inquiry, because it has the opportunity to see the witness while in the witness box and to observe his demeanour. We, however, feel that the appellate Court, having no such opportunity to observe the demeanour of the witness, should hold an inquiry and give an opportunity of being heard to him, before forming an opinion that an offence within the meaning of clause (b) of sub-Section(1) of Section 195 of the Code of Criminal Procedure appears to have been committed by him. It is only thereafter, an order qua filing a complaint, as contemplated under Section 340 of the Code of Criminal Procedure, should be passed.

24. Therefore, before initiating any action against PW-6 Bakshi Ram, we deem it expedient and in the interest of justice to call upon him to show cause as to why an action be not initiated against him in the light of the observations in this judgment. Consequently, there shall be a direction to the Registry to issue show cause notice to PW-6 Bakshi Ram for ***30.12.2016*** and the proceedings be registered against this witness separately. A copy of judgment be also sent to him alongwith show cause notice. Office of learned Advocate General to collect notice from the Registry of this Court for onward transmission to the Superintendent of Police, Mandi, for effecting service thereof upon the witness aforesaid well before the date fixed. The record of the trial Court be retained for being referred to at the time of further consideration of the matter, after taking on record the version of the witness, to be referred to as 'the respondent' in the proceedings ordered to be drawn separately against him.

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

Karam Chand .....Petitioner.
Versus
State of H.P. .... Respondent.

Cr. Revision No. 155 of 2011.
Date of Decision: 21st October, 2016.

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

For the Petitioner: Mr. Naveen K. Bhardwaj, Advocate.
For the Respondent: Mr. R.S. Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The learned trial Court convicted the accused/revisionist for his committing offences punishable under Sections 279, 304-A of the Indian Penal Code and under Section 181 of the Motor Vehicles Act. It also imposed upon the accused/convict consequent sentences for his committing the afore referred penal misdemeanors. The learned trial Court proceeded to hence sentence him to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.1000 for commission of an offence punishable under Section 279 of the IPC. In default of payment of fine amount, he was sentenced to undergo simple imprisonment for a period of one month. He was further sentenced to undergo simple imprisonment for a period of six months and to a pay fine of Rs.500/- for commission of an offence under Section 337 of the IPC. In default of payment of fine he was sentenced to undergo simple imprisonment for a period of one month. He was further sentenced to undergo simple imprisonment for a period of six months and to pay a fine of Rs.500/- for commission of an offence punishable under Section 304-A of the IPC and in default of payment of fine he was sentenced to undergo further imprisonment for one month. He was further sentenced to pay a fine of Rs.500/- for commission of an offence punishable under Section 181 of the Motor Vehicles Act and in default of payment of fine he was

sentenced to undergo further imprisonment for one month All the sentences were directed to run concurrently. The accused/convict preferred an appeal therefrom before the learned Sessions Judge, Kullu, H.P. The Appellate Court rendered a judgment in affirmation to the verdict of conviction and consequent sentences recorded against him by the learned trial Court. The accused/convict has been hence led to therefrom institute the instant revision petition before this Court seeking therein the setting aside of the concurrently recorded findings of convictions and consequent sentences imposed upon him by both the learned Courts below.

2. The facts relevant to decide the instant case are that on 23.11.2009 an information was received from the Hospital that one person had succumbed to his injuries sustained in an accident. PW7 alongwith HHC Gautam visited Mission Hospital, Kullu in connection with the investigation of the present case and recorded statement of PW1 Sunny Kumar under Section 154, Cr.P.C. As per statement of PW-1, he had gone in his taxi along with a passenger towards Bahang on 20.11.2009. At about 9 a.m., he was taking tea at Bahang. At the relevant time, one person came on motor cycle from Palchan side and deceased Angchuk was hit with the motor cycle bearing No. HP34A-833. The injured Angchuk was shifted to hospital by PW1 in his taxi. The deceased died in the Mission Hospital on 22/23/11/2009. The Investigating Officer sent the statement to the police station and FIR Ex.PW6/A was prepared. The documents of the motor cycle were seized and mechanical report was procured. Statements of the witnesses were recorded as per their version. In the investigation the police came to the conclusion that due to rash and negligent driving of the motor cyclist the accident has occurred, hence, the accused was arrested on 25.11.2009. The police completed all the codel formalities.

3. On conclusion of investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed before the learned trial Court.

4. The accused was charged by the learned trial Court for his committing offences under Sections 279, 304-A of the IPC and Section 181 of the Motor Vehicles Act. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused/convict under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court in which the accused claimed innocence and pleaded false implication in the case.

5. On an appraisal of evidence on record, the learned trial Court, returned findings of conviction against the accused/convict. In an appeal preferred by the accused/revisionist before the learned Sessions Judge, Kullu, the latter affirmed the verdict of conviction and consequent sentences recorded against the accused/convict by the learned trial Court for his committing offences punishable under Sections 279, 304-A of the IPC and under Section 181 of the Motor Vehicles Act.

6. The accused/convict is aggrieved by the judgments of conviction recorded by both the learned courts below. The learned counsel for the accused/convict has concertedly and vigorously contended qua the findings of conviction recorded by both the learned Courts below standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction standing reversed by this Court in the exercise of its revisional jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by both the Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The deceased, one Angchuk, in sequel to his standing struck with the motor cycle driven at the relevant time by the accused/revisionist sustained injuries on his person, injuries whereof stand depicted in MLC, Ex.PW5/A. For receiving treatment for the injuries gained by him in the alleged occurrence, he was taken to Mission Hospital, Kullu whereat he succumbed to them. In sequel thereto PW-4 Dr. Raj Kumar conducted postmortem examination on the body of deceased Angchuk. Postmortem report is comprised in Ex.PW4/A. A perusal whereof discloses qua the demise of Angchuk standing sequelled by a head injury leading to subdural haematoma intracesebral haematoma. The aforesaid cause as stands ascribed in Ex.PW4/A qua the demise of Angchuk holds a nexus with the injuries depicted in MLC, Ex.PW5/A, injuries wehreof stand proven to be suffered by him in sequel to his person standing struck with a motor cycle allegedly driven in a rash and negligent manner by the accused/revisionist. A careful perusal of the statement of the accused recorded under Section 313, Cr.P.C., specifically with his answering in the affirmative, the apposite question No.2 occurring therein wherewithin recitals occur of his on the relevant day driving motorcycle bearing No. HP-34A-833, is per se a pronounced portrayal of his acquiescing to the factum of his at the relevant time driving the aforesaid motorcycle. However, the learned counsel appearing for the accused/revisionist contends of the aforesaid acquiescence of the accused/revisionist would not ipso facto beget a conclusion qua the charge for which accused/revisionist stood tried standing unflinchingly proven. He contends of with PW-1 Sunny Kumar making a report qua the ill-fated occurrence which took place on 20.11.2009 belatedly on 23.11.2009 also when no sound tangible explanation stands purveyed by the prosecution in explication of the aforesaid delay, concomitantly renders the belated recording of the statements of PW-1 Sunny Kumar and PW-8 Vikas Thakur by the Investigating Officer being construable to be a clever ploy deployed by the Investigating Officer for falsely implicating the accused/revisionist, whereupon, he contends qua their depositions qua the ill-fated occurrence recorded before the learned trial Court also losing their creditworthiness.

10. The aforesaid submission addressed by the learned counsel appearing for the accused/revisionist ought to suffer the ill-fate of it warranting negation significantly when PW-1 in his examination-in-chief has made vivid echoings therewithin qua the accused/revisionist while driving his motorcycle at the relevant time his being negligent in driving it, negligence whereof stands bespoken therein to stand comprised in his driving his vehicle at an excessive brazen pace besides his being unmindful to the fact of the deceased occupying the road while his concerting to cross over to its other side. The aforesaid ascription by PW-1 qua hence the accused/revisionist despite sighting the deceased to occupy the road his hence abandoning to adhere to the standards of due care and caution, abandonment whereof qua his enjoined duty to adhere to the standards of due care and caution stands pronounced by his omitting to apply the brakes of the motorcycle whereat he was atop whereupon, hence, the ill-fated mishap may stand obviated, has remained unconcerted to be repulsed by the learned defence counsel while holding him for cross-examination, significantly when therewithin there is no apposite suggestion put to PW-1 by the learned defence counsel while subjecting him to cross-examination in portrayal of the accused/revisionist in the manner aforesaid concerting to obviate the ill-fated mishap. Contrarily, in the cross-examination to which PW-1 stood subjected to by the learned defence counsel a suggestion stood put to him qua his at the relevant time standing positioned at the dhaba of a Nepali located adjoining a curve. PW-1 answered the aforesaid suggestion in the affirmative. The effect of the aforesaid suggestion answered in the affirmative by PW-1 when read in coagulation with the further affirmative suggestion put to him by the learned defence counsel while his standing held to cross-examination by the learned defence counsel, suggestion whereof stands couched in a phraseology qua the deceased while standing by the side of the curve his being sightable from the dhaba whereat he stood positioned, suggestion whereof stood answered affirmatively, is a magnifying display of the defence conceding to the factum of PW-1 rendering a credible ocular account qua the occurrence. Furthermore, the effect of the aforesaid inference is of the delay, if any, occurring in the lodging of the FIR holding no consequence, especially when PW-1 pronounces in his examination-in-chief qua in sequel to the deceased standing struck with the motorcycle allegedly driven rashly by the accused/revisionist his suffering injuries on his person, for treatment whereof his carrying him to hospital wherefrom it

can be concluded qua his hence standing precluded to promptly report the incident. Consequently, reinforcingly it can be concluded qua the Investigating Officer not by sheer contrivance introducing PW-1 as a witness to the occurrence also his belatedly recording his statement qua the occurrence holds no element of his employing a stratagem for falsely implicating the accused nor it can be concluded therefrom of PW-1 being an invented witness to the occurrence.

11. The learned counsel appearing for the accused/revisionist has contended of with another eye witness to the occurrence, who deposed as PW-8 making communications in his testification qua the deceased proceeding to tread upon the road without holding any awareness qua the occupation of the road at the relevant time by the motorcycle on which the accused/revisionist was atop also his exculpating the purported penal misdemeanor of the accused/revisionist, scuttling the effect of the testimony of PW-8. However, even if, the aforesaid communication qua the occurrence stand testified by PW-8, nonetheless, the counsel for the accused cannot make any capitalization therefrom, significantly when for the reasons aforestated (a) the learned counsel while holding PW-1 to cross-examination has been unable to tear the efficacy of his testimony qua the ill-fated occurrence comprised in his examination-in-chief; (b) when for reasons aforestated the defence concedes to the factum of PW-1 at the relevant time sighting the occurrence and (c) even if, PW-8 has not deposed a version qua the occurrence with omnibus parameteria affinity vis-a-vis the testimony rendered qua it by PW-1 yet with the motorcycle driven by the accused/revisionist standing proven to at the relevant time occupy the road also with his at the relevant time provenly striking the deceased, who thereat was attempting to cross the road, the accused/revisionist was obliged to by applying the brakes of the motorcycle ensure obviation of the accident whereas he has evidently omitted to do so significantly when it was not incumbent upon the deceased pedestrian, who was concerting to cross the road, to obviate the mishap, especially when no evidence surges forth qua the deceased abruptly appearing on the road without giving any opportunity to the accused to apply the brakes of his motorcycle, contrarily is a omnibus display of the accused wantonly wandering astray from adhering to the standards of due care and caution. In aftermath his penal inculpation for the penal misdemeanors is warranted.

12. For the reasons which have been recorded hereinabove, this Court holds that both the learned Courts below have appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by both the learned Courts below does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

13. Consequently, there is no merit in the instant petition and the same is dismissed. In sequel, the judgments impugned hereat are maintained and affirmed. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Sh. Bhagat Ram. .....Appellant.

Versus

Smt. Kanta Devi. .....Respondent.

FAO (HMA) No. 516 of 2008.
Date of decision: October 24, 2016.

Hindu Marriage Act, 1955- Section 13- Husband pleaded that wife had left her matrimonial home two months after giving birth to a child – she refused to accompany her husband despite requests to do so – she had abandoned the company of the husband without any reasonable cause – wife pleaded that husband had re-married during the subsistence of the marriage- four children were born to the husband from the marriage – husband had turned the wife out of the

matrimonial home at the instance of the second wife – the petition was dismissed by the Trial Court- held in appeal that husband had failed to prove the cruelty, rather it was proved that husband had treated the wife with cruelty – documents established the second marriage of the husband – wife has a reason to live separately from the husband as no lady would reside with another lady – the trial Court had properly appreciated the evidence- appeal dismissed.

(Para-10 to 13)

For the appellant : Mr. Neeraj Gupta, Advocate.
For the respondent : Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

This appeal is directed against the judgment and decree dated 22.3.2005 passed by learned Additional District Judge, Mandi in a petition under Section 13 of Hindu Marriage Act registered as HMP No. 10 of 2005 whereby the petition has been dismissed and the decree for grant of divorce on the ground of cruelty sought by the appellant (hereinafter referred to as 'petitioner') against his wife the respondent has been declined.

2. The parties to the present *lis* have solemnized marriage on 13.10.1984 in accordance with Hindu customs and ceremonies. One son is born to them out of this wedlock in the year 1986. According to the petitioner the respondent allegedly left the matrimonial home after two months of the birth of child and started living in her parents' house at village Dehar, Tehsil Sundernagar District Mandi. He visited the place of his in-laws to bring her back to the matrimonial home, however she refused to do so. He accompanied by one Beli Ram and Kushal again went to the place of his in-laws and asked her to accompany him to the matrimonial home but she refused to do so. She is working as JBT teacher and posted as such in Govt. Primary School, Saul (Salapar). The complaint, therefore, is that respondent has abandoned his company without any justifiable cause and thereby treated him with cruelty. He, therefore, has sought the dissolution of his marriage with respondent by a decree of divorce.

3. The respondent when put to notice had contested the petition on the grounds, inter-alia, that the petitioner during subsistence of a valid marriage with her has remarried with another lady namely Tripta Devi. Four issues i.e. three daughters and one son is born to Tripta Devi from the loins of the petitioner. On merits, it is denied that she has abandoned the company of the petitioner without any justifiable cause as according to her it is rather the petitioner who himself has turned out her from the matrimonial home along with her son in the year 1988 and since then she is residing at her parental house along with her son. It is rather the petitioner who allegedly treated her with cruelty because according to her she has been turned out from the matrimonial home at the behest of Tripta Devi, his second wife.

4. On the pleadings of the parties, the following issues were framed:

1.Whether the petitioner is entitled for the decree of divorce as alleged? OPP

2.Whether this petition is not maintainable? OPR

3.Relief.

5. The petitioner-husband has stepped into the witness box as PW1 and examined Shri Beli Ram PW2. He has placed reliance on Ext.P1, birth certificate of Master Banti born to him out of his wedlock with the respondent, Ext.P2 the order passed by learned Sub Divisional Judicial Magistrate, Sundernagar dismissing thereby the complaint under Section 406 IPC filed by the respondent against the petitioner and his father, Ext.P3 the petition for seeking divorce which was filed previously by the petitioner against the respondent and Ext.P4 the order passed in the petition Annexure-P3 consequent upon the compromise arrived at between the parties.

6. The respondent on the other hand has examined RW1 Smt. Sharda Devi, Centre Head Teacher, Government Central School, Naulakha who has produced the admission certificate

and proved the extract thereof Ext.RW1/A. RW2 Shri Khub Ram was Election Kanungo in the office of SDM, Sundernagar. He has proved the voter list Ext.RW2/A. RW3 Dassu Ram is a witness examined by her in support of her case. She herself has stepped into the witness box as RW4.

7. Learned trial Judge on appreciation of the oral as well as documentary evidence has arrived at a conclusion that the petitioner has failed to prove that he has been treated with cruelty by the respondent, the petition as such has been dismissed.

8. The legality and validity of the impugned judgment and decree has been questioned on the grounds, inter alia, that learned trial Court has not appreciated the evidence available on record in its right perspective and placed undue reliance on the documents Ext.RW1/A and Ext.RW2/A while answering issue No. 1 against the petitioner. It is pointed out that Ext.RW1/A and Ext.RW2/A are not proved on record in accordance with the provisions contained under the Evidence Act. The same as such could have been ignored. No reliance could have also been placed on the testimony of RW3 and RW4.

9. Mr. Neeraj Gutpa, Advocate, learned counsel representing the petitioner has vehemently argued that the respondent as per the cogent and reliable evidence available on record has abandoned the company of the petitioner without any justifiable cause and thereby treated him with cruelty. Therefore, according to learned Counsel the petition in all probability was required to be allowed and the decree of divorce as sought by the petitioner granted in his favour. Mr. G.R. Palsra, learned Counsel representing the respondent has pointed out from the record that the another lady Smt. Tripta Devi is residing with the petitioner in the capacity of his wife and that four issues have been born to her from his loins. Therefore, according to Mr. Palsra it is rather the petitioner who has treated the respondent with cruelty.

10. On analyzing the rival submissions and also reappraisal of the evidence available on record, in the considered opinion of this Court learned trial Judge has not committed any illegality or irregularity while declining the decree of divorce for the reasons that he has miserably failed to prove that his wife the respondent has treated him with cruelty. The evidence as has come on record by way of own testimony of the petitioner and also by that of RW1 and RW2 as well as that of the respondent herself while in the witness box as RW4 make it crystal clear that it is rather the petitioner who has treated the respondent with cruelty because irrespective of the petitioner himself and PW2 Beli Ram having denied the suggestion that the petitioner has solemnized marriage with Tripta Devi, denied being wrong. It is proved from the documents Ext.RW1/A and Ext.RW2/A that Tripta has been shown the wife of the petitioner in the record of Govt. Central School, Naulakha, Tehsil Sundernagar District Mandi. Ext.RW1/A is the extract of the admission and withdrawal register which has been maintained in the school. As per the entries in this document Kumari Dimple is daughter of Bhagat Ram, though name of her mother is not there in this document. It has not been put to RW1 in her cross-examination that Dimple is not born to Tripta Devi from his loins. The extract of voter list Ext.RW2/A reveals that Tripta Devi has been shown wife of Bhagat Ram. No suggestion was given to RW2 that Tripta Devi in this document is some other lady and Bhagat Ram also is someone else. Such documentary evidence substantiates the claim of the respondent that Tripta Devi is living with the petitioner as his wife. Although the petitioner while in the witness box has denied the suggestion that the petitioner has brought to his house another lady Tripta Devi in the year 1986 and that they both are residing together as husband and wife. Similarly, the suggestion that from the loins of petitioner said Tripta Devi has given birth to three daughters and one son and that Dimple and Rajni two girls are residing with him in his house. Yet the documentary evidence discussed hereinabove reveal that he is treating Tripta Devi as his wife and she is living with him in his house. Kumari Dimple is born to said Tripta Devi from his loins. He has admitted that compromise was arrived at between him and the respodent in the divorce petition, HMP No. 2 of 1990 previously filed by him against the respondent and that the condition of the compromise was that in future he will not live in the company of some other lady. This also lead to the only conclusion that Tripta Devi is living with the petitioner in the capacity of his wife. Admittedly the

respondent is residing since 1987 in village Dehar at the place of her parents. She however, had abandoned the company of the petitioner for justifiable reasons because no wife will tolerate that during subsistence of the marriage her husband is having relations with some other lady.

11. True it is that a complaint under Section 406 IPC filed by the respondent against the petitioner has been dismissed at initial stage itself vide order Annexure-P2 because the preliminary evidence was not suggestive of that the respondent has entrusted the dowry articles to the petitioner and his father Dhungal Ram. The another complaint she filed under Section 494 of the Indian Penal Code has also been dismissed by learned Judicial Magistrate Ist Class vide judgment dated 26.11.2010 and the appeal she preferred also stand dismissed being not maintainable vide order dated 25.6.2016 passed by learned Additional Sessions Judge-I, Mandi Camp at Sundernagar. However, it is not known that any appeal is preferred by the respondent in this Court or not. Anyhow, the judgment Ext.P2 and the judgment of acquittal in complaint which was filed by the respondent against the petitioner and Tripta Devi under Section 494 of the Indian penal code cannot be taken to arrive at a conclusion that the petitioner is not living with Tripta Devi nor four issues born to her from his loins. It is a separate matter that respondent has failed to prove the solemnization of marriage by the petitioner with Smt. Tripta Devi because it is not so easy to prove the factum of solemnization of 2nd marriage. However, there cannot any bearing of dismissal of complaint under Section 494 of Indian Penal code, the respondent had filed against the petitioner in the preset proceedings.

12. The present as such is a case where the respondent has not treated the petitioner with cruelty and rather it is he who has subjected her to mental as well as physical cruelty because in view of he is living in the company of Tripta Devi in his house and four issues are born to them, the possibility of the respondent having been tortured by him and turned out from the matrimonial home cannot be ruled out. Learned trial Judge, therefore, has appreciated the evidence available on record in its right perspective. The findings recorded by learned trial Court cannot be said to be legally and factually unsustainable. Being so, the impugned judgment and decree deserves to be affirmed.

13. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. No order so as to cost.

14. Pending application(s), if any, also stands disposed of.

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

Col. Pawan Kumar Sharma .....Appellant/Petitioner.

Versus

Smt. Bhavna Sharma .....Respondent.

FAO No. 420 of 2009.
Reserved on : 05.10.2016.
Decided on : 25th October, 2016.

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized according to Hindu Rites and Custom- two children were born from the wedlock – husband was posted as a captain in the army – the wife used to leave her matrimonial home on arrival of the husband and used to reside with her parents – wife left matrimonial home without any reasonable cause and did not join despite efforts- the wife pleaded that she was thrown out of her matrimonial home after her parents failed to fulfill the demand of dowry – the husband used to beat the children – the petition was dismissed by the Court- held in appeal that the wife had left her matrimonial home without any reasonable cause and had not returned despite the efforts made by the husband – the relationship between the parties had irretrievably broken down - the

wife is not willing to join the company of the husband – therefore, appeal allowed and the marriage between the parties ordered to be dissolved. (Para-9 to 14)

Cases referred:

Durga Parasanna Tripathy versus Arundhati Tripathy, AIR 2005 SC 3297
Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675
K. Vengadachalam versus K.C. Palanisamy and others, (2005)7 SCC 352
Statish Sitole v. Ganga, AIR 2008 SC 3093

For the Appellant: Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajit Jaswal, Advocate.
For the Respondent : Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered by the learned Additional District Judge, Fast Track Court, Chamba, Himachal Pradesh, on 14.07.2009 in H.M.A. Petition No. 27 of 2008, whereby it refused the according qua the petitioner, a decree for dissolution of his marital ties with the respondent.

2. The petitioner/appellant herein standing aggrieved by the rendition of the learned Additional District Judge, hence concerts to reverse it by preferring an appeal therefrom before this Court.

3. The brief facts of the case are that the petitioner claimed the respondent to be his legally wedded wife. Out of their wedlock two female children have born in the years 1986 and 1990 respectively and they are living with the respondent. It is averred that the petitioner was captain in Indian Army and the respondent was a regular Govt. servant in Education department at the time of her marriage. When he was posted in Hussainiwala Border in Firozpur in "operational Trident" and the family was not allowed to be kept there due to which, the respondent started living with her mother and occasionally visited his house. He provided each and every necessities of life to the respondent but she was not at all interested in him. Whenever, he used to come to Chamba on holidays, the respondent used to go to her parents' house on the same day or some times one day prior to his coming at Chamba and thus due to her this act, he had to stay alone at his own house during the holidays and only on his repeated requests she used to come back to the matrimonial house but that too not for more than two days. The petitioner has further pleaded and claimed that the second child was born in the year 1990 and after her birth, the respondent without any reasonable cause and without his consent left the matrimonial house and started living with her mother. However, the petitioner and his mother tried to bring her back and convince her that she should live in her matrimonial house. It is averred that in May, 1996, his nephew Chandan Koushik expired in an accident due to which the people from the locality and society used to come to his house to condole but she used to watch TV in her bedroom and did not participate in the mourning. The matter was reported to her mother but on next day, her brother came to his house and took all her belongings without his consent and she also left the matrimonial house without any reasonable cause and his consent. Since then she has failed to join his company and completely deserted him, although, he and his family members tried to reconcile the matter. It is further averred that his other nephews died in the years 1999 and 2001 but the respondent or her family members did not come to his house. On 15.9.2006 his mother also died but nobody from the respondent's house came to his house. It is further claimed that in the year 2003, on his persuasion, a meeting with the respondent was organized through one Shri Chaman Sharma for conciliation of the matter but in vain. It is averred that he has retired from the Indian Army on 1.2.2002 as Colonel and undergone mental pain and suffering due to the acts of the respondent, who has failed to join his

company since 1996 and as such, the marriage has broken down irreparably. Hence, he sought decree for divorce for dissolution of his marital ties with the respondent.

4. The respondent contested the petition and filed reply. In the reply, the respondent has admitted the relationship between the parties including the off spring as pleaded in the petition, however, the respondent has further pleaded and claimed that she had been living at her matrimonial house alongwith her daughters till date she was forcibly thrown out from the matrimonial house by the petitioner and his family members. She has pleaded that she being loyal Hindu wife served the petitioner as well as his family members like a humble daughter-in-law. It is also alleged that she maintained her daughters as well as her mother in law from her own hard earned money. It is alleged that she was maltreated by the petitioner and his family members. Her second daughter was born to her in the year 1991 and after her birth, the petitioner got annoyed as she had not given birth to a male child. It is alleged by her that the petitioner used to demand dowry by saying that since he is a captain in Army, her parents must provide good car alongwith diamond button on his coat. She has also alleged that the petitioner had given beatings to her elder daughter and in that process, her ear and face were hurt so badly that she had to be rushed to the District Hospital, where she was treated for her injuries by the lady doctor. She has further alleged that Chandan Koushik expired in May, 1996 and at that time relatives of the petitioner advised her not to disclose it to her mother in law who was an old lady and then the relatives along with her mother in law went to Nahan for condolence where the respondent also0 arrived but she was assigned the job of caretaker of house at Chamba. It is also alleged by her that after return from Nahan to Chamba, the petitioner and his family members started harassing and maltreating her and gave beatings to her and turned her and her minor daughters out from the matrimonial house. Thereafter, she requested number of times to the petitioner to allow her to live in the matrimonial house, but all efforts went to vain as the petitioner and his family members did not allow her to live in the matrimonial house. She has further alleged that one of the petitioner's cousin sister namely Rajnish Sharma invited her to Hotel Irawati, where the petitioner was present who forced her to sign customary divorce papers, which she flatly refused. Even prior to that, two notices along with customary divorce deed were sent to her which were never answered by her. She has denied the allegations of cruelty and desertion as pleaded by the petitioner and prayed for the dismissal of the petition.

5. The petitioner/appellant herein filed rejoinder to the reply of the respondent, wherein, he denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

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

1. Whether the respondent has failed to join the company of the petitioner and completely deserted him as alleged? OPP

2. Whether the respondent after solemnization of the marriage has treated the petitioner with cruelty as alleged? OPP

3. Whether the petitioner has suppressed the material facts from the court, as alleged, if so, its effects? OPR

4. Relief.

7. On an appraisal of evidence, adduced before the learned Additional District Judge, he dismissed the petition of the petitioner/appellant herein.

8. Now the petitioner/appellant herein has instituted the instant appeal before this Court wherein he assails the findings recorded by the learned Addl. District Judge in his impugned judgment and decree.

9. The appellant herein/petitioner tied nuptial marital knots with the respondent herein in September, 1985. Two female children were born from their wedlock respectively in the year 1986 and 1991. The alienation of the respondent from the matrimonial company of the

appellant herein/petitioner, stands averred to commence in the year 1991 whereat the respondent herein delivered a female child whereafter she is averred to without any reasonable cause besides without the consent and against the wish of the petitioner/appellant herein, depart to her parental home. Apart from the aforesaid factum of the respondent herein deserting the matrimonial company of the appellant herein, the latter has averred qua in May, 1996 when his nephew met his end in an accident, hers remaining confined to a room whereat she continued to watch television rather than attend to people who had come to his residence for condoling the demise of his nephew Chandan Koushik. Though the apathetic attitude of the respondent herein was complained by the petitioner to her mother yet it sequeled the respondent's brothers to come to the matrimonial home of the respondent whereat they without the consent of the petitioner/appellant herein along with her belongings took the respondent with them to her parental home. Since, the departure of the respondent herein from her matrimonial home in May, 1996, the petitioner avers of the respondent, despite his concerting to regain her matrimonial company, she portraying stark obduracy in joining his company at her matrimonial home. Even in the years 1999 and 2001 whereat the demise of the nephews of the petitioner occurred, the latter avers qua neither the respondent nor her family members visiting him to condole their demise. He continues to aver of on 15th September, 2006, whereat the demise of his mother occurred neither the respondent nor her family members visiting his home to condole her demise. He also avers qua the respondent not permitting him to meet his children. He avers qua in the year 2003, on his persuasion through the aegis of one Chaman Sharma, a meeting with the respondent stood organized, for bringing amity in their relations yet his efforts in the aforesaid regard proving abortive. The prolonged separation since the year 1996 upto the date of institution of the instant petition, of the respondent from the matrimonial company of the petitioner stands espoused by him to ipso facto connote of their marital relations standing irretrievably broken down, whereupon he seeks dissolution of his marital ties with the respondent besides obviously contends qua, on score of desertion besides concomitant mental cruelty perpetrated upon him, his thereupon standing entitled to a decree of dissolution of his marital relations with the respondent.

10. The aforesaid averments constituted in the petition by the petitioner also stand communicated by him in his testification. His testification as also the averments constituted in the petition also stand corroborated by PW-2 and PW-3. The respondent herein for succoring her repudiation to the averments constituted in her reply to the apposite petition has testified as RW-1. For meteing corroboration thereto she has depended upon the testimonies of RW-2, RW-3 and RW-4. Since, the evidence adduced by the contestants herebefore does succor their respective espousals hence this Court is enjoined to with discerning circumspect care unearth therefrom the truth carried therein. However, before proceeding to discern the respective veracities of the evidence adduced herebefore by the contestants in substantiation of their respective espousals encapsulated in their respective pleadings, the effect of the alleged apathy of the respondent herein emanable from hers purportedly not attending to mourners, who visited the house of the appellant herein/petitioner, for condoling the demise of his nephew which occurred in the year 1996 besides her apathy emanable from hers not visiting her matrimonial home in the years 1999 and 2001 whereat also the demise of the nephews of the appellant herein occurred, lastly the effect of the apathy of the respondent herein to in September, 2006 not visit the house of the petitioner/appellant herein to mourn the demise of his mother, has to be pronounced upon, significantly when the aforesaid purported misdemeanors of the respondent herein beset the appellant herein with mental trauma. The effect of the aforesaid purported misdemeanors of the respondent herein even if assumingly carry any vigorous sinew, their tenacity omnibusly wanes with an imminent display of the appellant herein instituting the instant petition in the year 2007. The immense hiatus since the purported misdemeanors of the respondent herein vis-a-vis the institution of the instant petition by the appellant herein brings to the fore an inevitable inference of the appellant herein thereupon condoning the aforesaid purported misdemeanors which he ascribes to the respondent herein. Also as a corollary, their effect, if any, upon the mental psyche of the petitioner cannot be construed to be holding any enormity or gravity in both potency or in sinewed vigour wherefrom a deduction is derivable of theirs not hence purveying to the appellant

herein a formidable weapon for seeking dissolution of his marital ties with the respondent. Contrarily, for reasons aforestated the appellant herein is to be construed to be condoning the purported misdemeanors of the respondent herein besides at the time of institution of the petition at hand their concomitant bearing upon his psyche losing effect.

11. Dehors the aforesaid, the appellant herein has conceived a ground for annulling his marital ties with the respondent herein on the score of the respondent for an inordinately prolonged duration of time alienating herself from his matrimonial company whereupon he concerts to erect an argument qua his marital ties with the respondent herein standing irretrievably broken down wherefrom he on the anvil of a decision of the Hon'ble Apex Court reported in ***Durga Parasanna Tripathy versus Arundhati Tripathy, AIR 2005 SC 3297*** wherein the Hon'ble Apex Court on surging forth of evidence therebefore of the marital partners thereat living separately for 14 years besides prevalence thereat of evidence in portrayal of concerts made by the husband to retrieve his errant spouse to her matrimonial home proving abortive had thereupon construed qua their marriage standing irretrievably broken down, leading it to conclude of thereupon the husband proving the animus deserdendi of the errant spouse beside concluded qua given the prolonged estranged embittered relations inter se them, the refusal of a decree of dissolution of their marital ties begetting no fruitful purpose significantly when their matrimony was irreparable. Also he has depended upon a judgment of the Hon'ble Apex Court reported in ***Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675*** wherein the Hon'ble Apex Court has held qua with proof emanating qua irretrievable break down of marriage, besides proof erupting qua it standing damaged beyond repair warranting incorporation thereof in the relevant statute as a ground for dissolution of marriage, for incorporation whereof it made recommendations also it on emanation of proof aforesaid concluded qua the prolonged separation of the spouses ipso facto purveying succor to an inference of their marital ties standing irretrievably broken down whereupon it annulled the marital ties inter se the contestants thereat. The aforesaid pronouncements also stand pronounced by the Hon'ble Apex Court in ***K. Vengadachalam versus K.C. Palanisamy and others, (2005)7 SCC 352*** and ***Statish Sitole v. Ganga, AIR 2008 SC 3093***. The factum of prolonged separation of the spouses thereat provided impetus to the Hon'ble Apex Court to conclude of any concert to beget continuation of marital relations inter se spouses thereat by refusing to annul their marital ties per se tantamounting to cruelty whereupon it proceeded to annul the marital ties inter se the contesting parties thereat.

12. The learned trial Court by delving deep into the evidence adduced therebefore by the parties at contest had hence distinguished the ratio decidendi propounded by the Hon'ble Apex Court in the aforesaid citations whereupon it concluded of the version propounded in the testification of the petitioner/appellant herein standing gripped with falsity whereas the contentions reared by the respondent holding a virtue of truth. It also concluded of with the petitioner/appellant herein not adducing cogent evidence in display of the respondent herein while hers holding an animus deserdendi hers hence separating from his company, constraining it to hold of hence the petitioner/appellant herein contriving besides engineering a ground for divorce. The inference recorded by the learned trial Court of the petitioner/appellant herein inventing a ground for divorce stood anvilled upon the factum of his transmitting a notice, comprised in Ex.RB, to the respondent wherewithin he beseeched her to facilitate annulment of their marital ties by by their conjointly resorting to customary law also with enunciations occurring therein of the petitioner/appellant herein aspiring to solemnize a second marriage, reiteratedly whereupon it erected an inference of the petitioner contriving a ground for divorce. The aforesaid exhibits do bely the espousal of the petitioner/appellant herein qua his concerting to reclaim the matrimonial company of the respondent herein. Further more the deposition of RW-4, an adult daughter begotten from the wedlock of the contesting parties hereat wherewithin she succors the contentions held in the pleadings of the respondent herein beside imputes fault to the petitioner/appellant herein, provided impetus to the learned trial Court to form a conclusion of the appellant herein/petitioner derelicting to preserve his matrimony with the respondent herein, rather his aberrant behaviour bolstering the departure of the respondent

herein to her parental home wherefrom it concluded of the appellant herein failing to prove the trite factum of the respondent herein with an animus deserdendi departing to her parental home.

13. Be that as it may, dehors the tenacity of the conclusion formed by the learned trial Court also dehors the factum of the petitioner/appellant herein assumingly contriving a ground for annulment of his marital ties with respondent herein nonetheless the prolonged separation of the respondent from the matrimonial company of the appellant herein when stands unflinchingly proven also when their relations have developed acute estrangement besides stand painfully embittered also with the adult daughter of the contestants hereat imputing cruelty to the petitioner/appellant herein constitute hard realistic evidentiary data for bolstering a deduction qua the marriage inter se the parties at contest standing irretrievably broken down also it hence being unevacuable whereupon qua refusal of a decree of divorce would be a futile attempt to revive their capsized matrimony rather would perpetuate torment upon both of them. The learned trial Court has remained oblivious to the hard evidentiary realities as stand evinced from the record existing hereat rather it by drawing certain subtle distinctivities inter se the factual scenario prevailing hereat vis-a-vis the scenario prevailing in the citations relied upon by the learned counsel appearing for the appellant, has refused to annul their marital ties, refusal whereof is a futile attempt to preserve their dismantled marital relation.

14. The refusal by the learned trial Court to accord a decree qua annulment of martial ties inter se the petitioner and the respondent has erupted on its remaining unmindful of (a) suggestion put to the petitioner/appellant by the counsel for the respondent while holding him to cross-examination, wherewithin articulations are held qua existence of temperamental inconsistencies inter se them, suggestion whereof stood answered in the affirmative by the petitioner; (b) the effect of the aforesaid suggestion and the consequent answers in affirmation thereto rendered by the petitioner blunts the effect of the suggestion subsequently put to the petitioner by the counsel for the respondent during the course of his subjecting him to cross-examination qua his willingness to accept the respondent at her matrimonial home, besides the answer in the negative purveyed thereto by the petitioner holds no leverage to the respondent herein to contend qua the petitioner contriving a ground to annul his marital ties with her. The effect of the aforesaid evidentiary data existing herebefore is qua their existing mental incompatibility inter se the married spouses whereas mental compatibility is imperative for flourishing conviviality in matrimony. Since the institution of marriage would flourish only on survival of affability inter se married spouses whereas with affability inter se both provenly ebbing given their prolonged embittered estranged relations also when the adult daughter of the petitioner imputes cruelty to the petitioner whereas she along with her sister besides with her mother are enjoined to stay in harmony with the petitioner/appellant herein at his home, matrimonial harmony whereof when has suffered a deep fracture beside fissure, any refusal of a decree for annulment of marital ties inter se the petitioner/appellant and the respondent herein would be a futile exercise also would perpetuate agony and torment upon both. For obviating the aforesaid causality, it is deemed fit and proper to disregard the subtle distinctivities prevaling in the factual matrix propounded in the citations of the Hon'ble Apex Court vis-a-vis the factual matrix prevailing hereat rather with the predominant fact of both holding prolonged estranged relations whereupon their marriage has foundered constitute the solitary consideration for annulling their martial ties. Also it appears of the respondent not willing to join her matrimonial home significantly when despite this Court ordering on 6.9.2016 for hers recording her presence herebefore for facilitating this Court to beget a reconciliation inter se her and the appellant, hers omitting to record her presence hereat on 20.9.2016, omission whereof spurs an inference qua hers being uninterested in reviving her marital ties with the petitioner/appellant herein hence her aspiration also warrants vindication.

15. For the foregoing reasons, it is apt to clinchingly conclude of with the marital ties of the petitioner/appellant herein with the respondent herein standing broken down irretrievably hence, the rendition of a decree of severance of their marital ties would be both just and expedient. Consequently, the instant appeal is allowed. Accordingly, the marriage inter se the petitioner/appellant and the respondent herein is ordered to be dissolved subject to the

appellant herein/petitioner paying from 1st November, 2016 per mensem permanent alimony to her to the extent of 35% of the pensionary benefits received by him, defrayment whereof be made by his remitting per mensem in her savings bank account the aforesaid quantum of alimony assessed vis-a-vis the respondent herein, particulars whereof be supplied within one week from today by the learned counsel for the respondent herein to the learned counsel for the petitioner/appellant herein, further subject to his within two months from today preparing FDRs in the name of his adult daughters respectively each in a sum of Rs.5,00,000/- (Rs. Five lacs Only) towards the expenses of their marriage, FDRs whereof shall be deposited by the appellant herein in the Registry of this Court. In sequel, the judgment and decree impugned before this Court is quashed and set aside. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

National Insurance Company Ltd. ....Appellant.

Versus

Smt. Puran Dei and others ....Respondents.

FAO No. 153 of 2016.
Decided on : 25th October, 2016.

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

(Para-4 to 6)

For the Appellant: Mr. Rajiv Jiwan and Mr. Ajit Sharma, Advocates.
For Respondents No.1 and 2: Mr. Manoj Thakur, Advocate.
For Respondents No.3 to 5: Mr. T.S.Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned order of the learned Commissioner, under the Workmen's Compensation Act, 1923, Bilaspur, District Bilaspur, H.P. (for short the "Commissioner"), whereby he allowed the application preferred thereat by the claimants/respondents No.1 and 2 wherein they claimed grant of compensation vis-a-vis them under the Workmen's Compensation Act (for short the "Act").

2. The claimants/respondents No.1 and 2 herein are successors-in-interest of deceased Chaterpal, whose demise occurred in an ill-fated accident involving truck bearing No. HP-24-5291, whereon he stood at the relevant time engaged as a cleaner by respondents No.3 and 4. They had instituted a petition before the Commissioner staking a claim therein for assessment of compensation under the Act qua them. The learned Commissioner on standing seized with the relevant evidence, pronounced an award wherein he assessed compensation in a sum of Rs.6,71,389/- along with interest @ 12% per annum vis-a-vis the claimants/respondents No.1 and 2 herein besides liability thereof stood fastened upon the insurance company.

3. The Insurance company-appellant herein standing aggrieved by the rendition of the learned Commissioner hence concerts to assail it by preferring an appeal therefrom before this Court.

4. The learned Commissioner had while concluding qua the deceased drawing wages in a sum quantified @ Rs.3000/- per month had depended upon the testimony of PW-1 Puran Dei, the mother of deceased Chaterpal. She had therein pronounced qua the deceased drawing from his employment under his employer wages @ Rs.3000/- per month besides his employer defraying to him diet money quantified at Rs.50 per day. Though, the aforesaid articulations made by PW-1 in her testification qua hence deceased Chaterpal, the predecessor-in-interest of the claimants/respondents No.1 and 2 herein cumulatively drawing wages @ Rs.4500/- per month, yet the learned Commissioner concluded of the amount of wages per month drawn by the deceased from his employment as a cleaner in the truck owned by respondents No.3 and 4 standing comprised in a sum of Rs.3000/- whereon he applied the relevant statutory principles for determination of compensation vis-a-vis the claimants/respondents No.1 and 2 herein. Since, the learned Commissioner has taken only a sum of Rs.3000/- to be the per mensem wages drawn by the deceased from his employment as a cleaner under his employers, the aforesaid sum is visibly a just and reasonable sum of wages per mensem drawn by the deceased while his standing engaged as a cleaner in the ill-fated vehicle by his employers. In aftermath the aforesaid computation of wages per mensem drawn by the deceased while his standing engaged as cleaner in the ill fated vehicle by his employers does not warrant any interference. Even otherwise the Insurance company has not adduced the relevant best evidence comprised in its concerting to lead into the witness box the employers of the deceased wherefrom the apposite elicitations may have upsurged qua the deceased drawing wages per mensem in a figure lesser than Rs.3000/-. Consequently, reiteratedly, the conclusion drawn by the learned Commissioner qua the deceased drawing wages constituted in a sum of Rs.3000/- per mensem while his serving in the ill-fated vehicle as a cleaner under his employer warrants deference.

5. The learned counsel appearing for the Insurance Company has contended of with the driving licence held by the driver, who at the relevant time was driving the ill-fated vehicle, licence whereof stands comprised in Ex. RW1/A holding reflections therewithin qua it authorizing him to drive a heavy transport vehicle, validity whereof enduring upto 30.12.2006. whereas with the ill-fated occurrence taking place on 17.01.2007, qua hence thereat the driving licence held by the driver of the ill-fated vehicle not holding any valid subsisting force, whereafter, he contends qua the fastening of the relevant liability upon it by the learned Commissioner in the impugned rendition warranting interference. However, the aforesaid contention also warrants its standing discountenanced in the face of the provisions encapsulated in Section 14 of the Motor Vehicles Act, 1988, the relevant provisions whereof stand extracted hereinafter, mandating qua on an application standing preferred by a holder of a driving licence before the licencing authority concerned whereupon he on its validity expiring seeks its renewal therefrom, it holding an empowerment to renew it, renewal whereof holding validity besides effect from the date of its expiry. However, the aforesaid mandate held therewithin is subject to the mandate held in its proviso. The relevant provisions of Section 14 of the Motor Vehicles Act read as under:-

> " 14. Currency of licences to drive motor vehicles:-
>
> (1).....
>
> (2). A driving licence issued or renewed under this Act Shall,-
>
> (a) in the case of a licence to drive a transport vehicle, be effective for a period of three years"

The relevant provisions of Section 15 of the Motor Vehicles Act read as under:_

> "15. Renewal of driving licences.- (a) Any licensing authority may, on application made to it, renew a driving licence issued under the provisions of this Act with effect from the date of its expiry:

> Provided that in any case where the application of the renewal of a licence is made more than thirty days after the date of its expiry, the driving licence shall be renewed with effect from the date of its renewal:
>
> Provided further that where the application is for the renewal of a licence to drive a transport vehicle or where in any other case the applicant has attained the age of forty years, the same shall be accompanied by a medical certificate in the same form and in the same manner as is referred to in sub-section (3) of section 8 and the provisions of sub-section (4) of section 8 shall, so far as may be apply in relation to every such case as they apply in relation to a learner's licence."

The proviso to Section 15 wherewithin a mandate is held qua on more than 30 days elapsing since its expiry whereupon its renewal stands concerted by its holder, the renewal of his driving licence by the licencing authority concerned holding effect from the date of its renewal and not from the date of its expiry wherefrom the inevitable conclusion is of unless the holder of a driving licence within 30 days elapsing since its expiry prefers an application before the licencing authority concerned wherein he asks for its renewal therefrom, the renewal of the relevant driving licence by the licencing authority concerned being construable to hold effect from the date of its renewal. In other words, if only when the holder of a driving licence on expiry of his driving licence prefers an application within 30 days elapsing since its expiry concerting therein its renewal by the licencing authority concerned thereupon alone its renewal by the licencing authority concerned relating back to the date of its expiry otherwise not. Consequently, with reflections occurring in Ex.RW1/A qua the driving licence of the driver of ill-fated vehicle surviving upto 30.12.2006 whereas the vehicle which he was driving at the relevant time suffering an accident on 17.01.2007 hence with the ill-fated occurrence taking place with less than 30 days elapsing vis-a-vis the date of expiry of the apposite driving licence also when thereupto not more than 30 days elapsed therefrom, it cannot be concluded of hence (a) the relevant driver not preferring within 30 days since its expiry an apposite application before the licencing authority concerned for obtaining its renewal therefrom (b) of qua it holding force and validity at the time of the ill-fated occurrence significantly when its renewal stood concerted within 30 days elapsing since its expiry (c) besides its renewal relating back to the date of its expiry. Consequently, when only on 30 days elapsing since 30.12.2006 besides therewithin his omitting to seek its renewal from the licencing authority concerned, a conclusion was garnerable of hence renewal of his driving licence by the licencing authority concerned being effective from the date of its renewal. Contrarily, reiteratedly when RW-1 in his testification has not made any communication qua the driver of the ill-fated vehicle seeking renewal of his driving licence from the licencing authority concerned on more than 30 days elapsing since 30.12.2006, it has to be concluded qua hence his seeking renewal of the apposite driving licence within 30 days from the date of its expiry also therefrom it has to be concomitantly concluded qua his driving licence being construable to be effective vis-a-vis the date of its expiry i.e. 30.12.2006. In sequel, whereof it is to be concomitantly concluded qua at the time contemporaneous to the occurrence of the ill-fated incident, his holding a valid driving licence to drive the relevant vehicle. In aftermath, the findings recorded by the learned Commissioner on the aforesaid apt issue do not merit any interference.

6. For the reasons recorded hereinabove, no substantial question of law much less a substantial question of law arises for determination in the instant appeal. Consequently, there is no merit in the instant appeal and it is accordingly dismissed. In sequel, the order impugned hereat is maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Satish Chander .....Appellant-Plaintiff.
Versus
Jagdish and others .....Respondents/defendants.

RSA No. 383 of 2007.
Reserved on : 06.10.2016.
Decided on : 25th October, 2016.

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that suit land was earlier owned by his mother V – she had executed a Will in favour of the plaintiff and defendant No.1- the other land was given to proforma defendants No. 2 and 3- defendant taking advantage of the absence of the plaintiff got executed a gift deed – the suit land was ancestral in the hands of V – the defendant pleaded that the Will and gift deed were executed in a free and disposing state of mind – the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that the execution of the Will was not disputed – the gift deed was executed after the execution of the Will- the gift deed was registered and there is presumption of its due execution – however, it was recorded by the revenue officer that possession was delivered after receiving an amount of Rs.5,000/- - therefore, it has not been proved that the gift was executed without any consideration- the donee had failed to prove that no undue influence was exercised by him upon the donor – further, the scribe and the witnesses were common – the Sub Registrar was also not examined – the Courts had not properly appreciated the evidence – appeal allowed- judgments of the Courts below set aside and the suit of the plaintiff decreed. (Para-7 to 14)

Case referred:
Krishna Mohan Kul alias Nani Charan Kul and another versus Pratima Maity and others (2004)9 SCC 468

For the Appellant: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For Respondent No.1: Mr. Ashok Sharma, Senior Advocate with Ms. Sukarma Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Regular Second Appeal stands directed against the impugned judgement and decree recorded by the learned Additional District Judge, Fast Track Court, Kangra at Dharamshala in Civil Appeal No. 147-J/05/03, whereby he in affirmation to the verdict recorded by the learned trial Court dismissed the suit of the plaintiff wherein he had sought a declaration qua gift deed comprised in Ex.DW2/A being quashed and set aside. The plaintiff/appellant herein stands aggrieved by the concurrently recorded renditions of both the learned Courts below wherefrom he has instituted the instant appeal herebefore.

2. The brief facts leading to the lis inter se the parties were that the plaintiff sought declaration that he is joint owner to the extent of 435/924 shares in the suit land since the suit land was earlier owned by the mother of the parties Smt. Vidya Devi wife of late Dharam Vir. It had been averred that a Will was executed by Vidya Devi in favour of the plaintiff and defendant No.1 in full disposing mind on 9.4.1991 and as per that Will, the land to the extent of 0-02-85 hectares was given to defendant No.1 and 0-03-84 hectares was given to the plaintiff. The deceased had also executed a Will in respect of other land vide which the land had been given to the proforma defendants NO.2 and 3. The plaintiff was earlier residing at Patiala and thereafter shifted to Shimla as he was in government service. The defendant taking advantage of the

absence of the plaintiff by playing fraud upon Vidya Devi got a false and fictitious gift deed executed. The suit land in the hands of Vidya Devi was ancestral qua the plaintiff and defendant No.1 and proforma defendants who are governed by custom in the matter of alienation being agriculturists. It had also been averred that the land being ancestral property was to devolve upon the plaintiff and defendants but by way of Will executed by Vidya Devi the reversionary rights of the plaintiff got effected and he got deprived of his share in the suit land. It had also been averred that the gift deed is not valid and the plaintiff is not bound by the gift deed. The plaintiff had further averred that Vidya Devi had also constructed a house over the suit land about two years back and there was another old house existing on the suit land constructed by the forefathers of the parties. The plaintiff and the defendants have got their shares in both the house since the parties are in joint possession of both the houses. The defendant NO.1 in connivance with the revenue staff got mutation sanctioned on the basis of the alleged gift deed in his favour without notice to any of the interested parties or to deceased Vidya Devi. The defendant No.1 was asked time and again that he should not claim anything as per the alleged gift deed but in vain, hence the instant suit.

3. Defendant No.1 contested the suit and taken preliminary objections inter alia maintainability, locus standi, estoppel, cause of action. It had been averred that the plaintiff was regularly visiting to his house. It had also been averred that Vidya Devi was not a simple lady. She executed a valid gift deed in faovur of defendant No.1 out of her free will and undue influence. The gift was registered with the Sub Registrar, Jawali. Thus there was no question of fraud. Defendant NO.1 has become owner of 558 shares out of 924 shares out of which 285 shares were due on account of the gift deed. The houses constructed by defendant No.1 by raising loan from the financial institution. Thereby the plaintiff and proforma defendants have got no share over that house. The plaintiff is owner to the extent of 366 shares out of 924 shares. It had been averred that the parties are not governed by custom in the matters of alienation. Vidya Devi had every right to alienate suit land by way of gift being owner-in-possession of the suit land. The deed is valid and a legal document. Thereby the plaintiff is not entitled to any relief.

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

1. Whether the plaintiff is joint owner to the extent of 435/924 share i.e. 0-04-57 HM, out of the suit property, as alleged? OPP

2. Whether the gift deed dated 23.4.1991 executed by Vidya Devi in favour of defendant No.1, is result of fraud , as alleged? OPP

3. Whether the suit of the plaintiff is not maintainable in the present form, as alleged? OPD

4. Whether the plaintiff has no locus stnadi to file the present suit, as alleged? OPD

5. Whether the plaintiff is estopped to file the present suit, as alleged? OPD.

6. Whether the plaintiff has no enforceable cause of action, as alleged? OPD.

6-A. Whether the property is ancestral and parties are governed by customs in the matter of alienation of such property, as alleged? OPP

7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, it dismissed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the plaintiff/appellant herein before the learned first Appellate Court, the latter Court while dismissing the defendant's appeal, affirmed the findings recorded by the learned trial Court.

6. Now the plaintiff/appellant herein has instituted the instant Regular Second Appeal before this Court assailing therein the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 24.08.2007, this Court, admitted the appeal instituted by the plaintiff/appellant against the

judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether misreading of oral as well as documentary evidence which goes to the root of the matter has vitiated the findings of the ld. Courts below.

b) Whether the Ld. Courts below have arrived at wrong conclusion by the misreading of documents Ex.P1, Ex.DW2/A and ExPW3/F?

c) Whether the learned Courts below were right in holding that the documents Ex.DW2/A, the gift deed was not in violation of Section 122 of the |Transfer of Property Act?

d) Whether the learned Court below is wrong in holding that the suit property is not an ancestral property and could have been alienated in the matter it has been done so?

e) Whether the learned Court below erred in holding that the property is not ancestral and is not governed by local custom.

f) Whether the learned Court below is right in holding that the gift deed Ex.DW2/A dated 23.4.91 is not a result of fraud?

Substantial questions of Law No.1 to 6:

7. The plaintiff/appellant and the contesting defendant/respondent are the off springs of deceased Vidya Devi. Vidya Devi, the predecessor-in-interest of the contestants herebefore had prior to the execution qua her property of Ex.DW2/A executed a testamentary disposition whereby she devised her estate vis-a-vis the parties at contest in the manner enshrined therein. The testamentary disposition of Vidya Devi, the predecessor-in-interest of the contesting parties hereat stands comprised in Ex.P-1. It stood executed on 9.4.1991. It also stood registered by the Sub Registrar concerned. It stood scribed by one Tilak Raj, Advocate and marginal witnesses thereto are Sadhu Ram and Shiv Singh. In quick succession thereto gift deed comprised in Ex.DW2/A stood executed by the predecessor-in-interest of the contesting parties hereat vis-a-vis defendant No.1/respondent No.1 herein. The factum of valid and due execution of Will comprised in Ex.P-1 has remained uncontroverted. However, an acerbic contest has erupted qua the valid and due execution of gift deed comprised in Ex.DW2/A. With execution of gift deed by the predecessor-in-interest of the parties at contest occurring in a short span vis-a-vis execution of a testamentary disposition comprised in Ex.P-1 by her, obviously the factum aforesaid stands highlighted by the learned counsel appearing for the appellant/plaintiff to constitute a suspicious circumstance impinging upon its volitional execution by the donor vis-a-vis the contesting defendant No.1. The validity of gift deed comprised in Ex.DW2/A stands pronounced by the testimony of its scribe also by the witnesses thereto. Apart therefrom, the factum of gift deed embodied in Ex.DW2/A standing presented for registration by the predecessor-in-interest of the contesting parties hereat before the registering authority concerned whereupon it stood accepted for registration also with occurrence of an endorsement qua its contents standing readover and explained to the donor, does strip the vigour of the contention of the learned counsel for the plaintiff/appellant of the donor since deceased standing beguiled by the donee to execute it in his favour. Contrarily, a tentative inference is erectable of it constituting a volitional disposition of her estate vis-a-vis the contesting defendant/respondent herein.

8. Be that as it may, even if, the recitals embodied in Ex.DW2/A do unveil the factum of its execution by the donor being bereft of any consideration passing from the donee to the donor whereupon it dons the mantle of a validly executed instrument of gift yet the order of mutation comprised in Ex.PW3/F attested by the revenue officer concerned on its presentation before him by the donor, who thereat stood accompanied by Shri Tilak Raj, Advocate, brings to the fore the factum of the donor on therebefore recording her appearance acquiescing tot he factum of hers receiving a sum of Rs.5000/- in lieu of her transferring possession of the corpus of the property enunciated in Ex.DW2/A vis-a-vis contesting defendant No.1/respondent No.1.

Both the learned Courts below had overlooked the occurrence of the aforesaid recitals in the order of the mutation recorded by the revenue officer on presentation of Ex.DW2/A before him, whereat Shri Tilak Raj, Advocate, identified the donor, who therebefore obviously had recorded her appearance on the score of it being unreadable whereas only the recitals existing in Ex.DW2/A being readable for forming a construction of it constituting a gratuitous transfer of property alienated by the donor to the donee wherewithin with no recitals occurring in display of passing of consideration from the donee to the donor constituting a conclusive pointer of it being construable to be a gratuitous alienation of the suit property by the donor to the donee. The slighting, by both the Courts below of the germane recitals embodied in Ex.PW3/F wherewithin portrayals are held of monetary consideration passing from the donee to the donor in lieu of the donor passing possession of the suit property to the donee, on the score of theirs being unreadbale, has begotten gross mis-appraisal of there impact upon the trite factum of the gift deed comprised in Ex.DW2/A being construable to be a volitional gratuitous transfer of the property by the donor to the donee. True it is that the recitals in Ex.DW2/A omit to bespeak of passing of monetary consideration from the donee to the donor also true it is of Ex.DW2/A alone constituting the instrument whereupon title qua the suit property stood bestowed upon the donee besides true it is of the order recording attestation of mutation by the Revenue officer concerned on production of Ex.DW2/A before him by the donor not conferring title qua the suit property upon the donee yet the existence of recitals therein of the donor passing possession of the suit property to the donee in lieu of hers receiving a sum of Rs.5000/- cannot be amenable to a construction of its occurrence therein being mechanical nor the aforesaid germane recital occurring therein can stand segregated from the factum of execution of Ex.DW2/A nor it can be read in isolation therefrom, conspicuously, when in pursuance thereto possession of the suit property stood received by the donee from the donor. Since delivery of possession of the suit property from the donor to the donee is imperative for a transaction of gift being construable to stand completed, imperatively, hence with the transaction of gift standing completed with the revenue officer concerned recording an order qua possession of the suit property standing delivered to the donee by the donor in lieu of the latter receiving a sum of Rs.5000/- from the former holds a natural sequel of thereupon thereat the transaction of gift standing completed besides consummated. As a corollary, though the instrument of gift comprised in Ex.DW2/A omits to hold therewithin any recital of passing of consideration from the donee to the donor rather holds communication therewithin qua conveyance of the suit property by the donor to the donee being a volitional gratuitous disposition, the aforesaid recitals occurring in Ex.DW2/A are excludable for forming a construction whether Ex.DW2/A is a volitional gratuitous transfer of the suit property significantly when they are read in entwinement with the order of mutation recorded in Ex.PW3/F whereat, for reasons aforestated, the transaction of gift stood consummated. Contrarily when order of mutation embodied in Ex.PW3/F holds traits besides elements of passing of consideration from the donee to the donor in lieu of passing of possession from the latter to the former whereupon hence with a key characteristic feature of a gift for thereupon it standing concluded to be holding tenacity in law significantly qua its standing bereft of consideration passing from the donee to the donor obviously stands diminished. In aftermath, it is apt to conclude of Ex.DW2/A being unamenable to a construction of it being an instrument of gift within the ambit of its statutory definition held in the apposite provisions of the Transfer of Property Act.

9. Also both the learned Courts below had made short shrift of an apposite recital aforesaid occurring in Ex.PW3/F on score of no suggestion in tandem thereto standing put by the learned counsel for the plaintiff to the defendant's witnesses while holding them to cross-examination. The assigning of the aforesaid reason by both the learned Courts below for theirs omitting to rid off the impact of the apposite recitals embodied in Ex.PW3/F upon Ex.DW2/A for the latter being thereupon not being construable a to be validly executed instrument of gift, has emanated on theirs holding a view of the plaintiff standing enjoined to discharge the onus of proving the factum of Ex.DW2/A standing gripped with a vice of falsity or with a vice of its execution emanating from the contesting defendant/respondent practicing deception upon his predecessor-in-interest. The aforesaid view as taken by both the learned Courts below appears to

germinate from theirs fallaciously holding a view of unlike a testamentary disposition, propounder whereof stands enjoined to dispel the suspicious circumstances surrounding its execution, the plaintiff while impeaching the validity of Ex.DW2/A standing obliged to prove the factum of its execution emanating from the contesting defendant No.1 practicing deception upon the donor, onus whereof standing undischarged by the plaintiff/appellant, theirs on anvil of the testimonies of the scribe of Ex.DW2/A besides on anchor of the testification of the witness thereto also on anchor of it being a registered instrument of gift whereupon a presumption of truth is fastened, presumption whereof remaining uneroded by adduction of convincing evidence, concluded of Ex.DW2/A being free from any stain of its execution ensuing from the contesting defendant practicing deception upon the donor. However, the aforesaid view as taken by the learned Courts below is in gross transgression of the mandate of the Hon'ble Apex Court propounded in ***Krishna Mohan Kul alias Nani Charan Kul and another versus Pratima Maity and others (2004)9 SCC 468,*** the relevant paragraph 14 whereof stand extracted hereinafter:-

> "14. It is now well established that a Court of Equity, when a person obtains any benefit from another imposes upon the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. The proposition is very clearly stated in Ashburner's Principles of Equity, 2nd Edn. p.229, thus:
>
> "When the relation between the donor and donee at or shortly before the execution of the gift has been such as to raise a presumption that the donee had influence over the donor, the Court sets aside the gift unless the donee can prove that the gift was the result of a free exercise of the donor's will.""
>
> (P....475)

Wherewithin a mandate stands propounded of a grantee or a donee concerting to maintain a contract or a gift each standing obliged to prove qua his in obtaining it not exerting any influence upon the granter or the donor significantly when the donee holds a fiduciary relationship with the donor also when the donor at the time contemporaneous to its execution was under the care of the donee, whereupon a presumption is erectable of his exerting influence qua its execution vis-a-vis him upon the donor, presumption whereof is enjoined to be dispelled by the donee. The essential nuance of the mandate of the Hon'ble Apex Court besets the donee with an onerous obligation to satisfy the conscience of the Court qua execution of gift deed qua him by the donor being free from his dominating the will of the donor. The concomitant effect of the rendition of the Hon'ble Apex Court is of alike a testamentary disposition whereupon its propunders standing enjoined to by cogent evidence explicate the suspicious circumstance(s) surrounding its execution for theirs thereupon satisfying the judicial conscience of the Court qua its execution being free from any suspicious circumstance(s), a donee also likewise standing enjoined to explicate the suspicious circumstance(s) surrounding its execution. Now herebefore, it is imperative to under score qua whether the donee had the opportunity to dominate the will of the donor, opportunity whereof would arise on proof emanating of his staying in her company at the stage contemporaneous to its execution. Only on the aforesaid upsurgings emanating herebefore would this Court be inclined to enjoin the donee to prove the factum of its execution being free from his dominating her will besides this Court would stand coaxed to make it incumbent upon the donee to dispel suspicious circumstance(s) surrounding its execution. In the endeavour aforesaid, an incisive perusal of the relevant record makes vivid upsurgings qua the donor staying in the company of the donee at the stage contemporaneous to the execution of Ex.DW2/A, whereupon he stood obliged, dehors his not assailing it also dehors onus standing not cast upon him to prove the factum of its execution emanating from his practicing deception upon the donor also dehors no suggestion standing put to the defendants witnesses by the learned counsel for the plaintiff hinged upon the order of mutation in succession to its execution standing attested by the revenue officer concerned holding recitals qua consideration passing from the donee to the donor in lieu of the former transferring possession of the suit land to him, whereupon for reasons aforestated the transaction of gift stood consummated also when it

adversely impinged upon the trite factum of it thereupon lacking the statutorily trait of it being a volitional gratuitous transfer of the suit property by the donor to the donee, for it hence being construable to be a validly executed instrument of gift qua the suit property, to adduce evidence dispelling the factum of its execution not ensuing from his in any manner dominating the will of the donor. Reiteratedly, he was enjoined to make apposite pronouncements in dispelling the aura of suspicion surrounding the factum of purported volitional gratuitous disposition of the suit property under Ex.DW2/A by the donor to the donee. However, the aforesaid apposite bespeakings remain uncommunicated by the contesting defendant's witnesses. Since, the citation aforesaid of the Hon'ble Apex Court propagates a view qua akin to a propounder of a testamentary disposition standing enjoined to dispel the suspicious circumstance surrounding the valid and due execution of a testamentary disposition of a deceased testator, the donee likewise standing obliged to dispel the aforesaid suspicious circumstance surrounding the valid and due execution of Ex.DW2/A conspicuously when they are impinging upon the factum of its execution being not a volitional gratuitous transfer of the suit property by the donor to the donee. Since for removing the aura of suspicion ingraining the instrument of gift comprised in Ex.DW2/A, no apposite bespeakings occur in the testifications of the defendants witnesses, omissions whereof when read in coagulation with the apposite order of attestation of mutation comprised in Ex.PW3/F candidly convey qua the alienation of the suit land under Ex.DW2/A being a coloured transaction or a sham transaction also are loudly communicative under its guise the donor receiving consideration from the donee for handing over possession of the suit property to the donee whereupon the act of gift stood completed besides consummated, rendering Ex.DW2/A to be hence not construable to be a gift of the suit property. Furthermore, with a short gap occurring inter se the execution of a testamentary disposition by the predecessor-in-interest of the contesting parties hereat vis-a-vis the execution of gift deed comprised in Ex. DW2/A, is also a significant suspicious circumstance which too has remained inexplicated nor any reason stands purveyed by the donee qua the predominant prevailing reason besetting the donor to since the execution by her of a valid testamentary disposition of her estate, execute gift deed comprised in Ex.DW2/A besides with one Shri Tilak Raj scribing both the will and the gift deed besides with witnesses in both the aforesaid documents being common is connotative of the contesting defendant No.1 in tandem with the aforesaid contriving its execution.

10. Be that as it may, the commonality of scribe of both the aforestated instruments also given the commonality of the witnesses thereto begets an inference of theirs in tandem with the scribe of Ex.DW2/A besides with intra se complicity, theirs dominating the Will of the donor also theirs beguiling her to present it for registration before the Sub Registrar concerned. The shroud of the beguile practiced upon the donor by the donee in tandem with the aforesaid gets unveiled by revelations occurring in the order of mutation attested thereupon by the Revenue Officer concerned. The effect of the aforesaid conclusion is of validity imputed to a registered instrument of gift getting waned, more so, when the Sub Registrar concerned, who made an endorsement(s) therein has remained unexamined qua his in the presence of the donor making the relevant endorsement(s) thereon. In sequel, his non-examination begets an inference of the endorsement(s) occurring therein qua its contents standing readover and explained to the donor being construable to be mechanically besides perfunctorily made by the ministerial staff of his office, whereupon, no sanctity is imputable to them. Predominantly when the aforesaid inference, for reasons aforestated, stands enjoined to be explained besides to be dispelled by the donee, whereas, his omitting to examine the Sub Registrar concerned for enhancing the vigour of the relevant endorsement occurring therein bolsters a derivative of the entire act of registration of Ex.DW2/A by him, emanating on its scribe besides witnesses thereto acting in tandem with the donee bereft of the volition of the donor.

11. The concurrently recorded findings recorded by both the learned Court below qua the suit property being the self acquired property of deceased Vidya Devi are well founded especially when the predecessor-in-interest of the contesting parties received the suit land under a testamentary disposition executed in her favour by her father-in-law. Since, the suit land stood received by the predecessor-in-interest of the contesting parties under an testamentary

disposition executed in her favour by her father-in-law, it obviously becomes her self acquired property, whereupon she held an indefeasible right to alienate it in the manner she chose.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are not based upon a proper and mature appreciation of the evidence on record. While rendering the apposite findings, the learned first Appellate Court as also the learned trial Court have excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the plaintiff/appellant and against the defendant No.1/respondent.

13. In view of above discussion, the present Regular Second Appeal is allowed and the judgements and decrees rendered by both learned Courts below are set aside. Consequently, the suit of the plaintiff is decreed and in sequel, gift deed of 23.4.1991 comprised in Ex.DW2/A is quashed and set aside and the plaintiff/appellant is held joint owner to the extent of 435/924 shares i.e. 0-04-57 HMS in the land bearing Khata NO.235, Khatauni No.719, Khasra Nos. 2132, 2133 and Khata No.236, Khatauni No.711, Khasra Nos. 2134, 2135, Plots-4, measur4ing 0-10-34 HMs situated in village Kehrian, PO AND Tehsil Jawali, District Knagra, H.P. along with the construction existing on the said lands consisting of one old house constructed by the forefathers of the parties and the new house constructed about two years back by the deceased Smt. Vidya Devi and the defendant No.1 has got 336/924 share,measuring 0-03-58 HMS in the said land and the proforma defendants No.2 to 4 have 51/924 share each (0-00-73 HMS in the said land on the basis of the Will dated 9.4.1991 comprised in Ex.P-1. The parties are left to bear their own costs. Decree sheet be drawn accordingly. All pending applications also stand disposed of.

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

Sita Devi and others ..Appellants/defendants

Versus

Lekh Ram and others. ..Respondents/plaintiffs.

RSA No. 412 of 2009.
Reserved on : 18/10/2016
Date of decision: 25/10/2016

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

(Para-9 to 13)

For the appellants: Mr. G.D.Verma, Sr. Advocate with Mr. Ashok Tyagi, Advocate.

For the respondents: Mr. A.K.Pathania,, Mr. R.K.Gautam and Mr. Pawan Gautam, Advocates for respondentsNo. 1, 2, and 4 to 41 and LRs of respondents No. 3, 34 and 38.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned Additional District Judge, Una, H.P., whereby he affirmed the rendition of the learned Sub Judge 1st Class, Court No.I, Amb, District Una. The defendants standing aggrieved by the concurrently recorded renditions of both the learned Courts below concert, through the instant appeal constituted before this Court, to reverse the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiffs filed a suit in representative capacity seeking a declaration to the effect that the judgement and decree of 9.12.1959 had been obtained by the defendants by playing a fraud on the Court and the residents of village Tiai, Tehsil Amb, District Una, having been obtained collusively and in connivance with Sant Ram the Ex-Sarpanch of the village and as such was a nullity in the eyes of law. The premises on which the suit was laid was Shamlat deh and the same stood vested in the Gram Panchayat Tiai by operation of law under the provisions of Section 3 of the Punjab Act No.1 of 1954 and mutation No. 113 had come to be sanctioned in this behalf on 18.6.1955 and since then the Shamlat was being managed by the Panchayat. The defendants had instituted a suit being Civil Suit No. 293/1959 against the Gram Panchayat Tiai seeking a declaration that land measuring 2860 Kanals and 17-1/2 marlas was owned and possessed by them. On 12.8.1959 the Gram Panchayat vide its resolution had resolved to contest the case and authorized Sant Ram to defend the case on behalf of the Panchayat. On 9.12.1959 Sant Ram Pardhan had made a statement in Court that the suit of the plaintiffs be decreed. In 1968 the defendants got the mutation in their name in pursuance to the judgement vide mutation No. 136 of 1968 and thereafter a civil suit No. 484 of 1969 titled as Gram Panchayat vs. Khoshala was filed challenging the aforesaid mutation. In the year 1972 Sarpanch Sant Ram again won the election and became the Sarpanch and again got a resolution passed on 9.3.1973 seeking to withdraw the Civil Suit No. 484 of 1969. The said suit was also dismissed as withdrawn on 23.3.1973. The present plaintiffs again in representative capacity filed suit alleging themselves to be beneficiary in the suit being Shamlat challenging the withdrawal of the suit. The matter went upto the Hon'ble High Court and in Regular Second Appeal No. 161 of 1987 Hon'ble High Court observed that as long as judgement and decree of 9.12.1959 is not challenged the plaintiffs could not succeed in getting any relief in the said suit out of which aforesaid RSA arose. The plaintiffs therein again filed review petition wherein the Hon'ble High Court had given liberty to avail the remedy of challenging the judgement and decree Ext.D-2 and Ext.D-3. The plaintiffs herein, therefore, challenging the judgement and decree of 9.12.1959 have filed the present suit.

3. The defendants No.1 to 18 preferred a common written statement. They interalia raised the preliminary objections of locus standi, limitation, cause of action, maintainability, the suit being barred under the provisions of Order 2, Rule 2 CPC and the plaintiffs being estopped from bringing the suit in view of the earlier suit having been filed by them.

4. On merits, the defendants denied that any fraud was played or any mis statement of fact was ever made in the Court. It was denied that the defendants had colluded with Sant Ram the then Sarpanch. The plaintiffs were stated to be in full knowledge of the decision rendered in 1959. The suit land was stated to have never been vested either in the Gram Panchayat or in the State. As per the defendants the Gram Panchayat and the State did not claim any interest or title to the suit land. The plaintiffs were thus estopped from agitating the matter which is in the competence of Gram Panchayat or the State. The State of H.P. being defendant No.21 had preferred a separate written statement. As per the State the Shamlat lands vested in the Panchayat under the Act of 1961 and had come to be vested in the State of H.P. by virtue of H.P. Village Common Lands (Vesting and Utilisation) Act and as such the earlier decree of the Court has no effect in operation of the H.P.Village Common Land (Vesting and Utilisation) Act, 1976. On merits it was the case of the State that the decree passed in Civil Suit No. 293/59

had become a nullity in view of the Section 3 of the H.P.Act and the suit land had in fact been vested in the State of H.P.

5. Replication to the written statement stood filed wherein the averments made in the written statement were controverted and those made in the plaint were re-asserted.

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

1. Whether judgement and decree dated 9.12.1959 in Civil Suit No. 293 of 1959 is collusive, result of fraud and misrepresentation, as alleged? OPP.

2. If issue No.1 is proved in affirmative, whether suit land is Shamlat Deh in use of inhabitants of the village, Tiai? OPP.

3. If issue No. 1 and 2 are proved in affirmative whether the plaintiffs are entitled to the relief of injunction, as prayed, OPP.

4. Whether the suit is not within time? OPD.

5. Whether plaintiffs have no cause of action? OPD.

6. Whether suit is barred by limitation? OPD.

7. Whether suit is bad for non mentioning of particulars of fraud as required under Order 6 Rule 2 CPC? OPD.

8. Whether suit is barred by principle of res judicata under Order 2 Rule 2 CPC.

9. Whether the plaintiffs have no title either proprietary or possessory in suit land? OPD.

10. Relief.

7. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs besides the learned Additional District Judge, affirmed the findings of the learned trial Court.

8. Now the defendants/appellants herein have instituted before this Court the instant Regular Second Appeal wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 30.11.2011, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

"1. Whether plaintiffs/ respondents have failed to discharge the legal onus with regard to alleged fraud and mis representation of facts in the present case as they have not pleaded the same as per order 6 Rule 2 and 3 of CPC nor have proved the same according to law?

2. Whether the suit of the plaintiffs was not abated as plaintiffs at Sr. No. 7, 8, 14, 16, 22 in the trial stage before the First Trial Court had been expired during the pendency of the suit itself and as no legal heirs had been brought on record by the plaintiffs/respondents within the time period as prescribed under law and matter as a whole had abated and suit was liable to be dismissed as a whole?

3. Whether the finding by both the Courts below are palpably illegal and erroneous on account of concurrent misappreciation and misconstruction of the pleadings of the parties, as well as oral and documentary evidence on record and the legal proposition of law as applicable to the facts of the case?

4. Whether the documents Ext.P-3, Ext.P-4, Ext.P-5, Ext.P-6, Ext.P-7, Ext.PW-1/A and Ext.PW-1/B have wrongly been ignored by the learned court below, though legally proved on record?

5. Whether the learned lower Courts below have not committed illegality in returning the findings without considering pleadings and evidence of the parties that the suit is within period of limitation on the basis of clear oral and documentary evidence on record, though it is proved on record that the suit is hopelessly barred by limitation?

6. Whether the suit of the plaintiffs/respondents has not become infructuous in view of the fact that the State Government has vide its notification No. Rev.B.A.(3)-8/2001 dated 10/09/2004 has reverted back the ownership to the legal heirs of the original owners as per their shares and as even thereafter the land has been revested in the names of the appellants and the mutation in this regard has also not been challenged by the respondents/plaintiffs till date. The notification is also placed on record of the learned Courts below but the same has not been considered hence this pure question of law is yet to be decided in the appeal."

Substantial questions of law.

9. The parties at lis are not at contest qua the factum of the suit land standing under Punjab Act No. 1 of 1954 vested in the Gram Panchayat concerned, in pursuance whereof mutation No. 113 comprised in Ext.PW-2/A stood attested/sanctioned on 18.06.1955. One Khoshala since diseased now represented by his LRs besides others instituted suit No. 293/59 against Gram Panchayat Tiai, Tehsil Amb, in 1959 wherein they staked a declaratory right qua theirs holding possession of the suit land as its owners. On the suit aforesaid standing instituted before the Civil Court concerned, notice stood issued to the Gram Panchayat concerned, whereupon it under Ext.PW-4/A resolved to defend the suit also thereunder its the then Sarpanch Sant Ram was bestowed with an authorization to defend the interests of the Gram Panchayat concerned in the suit aforesaid instituted against it, in the Civil Court concerned. A perusal of the apposite resolution, unveils of Sant Ram the then Sarpanch of Gram Panchayat Tiai, Tehsil Amb, holding thereunder an authorization to defend before the Civil Court concerned the interests of the Gram Panchayat concerned vis.a.vis the suit land qua which a suit stood instituted by the aforesaid Khoshala and others for whittling the effect of the statutory vestment of the suit land in the Gram Panchayat concerned. However, Sant Ram, the then Sarpanch of Gram Panchayat, Tiai, who held an authorization to defend the interests in litigation of Gram Panchayat Tiai also who did not hold any specific authorization, to, in derogation of the interests in the suit land of the Gram Panchayat concerned, compromise the suit significantly when qua the suit land ownership stood vested qua it under a legislative enactment whereas he despite his not holding any specific authorization to compromise the interests in litigation of Gram Panchayat, Tiai, besides obviously in transgression of Ext.PW-4/A proceeded to record a statement on 9.12.1959 before the Civil Court concerned whereupon he accepted the claim in the suit of the plaintiffs therein, statement whereof stands couched in the hereinafter extracted phraseology :-

"Bian Kiya Ke Dawa Mudai se Iqwal Hai. Decree Bahak Mudian di jawe. Kharcha Frikan Rakha Jawe. Sun Kar Darust Taslim Kiya."

10. In sequel thereto the Civil Court decreed the suit of the plaintiffs i.e Khosala and others instituted against Gram Panchayat Tiai, Tehsil Amb. The decree rendered by the Civil Court concerned vis.a.vis Khoshala and others sequelled attestation of mutation No.136 in the year 1968 qua the suit land vis.a.vis them. The aforesaid mutation stood resolved by the Gram Panchayat Tiai to face the ordeal of it standing subjected to a challenge before the Civil Court concerned whereupon Civil Suit No. 484 of 1969 stood instituted before the Civil Court concerned. However, Sant Ram, the then Sarpanch of Gram Panchayat concerned who obviously abused besides infringed the authorization previously bestowed upon him by Gram Panchayat Tiai, authorization whereof stands comprised in Ext.PW-4/A, inference of infringement thereof by him stands spurred from his transgressing the specific mandate held therewithin whereupon he stood authorized to defend the interests in the suit instituted against it by Khoshala and others

besides stands pointedly communicated in his recording a statement before the Civil Court concerned holding therein articulations of the suit of Khoshala and others instituted against Gram Panchayat, Tiai, being ordered to be decreed whereupon an apposite decree stood rendered vis.a.vis Khoshala and others, on standing re-elected in 1972 as Sarpanch of Gram Panchayat Tiai, Tehsil Amb, ensured passing of a resolution on 9.3.1973 by the Gram Panchayat concerned wherewithin echoings are held qua Civil Suit No. 484 of 1969 being withdrawn. In pursuance thereto Civil Suit No. 484 of 1969 nominclatured as Gram Panchayat Tiai vs. Khosala and others stood withdrawn on 23.3.1973 by the Gram Panchayat Tiai wherein mutation No. 136 of 1968 as stood sanctioned qua the suit land vis.a.vis plaintiffs Khoshala and others was subjected to an assault standing constituted thereupon. As a corollary thereto the apposite decree in consonance therewith stood rendered by the Civil Court concerned. The plaintiffs instituted a suit on 3.4.1973 before the Sub Judge Ist class, Una whereby they claimed a declaratory decree for setting aside mutation number 136 sanctioned on 25.3.1968 also claimed a declaratory relief qua the apposite decree dismissing as withdrawn the suit of the Gram Panchayat Tiai, Tehsil Amb, being declared to be illegal and void, it standing sequelled by collusion and fraud.

11. The aforesaid civil suit stood instituted on 3.4.1973 by the plaintiffs before the Sub Judge Ist Class, Una whereby they assailed the attestation of mutation bearing No. 136 sanctioned on 25.3.1968 mutation whereof stood attested in pursuance to the rendition of the Civil Court concerned recorded in 1959 whereupon the plaintiffs therein stood declared to be owners in possession of the suit land besides therein they assailed the decree rendered on 17.3.1982 by the Civil Court concerned. The suit aforesaid suffered the fate of dismissal. In an appeal carried therefrom before the learned Addl. District Judge it suffered an alike fate. The plaintiffs therein assailed the decision recorded by the Addl. District Judge, Una by preferring an appeal therefrom before this Court whereupon this Court dismissed their Regular Second Appeal bearing No. 161 of 1987. This Court while pronouncing an adjudication upon RSA No. 161 of 1987 dismissed the appeal preferred herebefore by the plaintiffs. The reason which prevailed upon this Court to dismiss the aforesaid Regular Second Appeal preferred herebefore by the plaintiffs stood embedded in (a) the factum of the apposite decree of the Civil Court concerned rendered on 9.12.1959 acquiring finality arising from the factum of it remaining un-assailed. (b) Also for want of an onslaught standing constituted against it in the suit of the plaintiffs, their suit of 1973 for setting aside the relevant mutation recorded in the year 1968, mutation whereof stood anvilled thereupon, warranting dismissal. Significantly since no challenge stood constituted by the plaintiffs against the rendition of the Civil Court concerned pronounced on 9.12.1959 constrained this Court to dismiss the Regular Second Appeal preferred herebefore by the plaintiffs against the concurrently recorded renditions of the learned Courts below whereby they declined to interfere with the mutation recorded in the year 1968 also declined to afford a declaratory relief qua the decree of dismissal as withdrawn, pronounced qua Civil Suit No. 484 of 1969 being declared to be null and void, it standing procured by collusion and fraud. The plaintiffs therefrom preferred Civil Review No. 47 of 1997 before this Court whereupon they sought review of the judgement of this Court recorded in RSA No. 161 of 1987. This Court dismissed the aforesaid review petition yet it reserved liberty to the plaintiffs to by availing the appropriate mechanism prescribed by law constitute a challenge to the judgement and decree pronounced in 1959 by the Civil Court concerned rendition(s) whereof stand comprised in Ext.D-2 and Ext.D-3. Also it ordered qua the question of limitation being sympathetically considered by the Civil Court concerned whereat the plaintiffs constitute a challenge to the judgement and decree comprised in Ext.D-2 and Ext.D-3. In sequel, thereto the plaintiffs instituted Civil Suit No. 12-1 of 1998 before the Civil Judge, Jr. Division, Court No.1, Amb whereupon the latter Court decreed the suit of the plaintiffs. The learned First Appellate Court on standing seized with an appeal preferred therebefore by the aggrieved defendants dismissed it. The defendants stand aggrieved by the renditions of the learned Courts below hence for reversing them they have herebefore instituted the instant Regular Second Appeal.

12. The suit of the plaintiffs initially instituted in the year 1973 besides their successive suit instituted in the year 1998 stood instituted in a representative capacity, in latter

suit whereof they obtained success by adducing cogent evidence in display qua theirs in consonance with prescriptions held in the relevant apposite records holding customary rights qua user of the suit land whereupon they canvassed qua theirs holding a concomitant leverage to unsettle the mutation recorded qua the suit land in the year 1968, mutation whereof stood anchored upon a decree of the Civil Court concerned pronounced in 1959, rendition whereof of the Civil Court is palpably in gross transgression of a legislative enactment nomenclatured as Punjab Act No. 1 of 1954 whereupon the suit land came to be vested in Gram Panchayat Tiai besides in sequel whereto mutation comprised in 113 came to be sanctioned vis.a.vis. the Gram Panchayat concerned. With the suit of the plaintiffs standing instituted in a representative capacity besides with right of customary user of the suit land by the plaintiffs standing clinchingly sustained by emphatic evidence, resultantly though on occurrence of demise of co-plaintiffs No. 7, 8, 14, 16 and 22 during the pendency of the suit before the learned trial Court, no apposite motion was made before the Civil Court concerned for theirs standing substituted by their LRs nor an order emanated therefrom qua theirs being ordered to be substituted by their LRs yet the omission on the part of the plaintiffs to beget their substitution by their LRs, would not entail a consequence of the suit of the plaintiffs abating as a whole, contrarily the suit of the plaintiffs would abate only qua deceased co-plaintiffs who died during the pendency of the trial of the suit before the learned trial Court and on occurrence of whose demise they remained unsubstituted by theirs LRs in the apposite array of co-plaintiffs. Since an order of abatement of the extant suit vis.a.vis. co-plaintiffs whose demise occurred before the learned trial Court may ipso facto bar their legal representatives to claim the benefit of an apposite decree, if any, pronounced by this Court vis.a.vis. other co-plaintiffs also when a suit stands instituted in a representative capacity whereunder the collective interest of the village proprietary body qua user by them of the suit land stands staked, hence occurrence of names of the deceased in the apposite array of litigants in the renditions of the learned Courts below would not beget a sequel qua the apposite renditions hence standing ingrained with a vice of nullity, as any pronouncement by this Court qua hence the renditions of the Court concerned standing afflicted with a vice of nullity would defeat the collective interests qua the suit land of the village proprietary body, collective interests whereof stand propagated by the plaintiffs for themselves besides for the entire village proprietary body, by theirs instituting a representative suit whereunder they claim assertion of customary rights upon the suit land, rights whereof stand espoused to ensue in their favour in pursuance of the suit land vesting in the Gram Panchayat concerned under a legislative Enactment aforesaid also predominantly when the nature of the rights asserted by the plaintiffs are res communis besides when for lack of impleadment at the apposite stage of the LRs of deceased co-plaintiffs has begotten the sequel of the suit standing ordered to abate vis.a.vis. them, concomitantly it would be in sagacious to conclude qua the renditions of the Courts below standing stained with a vice of nullity arising from occurrence of their names in the apposite array of litigants in the pronouncements made by the Courts concerned. The aforesaid view is warranted to obviate perpetuation of any mishap to the collective interests of the village proprietary body in the suit land, collective interests whereof stand concerted to be protected through the plaintiffs instituting the instant suit in a representative capacity whereon the trite assault for assailing the relevant pronouncements occurring in the relevant exhibits stand anchored upon bestowment upon them by a legislative Enactment customary rights of user of the suit land. Since the collective interests of the village proprietary body stand canvassed through a suit filed by the plaintiffs in a representative capacity before the Civil Court concerned, as a corollary when obviously the interests in the suit land canvassed by the plaintiffs are not individual interests qua property held individually as owners by them rather when the suit property was owned by the Gram Panchayat concerned whereon in consonance with prescriptions held in the relevant records they hold only customary rights qua its user, exercise of rights whereon by them stand clinchingly proven, in sequel thereto when insistence with inflexible rigidity is enjoined to be made when plaintiffs sue in an individual capacity qua suit property whereon they assert rights as owner in their individual capacity qua on demise of co-plaintiffs on an apposite motion at the apposite stage before the Court concerned theirs imperatively standing ordered to be substituted in the apposite array of litigants by theirs

LRs, want whereof rendering the apposite pronouncement of the Court concerned to stand ingrained with a vice of nullity. Contrarily for reasons aforestated when the extant suit stands contra distinctively instituted in a representative capacity qua suit property whereon they do not stake any individual right of ownership rather only espouse rights qua its customary user, the rigour of the aforesaid inflexible dictate warrants its standing relaxed significantly for protecting the collective interests in the suit land of the village proprietary body also when the pronouncement of this Court qua the suit of the plaintiffs abating in part qua deceased co-plaintiffs who at the apposite stage remained unsubstituted by their LRS would hence suffice to mete a formal deference thereto, deference aforesaid obviously wanes the effect of the aforesaid omission. Consequently, in the peculiar facts and circumstances of the case prevailing hereat it is deemed fit to order qua the suit of the plaintiffs standing abated vis.a.vis. co-plaintiffs whose demise occurred during the pendency of the trial of the suit before the learned trial Court whereat they remained unsubstituted by their LRs, without ordering for the renditions of the Courts below being declared to be nonest.

13. The factual matrix of the case as aforestated underscores the factum of the rendition of the Civil Court concerned pronounced in 1959 standing pronounced vis.a.vis. the suit land also it unveils of it standing pronounced inter partes holding no congruity vis.a.vis. inter partes herebefore. Consequently, for lack of distinctivity in the litigating parties before the Civil Court concerned which pronounced a decree in the year 1959 vis.a.vis. the defendants herebefore the principle of res judicata may not stand attracted vis.a.vis. the extant suit of the plaintiffs herebefore. Tritely put the principle of res judicata encapsulated in Section 11 of the CPC is hinged upon estoppel arising from conclusivity of judicial pronouncement whereas the principle of estoppel embodied in Order 2 Rule 2 CPC is anchored upon pro active waiver besides abandonments by plaintiffs to incorporate in their previous suit, all reliefs besides causes of action which arose thereat. Significantly when the pronouncement qua the suit land occurring in the year 1959 holds analogity vis.a.vis the suit land hereat yet with the plaintiffs herebefore not being contestants therebefore whereupon hence the principle of resjudicata may not stand attracted vis.a.vis the instant suit yet it is enjoined to cross the hurdle of limitation besides the hurdle of the mandate of Order 2 Rule 2 CPC. The plaintiffs would succeed in crossing the hurdle of limitation only on theirs emphatically by sustainable relevant evidence proving the factum of theirs acquiring knowledge only in the year 1998 qua the pronouncement of the Civil Court which occurred in the year 1959 erupting on deception standing practiced upon it by the plaintiffs therein in collusion with Sant Ram the then Sarpanch of the Gram Panchayat Tiai whereupon it would concomitantly acquire a stain of nullity also would hence pave way for facilitating the plaintiffs, to, on theirs thereupon acquiring knowledge qua the pronouncement of the Civil Court concerned standing procured by collusion or fraud practiced upon the Court concerned by the plaintiffs in collusion with Sant Ram the then Sarpanch of Gram Pranchayat concerned, institute an apposite suit for assailing the decree and judgement rendered in the year 1959. The aforesaid conclusion stands erected given there being no wrangle qua the proposition qua a decree obtained by fraud being nonest also there being no quarrel with the proposition of law of it being assailable within the statutorily prescribed period of time computable from the date of acquisition of knowledge by the aggrieved qua it standing procured by fraud or collusion. However, before applying the aforesaid principle of law it is imperative to determine whether the plaintiffs acquired knowledge earlier than 1998 qua the pronouncement of the Civil Court concerned which occurred in the year 1959 standing obtained by fraud. In case this Court holds of the plaintiffs prior to 1998 holding active knowledge qua the fraud practiced upon the Civil Court concerned by the plaintiffs therein in collusion with Sant Ram the then Sarpanch of Gram Panchayat Tiai, Tehsil Amb, the inevitable sequel thereto would be of with hence the plaintiffs abandoning to in their previous suit instituted in the year 1973 incorporate therein the trite factum of the pronouncement of the Civil Court concerned rendered in the year 1959 standing obtained by fraud whereas it stood enjoined by the mandate of Order 2 Rule 2 CPC to stand embodied therein, transgression whereof would attract qua their instant suit the statutory principle of theirs standing estopped to incorporate in the extant suit a declaratory relief qua the rendition of the Civil Court concerned pronounced in 1959 emanating on fraud in the manner

aforesaid standing practiced upon it. The learned counsel for the defendants/appellants contends with vigour qua with the plaintiffs' in their instant suit infracting the embargo of Order 2 Rule 2 CPC arising from the factum of theirs holding knowledge, qua the factum of rendition of the Civil Court concerned pronounced in 1959 purportedly standing vitiated with a vice of nullity it standing procured by them by theirs purportedly practicing fraud upon it in collusion with Sant Ram the then Sarpanch of Gram Panchayat concerned, at the stage contemporaneous to the trial of Civil Suit No. 484 of 1969 by the Court concerned, knowledge whereof held thereat by them is garnerable from the factum of the plaintiffs constituting apposite pleadings in the instant suit qua theirs acquiring knowledge qua the rendition of the Civil Court concerned pronounced in 1959, on the apposite judgement and decree embodied in Ext.D-2 and Ext.D-3 standing adduced therebefore in evidence, pleading whereof portrays their acquiescing qua the trite factum whereupon they held leverage to with the leave of the Court make apposite amendments in the plaint for hence thereat theirs assailing the aforesaid renditions comprised in the aforesaid exhibits whereas theirs omitting to do so, rendered invokable vis.a.vis the extant suit, the mandate of order 2 rule 2 CPC whereupon they stand statutorily ousted to canvas therein qua the judgement and decree of the Civil Court concerned pronounced in 1959 being declared to be null and void, it standing engineered by fraud practiced upon the Civil Court concerned by them in collusion with Sant Ram the then Sarpanch. However, the aforesaid submission holds no vigour significantly when the plaintiffs herebefore were not contestants in the Civil Suit which stood instituted before the Civil Court concerned in the year 1959 hence concomitantly when the renditions comprised in Ext.D-2 and Ext.D-3 stood not rendered inter partes litigants in the instant Civil Suit, as a corollary, it would be an over exacting expectation from them qua theirs thereat holding knowledge qua the pronouncement of the Civil Court concerned which occurred in the year 1959. Also the effect of the aforesaid inference is of the mere factum of adduction into evidence of the judgement and decree of the Civil Court concerned comprised in Ext.D-2 and Ext.D-3 not holding the effect of theirs thereupon also acquiring knowledge qua the resolution passed by the Gram Panchayat concerned, resolution whereof stands pronounced in Ext.PW-4/A whereupon its the then Sarpanch Sant Ram was authorized to defend the apposite civil suit whereas in transgression of the mandate held therewithin qua his standing enjoined to defend its interests in the Civil Suit preferred against it by the apposite plaintiffs therein, his causing mishap to the interests in the suit land of Gram Panchayat Tiai, by making a statement before it, holding echoings therein qua his concedeing to the claim staked by the apposite plaintiffs in their apposite suit, proclamation whereof held therewithin is a loud vivid display qua his for securing vis.a.vis them the decree as prayed for in their suit instituted in the year 1959 his hence colluding with the plaintiffs therein whereupon it obviously acquired a stain qua its rendition emanating from fraud standing practiced upon it by the plaintiffs in collusion with Sant Ram the then Sarpanch of the Gram Panchayat concerned. Predominantly also the judgement and decrees of the Civil Court concerned rendered in 1959 stand unaccompanied by the resolution of the Gram Panchayat concerned reflected in Ext.PW-4/A, mandate whereof stood transgressed by its the then Sarpanch Sant Ram also when no efficacious evidence stands adduced by the defendant in display of the plaintiffs earlier than 1998 acquiring knowledge qua its making by the Panchayat concerned evidence whereof stood denoted in the relevant register portraying qua theirs applying for its copies whereas it constituted the foundation for the plaintiffs efficaciously propagating qua the rendition of the Civil Court concerned comprised in Ext.D-2 and Ext.D-3 standing procured by collusion occurring interse the apposite plaintiffs therein and Sant Ram the then Sarpanch of Gram Panchayat Tiai. In aftermath the mere adduction into evidence of Ext.D-2 and Ext.D-3 during the course of trial of the civil suit instituted by the plaintiffs in the year 1973 would not ipso facto beget a conclusion of theirs thereat also acquiring knowledge qua the making of a resolution comprised in Ext.PW-4/A by the Gram Panchayat concerned nor also hence it can be concluded qua their omission, to in the extant suit assail Ext.D-2 and Ext.D-3 by making a motion under Order 6 Rule 17 CPC before the court concerned whereby they sought its leave to incorporate in their apposite pleadings an apposite relief qua Ext.D-2 and Ext.D-3 standing pronounced to suffer invalidation given theirs standing stained with a vice of nullity arising from theirs standing procured for them by Sant Ram, the then Sarpanch of Gram

Panchayat Tiai by the latter transgressing the mandate of Ext.PW-4/A besides its rendition erupting on his holding active complicity with them, conspicuously when he committed breach of resolution comprised in Ext.PW-4/A by making therebefore a statement abandoning the interests in the suit land of the Panchayat concerned whereupon the apposite judgement and decree stood pronounced, inviting qua them the bar of estoppel constituted in the provisions of Order 2 Rule 2 CPC. In other words, when Ext.D-2 and Ext.D-3 stood founded upon Ext.PW-4/A knowledge whereof stood for reasons aforestated unacquired by the plaintiffs till 1998 it was neither imperative for the plaintiffs to introduce in their earlier plaint the aforesaid factum of Ext.D-2 and Ext.D-3 standing ingrained with any vice of nullity it standing procured by fraud nor also they stood enjoined to in their earlier plaint by making a motion before the appropriate Court concerned seek its leave for incorporating an apposite relief therein qua it hence suffering invalidation nor also any omission of the plaintiffs qua the facet aforesaid would attract qua them the rigour of the bar of estoppel constituted in Order 2 Rule 2 CPC significantly when for its attraction, proven acquisition of knowledge by the plaintiffs qua the relevant germane facet, at the relevant stage qua its imperative incorporation in the plaint, is essential. However, when the aforesaid trite factum is amiss hereat, reiteratedly the bar of estoppel constituted under Order 2 Rule 2 CPC whereupon the plaintiffs stand interdicted to qua the relevant facet seek relief from the Civil Court remains unattracted qua them, thereupon the inevitable sequel is of suit of the plaintiffs for setting aside the pronouncement of the Civil Court concerned rendered in 1959 being construable to be within limitation. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. I find no merit in this appeal, which is accordingly dismissed and the judgments and decrees of both the Courts below are maintained and affirmed. Substantial questions of law are answered accordingly. No costs. However, the defendants are directed to within two weeks comply with the orders of this Court of 18.10.2014 rendered in CMP No. 11109 of 2014. The pending application(s), if any, also stand disposed of. Records of the Courts below be sent back forthwith.

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

Chaman Lal and others ....Appellants.

Versus

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

Cr. Appeal No. 135 of 2008.
Date of Decision: 26th October, 2016.

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

For the Appellants: Mr. Dinesh Sharma and Mr. Y.Paul, Advocates.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the judgment rendered by the learned Addl. Sessions Judge, Fast Track Court, Solan, District Solan, H.P. on 7.3.2008 in Case No. 5 FTC/7 of 2007, whereby, the latter Court recorded findings of conviction against the accused/respondents qua theirs committing offences punishable under Sections 498-A and 306 read with Section 34 of the IPC besides in consequence thereto imposed sentence of imprisonment upon them in the hereinafter extracted manner:-

"1. to undergo rigorous imprisonment for a period of three years each and to pay a fine of Rs.5000/- each for the commission of offence punishable under Section 306 read with Section 34 of the IPC and in case of default of payment of fine to further undergo rigorous imprisonment for a period of two months each.

2. to undergo rigorous imprisonment for a period of one year each and to pay a fine of Rs.2000/- each for the commission of offence punishable under Section 498-A read with Section 34 IPC and in case of default of payment of fine to further undergo rigorous imprisonment for one month each."

2. Brief facts of the case which are necessary to determine the appeal are that Ranjubala, deceased, daughter of Khushi Ram, was married to accused Chaman Lal in November, 2005. On 23.10.2006 Ranjubala allegedly consumed poison in the matrimonial house and committed suicide. On 24.10.2006,Kushi Ram, father of deceased Ranjubala lodged report with the police wherein he alleged that about four months after the marriage, his daughter Ranjubala had told him that her husband Chaman Lal, mother-in-law Jai Devi and sister-in-law Sunita had been harassing her in the matrimonial house without any cause, but he made her daughter to understand and sent her to her matrimonial house. On 20.10.2006, Ranjubala had told him on telephone about the maltreatment given to her by the accused in the matrimonial house and she also told that she was fed up with that, but he had assured his daughter to send some relatives to her matrimonial house and after that he had told about it to Om Dutt Pradhan, who advised him to settle the matter through relatives. Thereafter, on 23.10.2006, he had sent his relatives Ashok Kumar, Prem Chand, Kuldeep, Anil, Kulwinder, Sandhya, Suresh and Rekha to the matrimonial house of his daughter Ranjubala, but on 23.10.2006 at about 9.30 p.m., he received a phone call from police station Nalagarh and was told that Ranjubala had consumed poison and died. Khushi Ram also stated in his statement that his daughter Arti, who had gone to the matrimonial house of Ranjubala on 22.10.2006, told him that while she was in kitchen on 23.10.2006, accused Chaman Lal had slapped her sister Ranjubala and thereafter Ranjubala had gone towards cow shed whereat she was found lying unconscious. He also stated in his statement that his daughter Ranjubala was subjected to cruelty by the accused in the matrimonial house and their conduct forced her to commit suicide. On the basis of statement of Khushi Ram, FIR was recorded at Police Station Nalagarh. Thereafter the police completed all the codel formalities.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Sections 498-A, 306 read with Section 34 of the IPC to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 14 witnesses. On closure of prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence. However, they did not lead any defence evidence.

6. On an appraisal of evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant for theirs committing offences punishable under Sections 498-A and 306 read with Section 34 of the IPC.

7. The accused/appellants herein are aggrieved by the judgment of conviction recorded by the learned trial Court. The learned defence counsel for the appellants has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction recorded by the learned trial Court being reversed by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

8. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

9. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

10. Deceased Ranjubala was married to accused/appellant No.1 Chaman Lal in the month of November, 2005. She within less than one year elapsing therefrom committed suicide by consumption of poison, factum whereof stands unraveled in the apposite postmortem report comprised in Ex.PW8/B. Accused/respondent No.1 Chaman Lal, her husband besides accused No.2 and accused No.3, her mother-in-law and sister-in-law respectively are alleged to abet the commission of suicide by deceased Ranjubala. The prosecution had depended upon the testimonies of the relatives of deceased Ranju Bala as also upon the deposition of the Pradhan of the Gram Panchayat concerned for propagating qua the accused/appellants herein during the currency of her stay at her matrimonial home, meteing ill-treatment besides maltreatment to the deceased hence actuating besides instigating her to commit suicide. The deposition of PW-1, Khushi Ram, the father of the deceased unveils of within 2-3 months of marriage standing solemnized inter se his deceased daughter with accused Chaman Lal, the accused perpetrating ill-treatment upon her. However, he has omitted to communicate therein the nature of the ill-treatment perpetrated by the accused upon the deceased nor also he has communicated its enormity. Resultantly, he has obviously in his testification made a nebulous attribution qua perpetration of ill-treatment upon the deceased by the accused during former's stay at her matrimonial home. Given lack of enunciations with specificity qua the nature of ill-treatment besides its potency, it is hazardous to invincibly conclude therefrom qua its nature besides its gravity, in sequel wherefrom it is unbefitting to conclude qua the alleged ill-treatment perpetrated upon the deceased by the accused during the former's stay at her matrimonial home hence goading besides instigating her to commit suicide.

11. The deposition of PW-1, Khushi Ram stands corroborated by PW-2, Arti, his daughter besides by the deposition of PW-7 Anil Kumar. However, PW-2, the sister of the deceased and PW-7, the cousin brother of PW-1, both in their respective testifications comprised in their respective examinations-in-chief echoed qua after solemnization of marriage inter se the deceased and accused Chaman Lal, both once and twice visiting the parental home of the deceased. Both also deposed qua on completion of stay, of the deceased in the company of her husband, at her parental home, her husband taking her along with him to her matrimonial home. However, when PW-1 has omitted to testify the aforesaid fact as stands conjointly deposed by PW-2 and PW-7, wherefrom an inevitable conclusion is qua PW-1 inventing the factum of the deceased on hers visiting her parental home hers unraveling the factum of hers standing ill-treated by the accused at her matrimonial home. Apart therefrom, with both PW-2 and PW-7 unanimously disclosing in their respective testimonies qua on the deceased visiting her parental home hers thereat standing accompanied by her husband, who after their stay thereat retrieved her therefrom to her matrimonial home wherefrom it is befitting to conclude of hence amity prevailing inter se both besides qua when at the relevant time she stood accompanied by accused

Chaman Lal to her parental home, she obviously hence not making any disclosure either to PW-1, PW-2 or PW-7 qua hers at her matrimonial home standing subjected to ill-treatment by the accused/appellants herein. Resultantly, it appears qua the close relatives of the deceased Ranjubala contriving the factum qua hers on hers visiting her parental home hers making disclosures thereat qua hers at her matrimonial home standing subjected to ill-treatment by the accused, more so, given the lack of specification in their respective testifications qua the nature of ill-treatment which stood perpetrated by the accused upon the deceased or its gravity, it is inapt to secure a conclusion of thereupon the psyche of the deceased suffering torment nor it is apt to conclude of the accused actuating or instigating the deceased to commit suicide. Moreover, the principle of proximity inter se the alleged penal misdemeanors ascribed to the accused by the prosecution witnesses vis-a-vis the ill-fated occurrence stands unsatiated significantly when each of the prosecution witnesses omit to with specificity pronounce in their respective testifications qua the time whereat deceased Ranjubala visited her parental home whereat penal ascriptions vis-a-vis the accused/appellants stood ascribed vis-a-vis them by the deceased by the latter making the apposite purported communications to them. In sequel, it is hazardous to record any firm conclusion therefrom qua at the time of the ill-fated occurrence it holding apposite proximity in time vis-a-vis the relevant purported penal misdemeanors ascribed to the accused by the prosecution witnesses. In aftermath, for lack of proximity inter se the alleged ascription of penal misdemeanors by the prosecution witnesses to the accused/respondents vis-a-vis the ill fated occurrence, the prosecution ought to be concluded to not succeed in proving the trite factum of the alleged penal misdemeanors ascribed by the prosecution witnesses to the accused/respondent goading deceased Ranjubala to commit suicide.

12. Be that as it may, a perusal of the record discloses of PW-1 making disclosures to the Pradhan of the Gram Panchayat concerned, who has deposed as PW-3 qua the trauma which befell upon the deceased at her matrimonial home. However, the factum of PW-1 making disclosures to PW-3 qua the trauma gripping the deceased Ranjubala at her matrimonial home appears to be engineered also it is visible of PW-3 in collusion with PW-1 contriving the factum of the deceased making a disclosure to PW-1 qua the woes or sufferings befalling upon her at her matrimonial home significantly when PW-2, the daughter of PW-1 in her cross-examination has voiced therein qua the alleged penal misdemeanors perpetrated at her matrimonial home by the accused upon the deceased, not standing reported either to the panchayat or to the police. In sequel, thereto, it is also apt to conclude qua hence PW-1 engineering the factum qua penal misdemeanors standing perpetrated by the accused upon the deceased at the latter's matrimonial home.

13. Though PW-2, a purported eye witness to the incident of cruelty which purportedly occurred in immediate proximity to the ill-fated occurrence wherefrom the prosecution assays of its proving the charge against the accused, testifies qua the accused in immediate proximity to the ill-fated occurrence in her presence slapping the deceased wherefrom it is befitting to conclude qua the findings of conviction recorded against the accused by the learned trial Court warranting no interference. However, the testimony of PW-2 is to construed conjointly with the testimony of PW-7 for ascertaining qua hence PW-2 deposing a truthful version qua the factum of the accused in immediate proximity to the ill fated occurrence slapping deceased Ranjubala in her presence. Though, PW-2 deposes qua at the relevant time the deceased serving tea to her besides to PW-7 yet PW-7 has not voiced in his testification qua thereat accused Chaman Lal slapping deceased Ranjubala. Also PW-7 has omitted to testify qua the eruption of an altercation inter se the deceased Ranjubala and accused Chaman Lal at the site besides at the venue whereat PW-2 was also present. However, contrarily besides contradistinctively vis-a-vis PW-7, PW-2 deposes qua an altercation occurring inter se deceased Ranjubala and accused Chaman Lal. She in contradiction to PW-7 also deposes, qua accused Chaman Lal slapping deceased Ranjubala in his presence. Obviously, when both were conjointly present at the relevant time at the site of occurrence, the omission by PW-7 to depose the trite factum aforesaid renders the testimony of PW-2 qua it being construable to be wholly engineered besides contrived, whereupon, no credence can be fastened. In aftermath, the aforesaid

testification of PW-2 holds no vigour wherefrom the ensuing conclusion is of the relevant act of cruelty imputed to accused Chaman Lal by PW-2 being discardable.

14. Furthermore, PW-2 deposes qua an altercation over telephone taking place inter se the deceased and accused Chaman Lal yet the factum aforesaid appears to be contrived significantly when precedingly thereto she falsely deposes of accused Chaman Lal slapping deceased Ranjubala, whereupon an inference spurs qua hence when accused Chaman Lal at the relevant time being available in his house, whereupon it is difficult to conclude of both holding any opportunity to hold a telephonic communication, especially when an inference qua possibility of a telephonic conversation occurring inter se both Chaman Lal and deceased Ranjubala would stem only when they were at the relevant time present at different locations, whereas, theirs being available together at the site of occurrence there was no opportunity for both to hold a telephonic conversation or also the testification of PW-2 qua theirs thereon holding an altercation vis-a-vis each other is bereft of credence. Tritely put the purported incident of cruelty which purportedly occurred in close proximity to the ill-fated occurrence does not hold any formidability nor hence it can be concluded of the prosecution succeeding in proving its charge against the accused.

15. The learned Deputy Advocate General has contended with force of with the ill-fated occurrence taking place within less than one year elapsing since the solemnization of a marriage inter se deceased Ranjubala and accused Chaman Lal, the presumption embodied in Section 113 of the Indian Evidence Act standing attracted, wherefrom, it would be befitting for this Court to sustain the findings of conviction recorded against the accused. However, the anchor for drawing succor from the aforesaid presumption embodied in Section 113 of the Indian Evidence Act is of proven cruelty standing perpetrated upon the deceased by the accused. Since, for reasons aforestated, there is no proven evident cruelty perpetrated upon the deceased by the accused, the benefit of the statutory presumption is unavailable for it standing attracted qua the accused.

16. The summom bonum of the aforesaid discussion is that the learned trial Court below has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of the evidence on record.

17. Consequently, the instant appeal is allowed and the accused are acquitted for the commission of offences punishable under Section 498-A and 306 read with Section 34 of the IPC. In sequel, the judgment impugned before this Court is set aside. Fine amount, if deposited, be refunded to the accused/appellants. Records be sent back forthwith.

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

Kewal Krishan and others .....Appellants.

Vs.

Surjeet Singh and another .....Respondents.

RSA No.: 120 of 2007
Date of Decision: 26.10.2016

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – defendants threatened to interfere in the suit land and to demolish the Chhapar situated over the same without any right to do so – defendants pleaded that they were licencees and had constructed a chhapar under the licence – suit was decreed by the trial Court – an appeal was preferred, which was allowed- held in second appeal that findings were recorded by Appellate Court on the basis of conjectures and not on the basis of the facts- the Court can record the findings on the basis of the facts and not on the basis of presumption- it was obligatory for the

Appellate Court to take into consideration the reasoning of the trial Court and thereafter to record its own findings- appeal allowed – case remanded to the Appellate Court for a fresh decision.

(Para- 10 to 15)

For the appellants: Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Pathik, Advocate.
For the respondents: Mr. R.P. Singh, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (oral) :

By way of this appeal, the appellants/plaintiffs have challenged the judgment and decree passed by the Court of learned Additional District Judge, Fast Track Court, Una in Civil Appeal No. 133/98 RBT No. 123/04/98 dated 21.12.2006, vide which, learned appellate Court while allowing the appeal filed by the present respondents, has set aside the judgment and decree passed by the Court of learned Senior Sub Judge, Una, in Civil Suit No. 119/1986 dated 29.06.1998, whereby the learned trial Court had decreed the suit for permanent injunction filed by the present appellants.

2. This appeal was admitted on 29.12.2007 on the following substantial questions of law:

> *"1. Whether the licence can be legally proved to have been created without there being any writing or non-producing the licensor/owner?*
>
> *2. Whether the entry of possession reflected after deleting the name of the earlier possessor without serving any notice or without affording any opportunity to such owner, can raise the presumption of truth to him and contrary approach of the learned lower appellate Court is not legally sustainable"*

3. Brief facts necessary for the adjudication of the present case are that predecessor in interest of present appellants/plaintiffs (hereinafter referred to as 'the plaintiffs') filed a suit praying for a decree of permanent injunction restraining the defendants from interfering in any manner and from taking forcible possession of land measuring 1KL.-5MLs. being 25/37th share, out of land measuring 1KL.-17MLs. bearing Khewat No. 92, Khatauni No. 130, Khasra No. 1123, as per jamabandi for the year 1981-82, situated in village Jankaur, Tehsil and District Una (hereinafter referred to as 'suit land') and further restraining the respondents/defendants from demolishing the 'Chhapar' in the suit land. The case of the plaintiff (since expired) was that he was owner in possession of the suit land and defendants had no right, title or interest over the same. As per the plaintiff, defendants who were headstrong persons threatened the plaintiff to interfere and to take forcible possession of the suit land and further to demolish the 'Chhapar' which was situated over the same. It was further the case of the plaintiff that he had requested the defendants many a times not to interfere, not to take forcible possession of the suit land and not to demolish the 'Chhapar' existing on the suit land but defendants refused to accede to the requests of plaintiff and accordingly, on these bases, suit was filed by the plaintiff.

4. Defendants contested the claim of the plaintiff and stated in the written statement that the plaintiff was not the owner in possession of the suit land. According to the defendants, they were coming in possession of the suit land as licensee under the owners/pre-empter (not the plaintiff) and had constructed a 'Chhapar' over the suit land which was being used by them only, to the exclusion of the plaintiff. It was further the case of the defendants that earlier plaintiff alongwith his sons had made an attempt to take forcible possession over the suit land for which criminal proceedings were also initiated. On these bases, claim of the plaintiff was denied by the defendants

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

"1. Whether the defendants are licensees over the suit land as alleged? OPD

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

3. Whether the plaintiff has no locus-standi to file the suit? OPD.

4. Whether the suit is time barred? OPD

5. Whether the suit is not properly valued? OPD

6. Relief."

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

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*No.*
Relief:	*Suit decreed for permanent injunction against the defendants as per operative part of judgment."*

7. It was held by the learned trial Court that plaintiff who entered the witness box as PW1 stated that he had purchased the suit land from Roshan Lal and had constructed a shed thereupon. Learned trial Court further held that PW1 Brahma Nand had deposed in the Court that Roshan Lal had filed a suit for preemption which was decided in favour of plaintiff and he remained in possession of the suit land and Roshan Lal had filed an execution petition for possession of the suit land which was dismissed. In his cross examination, he stated that he had paid the sale price to daughter of Roshan Lal and the factum of any case having been registered against him was also denied. Learned trial Court also took note of the fact that this witness deposed that after the preemption suit, Roshan Lal had obtained the money from Surjeet Singh and given possession of the suit land to Surjeet Singh. Learned trial Court further held that in rebuttal , defendant Surjeet Singh had examined himself as DW-1 and also examined Kishan Singh, Ravinder Kumar, Mohabat Rai and Bishan Dass. Learned trial Court took note of the fact that DW1 Surjeet Singh stated that suit land was owned by Roshan Lal which was sold by him to Brahma Nand but Smt. Rakesh Kumari, daughter of Roshan Lal had filed a suit for preemption in the year 1968 which was decided in her favour and preemption amount was received by Brahma Nand. As per defendants, thereafter Roshan Lal gave this land to them who constructed a house over the same and also paid the amount of said land to Roshan Lal. Learned trial Court also took note of the fact that defendants were never dispossessed by Roshan Lal from the suit land and the plaintiff never came in possession of the suit land. It was taken note of by the learned trial Court that defendants stated that when plaintiff and his sons came to dispossess defendants from the suit land forcibly by demolishing the house, a case under Section 325 of IPC was registered against them. Learned trial Court also took note of the fact that DW2 Kishan Singh had stated that defendant was in possession of the suit land and plaintiff never came in possession of the same. It was also taken note of by the learned trial Court that in cross examination this witness admitted that there was civil litigation between him and Brahma Nand. Learned trial Court also took note of the fact that plaintiff had produced copy of jamabandi for the year 1981-82 Ext. P-1, as per which, suit land was shown to be in joint ownership and possession of Rattan Chand s/o Pratap Singh and Brahma Nand s/o Salig Ram and Ext. P-2 was the copy of khasra girdawari for the years 1982 to 1986, contents of which were almost similar. It was also taken note of by the learned trial Court that defendants had filed copy of Khatauni Ext. D-1, in which the suit land was shown in the joint ownership of Rattan Chand and Brahma Nand and in the possession of Surjeet Singh and Ram Parkash. Learned trial Court also took note of the fact that Ext. D-2 was the copy of judgment of Sub Judge 2nd Class, Una. In the said suit, Smt. Rakesh

Kumari, daughter of Roshan Lal had filed suit for possession through preemption which was decreed and plaintiff was directed to deposit Rs. 400/- on or before 28.02.1967, failing which suit of the plaintiff shall stand dismissed. Learned trial Court also took note of Ext. D-3, copy of khasra girdawari for the years 1982 to 1986 and Ext. D-4, copy of MIsal Hakiat Bandobast Jadid for the year 1987-88 in which suit land was shown in joint ownership of plaintiff Rattana and in possession of defendant. It was held by learned trial Court that oral and documentary evidence on record proved that the suit land was owned and possessed by Sh. Roshan Lal and the same was purchased from him by plaintiff Brahma Nand and a suit was filed by Kumari Rakesh d/o Roshan Lal for possession by way of preemption which was decreed subject to depositing preemption amount of Rs. 400/- on or before 28.02.1967, but there was nothing on record to show that this amount had ever been paid or deposited on or before 28.02.1967 by the plaintiff Brahma Nand nor there was any order of dismissal of suit. Learned trial Court further held that execution petition filed by Rakesh Kumari was dismissed in default on 17.11.1984. It was held by the learned trial Court that Kumari Rakesh had not obtained the possession of the suit land from the plaintiff through preemption, which established that plaintiff was in possession of the suit land and the same was never delivered to Rakesh Kumari. It was held by the learned trial Court that the plea of defendants that they are licensees of the suit land was not proved on record. Learned trial Court further held that the defendants did not examine Roshan Lal or his daughter Rakesh Kumari nor there was any record to prove as to how and when possession of the suit land was given to the defendants. Learned trial Court further held that though plaintiff in his statement had mentioned that the suit for preemption was decided in his favour but a perusal of statement of plaintiff revealed that he was an illiterate person and on these bases, it was held by the learned trial Court that it could not be said that plaintiff was aware of legal complications of the decision. It was further held by the learned trial Court that the plaintiff in fact was in possession of the suit land since possession thereof had not been taken from him by the true owner i.e. Smt. Rakesh Kumari nor the true owner stepped into witness box to deny this fact that possession of the suit land was not with the plaintiff. Accordingly, on these bases, the suit so filed by the plaintiff was decreed by the learned trial Court.

8. Feeling aggrieved by the said judgment passed by the learned trial Court, defendants filed an appeal. Learned Appellate Court vide its judgment and decree dated 21.12.2006 set aside the judgment and decree passed by the learned trial Court and allowed the appeal by dismissing the suit so filed by the plaintiff. A perusal of the judgment passed by the learned Appellate Court demonstrates that while coming to the conclusion that the suit land was not in possession of the plaintiff but rather was in possession of the defendant, it took note of the fact that the plaintiff had not disclosed in his pleadings as to how he had become owner of the suit land and had not come to the Court with clean hands as the factum of Roshan Lal being the owner of the suit land and the factum of suit for preemption having been filed by the daughter of Roshan Lal, which was decided on 19.12.1986, was not disclosed in the plaint. Learned Appellate Court took note of the fact that rather in his statement plaintiff (PW1) was claiming that the said suit was decided in his favour. On these bases, it was held by the learned Appellate Court that such like conduct of the plaintiff created a doubt in the mind of the Court as to whether plaintiff was entitled to be granted the relief of injunction. It was further held by the learned Appellate Court that in the plaint, plaintiff had not explained his source of ownership but while appearing as PW1 he had deposed about his source of ownership and previous litigation between the parties. Learned Appellate Court observed that it was strange that he had not deposed even a single word qua accruing of cause of action against the defendants. It was further held by the learned Appellate Court that it was nowhere mentioned in the plaint that defendants were threatening to take forcible possession of the suit land or were threatening to interfere with his possession. It was further held that there was no other evidence on record to prove the cause of action as plaintiff had not examined any other witness except himself. It was further held by the learned Appellate Court that nowhere execution petition filed by daughter of Roshan Lal for possession was dismissed in default but simply because of this it could not be said that possession was still with the plaintiff. Learned trial Court observed that there was always a possibility of out of Court settlement. It further held that plaintiff in his examination in chief had

stated that he had received money and if he had received the preemption money, the possibility of handing over possession by him to the daughter of owner may also be there. On these bases it was held by learned Appellate Court that that was why the entry came in favour of defendants in the latest revenue record as discussed above. It further held that there was nothing on record to show that plaintiff ever challenged the entries mentioned in Ext. D-X and, therefore, it was difficult to say that plaintiff was still in possession of the suit land. On these bases, it was concluded by the learned Appellate Court that learned trial Court had not properly appreciated the evidence on record and accordingly learned Appellate Court while settling aside the judgment and decree passed by the learned trial Court allowed the appeal and dismissed the suit so filed by the plaintiff.

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

10. It is clearly borne out from the findings which have been returned by the learned Appellate Court while concluding that the suit land was in possession of the defendants and not the plaintiff that the same are based on conjectures and not based on material on record. The relevant extract of the findings so returned by the learned Appellate Court are reproduced below:-

- *No doubt the execution petition filed by the daughter of Roshan Lal for possession was dismissed in default but simply because of it, it cannot be said that the possession is still with the plaintiff. There is always a possibility of out of the Court settlement and it is not necessary to take possession through Court.*
- *He as stated in his chief examination even that he had received the preemption money. If he had received the money then possibility of handing over possession by him to the daughter to owner may also be there.*
- *It is pertinent to note that there is nothing on the record to show that the plaintiff ever challenged these entries in Ext. DX. So it is very difficult to say that the plaintiff is still in possession of the suit land.*

11. I am afraid that the findings so arrived at by learned appellate Court are not sustainable. The findings of fact by a Court of law cannot be based on presumptions. On the basis of material adduced on record by both the parties, the Court has to give a definite finding.

12. Learned trial Court after appreciating material on record held that the plaintiff had proved that he was in exclusive possession of the suit land and on these bases, learned trial Court decreed the suit in favour of the plaintiff. This Court is not making any observation as to whether the finding so returned by learned trial Court was correct or not. However, in my considered view, in case the finding arrived at by learned trial Court was to be set aside or distinguished by learned appellate Court, then it was obvious that after taking into consideration the reasonings behind the findings so arrived at by learned trial Court, learned appellate Court should have had returned its independent findings which were to be arrived at on the basis of material on record and not on the basis of conjectures, surmises or presumptions. However, this has not been done by the learned appellate Court in the judgment under challenge.

13. It is well settled law that the first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage and anything less than this is unjust to him. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court and first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on question of fact and law. It is settled law that while reversing a finding of fact, the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate court had discharged the duty expected of it. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all the issues involved in the case alongwith the contentions put forth and pressed by the parties for decision by the appellate Court.

14. In view of the above salutary principles, I am of the considered view that the learned appellate Court has failed to discharge the obligation placed on it as first appellate Court by deciding the appeal on presumptions rather than returning its findings by coming close quarters with the reasoning assigned by the learned trial Court and thereafter assigning its own reasons for arriving at a different finding.

15. In view of the discussion held above, the appeal is allowed and judgment and decree dated 21.12.2006 passed by the Court of learned Additional District Judge, Fast Track Court, Una, in Civil Appeal No. 133/98 RBT No. 123/04/98 are set aside. The case is remanded back to learned appellate Court i.e. Fast Track Court, Una with a direction to decide the appeal afresh on merits. Parties through their counsel are directed to put in appearance before the learned appellate Court on 12.12.2016. Keeping in view the fact that case pertains to the year 1986, this Court hopes and trusts that learned appellate Court shall adjudicate upon the appeal as expeditiously as possible. No order as to costs. Miscellaneous application(s), if any, also stands disposed of. Registry is directed to return back the records of the case to learned appellate Court forthwith.

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

Shri Pratap Singh and others .....Appellants.

Vs.

Shri Ram Rattan, son of Shri Lachhmi Singh
(since deceased) through his legal representatives and others .....Respondents.

RSA No.: 336 of 2007
Reserved on: 01.09.2016
Date of Decision: 26.10.2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs filed a civil suit pleading that they were co-owners in possession of the suit land – D had executed sale of his share but mutation could not be attested- the sale deed was mistakenly executed regarding the whole land, which was not permissible- revenue entries were not correctly recorded- defendants started digging the suit land to raise structure over the same- suit was decreed by the trial Court- an appeal was filed, which was allowed- held in second appeal that copy of jamabandi shows that D was co-sharer to the extent of 1/4th share – revenue record does not substantiate the fact that entire land was exclusively owned and possessed by D- therefore, he could not have parted with more land than was owned by him- the plea that defendants had become owners by way of adverse possession was not proved as no evidence was led that D was in possession of the entire land to the exclusion of the other co-owners - it was also not proved that D had denied the title of the other co-owners – appeal allowed- judgment and decree passed by District Judge set aside.

(Para-12 to 27)

Cases referred:

P. Lakshmi Reddy Vs. L. Lakshmi Reddy AIR 1957 SC 314

MD. Mohammad Ali (dead) by LRs. Vs. Jagadish Kalita and others, 2004 (1) SCC 271

Mohammad Baqar and others Vs. Naim-un-Nisa Bibi and others, AIR 1956 SC 548

For the appellants: Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.

For the respondents: Mr. K.D. Sood, Sr. Advocate, with Mr. Rajnish K. Lal, Advocate, for respondents No. 1 to 3.

None for respondents No. 4 to 10.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, the appellants/plaintiffs have challenged judgment passed by the Court of learned District Judge, Solan, H.P. in Civil Appeal No. 60-S/13 of 2006 dated 01.06.2007 vide which, learned appellate Court has allowed the appeal filed by the present respondents/defendants against the judgment passed by the Court of learned Civil Judge (Senior Division), Kandaghat, District Solan, H.P. in Civil Suit No. 5-K/1 of 2002 dated 03.05.2006.

2. Brief facts necessary for the adjudication of the present case are that the appellants/plaintiffs (hereinafter referred to as 'the plaintiffs') filed a suit for declaration and injunction against the defendants on the grounds that plaintiffs and proforma defendant No. 4 were co-owners in joint possession of half share in 8 plots of land measuring 13 bighas and 5 biswas, comprised in Khasra Nos. 15, 23, 55, 57, 73, 81, 95 and 109, Kitas 8, entered at Khewat No. 4, Khatoni No. 5, situated in village Mahog, Pargna Chail, Tehsil Kandaghat, District Solan, H.P. as per Jamabandi for the year 1996-97 alongwith the defendants. As per the plaintiffs, the suit land was in joint possession and ownership of Shri Dhingia to the extent of 1/4th share, Shri Mehar Singh to the extent of 1/4th share and Shri Motia, who was owner to the extent of ½ share in the year 1966-67 Bikrami. Shri Dhingia, who was co-owner of the suit land to the extent of 1/4th share sold his share by way of a registered sale deed dated 18 Kartika, 1967 Bikrami in favour of Shri Biru, son of Shri Haria. Shri Dhingia expired after the execution of the sale deed and the factum of the sale could not be incorporated in the revenue records during the life time of Shri Dhingia. Mutation No. 6 on the basis of the said sale deed was attested on 11th Maghar, Samvat 1967 Bikrami. Further, as per the plaintiffs, Dhingia died issueless and his estate was inherited by Shri Mehar Singh, son of Shri Shonku vide mutation No. 9 attested on 16th Jaisth, 1969 Bikrami. It was further the case of the plaintiffs that it appeared from the records that Dhingia, who was owner only of 1/4th share in the land measuring 13 bighas and 5 biswas, i.e. the suit land appeared to have executed the deed of sale by mistake with respect to the entire suit land. According to the plaintiffs, Dhingia could not have sold the land in its entirety as he had no right, title or interest of any kind over the entire suit land save and except his share. It was further the case put up by the plaintiffs that from the records it appeared that Mehar Singh, who was to inherit the estate of Shri Dhingia objected to the attestation of mutation, but revenue officer attested the same by exceeding his jurisdiction. As per the plaintiffs, Biru could not have purchased the land through sale deed dated 11th Maghar, Samvat 1967 Bikrami in excess of 1/4th share in the suit land. It was further the case of the plaintiffs that Motia who was co-owner in joint possession to the extent of ½ share died in the year 1968 Bikrami and his estate devolved upon his son Shri Jash Ram through mutation No. 8 attested on 16th Jaisht, 1969 Bikrami. As per the plaintiffs, though after the death of Shri Dhingia and Motia the suit land should have been shown to be owned and possessed by Shri Biru to the extent of 1/4th share, Shri Mehar Singh to the extent of 1/4th share and Shri Jash Ram to the extent of ½ share, but the revenue entries did not depict the correct position. According to the plaintiffs, on the basis of the said wrong revenue entries, the defendants were trying to derive undue advantage. It was further the case of the plaintiffs that after the death of Shri Biru, his estate devolved upon Smt. Niharikhi his wife, who died issueless and her estate devolved upon Shri Jonki, who was brother of Biru. After the death of Shri Jonki, his estate devolved upon his son Jhamtu. According to the plaintiffs, though the revenue entries should have reflected Jhamtu to be owner to the extent of 1/4th share, Shri Mehar Singh to the extent of 1/4th share and Jash Ram to the extent of ½ share, yet the revenue record rather than depicting the factual position, reflected wrong position and the entries so recorded which were factually incorrect did not affect the right, title or interest of the plaintiffs or proforma respondent No. 4 and their predecessors adversely. According to the plaintiffs, during his life time, Mehar Singh adopted Jagat Ram as his son and after the death of Mehar Singh, Jagat Ram acquired right, title and interest to the extent of 1/4th share qua the estate of Mehar Singh. Jagat Ram was succeeded by his widow Subda, who executed a registered sale deed dated 21st May, 1954 in favour of Shri Bijnu, son of Shri Totu and after the execution of

gift deed, revenue records should have depicted Jagat Ram as owner to the extent of 1/4th share, Shri Bijnu to the extent of 1/4th share and Shri Jash Ram to the extent of ½ share, but the entries continued to be recorded contrary to the factual position. Further as per the plaintiffs, Bijnu sold his share to the defendants through a registered sale deed dated 1st October, 1962 and after the death of Jagat Ram, his estate devolved upon his widow Smt. Gauri, his son Shri Siri Ram and daughters Smt. Kaushalya, Smt. Satya and Smt. Bimla. Siri Ram was succeeded by his son Shri Joginder Singh and Shri Sat Pal and daughters Smt. Sumitra and Smt. Indira Devi. After the death of Jash Ram, his estate was succeeded by Smt. Chainu, Smt. Kaushalya and his sons Dada Nand, Brij Lal, Partap Singh and Ishwar Chand. According to the plaintiffs, mutation of sale which was made by Shri Dhingia in favour of Shri Biru was incorrectly attested and the same led to wrong entries in the revenue record which were contrary to the factual position. Thus, as per the plaintiffs, transfer of interest by Shri Dhingia in excess of his share was illegal, null and void. It was further contended by the plaintiffs that defendants had started digging the suit land with an intention to raise structure over the property. The plaintiffs objected and made requests to defendants to desist from the same, but they did not accede to their request, hence the suit was filed by the plaintiffs.

3. The suit was contested by defendants No. 1 to 3, who in their written statement denied the claim as was set forth by the plaintiffs. According to the defendants, the revenue entries showing plaintiffs and proforma defendants as co-owners were wrong and illegal and were not binding on the rights of defendants No. 1 to 3. As per them, since they had purchased the suit land from Shri Bijnu Ram, s/o Totu through registered sale deed dated 01.10.1962, the revenue entries to the contrary were not binding upon them. According to the defendants, even the mutation of inheritance of Smt. Kasaulaya, widow of Shri Jash Ram in favour of her son Sh. Kuldeep was wrong. It was further the case of the defendants that they exclusively possessed the suit land as owners. It was further mentioned in the written statement that Bijnu acquired ownership and possession of land on the basis of registered gift deed from Smt. Subdha, wife of Shri Jhamtu and Jhamtu acquired ownership from his father Shri Chungi, who had become owner by succession from Smt. Thagi. According to the defendants, Thagi acquired ownership and exclusive possession from Shri Biru and Biru had purchased the suit land from Dhangia, predecessor-in-interest of Shri Mehar Singh, son of Shankru @ Shangu. On these bases, it was stated by the defendants that Dhangia was in exclusive possession of the entire suit land. It was further the case of the defendants that defendants No. 1 to 3 after purchase of the suit land by way of registered sale deed dated 01.10.1962 treated themselves to be exclusive owners in possession of the suit land and their possession over the suit land was peaceful, continuous and hostile to the knowledge of the plaintiffs and their family members and defendants No. 1 to 3 never admitted the plaintiffs and their brother Shri Ishwar Chand to be owners nor they were allowed to participate in the profits of the property. According to the defendants, there was complete ouster of plaintiffs and Ishwar Chand from the suit land and defendants No. 1 to 3 had otherwise also become owners of the suit land by way of adverse possession, which started from 01.10.1962. On these bases, it was contended by defendants No. 1 to 3 that they were absolute owners in possession of the suit property from 01.10.1962 and were enjoying exclusive possession of the suit land to the exclusion of the plaintiffs and proforma defendants. On these bases, the defendants No. 1 to 3 denied the claim of the plaintiffs.

4. Learned trial Court on the basis of the pleadings of the parties, framed the following issues:

> *"1. Whether the plaintiffs and proforma defendants No. 4 to 11 are joint owners in possession of suit land to the extent of ¾ share as alleged? OPP*
>
> *2. Whether the sale deed Sh. Dingia in favour of Sh. Biru beyond his share is illegal and not binding, as alleged? OPP.*
>
> *3. If Issue No. 2 is proved in favour of the plaintiff, whether the plaintiff is entitled for declaration regarding correction of revenue entries? OPP.*

4. Whether the subsequent transfers by Sh. Biru are not binding, as alleged? OPP

5. Whether the possession of defendants No. 1 to 3 over the suit land has ripened into ownership by way of adverse possession, as alleged? OPD.

6. Whether the present suit is liable to be stayed in view of Section 10 C.P.C.? OPD.

7. Whether the suit is barred by limitation, as alleged? OPD.

8. Relief."

5. On the basis of the evidence led by the respective parties, learned trial Court returned the following findings against the issues so framed:

"Issue No. 1:	Yes.
Issue No 2:	Yes.
Issue No. 3:	Yes.
Issue No. 4:	Yes.
Issue No. 5:	No.
Issue No. 6:	No.
Issue No. 7:	No.
Relief:	Suit of plaintiffs decreed as per operative part of judgment.

6. Learned trial Court held that from the evidence led by the parties both ocular as well as documentary, it was evident that Dhingia was owner to the extent of 1/4th share, Sh. Mehar Singh to the extent of 1/4th share and Motia was owner to the extent of ½ share. It further held that there was no jamabandi placed on record by the defendants which could prove that Dhingia was owner to the extent of 13 ½ bighas of land. Learned trial Court further held that the sale deed which was executed by Dhingia in Samvat 1967 Bikrami, as per the revenue record available pertaining to the relevant time also reflected that Dhngia was owner of 1/4th share only. It further held that there was admission on the part of the defendants that plaintiffs were residing at village Mahog and further on the issue of complete ouster of co-sharers, the defendants themselves were not sure about the ouster of co-sharer from the suit land. Learned trial Court held that co-owner had no duty cast upon him to watch the conduct of other co-owners and to be on the look out to find out the extent of share purported to be transferred by the other co-sharer. It further held that co-sharer was entitled to assume that the permissive nature of possession had passed on to his co-owners transferee, who now became the co-owners in place of original owner. It further held that if subsequent purchaser asserts his title over the entire land and brings it to the knowledge of other co-owners, only then the issue of adverse possession can be raised. Learned trial Court further held that mere fact that co-owners were seeking partition of joint property would not amount to adverse possession. It further held that it was basic law that no vendor can pass a better title than what he possesses and on these bases, it was held by the learned trial Court that as Dhingia was having title qua 1/4th share in the suit land and was not having any right to execute sale deed qua entire 13 ½ bighas of land in favour of Biru, therefore, the sale pertaining to 3/4th share of the entire property was meaningless. It further held that ouster has to be expressly proved and possession of one party over the joint property cannot be treated as adverse possession until and unless there was clear cut disclaiming on the part of co-sharer in possession of right, title and interest of other co-sharer. It further held that there has to be an intention of excluding other co-sharer from possession and such intention has to be expressed by assertion or otherwise. On these bases, it was held by the learned trial Court that in the case in hand, defendants had purchased the suit land from Bijnu but there was no evidence on record to show that either Dhingia or Biru ever claimed ouster of other co-sharer and it was no where pleaded by defendants No. 1 to 3 that right from their purchase date, i.e. 01.10.1962, they asserted their title hostile as to the other co-owners whose names appeared in the revenue

records. On these bases, it was held by the learned trial Court that in absence of such assertion and overt act, it could not be said that defendants No. 1 to 3 had become owners of the suit land by way of adverse possession by ouster of other co-sharers. Learned trial Court declared the plaintiffs and proforma defendant No. 4 as co-owners in joint possession qua ½ share and defendants No.1 to 3 as co-owners in joint possession to the extent of 1/4th share and proforma defendants No. 5 to 11 to the extent of rest 1/4th share in the land measuring 13 bighas and 5 biswas in village Mahog. It further held that transaction of sale and gift showing the devolution of interest in excess of the share of Sh. Dhingia over the suit land to be illegal, null, void and in operative over the right, title or interest over the suit property. Learned trial Court further restrained the defendants No. 1 to 3 from changing the nature of the suit land in any manner whatsoever till the same was partitioned by metes and bounds according to the shares mentioned above.

7. Feeling aggrieved by the judgment and decree so passed by the learned trial Court, defendants No. 1 to 3 filed an appeal. Learned appellate Court while accepting the appeal so filed by defendants No. 1 to 3, set aside the judgment and decree passed by the learned trial Court and dismissed the suit of the plaintiffs. It was held by the learned appellate Court that in the jamabandi of 1963-64, Dhingia had been shown in possession through mortgagee which was redeemed in 1967 B.K. and sold in the same year to Biru and there was no Jamabandi on record showing name of Biru, but upon his death, his wife's name appeared in subsequent jamabandi Ex. PW2/B and thereafter possession had passed in succession from one hand to another. Learned appellate Court further held that these long entries of over 100 years had shown the vendee through his successor in exclusive possession under the successors in interest of original owners. Though evidence had been led by the plaintiffs to show that they were cultivating the land jointly, but this appeared to be far from satisfactory as it was unlikely that the land was jointly possessed physically by the parties. Learned appellate Court further held that the suit land comprised of different khasra numbers and there was no evidence as to which khasra number was in possession of which party. It further held that it cannot be possible that both the parties were in joint possession of all the Khasra numbers. It further held that it was common sense that one co-sharer could mortgage the joint land only when others consented to it or when one was in exclusive possession. It further held that similarly no person would become mortgagee or purchaser of land which is in joint possession. Learned appellate Court held that the very fact that neither Biru nor his successors had applied for partition went to show that possession of the suit land was with them. It further held that had Dhingia not been in exclusive possession, there was no reason for the authorities to record his separate possession way back 100 years ago through a mortgagee and thereafter through a vendee. Learned appellate Court thus held that had the said three co-owners been in joint possession, their possession would have been recorded, which went to show that Dhingia was in exclusive possession of the suit land and this was the reason for him to sell whole of the suit land to Biru, predecessor-in-interest of the present appellants. Learned appellate Court further held that there was reference of partition in the remarks column of jamabandi for the year 1966-67 Bikrmi and may be the predecessor-in-interest of the parties had effected partition of joint land and suit land having come to the share of Dhingia. It further held that otherwise Dhingia could not have had sold whole the suit land to Biru when he had only 1/4th share in it. It further held that Mehar Singh, one of the co-owners with Dhingia after succeeding to his trial had never challenged during his life time the sale and had also not sought partition of the suit land. As per the learned appellate Court other co-owner Jash Ram had also not done so, which meant that they had accepted Dhingia to be exclusive owner of the suit land. Learned appellate Court further held that other co-sharers and their successors could be assumed to be having knowledge of the exclusive possession of Biru and his successors in view of entries in the revenue records on account of various mutations of inheritance etc. attested from time to time. Learned appellate Court further held that possession of land was not a secret affair and every one is aware of it especially the persons who have any interest in it. It was thus held by the learned appellate Court that long and uninterrupted possession of Dhingia and his successors due to an invalid sale deed was certainly adverse to the true owners and they being in possession for more than 12 years continuously to the knowledge

of the true owners, had become its owners by way of adverse possession. On these bases, it was held by the learned appellate Court that even if Dhingia had only 1/4th share in the suit land, the predecessor of defendants No. 1 to 3 and defendants No. 1 to 3 had become owners of the suit land by way of adverse possession being in exclusive and hostile possession of the suit land to the knowledge of other co-owners and the findings recorded by the learned trial Court were thus not sustainable in law and on facts. On these basis, learned appellate Court while accepting the appeal filed by defendants No. 1 to 3 dismissed the suit so filed by the plaintiffs by setting aside the judgment and decree passed by the learned trial Court.

8. Mr. Bhupender Gupta, learned Senior Counsel appearing for the appellants has argued that the findings returned by the learned appellate Court, whereby learned appellate Court set aside the well reasoned judgment and decree passed by the learned trial Court were not sustainable either on facts or law. It was argued by Mr. Gupta that it stood proved on record that share of Dhingia over the suit land was only to the extent of 1/4th and this fact was duly borne out from the records of the case. Mr. Gupta argued that the learned trial Court after carefully appreciating the evidence on record had come to the conclusion that because Dhingia was having only 1/4th share in the entire suit land, he could not have had passed title better than what he himself possessed. In other words, according to Mr. Gupta, Dhingia could not have had alienated more than what his share was in the suit land. On these bases, it was urged by Mr. Gupta that while learned trial Court had rightly come to the conclusion that the sale deed in favour of the defendants pertaining to 13 ½ bighas of land was of no consequence, however, learned appellate Court committed an illegality by setting aside the said findings and that too by completely misreading and mis-construing the evidence on record. It was further argued by Mr. Gupta that keeping in view the fact that the appellants/plaintiffs were co-sharers over the suit land and their ouster from the same was not proved in accordance with law, it could be contended by defendants No. 1 to 3 in the alternative that from the date the suit land was purchased by them, they had become owners in possession over the same by way of adverse possession. Mr. Gupta argued that the learned appellate Court failed to appreciate that in case a party exerts its rights over the suit land by way of adverse possession, then the said party besides proving its possession over the land in issue has to demonstrate by leading cogent evidence that said possession is; (a) open; (b) peaceful; and (c) hostile to the knowledge of real owner. According to Mr. Gupta, it cannot be that defendants No. 1 to 3 on one hand contend that they are owners in possession over the suit land by virtue of a sale deed and at the same time they say that alternatively they have become owners over the suit land by way of adverse possession. On these bases, it was urged by Mr. Gupta that the judgment passed by the learned appellate Court vide which it dismissed the suit of the plaintiffs was perverse and was liable to be set aside.

9. Mr. K.D. Sood, learned Senior Counsel appearing for respondents No. 1 to 3 argued that there was no merit in the present appeal and the findings returned by the learned appellate Court were correct both on facts and on law and learned appellate Court had rightly set aside the judgment and decree passed by the learned trial Court and had dismissed the suit of the plaintiffs. Mr. Sood argued that it stood proved on record that Dhingia had in fact parted 13 ½ bighas of suit land and said suit land ultimately vested in defendants No. 1 to 3 by virtue of a duly registered sale deed executed on 01.10.1962 and since then defendants No. 1 to 3 were in exclusive possession over the suit land in their capacity as owners to the knowledge of everyone including the plaintiffs and proforma defendants. Mr. Sood further argued that since 01.10.1962, the plaintiff and proforma defendants even otherwise stood ousted from the suit land and there was no merit in the contention of the plaintiffs that Dhingia could not have sold more than his share over the suit land as Dhingia had alienated 13 ½ bighas of land long time back and the same was not objected to by the predecessor-in-interest of the plaintiffs and it was on these bases that defendants No. 1 to 3 had urged that even if it is proved that Dhingia alienated land in excess of his share, even then, keeping in view the fact that defendants No. 1 to 3 were in possession over the suit land w.e.f. 01.10.1962 and their possession over the same was open, peaceful and hostile as to the plaintiffs and proforma defendants, they had accordingly become owners of the same by way of adverse possession. It was further argued by Mr. Sood that the

conclusions arrived at by the learned trial Court that as per the revenue entries, the plaintiffs and proforma defendants continued to be reflected as owners of the suit land and were co-owners in possession of the suit land were totally contrary to the spot and revenue records in which exclusive possession of vendees had been recorded. According to Mr. Sood, learned appellate Court had after correct appreciation of the material on record rightly set aside the judgment and decree passed by the learned trial Court and the same did not warrant any interference. On these bases, it was argued by Mr. Sood that there was no merit in the appeal and the same be dismissed.

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

11. This appeal was admitted on 10.03.2008 on the following substantial questions of law:

> *"1. When the defendants-respondents did not produce the Sale Deed allegedly executed by Shri Dhingia in favour of Shri Biru, the predecessor-in-interest of defendants-respondents, are not the findings of Lower Appellate Court that defendants-respondents have become owners of the suit land by adverse possession on the basis of such invalid sale?*
>
> *2. When Shri Dhingia was admittedly owner of ¼ share in the land in dispute, has not the Lower Appelate Court acted in erroneous and perverse manner in raising inferences of consent by other co-owners acknowledging such sale of their shares, when no registered document evidencing such fact was produced in evidence by defendants?*
>
> *3. Has not the Lower Appellate Court committed grave error of law and jurisdiction in ignoring settled proposition of law that possession of one co-owner is possession of all and unless specific plea of ouster is made and substantiated by specific and cogent evidence, the co-owners in exclusive possession cannot acquire title by prescription merely by afflux of time?"*

12. Records demonstrate that the case which was set up by the plaintiffs was that Dhingia being owner in possession of 1/4th share qua the suit land could not have passed on more land to his successors-in-interest in excess of what his share in the suit land was. The factum of his being owner in possession of 1/4th share in the suit land and his being capable of passing of 1/4th share over the suit land in favour of his successors-in-interest is not disputed even by the plaintiffs. Defendants No. 1 to 3 had come in possession of the suit property having purchased the same by way of sale deed dated 01.10.1962 from Bijnu. The sale deed is on record as Ex.-P-Z (12). As per this sale deed, Bijnu sold the land vide sale deed dated 01.10.1962 in favour of Ram Ratan, Rikhi Ram and Balak Ram. As per the said sale deed, Bijnu sold 13.5 bighas of land in favour of defendants No. 1 to 3. As per the plaintiffs, as Bijnu is one of the successors-in-interest of Dhingia, therefore, it has to be seen as to how and how much property actually devolved upon Bijnu. However, according to defendants No. 1 to 3, Mehar Singh did not succeed the interest of Dhingia qua suit land and the same was transferred by Dhingia during life time to Biru and it appeared that Dhingia owned some other land in village Mahog and village Damdar in addition to what he sold to Biru, which might be in possession of other co-owners and in fact Dhingia sold entire Khata qua suit land to Biru, which thereafter was exclusively possessed by him. According to them, as Dhingia was in exclusive possession of suit land being owner, he could sell the entire Khata to Biru and exclusive possession thereof was given to Biru.

13. In Ex. PW2/A, which is Hindi translation of Ex.-PA, i.e. copy of jamabandi for the year 1966-67 Bikrami, Mauza Mahog, Tehsil and District Sirmaur, Dhingia is reflected in the column of ownership as co-owner alongwith Mehar Singh and Motia. Whereas the share of Dhingia and Mehar Singh is reflected therein as "*Charam*" i.e. 1/4th, the share of Motia in the same is reflected as *"Nisaf"*, i.e. ½. One thing which is evident from the said jamabandi is that Dhingia was co-sharer with regard to the suit land measuring 13 ½ bighas and his share in the

same was to the extent of 1/4th. As per the case set up by defendants No. 1 to 3 in the written statement, Dhingia sold the land to Biru, Biru was succeeded by Smt. Thagi, Smt. Thagi was succeeded by Shri Chunghi, Shri Chunghi was succeeded by Jhamtu and Jhamtu was succeeded by his wife Subdha. Subdha by way of registered gift deed bequeathed the land to Bijnu and Bijnu sold the suit land to defendants No. 1 to 3.

14. The plea of adverse possession taken in the written statement as it finds mention in para-1 of the same is in the following words:

> *"1.....In fact Shri Dhangia son of Shri Kapuria was in exclusive possession of the entire land detailed in the para. Even in the year Samvat 1965 and right from the time of Shri Dhangia the property in question remained in exclusive possession of aforesaid person. The other co-owners, illegally shown in the revenue record never remained in possession of the land right from the time of Shri Motia, predecessor in interest of plaintiffs and their brothers, mother and Shri Ishwar Chand defendant No. 4 and replying defendants after purchase of the land through registered sale deed dated 01.10.1962 treated themselves to be exclusive owner in possession and their possession is peaceful, continuous and hostile to the knowledge of the plaintiffs and their family members and replying defendant never admitted the plaintiffs, their brother Shri Ishwar Chand to be owner nor they were allowed to participate in the profits of the property and there is complete ouster of the plaintiffs, Shri Ishwar Chand and their family members from the time of Shri Dhangia aforesaid and the adverse possession of the defendants which started on 01.10.1962 from the purchase of the land and possession, which is continuous, have ripened into ownership and thus the replying defendants are owner in possession of the suit land."*

15. No revenue record has been produced by defendants No. 1 to 3 to substantiate their contention that the entire suit land measuring 13.5 bighas was either exclusively owned and possessed by Dhinga or was exclusively possessed by him to the exclusion of other co-sharers. Keeping in view this fact that there is no material on record to demonstrate that the suit land was exclusively owned and possessed by Dhingia, the findings returned by the learned trial Court to the extent that Dhingia could not have parted with more land than what he owned were correct findings. A perusal of the judgment passed by the learned appellate Court in general and para-8 in particular of the same demonstrates that the line of arguments of defendants No. 1 to 3 who were appellants before the learned appellate Court was that though Dhingia had 1/4th share in the suit land, however, Biru, the vendee was put in possession of whole of the land of Dhingia and the possession of Biru in respect of ¾ share became adverse to other co-sharers the moment he came to possess it. Incidentally, the finding to this effect returned by learned trial Court that Dhingia had 1/4th share in the suit land has not been interfered with by the learned appellate Court and in its conclusions even the learned appellate Court has held that even if Dhingia had only 1/4th share in the suit land, the predecessors of defendants No. 1 to 3 have become owners of the suit land by way of adverse possession. Therefore, the factum of Dhingia being owner of only 1/4th share in the suit land has attained finality. The findings returned to this effect by the learned first appellate Court have not been assailed by defendants No. 1 to 3. In other words, they have accepted the findings returned by the learned appellate Court that though Dhingia was owner of the suit land only to the extent of 1/4th share, however, the predecessors-in-interest of defendants No. 1 to 3 had become owners of 3/4th share of the suit land by way of adverse possession.

16. In this background, the issue which now remains to be adjudicated is whether the findings returned by learned appellate Court to the effect that the predecessors-in-interest of defendants No. 1 to 3 had become owners-in-possession of the entire suit land by way of adverse possession are sustainable on the basis of material produced on record by the parties or not?

17. The Hon'ble Supreme Court in **P. Lakshmi Reddy** Vs. **L. Lakshmi Reddy** AIR 1957 SC 314 has held that in order to establish adverse possession of one co-heir as against

another, it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. The Hon'ble Supreme Court has held that ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse should be made out. It further held that possession of one co-heir is considered in law as possession of all the co-heirs. It further held that when one co-heir is found to be in possession of the properties, it is presumed to be on the basis of joint title. A co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus on his own part in derogation of the other co-heir' title. The Hon'ble Supreme Court further held that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. It further held that burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession. Therefore, it is evident that assertion of hostile title amongst co-owners must be to the knowledge of the plaintiffs and this is exactly the distinction between the case of adverse possession between co-owners and adverse possession between strangers.

18. In **MD. Mohammad Ali (dead) by LRs.** Vs. **Jagadish Kalita and others**, 2004 (1) SCC 271, the Hon'ble Supreme Court while dealing with a case where a co-sharer in exclusive possession set up the plea of adverse possession held that long and continuous possession by itself, would not constitute adverse possession and even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. It further held that a co-sharer becomes a constructive trustee of other co-sharer and the right of the appellant and/or his predecessors-in-interest would thus be deemed to be protected by the trustees.

19. A three Judges Bench of the Hon'ble Supreme Court in **Mohammad Baqar and others** Vs. **Naim-un-Nisa Bibi and others**, AIR 1956 SC 548 has held that as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession and exclusion and ouster following thereon for the statutory period.

20. Learned appellate Court while returning the findings that the successors-in-interest of Dhingia had become owners in possession of the entire suit land to the exclusion of other co-owners held that there were long entries over 100 years showing vendee through his successor in exclusive possession under the successors-in-interest of the original owners and that it was unlikely that the land was jointly possessed physically by the parties. It further held that the suit land comprised of different khasra numbers and there was no evidence which of khasra numbers were in possession of which particular party. On these bases, it held that it could be possible that both the parties were in joint possession of all Khasra numbers and if this be so, then how were they cultivating the land and appropriating the produce. Learned appellate Court further held that had Dhingia not been in exclusive possession, there was no reason for the authorities to record his separate possession for over 100 years and had three of the co-owners been in joint possession, then their possession would have been recorded as such. On these bases, it was held by the learned appellate Court that Dhingia was in exclusive possession of the suit land and for this reason, he sold the entire suit land to Biru, predecessor-in-interest of present appellants. It was further held by learned appellate Court that Mehar Singh, one of the co-owners with Dhingia never challenged during his life time the sale and also did not try to seek partition of suit land. It further held that other co-owner Jash Ram also had not done so, meaning thereby he accepted Dhingia to be exclusive owner of the suit land. It further held that other co-sharers and their successors can also be assumed having knowledge of exclusive possession of Biru and his successors in view of such entries in the revenue record. On these bases, it concluded that long and uninterrupted possession of Dhingia and his successors due to an invalid sale deed was certainly adverse to the true owners and they being in possession for more than 12 years continuously to the knowledge of true owners had become its owners by way of adverse possession.

21. In my considered view, the findings so returned by the learned appellate Court are not sustainable either on facts or on law. While coming to the conclusions that defendants No. 1 to 3 have become owners of the entire suit land by way of adverse possession, learned appellate Court concluded that Dhingia had gained possession of the entire suit land to the exclusion of other co-sharers and his possession as such qua other co-sharers had ripened into adverse possession. I am afraid the findings so returned by the learned appellate Court are not based on records but are based on mere conjectures and surmises. There is no evidence to substantiate the findings returned by the learned appellate Court to the effect that other co-sharers had accepted the exclusive possession of Dhingia to their express ouster qua the entire suit land. There is no material to decipher that Dhingia denied the right of other co-sharers to their knowledge. There is no evidence that Dhingia asserted his hostile title coupled with exclusive possession and enjoyment vis-à-vis the other co-sharers to their express knowledge. The findings so returned by learned appellate Court are based on assumptions.

22. It is well settled law that the first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage and anything less than this is unjust to him. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court and first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on question of fact and law. It is settled law that while reversing a finding of fact, the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate court had discharged the duty expected of it. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all the issues involved in the case alongwith the contentions put forth and pressed by the parties for decision by the appellate Court. In the present case, while setting aside the findings returned by the learned trial Court, the appellate Court has not based its findings on evidence on record, but has justified its findings on assumptions.

23. Incidentally, a perusal of the cross-examination of DW-1 Rikhi Ram demonstrates that he has admitted therein that the plaintiffs were residing where suit property was situated. He has also admitted that no partition of the suit land has taken place. In fact a minute perusal of the written statement filed by defendants No. 1 to 3 and the affidavit filed by DW-1 Rikhi Ram which is on record as Ex. D-1 also demonstrates that it is not in so many words that it has been stated by the defendants that Dhingia was owner of the entire suit land. According to them, the entire suit land was in fact in possession of Dhingia, but this contention of their's is belied from the documents.

24. There is one more important fact which learned appellate Court did not appreciate while relying upon entries in favour of the successors-in-interest of Dhingia to the effect that the entire suit land was in their possession, which fact is that how these entries were initially recorded in the revenue records. As I have already mentioned above, there is no evidence on record to substantiate that Dhingia was either owner of the entire suit property or was in possession of the entire property. Therefore, subsequent entries to this effect in favour of his successors-in-interest are *non est* as defendants No. 1 to 3 have not been able to substantiate from records as to how the entire suit land came to be recorded in ownership and possession or in possession of the successors-in-interest of Dhingia when Dhingia was neither owner-in-possession of the entire property nor was he in possession of the entire property.

25. The contention of the learned counsel for the respondents that presumption of truth is attached with the latter revenue entries is a rebuttable presumption because if the genesis of the entries so made in the revenue records is not substantiated and is doubtful, then the presumptions so attached with the revenue records stands rebutted.

26. The version of defendants No. 1 to 3 of complete ouster of other co-sharers of Dhingia is not substantiated from the records. It is settled law that he who acquires title from a co-owner or a co-sharer enters into the foot steps of co-owner does not acquires a title better than

that of co-owner/co-sharer. The factum of one of the co-sharer selling a portion of joint property would not amount to adverse possession and as Dhingia was having no right, title or interest over 3/4th portion of the suit land, he had no right in law to alienate the same in any manner whatsoever. Once the successors-in-interest of Dhingia entered into his foot steps, then they acquired the status of co-sharer and their possession over the suit property was on behalf of all the co-sharers. As far as defendants No. 1 to 3 are concerned they had purchased the suit land vide sale deed dated 01.10.1962. There is no material on record from which it can be inferred that from 01.10.1962, they asserted their title hostile to the other co-owners, whose names admittedly were existing in the revenue records. There is no material on record to substantiate that defendants No. 1 to 3 after they came in possession of the suit land became owners of the same by way of adverse possession by ouster of other co-sharers. In these circumstances, learned trial Court had rightly held plaintiffs and proforma defendant No. 4 as co-owners in joint possession qua ½ share and defendants No. 1 to 3 as co-owners in joint possession to the extent of 1/4th share and proforma defendants No. 5 to 11 to the extent of rest 1/4th share in the suit land measuring 13 bighas and 5 biswas in village Mahog and learned appellate Court erred in setting aside the findings so returned by the learned trial Court. Substantial questions of law are answered accordingly.

27. In view of the discussion held above, the present appeal is allowed with costs and the judgment and decree passed by the Court of learned District Judge, Solan in Civil Appeal No. 60-S/13 of 2006 dated 01.06.2007 is set aside, whereas the judgment and decree passed by the Court of learned Civil Judge (Senior Division), Kandaghat, District Solan in Civil Suit No. 5-K/1 of 2002 dated 03.05.2006 is upheld. Miscellaneous applications, if any, also stands disposed of.

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

Revti Devi ... Appellant

Versus

Hari Singh & Anr. ... Respondents

RSA No. 257 of 2008
Reserved on: 14.09.2016
Date of decision:26.10.2016

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

(Para-15 to 19)

Cases referred:

H. Venkatachala Iyengar Vs. B.N. Thimmajamma, AIR 1959 SC 443

Adivekka and others Vs. Hanamavva Kom Venkatesh (Dead) by LRS. and another, (2007) 7 Supreme Court Cases 91

For the appellant: Mr. Vijay Chaudhary, Advocate.

For the respondents: Mr. Praneet Gupta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

This appeal has been filed by the appellant/ plaintiff against the judgment and decree passed by the Court of learned Presiding Officer Fast Track Court, Mandi, in Civil Appeal Nos. 58/2004, 135/2005 dated 31.03.2008, vide which, learned Appellate Court dismissed the appeal filed by the present appellant against the judgment and decree passed by the Court of learned Civil Judge (Jr. Division), Sundernagar, in Old Civil Suit No. 144/1990, New Civil Suit No. 99/2002, dated 15.06.2004 and allowed the cross objections filed on behalf of the respondents/defendants under Order 41 Rule 22 C.P.C. against findings returned by learned trial Court on Issues No. 1(a) and 2.

2. This appeal was admitted on 02.06.2008 on the following substantial questions of law:-

"1. Whether any prudent and reasonable man would create tenancy after coming into force the HP Tenancy & Land Reforms Act, 1974 knowing fully well that the said tenant would acquire proprietary rights by operation of law?

2. Whether the learned courts below have erred in recording the findings to the effect that there was minor contradictions in the statements of plaintiff's witnesses without taking into consideration the fact that their statements were being recorded after a gap of 8-10 years and such minor contradictions were necessary outcome of passage of time?

3. Whether the learned courts below erred in concluding that the appellant/plaintiff has failed to prove the Will dated 14/5/86 (Ex. PW.2/A) and 4/11/86 (Ex.PW.2/B)?"

3. Brief facts necessary for the adjudication of the present case are that the appellant/plaintiff (hereinafter referred to as the 'plaintiff') filed a suit for declaration to the effect that land comprised under khewat No. 43, Khatauni No. 61, Khasra No. 1898/1454 old and present Khasra No. 1151 measuring 3-1-15 bighas, situated at village Bhour, Tehsil Sundernagar, District Mandi, HP (hereinafter referred to as 'suit land') was owned and possessed by the plaintiff as per Will dated 04.11.1986 which was the last Will of deceased Ganga Ram made by him in her favour and entries qua the same in favour of defendant No. 1 as owner thereof and in favour of defendant No. 2 as non occupancy tenant thereupon were wrong, illegal, null and void. It was further prayed that as the defendants had taken over the forcible possession over the suit land on the basis of said wrong and illegal revenue entries, possession of suit land be also delivered to the plaintiff as a consequential relief. According to the plaintiff, suit land was owned and possessed by one Shri Ganga Ram who during his lifetime was looked after and maintained by the plaintiff and out of love and affection and in lieu of services rendered to him by the plaintiff, Ganga Ram bequeathed the suit land in her favour by way of a registered Will dated 14.05.1985, which Will was later on revived and confirmed by him vide his last and final Will dated 04.11.1986, which Will was also executed by Ganga Ram in her favour. As per the plaintiff, Ganga Ram died on 07.11.1986 and after his death, she inherited and succeeded to the suit land on the basis of said Will and was in possession of the suit land in her capacity as owner. Further as per the plaintiff, Ganga Ram had not executed any other Will except the abovementioned two Wills in her favour, however, defendant No. 1 managed to obtain one Will in his favour from the deceased which was result of misrepresentation, deception, undue influence and fraud etc.. As per the plaintiff, the forged Will had no weight in the eyes of law. It was her case that in November, 1988, when she had sown wheat crop in the suit land, defendants in connivance with each other re-ploughed the suit land forcibly and changed the crop sown by her and instead had sown their own wheat seeds. As per plaintiff, she requested them not to do so and not to take law in their hands, however, defendant No. 1 disclosed to her that he was recorded as owner of the suit land while defendant No. 2 was non-occupancy tenant in possession under defendant No. 1. It was further the case put up by the plaintiff that thereafter she approached the Patwari Halqa

and obtained the copies of revenue record from him and after getting them 'visualized' from her counsel, the disclosure of defendant came to light. It was further stated by the plaintiff that mutation, if any, concerning the suit land in favour of defendant No. 1 and on the basis of same, subsequent entries in revenue record were wrong, illegal, null and void and inducting defendant No. 2 as non-occupancy tenant over the suit land was also wrong and illegal and without any authority. It was on these bases, the suit was filed by the plaintiff seeking the relief as mentioned above.

4. The suit filed by the plaintiff as contested by the defendants. As per defendants, suit land was recorded in the ownership of defendant No. 1 and was in possession of defendant No. 2 as non occupancy tenant and thereafter defendant No. 2 had become owner of the suit land by virtue of operation of law. Though, it was admitted by the defendants that the suit land was previously owned and possessed by Ganga Ram, however, it was denied that Ganga Ram was looked after and maintained by the plaintiff during his lifetime. It was further denied that Ganga Ram executed Will in favour of plaintiff out of love and affection. According to the defendants, Will dated 04.11.1986 was not genuine but was a fake and fictitious Will obtained by the plaintiff. According to the defendants though Will dated 14.5.1985 was executed by Ganga Ram in favour of plaintiff, however, the same was subsequently cancelled and in fact Ganga Ram, who was a close relative of defendant No. 1, during his lifetime had executed a registered Will dated 18.5.1985 in favour of defendant No. 1, out of love and affection in lieu of services rendered by defendant No. 1 to Ganga Ram, with regard to his entire moveable and immoveable property. It was further the case of the defendants that Ganga Ram had already inducted defendant No. 2 in possession of the suit land who was in actual possession of the suit land and defendant No. 2 had become owner of the same by operation of law and thereafter the suit land was in ownership and possession of defendant No. 2. It was denied by the defendants that Ganga Ram had not executed Will in favour of defendant No. 1 and as per defendants Will dated 18.05.1985 was the last valid Will executed by Ganga Ram in favour of defendant No. 1. As per the defendants, Will dated 18.05.1985 which was executed by Ganga Ram in favour of defendant No. 1 was his last valid Will and in fact the plaintiff after she came to know about said last Will of Ganga Ram having been executed in favour of defendant had managed to manufacture and obtain a fictitious Will allegedly executed in her favour by Ganga Ram in order to grab the suit property. It was denied that any revenue entries have been wrongly entered into in favour of defendant No. 1 in connivance of revenue officials or mutation sanctioned in favour of defendants was bad. According to the defendants, mutation proceedings were in full knowledge of the plaintiff and in fact plaintiff had not remained in possession of the suit land at any point of time. It was denied that plaintiff had ever sown any wheat crop over the suit land or she was forcibly dispossessed from the suit land in November, 1988, as alleged. According to the defendants, it was defendant No. 2 who had been cultivating the suit land during the lifetime of deceased Ganga Ram in his capacity as tenant and thereafter he had become owner in possession of the same by operation of law. On these bases, the case of the plaintiff was denied by the defendants.

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

> *"1. Whether Ganga Ram executed valid wills dated 14-5-1985 and 4-11-1986 in favour of the plaintiff, if so its effect? … OPP*
>
> *1(a) Whether the defendant No. 1/2 was tenant over the suit land and has become owner by operation of law and if so its effect? … OPD 2*
>
> *1(b) Whether the plaintiff has been forcibly dispossessed from the suit land by defendants in November, 1988 as alleged and plaintiff is entitled for relief of possession as claimed? … OPP*
>
> *2. Whether Ganga Ram executed a valid will dt. 18-5-1985 in favour of defendant No. 1? … OPD*
>
> *3. Whether the plaint is liable to be rejected for non-furnishing of particulars of fraud as alleged? … OPD*

4. Relief."

6. On the basis of material placed on record both ocular as well as documentary by the respective parties, learned trial Court dismissed the suit filed by the plaintiff after holding that perusal of record demonstrated that plaintiff has failed to prove that deceased Ganga Ram had executed 'Will' in favour of plaintiff. It was held by learned trial Court that the case of the plaintiff was that initially Ganga Ram executed a Will PW2/A in her favour which was later on revived and confirmed vide Will Ext. PW2/B dated 04.11.1986. Learned trial Court held that the first suspicious circumstance regarding the execution of Will Ext. PW2/B was the sitting arrangement of scribe, attesting witnesses and the testator. It further held that statements of plaintiff (PW1) and the attesting witnesses were contrary to each other which rendered the presence of all of them at one place to be doubtful. It was further held by the learned trial Court that the second suspicious circumstance was the contention of the plaintiff that the later Will in fact revived the earlier Will executed by Ganga Ram in her favour and also confirmed the same. Learned trial Court held that PW2 Shiv Lal, who was one of the attesting witnesses of the later Will, deposed that Will Ext. PW2/A was read over and thereafter Will Ext. PW2/B was scribed whereas PW3 Nek Ram other attesting witness deposed that no reference of the earlier Will i.e. Ext. PW2/A was made at the time of execution of second Will i.e. Ext. PW2/B. Learned trial Court also took note of the fact that the third suspicious circumstance surrounding the purportedly Will executed by Ganga Ram in favour of plaintiff was that a school boy was engaged to scribe the Will who had no knowledge about scribing the same. Learned trial Court further held that this witness also admitted that neither earlier Will was shown to him nor any reference was made of the same at the time of execution of Will Ext. PW2/B. Learned trial Court took note of the fact that as per admission of PW5 Lekh Ram, scribe of the Will Ext. PW2/B, he was himself not aware about the meaning of word 'Sanad Patra' which was mentioned on the top of the Will Ext. PW2/B and he also admitted that he had not scribed such words on the top of Will Ext. PW2/B. Learned trial Court further held that the fourth suspicious circumstance which shrouded the Will Ext. PW2/B being propounded by deceased Ganga Ram was thumb impression of deceased Ganga Ram. Learned trial Court held that the thumb impression of testator of Will Ganga Ram was not on the documents of Will Ext. PW2/B but was completely on the revenue stamp which was appended on the Will Ext. PW2/B. Said thumb impression nowhere touched paper Ext. PW2/B. In other words, affixation of thumb impression on revenue stamp at the bottom of the document and mentioning of 'Sanad Patra' on the top of the same made the existence of genuineness of such Will doubtful as per the learned trial Court. On these bases, it was held by the learned trial Court that the execution of Will Ext. PW2/B was not proved by the plaintiff.

7. As far as issue pertaining to defendant No. 2 having become owner by operation of law by virtue of defendant No. 2 earlier being tenant over the suit land is concerned, the same was answered against the defendants by the learned trial Court.

8. It was further held by the learned trial Court that plaintiff had failed to prove that she was in possession of the suit land and had been dispossessed from the same.

9. Issue to the effect that Ganga Ram had executed Will DW1/A in favour of defendant was answered against the defendants by the learned trial Court.

10. The issue whether the plaint was liable to be rejected on account of non-furnishing of particulars of fraud was decided against the plaintiff and in favour of defendants.

11. The judgment and decree so passed by the learned trial Court was challenged by the plaintiff by way of appeal. Cross-objections were filed by the defendants against the findings returned against the defendant on issues No. 1(a) and Issue No. 2.

12. Learned Appellate Court while dismissing the appeal filed by the plaintiff allowed the cross-objections which were filed by the defendants.

13. Learned Appellate Court confirmed the findings returned by the learned trial Court that deceased Ganga Ram had not executed any valid Will in favour of plaintiff, however, it

set aside the findings returned by the learned trial Court that Ganga Ram had not executed valid Will dated 18.05.1985 in favour of defendant No. 1. Learned Appellate Court also set aside the findings of the learned trial Court that defendant No. 2 was not tenant over the suit land and had not become owner by operation of law over the same. On the basis of material on record, the learned Appellate Court came to the conclusion that execution of Will purportedly executed by Ganga Ram in favour of plaintiff, Ext. PW2/B, dated 04.11.1986 was not proved by the plaintiff in accordance with law. It was held by the learned Appellate Court that said Will was shrouded with grave and suspicious circumstances and execution thereof had not been duly prove and hence the findings returned by the learned trial Court on issue No. 1 were correct and it could be safely held that the said findings given by the learned trial Court were not liable to be set aside. Learned Appellate Court further held that it was a matter of record that after 3-4 days of the purported execution of alleged Will Ext. PW2/B, Ganga Ram died. It further held that said Will Ext. PW2/B was no Will in the eyes of law whereas Will Ext. DW1/A dated 18.05.1985, which was executed by deceased in favour of defendant No. 1, fulfilled all the necessary requirements as provided under Section 63 of the Indian Succession Act and it was a valid Will as both the attesting witnesses had seen the testator putting thumb impression on the Will Ext. DW1/A. The scribe of the Will Asif Khan appeared as DW1 and Govind Ram (DW5), one of the attesting witnesses of the said Will, had clearly proved the execution of said Will and these witnesses were not interested witnesses and their statements remained unshattered. Learned Appellate Court also took note of the fact that the other attesting witness of Will Ext. DW1/A was stated to be dead and DW 5 Shri Nirmal Singh, Additional District Magistrate, Hamirpur, who at the relevant time was posted as Sub Registrar at Sundernagar categorically stated that Will in question was read over and explained to Ganga Ram who admitted its correctness. Learned Appellate Court further held that he also proved endorsement qua the registration of the documents Ext. PW5/A to Ext. PW5/C on the Will in question. It was further held by the learned Appellate Court that the statement of Nirmal Singh further proved that deceased Ganga Ram was in his senses and was in sound state of mind when he had executed Will Ext. DW1/A and on these bases, it could be safely held that said Will was not shrouded with suspicious circumstances as defendant No. 1 was real nephew of deceased Ganga Ram and he was looking after deceased Ganga Ram and his last rites were also performed by him (defendant No. 1). It was further held by learned trial Court that Rewati Devi who belonged to a different caste was not even adopted by deceased Ganga Ram as alleged. Learned Appellate Court further held that the findings returned by the learned trial Court to the effect that thumb impression of testator on the Will Ext. DW1/A was not identified by the defendants, was not based on the material on record as the defendants had proved the valid execution of Will Ext. DW1/A in favour of Hari Singh, on the basis of which, he had become owner of the suit land. Learned Appellate Court set aside the findings of learned trial Court to this effect. It further held that the factum of defendant No. 2 being a non-occupancy tenant earlier under Ganga Ram and thereafter under defendant No. 1 had been categorically stated by defendant No. 1 Hari Singh and his statement had not been shattered by plaintiff and moreover, the factum of said defendant being in possession of the suit land also proved prima facie that he was inducted as tenant over the suit land during the lifetime of deceased Ganga Ram. On these bases, the findings returned to the contrary by the learned trial Court were set aside. It was on these bases that the appeal filed by the plaintiff against the judgment and decree passed by the learned trial Court was dismissed by the learned Appellate Court whereas cross-objections filed by the defendants against the same were allowed.

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

15. The factum of Will Ext. PW2/B having been executed by Ganga Ram in favour of plaintiff stands concurrently decided against the plaintiff by both the learned Courts below. After taking into consideration the entire evidence on record it was held by the learned trial Court that the purported Will Ext. PW2/B was shrouded with suspicious circumstances. The findings so returned by the learned trial Court have been affirmed by the learned Appellate Court. Findings so returned by both the learned Courts below are duly borne out from the records of the case.

Therefore, it cannot be said that on the basis of statements of plaintiff witnesses plaintiff had proved the execution of Will Ext. PW2/B by Ganga Ram in her favour.

16. Section 63 of the Indian Succession Act clearly lays down that every testator shall execute his Will according to the following rules:-

> *"(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.*
>
> *(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.*
>
> *(c) The will shall he attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."*

17. It has been held by the Hon'ble Supreme Court in ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma***, ***AIR 1959 SC 443***, that in the cases in which execution of the Will is surrounded by suspicious circumstances, it may raise a doubt as to whether the testator was acting of his own free will. The Hon'ble Supreme Court has further held that in such circumstances, the initial onus is on the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed by the mere assertion of the propounder that the will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the will was made.

18. The Hon'ble Supreme Court has held in ***Adivekka and others Vs. Hanamavva Kom Venkatesh (Dead) by LRS. and another***, ***(2007) 7 Supreme Court Cases 91***, that where there are suspicious circumstances, the onus would be on the propounder to remove suspicion by leading appropriate evidence. Section 63 of the Succession Act lays down the mode and manner in which an unprivileged Will is to be executed. Section 68 of the Evidence Act postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the Court and capable of giving evidence. The proof of Will is not required as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be. In the present case, propounder of Will Ext. PW2/B i.e. the appellant was not able to dispel the suspicious circumstances shrouding the execution of Will Ext. PW2/B. She was not able to discharge this initial onus which is on the propounder of the Will. It could not be proved by her that the Will was executed in the mode and manner as is laid down under Section 63 of the Succession Act. Besides this, as has been taken note by the learned trial Court and in appeal by the learned Appellate Court, the said will was shrouded with suspicious circumstances which were not satisfactorily explained by the plaintiff.

19. Similarly, the findings which have been returned by the learned Appellate Court to the effect that Will Ext. DW1/A was proved to have been validly executed by deceased Ganga Ram in favour of defendant No. 1 cannot be faulted with. In my considered view, the findings returned by the learned trial Court that execution of Will Ext. DW1/A which was executed by Ganga Ram in favour of defendant No. 1 stood duly proved as per law are the correct findings. The execution of said Will by Ganga Ram in favour of defendant No. 1 has been duly substantiated by the statements of DW1 Arif Khan, the scribe of the Will and DW5 Govind Ram, one of the attesting witness. It has come in the statement of DW1 that Will Ext. DW1/A was

scribed at the instance of Ganga Ram and was read over to him and that at the relevant time he was in a sound disposing state of mind. He also stated that the other attesting witnesses of the said Will were Dila Ram and Govind Ram. In his cross examination, he categorically stated that after the Will Ext. DW1/A was scribed, firstly thumb impression on the same was put by Ganga Ram and thereafter signatures of the attesting witnesses were obtained on the same. He also stated in his cross examination that on the day when the Will Ext. DW1/A was scribed, Ganga Ram was in a sound state of mind and the Will was executed at his instance. Similarly, Govind Ram, one of the attesting witness of Will Ext. DW1/A, who entered the witness box as DW5, has clearly stated that Will Ext. DW1/A was written at the instance of Ganga Ram and when said Will was written, Ganga Ram was in sound state of mind and he (Govind Ram) and Dila Ram were present when said Will was executed. He further deposed that after the Will was executed it was read over to Ganga Ram who admitted it to be correct and thereafter he (Ganga Ram) appended his thumb impression over the same and thereafter attesting witness signed the same. He also stated that Will Ext. DW1/A was taken before the Tehsildar for the purpose of registration and he was also present there at that time. He further stated that Ganga Ram had stated even before the Tehsildar that the Will was correct. Nirmal Singh who entered the witness box as DW6 proved the factum of registration of Will Ext. DW1/A and he also stated that the will was read over to Ganga Ram who admitted the contents of same to be correct. Therefore, on the basis of said evidence produced on record by the defendants, the findings returned by the learned Appellate Court to the effect that execution of Will Ext. DW1/A was duly proved by defendant No. 1 as per the provisions of Indian Succession Act are the correct findings and findings to the contrary recorded by the learned trial Court were rightly set aside by the learned Appellate Court. Similarly, the factum of defendant No. 2 having been initially inducted as a tenant over the suit land by late Shri Ganga Ram and thereafter his continuing to be as such under defendant No. 1 and the factum of defendant No. 2 becoming owner of the suit land by operation of law and thereafter his being in possession of the suit land in his capacity as owner of the same has been duly proved by defendant No. 1. The statement of defendant No. 1 could not be shattered by the plaintiff and there is no reason as to why the same should be disbelieved. The findings returned in this regard by the learned Appellate Court in favour of defendants are also duly borne out from the records of the case and the conclusion arrived at by the learned trial Court was contrary to the material on record. Therefore, learned Appellate Court correctly returned said findings in favour of defendants by allowing the cross objections. During the course of arguments, learned counsel for the appellant could not point out as to how the findings returned by the learned Appellate Court to this effect were perverse and not borne out from the records of the case.

Therefore, in my considered view, no fault can be found with the judgment and decree passed by the learned appellate Court whereby it dismissed the appeal filed by the appellant/plaintiff against the judgment and decree passed by the learned trial Court and simultaneously allowed the cross objections filed by the defendants against the said judgment and decree. The substantial questions of law are answered accordingly and the appeal being devoid of any merit is dismissed. No order as to costs. Pending application(s), if any, also stands disposed of.

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

State of H.P. .....Appellant.

Versus

Chaman Lal and another .....Respondents.

Cr. Appeal No. 113 of 2007
Decided on : 26.10.2016

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

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Virender Kanwar, with Mr. Raman Prashar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge, Oral

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 26.9.2006 by the learned Sub Divisional Judicial Magistrate, Arki, District Solan, H.P. in Criminal Case No. 32/3 of 2001, whereby the learned trial Court acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 16.12.2000, Food Inspector, S.C. Joshi inspected the premises of Chaman Lal Malhotra, proprietor of General Merchant and Confectionary Works at Kunihar at about 1.20 p.m. where he was found conducting the business of the shop and at the time of inspection he was having 170 sealed packets of Glucose-V-Biscuits of 250 grams each in his possession meant for sale to the general public for human consumption, which were manufactured by 'Surya Food and Agro Limited, Noida, Priya Gold Industries (India) Ltd, Noida'. After disclosing his identity being Food Inspector, he served notice to accused No. 1 declaring his intention to take the sample of sealed Glucose-V-Biscuits out of these sealed packets and purchased six sealed packets of Glucose-V Biscuits of 250 grams each against the payment of Rs. 48/- as a sample for analysis. At the time of taking sample, accused No. 1 disclosed to the Food Inspector that he has purchased the said biscuits from M/s Shashank Enterprises, The Mall, Solan vide Bill No. 3521, dated 25.11.2000 under Section 14-A. So, a subsequent notice under Section 14-A was sent to accused No. 2 under the registered cover. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 16(1)(a)(i) read with Section 7(ii) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the Act) to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 3 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The accused respondent No.3 Purshotam Julka died during the pendency of the appeal before this Court. Hence, the prosecution case against him stands abated.

10. The Food Inspector concerned during the course of his inspecting the commercial premises of accused/respondent No.1 purchased from him six packets of biscuits weighing 250 grams each, purchase whereof stands displayed in Ext.P-2. The aforesaid food item was dispatched to the public analyst concerned whereupon he recorded an opinion of the batch number borne thereon being illegible besides the month and year of the manufacture or its packing remaining un-recited therein. Consequently, under the apposite report prepared by the public analyst concerned recorded in sequel to his subjecting the aforesaid food item to examination, he concluded qua it being misbranded, in sequel thereto the accused respondent No.1 besides respondents No.2 and 3 respectively the retailer besides forwarding agent and the manufacturer of the relevant food item stood arrayed as accused. A notice of accusation stood put to them qua theirs infringing the provisions of Section 16(1)(a)(i) read with Section 7(ii) of the Act. A thorough examination of the entire cross-examination to which the prosecution witnesses stood subjected to by the learned defence counsel unveils of theirs not standing put any apposite suggestion nor obviously any response upsurging in personification of the Food Inspector concerned on inspecting the commercial premises of respondent No.1 his not under Ext.P-2 purchasing from respondent No.1 the relevant food product/food item in sequel whereto it is inevitable to conclude qua the defence neither concerting to repudiate nor it concerting to controvert the trite factum of the Food Inspector visiting the relevant commercial premises nor also it concerting to belie the factum of purchase of the relevant food item by the Food Inspector concerned from accused/respondent No.1. Also the evidentiary material as exists herebefore makes a loud pronouncement qua accused No. 2 and 3 respectively the forwarding agent and manufacturer of the misbranded food item not concerting to repudiate the factum of theirs being respectively the manufacturer or the forwarding agent qua the relevant food item vis.a.vis. accused respondent No.1. Consequently, the derivative therefrom is of theirs acquiescing to the factum of theirs respectively manufacturing besides being the forwarding agent qua the relevant food item vis.a.vis. respondent No.1. The learned trial Court on visiting the entire record had concluded qua with availability of independent witnesses in proximity to the relevant commercial establishment of accused respondent No.1 yet their association in the relevant proceedings remaining unsolicited by the Food Inspector concerned staining the purchase by the Food Inspector concerned of the relevant food item from accused/respondent No.1. In sequel, thereto he concluded of the prosecution not succeeding in proving the charge against the accused. However, the aforesaid reason as purveyed by the learned trial Magistrate in his impugned order is ridden with gross perversity arising from his mis-appreciating the impact of purchase of the relevant food item by the Food Inspector concerned from the relevant Commercial premises occurring under Ext.P-2 also its overlooking the trite factum of the defence not adducing any evidence in denial of the aforesaid purchase standing ridden with a vice of compulsion or duress standing exercised upon accused No.1 by the Food Inspector concerned. For unavailability of the aforesaid evidence on record it was wholly inapt for the learned trial Magistrate to conclude qua with evident availability of independent witnesses in proximity of the relevant site of occurrence whereas theirs remaining unjoined at the time contemporaneous to his purchasing the relevant food item from accused respondent No.1, ingraining the entire prosecution version with a blemish of untruthfulness qua the relevant facet predominantly when the probative sinew for reasons aforestated of Ext.P-2 remained unshattered. In sequel, thereof, the aforesaid reason as assigned by the learned trial Magistrate for recording an order of acquittal vis.a.vis the accused warrants interference.

11. Be that as it may, the learned trial Magistrate had while recording an order of acquittal vis.a.vis. the accused had postulated a reason qua the prosecution standing enjoined by the mandate of Section 17(1)(a)(i) and Section 17(1-a)(ii) to display with specificity in the apposite complaint the factum of commission of offences by the Company itself and/or any nominated person or any other person who was incharge and was responsible to the Company for conducting its business wherefrom it concluded of with accused respondent No.1 standing neither averred in the apposite complaint nor evidence standing adduced qua his at the relevant time holding any authorization as a nominee of the manufacturer of the relevant food item who stood arrayed as accused No.3 or his being incharge of its business besides responsible to the Company for conducting its business, recorded a conclusion of thereupon the charge against the accused respondent warranting its being construable to stand jettisoned. However, the aforesaid reason as stands assigned by the learned trial Magistrate is also extremely legally frail as it emanates on a gross mis appreciation by him of the relevant provisions engrafted in Section 17 of the Act, provisions whereof are applicable where the relevant purported misbranded or adulterated food item stands purchased or stands seized from the premises of Company (M/s Surya Food and Agro Limited, Sector-2, Noida) besides only in the event of the aforesaid display there would be an onerous obligation cast upon the Food Inspector concerned to while concerting to prove charges framed vis.a.vis. the accused under Section 17 of the Act, to aver in the apposite complaint the relevant ingredients encapsulated in Section 17 of the Act whereas with contra distinctivity herebefore qua the relevant purchase/seizure of the mis branded food product or food item occurring on the Food Inspector concerned visiting/inspecting the retail commercial outlet of accused respondent No.1 who uncontrovertedly made its purchase/received it from accused No.2 latter whereof had received it from its manufacturer arrayed as respondent No.3, concomitantly did not entail upon the Food Inspector concerned to mete compliance to the provisions of Section 17 of the Act nor obviously he was enjoined to embody therein the ingredients thereof nor obviously any evidence in display of satiation thereof standing begotten was enjoined to be adduced by the prosecution. In sequel thereto the aforesaid reason as stands assigned by the learned trial Court to record an order of acquittal vis.a.vis. the accused suffers from a vice of infirmity arising from its misappraising the provisions of Section 17 of the Act.

12. The learned trial Magistrate on the anvil of a verdict of the Hon'ble Apex Court reported in Dwarka Nath and another vs. Municipal Corporation of Delhi, *1971 AIR 1844* wherein the Hon'ble Apex Court had declared ultra vires Rule 32(b) of the Prevention of Food Adulteration Rules, relevant portion whereof stands extracted hereinafter,

> "23. We are not inclined to accept the contention of Mr. Manchanda that Clause (b) of Rule 32 is beyond the rule making power of the Central Government under Section 23(1)(d) of the Act. It is well known that in many cases in business the name and address of a manufacturer or importer or vendor or packer has become associated with the character, quality or quantity of the article and as such we are of the opinion that Clause (b) of Rule 32 is a valid rule."

On anvil of its enactment being beyond the ambit of the rule making power of the relevant authority vice whereof ingraining it emanating on emergence of transgression of the mandate of Section 23 of the Act whereupon the trial Magistrate recorded a conclusion of the report of the public analyst concerned holding therewithin portrayals of the relevant food item/food product holding a vice of misbranding, not warranting acceptance, wherefrom it concluded of the accused standing entitled to an order of acquittal. The reliance as placed by the learned Magistrate upon the aforesaid verdict of the Hon'ble Apex Court emanates on his grossly misappreciating its subtle nuance tritely the one qua the relevant Rule 32(b) (e) of the 'Rules' enjoining upon the relevant manufacturer to on the label of the relevant food product item disclose therein the name and business address of the importer or packer also enunciate therein the batch number either in English or in Hindi or in combination, not carrying forward the salutary spirit of the Act qua its informing the consumer qua the purity or the freshness of the product, qua factum whereof the relevant customer would become enlightened only when the label of the relevant food product

holds portrayals qua the date and year of its manufacture besides holds reflections therein qua the date of expiry of the food product wherefrom reiteratedly the relevant consumer would stand apprised qua the freshness of the product besides would be baulked to purchase it for precluding injury to his health. Consequently, with contra distintivity occurring in the relevant Food Adulteration Rules vis. a vis. the nature of misbranding indulged by accused respondent No.3 wherefrom respondent No.1 purchased the misbranded food item/food product without his concerting to discover the factum of misbranding renders, all the accused from whom the relevant food item stood transmitted in an unbroken chain upto accused respondent No.1 wherefrom the Food Inspector purchased the relevant food product, to be vicariously liable for infringement of the relevant penal provisions.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Magistrate has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Magistrate suffers from perversity or absurdity of mis-appreciation and non appreciation of evidence on record. In sequel thereto, I find merit in this appeal, which is accordingly allowed and the judgement of acquittal rendered by the learned trial Magistrate is quashed and set-aside. Accordingly, the accused No. 1 and 2 are held guilty for theirs committing offences punishable under Sections 16(1)(a)(i) read with Section 7(ii) of the Prevention of Food Adulteration Act, 1954.

14. Let the accused/respondents No. 1 and 2 be produced before this Court on 16/11/2016 for theirs being heard on the quantum of sentence.

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

State of H.P. .....Appellant.
Versus
Tej Ram & others ....Respondents.

Cr. Appeal No. 602 of 2008.
Date of Decision: 27th October, 2016.

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

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Chief Judicial Magistrate, Sirmaur District at Nahan rendered on 31.0.3.2008 in Cr. Case No. 62/2 of 2006, whereby, he acquitted the accused/respondents herein for theirs allegedly committing offences punishable under Sections 341, 325, 323 and 506(1) read with Section 34 of the Indian Penal Code.

2. The facts relevant to decide the instant case are that on 16.06.2006 at about 7.00 p.m. at village Meerpur Kotla, the accused in furtherance of common intention wrongfully restrained the complainant Smt. Debo Devi from proceeding to the direction, to which she has

right to move and the accused in furtherance of common intention, caused simple hurt to complainant Smt. Debo Devi and her daughter while Smt. Debo Devi also sustained grievous injuries due to the blows of danda given by the accused and the accused also criminally intimidated the complainant and her family members with dire consequences, with a view to raise alarm on their persons. Smt. Devi Devi was rescued by her husband Anup Singh from the clutches of the accused and the accused also gave beatings to him. The complainant lodged FIR Ex.PW1/A at P.S.Nahan and during the investigation, the police visited the spot and the accused produced three dandas, which were taken into possession vide recovery memos Ex.PW1/B, Ex.PW1/C and Ex.PW1/D. The police also took into possession blood stained shirt of injured vide memo Ex.PW2/A. The complainant Smt. Debo Devi was medically examined at R.H., Nahan and her MLC is Ex.PW9/A and Kumari Pinki was also medically examined and her MLC Ex.PW10/A was obtained by the IO and the IO during the investigation prepared site plan Ex.PW12/A and recorded the statements of the witnesses. He also arrested the accused and later on released them on bail.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Sections 341, 323, 325 and 506(1)read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 12 witnesses. On conclusion of recording of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the trial Court, in which they claimed innocence. However, they did not lead any defence evidence.

5. On an appraisal of evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondents herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. With the user of dandas, Ex.P-1, P-2 and P-3, recovered under memos Ex.PW1/B to Ex.PW1/D, the accused/respondents are alleged to commit offences constituted in the relevant FIR comprised in Ex.PW1/A. The reflections in the apposite MLCs respectively comprised in Ex. PW9/A besides in Ex.PW10/A also the factum of the blood stained shirt of Debo Devi taken into possession under memo Ex.PW 2/A, stand contended by the learned Deputy Advocate General to make a vivid display qua hence the prosecution succeeding in proving its case against them. He contends qua the discarding by the learned trial Court of the aforesaid evidentiary material has sequeled gross perversity seeping qua its verdict arising from the factum of its not appraising their probative worth vis-a-vis the prosecution case.

10. The anvil of the prosecution version is in its entirety hinged upon the deposition of PW-1, who lodged FIR Ex.PW1/A. She in her testification comprised in her examination-in-chief has therein unveiled a version in corroboration to the embodiments occurring in Ex.PW1/A,

yet her testification comprised in her cross-examination belittles the credibility of her testification occurring in her examination-in-chief, conspicuously, when she therewithin testifies qua a civil litigation inter se her and accused/respondent Tej Ram pending before the Civil Court concerned. Also with hers making a communication therein qua after the institution of the aforesaid suit against her by accused/respondent Tej Ram, her family members also she vowing to teach a lesson to the accused. She has also pronounced therein of the instant complaint standing reared by a vendetta nursed by her vis-a-vis the accused, vendetta whereof arising from the factum aforesaid. The aforesaid communications existing in the cross-examination of the complainant graphically display of the FIR comprised in Ex.PW 1/A being contrived for falsely implicating the accused. Even otherwise, the testification of PW-1 qua the ill-fated occurrence as held in her examination-in-chief is bereft of probative worth in the face of an injured child witness PW-2 in her testification contradicting the testification of her mother, the complainant herein, who deposed as PW-1, wherein PW-2 has ascribed an incriminatory role vis-a-vis accused Tej Ram, whereas, obviously she has excluded the participation of Mito Devi and Tarsem Singh in the occurrence wherefrom the ensuing sequel is qua the entire genesis of the prosecution version testified by PW-1, wherein she has ascribed an incriminatory role also to accused No.2 and 3 in the alleged occurrence losing its credibility.

11. Be that as it may, PW-3 in his testification qua the occurrence comprised in his examination-in-chief has deposed in corroboration to the deposition of PW-1, his wife, nonetheless his deposition occurring therein is rid of sanctity in the evident face of his in his cross-examination to which he stood subjected to by the learned defence counsel unveiling the factum of his making immense improvements vis-a-vis his previous statement recorded in writing, improvements whereof stand comprised in the factum of his testifying of the accused chasing him with dandas whereupon he ingressed his house to obviate the assault assayed to be perpetrated on his person by the accused also stands constituted in his testifying qua blood oozing from the leg of his wife besides hers sustaining fracture on her arm, testifications whereof remained unembodied in his previous statement recorded in writing. Resultantly, when the aforesaid testifications rendered by PW-1 visibly stand stained with a vice of embellishments besides improvements vis-a-vis his previous statement recorded in writing, his testification in purported corroboration to the testification of his wife, PW-1, loses credibility. In aftermath, the recovery of weapons of offence Exts. P-1, P-2 and P-3 under memos Ext.PW-1/B to Ext.PW-1/D hold no efficacy nor also the reflections in the apposite MLCs comprised in Ext.PW-9/A and Ext.PW-10/A hold no probative sinew. Consequently, on anvil thereof, the accused cannot be concluded to stand connected with the offences for which they stood charged.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

13. Consequently, I find no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned trial Court is affirmed in favour of the accused/respondents herein. Records be sent back forthwith.

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

Dr. Dev Raj ....Petitioner.

Versus

Smt. Sandhya Sharma ....Respondent.

Cr. Revision No. 373 of 2014.
Reserved on: 24th October, 2016.
Date of Decision: 28th October, 2016.

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

Cases referred:
Dambarudhar Panda vs. Mahendranath Saran, 1992 CriLJ 2213
Uadi Shankar Awasthi versus State of U.P. & another, 2013(2) RCR (Criminal) 503
V. Narayana Bhat v. E. Subbanna Bhat, AIR 1975 Karnataka 162

For the Petitioner: Mr. Ajay Sharma, Advocate.
For the Respondent: Mr. Anirudh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge .

The respondent herein had instituted a complaint against the complainant/petitioner herein before the State Vigilance and Anti-Corruption Bureau, Solan qua the complainant/petitioner herein demanding illegal gratification for meteing transport expenses for visiting various places for verifying the position, status and tagging of cows purchased by the members of Self Help Group, Badhal, headed by the respondent herein. Consequently, FIR No. 11 of 2010 of 21.06.2010 stood registered against the complainant/petitioner herein constituting therein commission of offences by him under Sections 7 and 13 of the Prevention of Corruption Act. In sequel to the registration of the FIR, the complainant/petitioner herein faced prosecution before the learned Special Judge, Solan. The Charge for which he came to be tried stood concluded by the learned Special Judge, Solan to remain unsubstantiated whereupon it pronounced an order acquitting the accused/complainant/ petitioner herein. In an appeal carried therefrom by the State of Himachal Pradesh before this Court, this Court pronounced a judgment in affirmation to the judgment recorded by the learned Special Judge, Solan.

2. The pronouncement of the learned Special Judge, Solan in Corruption Case No.10-S/7 of 2010 occurred on 29.07.2011 whereas the pronouncement of this Court in Criminal Appeal No. 445 of 2011 as arouse therefrom whereupon this Court rendered findings in concurrence to the findings rendered by the learned Special Judge, Solan, stood rendered on 13.07.2012. The complainant/petitioner herein, accused in Corruption Case No.10-S/7 of 2011, embedded upon a complaint instituted by the respondent herein before the Police Station SV &ACB, Solan, whereupon he by concurrent verdicts stood pronounced to be not guilty, instituted a complaint against the respondent herein on 6.11.2013 before the learned trial Court. In the aforesaid complaint instituted by the petitioner herein before the learned trial Court he alleged therein of publications in daily newspaper "Divya Himachal", occurring in its edition of 22.06.2010, relevant portion whereof stands extracted hereinafter besides a publication occurring in Hindi newspaper "Punjab Kesari", in its edition of 22.06.2010, relevant portion whereof also stands extracted hereinafter also publications occurring in "Amar Ujala", "The Tribune" and "The Hindustan Times" wherewithin echoings stand encapsulated qua in pursuance to a complaint instituted against him by the respondent herein before the SV & ACB, Solan, his standing caught red handed while receiving illegal gratification besides theirs holding revelations of his coming to be arrested constituted libelous material whereupon his reputation in society stood lowered.

The relevant portion of a news item published in "the Divya Himachal" edition of 22.06.2010 reads as under:-

> ".....Pashu Chikatshak ko 5000/- Rupay ki rishpat letey rangey hathon giraftarr kar liya. Giraftaar kiyey gai Doctor ka naam Dr. Dev Raj Sharma hai, Solan Vigilance Viobhag main ek mahila Sandhya Sharma ney rapat daraz karwai thi ki Darlaghat Pashu Chikatsalya main Karyarat Ek Chikatsak ney kisi kaam ke badley 5000/- ki mang kar raha hai..... Taig lagwaney key liye karyarat veterinary Dr. Dev Raj Sharma ney ussey 5000/- ki mang ki hai"

The relevant portion of a news item published in daily newspaper Punjab Kesari reads as under:

> "....Pashu Chikatshak Dr. Dev Raj ki Rs.5000/- ki Rishpat Letey Rangey Hathon Giraftar Kar Liba Hai .....Pashuo Ko Tag Laganey ke awaiz kai dino sey pasey ki maang kar raha tha ....Sandhya Sharmaney iski Shikayat....."

The relevant portion of a news item published in daily newspaper Amar Ujala reads as under:-

> "Sandhya ka aarop hai ki Pashu Chikatsak Dev Raj Sharma Gai key kkan par tag laganey ke badley 10,000/- maang rahey they, baad me baat 5000/- per razi ho gai"

3. On consideration of preliminary evidence adduced before the learned trial Court, it proceeded to order for the summoning of accused/respondent herein. Against the summoning orders pronounced by the learned Magistrate, she preferred a revision petition before the revisional Court, revision petition whereof came to be accepted whereupon the summoning orders impugned therebefore stood quashed and set aside. The complainant/petitioner herein stands aggrieved by the rendition of the revisional Court whereupon he stands constrained to institute the instant petition before this Court, wherein he concerts to reverse the findings recorded by the Additional Sessions Judge-II, Solan in Revision Petition No. 3-ASJ-II/10 of 2014. The learned Additional Sessions Judge, Solan had meted deference to the provisions of Section 468 of the Cr.P.C. holding therewithin a dictat of the apposite period of limitation for an aggrieved setting in motion the criminal machinery qua offences punishable with imprisonment for a term exceeding one year but not exceeding three years, being a period of three years, in conjunction therewith it concluded qua with the maximum term of imprisonment prescribed qua proven commission of an offence under Section 500 of the IPC, being a period of three years besides in tandem thereof with evidently the apposite complaint standing instituted before the trial Court after three years elapsing since the publication of purported libelous matter(s), he concluded of the complaint being barred by limitation besides it being not maintainable.

4. The reasoning aforesaid afforded by the learned Additional Sessions Judge for dismissing the apposite complaint not being maintainable stands espoused by the learned counsel for the petitioner to suffer from a gross infirmity arising from the fact of his omitting to revere the mandate of the non obstante clause occurring in Section 473 of the Cr.P.C., wherewithin a mandate is held qua with availability therebefore of material in evident portrayal of the apposite delay standing properly explained, the Court concerned holding leverage to hence concomitantly draw affirmative satisfaction qua the facet aforesaid, rendering hence the apposite complaint to be maintainable even if it stands instituted before the competent Court of criminal jurisdiction beyond the statutorily prescribed period of limitation conspicuously with the apposite delay standing explicated it warranting condonation besides empowering the Court concerned to take cognizance on the apposite complaint. Moreover, he contends on the anvil of a judgment of the Orissa High Court reported in ***Dambarudhar Panda vs. Mahendranath Saran, 1992 CriLJ 2213*** wherein it is mandated of no application within the ambit of the non obstante clause to Section 473 of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C.), being enjoined to be preferred by the aggrieved complainant before the trial Magistrate for constraining attraction of its provisions vis-a-vis the maintainability of the apposite complaint significantly when the delay which has occurred in its institution stands displayed by the material as exists before the Court concerned to evidently stand explained whereupon it warrants its condonation, for obtaining benefit whereof he espouses herebefore of the relevant averments recorded in the apposite complaint which stand alluded herein-after activating besides renewing the cause of

action vis-a-vis the aggrieved complainant also hence theirs evidently explicating the delay thereupon warranting the Court below to order for cognizance being taken thereon rather on anvil of the provisions of Section 468 Cr.P.C. it being ordered to be dismissed. The relevant provisions of Section 473 read as under:-

> "473. Extension of period of limitation in certain cases:- Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court make take cognisance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice."

Moreover, he in coagulation thereof vis-a-vis the mandate of the Hon'ble Apex Court occurring in its verdict reported in ***Uadi Shankar Awasthi versus State of U.P. & another, 2013(2) RCR (Criminal) 503*** wherein a pronouncement occurs qua an offence where an enduring injury from the alleged misdemeanor of the accused accrues to the aggrieved, the relevant misdemeanor being construable to be constituting a "continuing offence" whereupon he espouses qua the mandate of Section 472 of the Cr.P.C. being applicable vis-a-vis the apposite complaint recording therein commission of offences by the respondent herein under Section 500 IPC significantly when the relevant offence constituted therein begets an enduring injury to the reputation of the complainant in the society, in sequel whereof he canvasses qua the computation of the apposite period of limitation for cognizance standing taken by the Magistrate concerned upon a complaint holding therewithin commission of a continuing offence commencing or beginning or running every moment, during the continuation of the enduring injury arising from the penal misdemeanor ascribed to the accused by the aggrieved, ensuingly he proceeds to contend of the petitioner herein in tandem thereto holding a right to initiate criminal prosecution against the respondent herein not only from the date of institution of a false complaint against him by the latter, significantly when in pursuance thereto his image in society stood lowered rather also when injury to his reputation in society endured continuously throughout the pendency of the trial against him for the charge arising from the complaint instituted by the respondent herein also when damage to his reputation endured during the pendency of the appeal preferred thereagainst herebefore by the State, rendered hence the penal ascriptions held vis-a-vis him in the apposite complaint to be construable to be constituting a continuing offence besides his standing perennially aggrieved wherefrom he contends of his throughout the aforesaid period whereon harm to his reputation endured besides even when on termination of the aforesaid proceedings against the petitioner herein injury to his image in society subsists perenially, the petitioner herein holding a leverage throughout the currency of the aforesaid trial to which he stood subjected to besides during the currency of the apposite appeal before this Court to nurse a grievance vis-a-vis the respondent herein besides obviously on culmination thereof his holding an empowerment to at any moment of time institute a complaint against the respondent herein. He hence espouses qua the view formed by the learned Additional Sessions Judge qua attraction qua the complaint the principles enshrined in Section 468 of the Cr.P.C., being inappropriate.

5. The aforesaid espousal made by the learned counsel for the petitioner herein openly militates against the principle constituted in Section 468 of the Cr.P.C., wherein a mandate stands encapsulated of the apposite period of limitation for enabling the Court concerned to take cognizance upon the apposite complaint being a period of three years significantly when the period of limitation aforesaid stands statutorily prescribed qua offences qua which a prescription is held in the relevant penal provisions qua imposition upon an accused a sentence of imprisonment for a term not exceeding three years whereupon with a proven offence under Section 500 IPC enjoining upon the Magistrate concerned to impose upon the relevant accused a sentence of imprisonment not exceeding three years, obviously renders the instant complaint instituted after more than three years elapsing since the institution of an FIR against the petitioner herein on a complaint of the respondent herein to be beyond limitation hence cognizance thereon standing barred. Moreover, likewise with the institution of the apposite complaint occurring after more than three years elapsing since publication of purported libelous matter(s) also renders it to be time barred besides concomitantly it being not maintainable.

6. Be that as it may, the learned counsel appearing for the petitioner contends qua with an offence of defamation being a continuing offence hence the apposite complaint falling within the frontiers of the pronouncements of the Hon'ble Apex Court reported in 2013(2) RCR (Criminal) 503. However, the aforesaid submission is unacceptable to this Court given the injury or harm to the reputation of a person arising from publication of a purportedly libelous matter being an instantaneous harm caused to the image of the aggrieved in society whereupon he stands enjoined to with utmost promptitude prefer a complaint before the court concerned. However, with the aggrieved procrastinating the reporting of a grievance arising from publication of a purported libelous matter, especially when on its publication he has acquired immediate knowledge thereof, he is to be construed to condone the damage or harm as purportedly befalls upon his reputation in society Moreover, any delay therefrom in his instituting a complaint before the Magistrate concerned would invite an inference of the purported libelous matter holding truth whereupon obviously any inculpation of the accused would be unwarranted. Necessarily when the aforesaid inferences stand invited by delay occurring on the part of the aggrieved to promptly report his grievance qua damage accruing to his reputation in society arising from publication of a purportedly libelous matter, it would be inappropriate to conclude qua his holding a leverage, to, on the anvil of the offence of defamation being a continuing one, institute a complaint beyond three years elapsing since the publication of a purportedly libelous matter. Predominantly also when damage or injury to his image or reputation in society arises from publication of a purportedly libelous matter, the apt concomitant thereof is qua with his apposite sensitivities standing instantaneously impaired his standing enjoined to with utmost promptitude therefrom galvanize the criminal machinery contrarily any procrastination on the part of the aggrieved in instituting the apposite complaint cannot be brooked. In sequel, it is held that the offence of defamation inflicts an instantaneous apposite injury upon the aggrieved whereupon it is to be construable for reasons aforestated to be not constituting a continuing offence nor it can be deduced qua the apposite injury to the reputation of the aggrieved in society perennially enduring nor also hence the counsel for the petitioner can draw benefit from the mandate of the Hon'ble Apex Court reported in 2013 RCR(Criminal) 503 to espouse herebefore qua his throughout the currency of the criminal proceedings against him standing inflicted with subsisting damage to his reputation in society besides he is baulked to canvass qua the apposite damage or injury to his esteem in society perennially continuing nor he holds any leverage to at any time prefer the apposite complaint before the Magistrate concerned. Any acceptance of the aforesaid submission of the learned counsel for the petitioner would negate the effect of the afore-referred inference drawn by this Court inferences whereof stand spurred for want of the aggrieved not galvanizing with promptitude the criminal machinery.

7. The learned counsel appearing for the petitioner has contended qua on the date of of the respondent herein arriving in the Court premises for giving evidence she outside the Court room in the presence of many persons passing sarcastic remarks qua him whereupon he contends qua a fresh cause of action standing spurred rendering hence his complaint to fall within limitation. Also thereupon, he contends on the anvil of a verdict of the Orissa High Court holding a pronouncement therein qua no application, for exercise of powers within the ambit of the non obstante clause of Section 473, Cr.P.C., by the Magistrate concerned, standing enjoined to be preferred thereat whereas the Court concerned on existence therebefore of circumstances in explanation of delay, holding an empowerment to condone the delay in the preferment of the apposite complaint therebefore. He also espouses herebefore of the aforesaid factum constituting a formidable explication within ambit of the non obstante clause of Section 473 of the Cr.P.C., whereupon the delay, if any, in the preferment of the apposite complaint before the Magistrate concerned standing explained besides renewing the cause of action rendering hence his complaint to be maintainable. However, as aptly concluded by the learned Additional Sessions Judge, the aforesaid espousal in purported explanation of the delay which has occurred in the preferment of the apposite complaint warrants its rejection significantly for omission in the complaint of the date whereon the apposite derogatory remarks stood proclaimed by the respondent herein besides given absence of an averment therein besides lack of testification by the complainant qua the persons in whose presence the purported sarcastic remarks stood

pronounced by the respondent herein. Consequently, the aforesaid submission holds no vigour and stands rejected.

8. Uncontrovertedly, the petitioner herein in sequel to a Court of law pronouncing an order of acquittal vis-a-vis the charge to which he stood subjected to besides tried, has instituted a suit for malicious prosecution vis-a-vis the respondent herein. The aforesaid institution of a suit for malicious prosecution by the petitioner herein against the respondent herein constituted the apposite remedy for redressing his grievance arising from his standing subjected to prosecution by the respondent herein, prosecution whereof he avers to arise from malice. Obviously, hence, the criminal complaint instituted under Section 500 of the IPC by the petitioner herein against the respondent herein on his standing acquitted by Courts of law is an inappropriate remedy besides its availment stands prohibited by a judgment recorded by the Karnataka High Court reported in ***V. Narayana Bhat v. E. Subbanna Bhat, AIR 1975 Karnataka 162*** wherein a mandate is held of a complaint made to the police even if it stands stained with vice of falsity, it being construable to be privileged whereupon even if the aggrieved accused therein stands subjected to unsuccessful prosecution, his holding no empowerment to prosecute the complainant therein for an offence under Section 500 IPC. The relevant paragraph No.7 of the judgment aforesaid stands extracted hereinafter:-

> "7. The reason why absolute privilege is extended to the statement of a witness made prior to the commencement of a judicial proceeding is based on public policy as stated by Lord Halsbury in 1905 AC 480. There is no reason why the principle stated in the said decision should not be extended to a party and the absolute privilege confined only to the statement of a witness under such circumstances. Of the two instances referred to by Blagden J. in ILR (1943) 1 Cal 250 the first refers to the editor of a newspaper as stated above. But it is doubtful whether the editor of the newspaper in such circumstances can claim absolute privilege on the basis of the principle laid down in 1905 AC 480. With regard to the second illustration referred to by Blagden J., if the complaint to the police results in an unsuccessful prosecution then the person defamed can only claim damages for malicious prosecution and not for defamation. In case the complaint to the police does not result in a prosecution, then also the persons defamed have no remedy in respect of defamatory statements made in such a complaint to the police. But if a false complaint is made to the police, the person who makes such a false complaint would be punishable either under Section 182 or Section 211 of the Indian Penal Code. It cannot therefore be said that a person against whom false charges are made in a complaint to the police, even if no further action is taken by the police authorities on such complaint, goes scot-free. I would, therefore, prefer to follow the earlier view of the Division Bench of the same High Court in AIR 1939 Cal 477 and the other decisions referred to above which take the view that a complaint to a police officer is absolutely privileged."

In view of the mandate held therewithin especially when the petitioner has extantly launched an inappropriate remedy against the respondent herein comprised in his instituting the instant complaint against her, it hence warrants its dismissal. Furthermore, permitting availment of the remedy canvassed herebefore by the petitioner herein would entail an unbefitting smothering of penal misdemeanors also would stifle prosecution of an accused for serious offences holding loud pronouncements of his indulging in moral turpitude. Necessarily, for obviating the aforesaid casualties to prosecuting an accused for serious offences, the remedy to him on his unsuccessful prosecution cannot be the one agitated in the extant complaint.

9. Lastly, the learned counsel appearing for the petitioner has canvassed of the impugned order rendered by the learned Additional Sessions Judge being an interlocutory order whereupon it is unamenable for interference by this Court. However, the aforesaid contention is meritless. The order summoning the respondent herein as pronounced by the learned trial

Magistrate, for reasons aforesaid, when arises from gross mis-appreciation by him of the import of the provisions of Section 468 of the Cr.P.C. also when the apposite complaint for the reasons aforestated is not maintainable, any holding of the respondent to prosecution would tantamount to a gross abuse of process of law. In aftermath the summoning order is to be construed to be substantially affecting the rights of the respondent herein to not stand subjected to a frivolous prosecution whereupon it is to be construable to be interfereable by the revisional Court.

10. For the reasons which have been recorded hereinabove, there is no merit in the instant petition, accordingly it is dismissed. The order impugned hereat is maintained and affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Paras Ram alias Govind .....Appellant-Plaintiff.

Versus

Smt. Jasmati and others ....Respondents/defendants.

RSA No. 33 of 2007.
Reserved on : 24.10.2016.
Decided on : 28th October, 2016.

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

For the Appellant: Mr. Dinesh Sharma and Y. Paul, counsel for the appellant.

For Respondents No.1,3 to 8 and 10: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Regular Second Appeal stands directed against the impugned judgement and decree recorded by the learned Presiding Officer, Fast Track Court, Mandi, District Mandi in Civil Appeal Nos.38/2004, 167 of 2005 whereby he in affirmation to the verdict recorded by the learned trial Court partly decreed the suit of the plaintiff qua damages to the tune of Rs.50,000/- wherein he had sought a decree for the specific performance of agreement to sell of 18.12.1991. The plaintiff/appellant herein stands aggrieved by the concurrently recorded renditions of both the learned Courts below wherefrom he has instituted the instant appeal herebefore.

2. The brief facts leading to the lis inter se the parties were that the defendant No.1 agreed to sell ½ share of the land comprised in Khasra No.1060 and 1072, khata and khatouni No.37/48, measuring 7-10-16 bighas, situated in village Bhiarta, I 11, Rajgarh Balh, Tehsil

Sadar, District Mandi, H.P. to the plaintiff through an agreement to sell on 18.12.1991 for a consideration of Rs.20,000/- in presence of independent witnesses. It is averred that on the day of execution of the aforesaid agreement to sell, defendant No.1 received a sum of Rs.19,000/- as an earnest money from the plaintiff in presence of the witnesses and duly acknowledged the receipt thereof. The balance amount of consideration was to be paid by the plaintiff to the defendant at the time of execution and registrtion of the sale deed. It is claimed that the plaintiff is in possession of the suit land for the last 20 years. The defendants have admitted the possession of the plaintiff over the suit land in the said agreement to sell and it has been written in the agreement to sell that whenever the plaintiff will ask the defendant No.1 for execution and registration of the sale deed, then the defendant No.1 will get the sle deed executed and registered. It is claimed that in the month of August, 1992, the plaintiff told defendant No.1 that he is going to Foreign country, Saudi Arabia and after returning from that country, the sale deed qua the suit land will be executed and registered to which defendant No.1 agreed. It is further averred by the plaintiff that when the plaintiff returned from the aforesaid country in the month of May, 1995, he requested defendant No.1 to perform his part of the agreement to sell and get the sale deed executed and registered in his favour but defendant No.1 avoided to do so. Thereafter when the plaintiff pressed defendant No.1 to do the needful, then it was disclosed to him that defendant No.1 has sold the aforesaid suit land to defendant No.2 though a sale deed registered and executed on 9.7.1993 which sale is illegal and void. It is also claimed that the plaintiff was always ready to perform his part of agreement to sell and was ready to bear entire expense of registration of the said sale deed. It is further averred by the plaintiff that on the basis of the aforesaid sale deed, the defendants are interfering with the possession of the plaintiff over the suit land since 10.01.1996 and are bent upon to alienate the suit land. The defendants are also trying to change the nature of the same. The plaintiff asked the defendants to admit his claim and get the aforesaid sale deed canceled but the defendants refused to do so. Hence, the present suit has been filed. It is prayed that a decree for specific performance of agreement dated 11.12.1991 be passed in favour of the plaintiff and against the defendants and a decree for permanent prohibitory injunction in favour of the plaintiff and against the defendant and other persons for restraining them from causing any interference with the suit land has also been sought.

3. Defendants No.1 and 2 contested the suit and filed joint written statement, wherein they have taken preliminary objections inter alia limitation, maintainability, and cause of action. It is claimed by the defendants that the defendant No.1 had not entered into the alleged agreement to sell of ½ share out of the suit land on 18.12.1991. The said agreement is forged, fake and void ab initio and not enforceable in the eyes of law. It is further claimed that defendants did not receive Rs.19000/- as an earnest money from the plaintiff for consideration of the agreement to sell. It is further claimed that the plaintiff is not in possession of the suit land rather the suit land is in possession of the defendants. It is further claimed that the plaintiff was fully aware of the transaction of the suit land entered into inter se defendants No.1 and 2, which sale is perfectly legal, valid and defendant No.2 is owner in possession of the suit land. It is denied by the defendants that they are interfering over the suit land.

4. Defendant No.2 has filed amended written statement wherein, preliminary objection has been taken to the effect that a compromise deed dated 16.7.1999 executed by defendant No.1 in favour of the plaintiff is collusive one and the same has been filed only with a motive to defeat his claim and the said deed does not effect the valuable rights of defendant No.2 nor defendant No.2 is bound by it and the same be declared null and void. On merits, it is claimed that defendant No.1 is a bona fide purchaser and she made necessary inquiry about the title of defendant No.1 before purchasing the suit land. Defendant No.1 was in possession of the suit land prior to execution of the sale deed dated 9.7.1993 in favour of defendant No.2. Defendant No.2 has purchased the suit land for a sum of Rs.50,000/- from defendant No.1 and since then, defendant No.2 is owner in possession of the suit land. She has prayed for the dismissal of the suit of the plaintiff.

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

1. Whether the defendant No.1 entered into an agreement to sell the suit land for consideration of Rs.20,000/- on 18.12.1991 in favour of the plaintiff, as alleged? OPP

2. Whether the plaintiff has performed and is still ready to perform his part of agreement, as alleged? OPP

3. If issue Nos. 1 and 2 are proved, whether the plaintiff is entitled for the relief of specific performance of contract, as prayed? OPP

4. Whether the sale deed executed by defendant No.1 in favour of defendant No.2 is wrong and illegal? OPP

4(a). Whether compromise deed dt. 16.7.1999 executed by defendant NO.1 in favour of the plaintiff is collusive as alleged? If so its effect? OPD-2

4(b). Whether defendant No.2 is a bonafide purchaser for consideration, as alleged, if so its effect? OPD-2

5. Whether the suit is barred by limitation? OPD

6. Whether the suit is not maintainable? OPD

7. Whether the plaintiff has no cause of action? OPD

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, it partly decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the plaintiff/appellant herein before the learned first Appellate Court, the latter Court while dismissing the plaintiff's appeal, affirmed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein has instituted herebefore the instant Regular Second Appeal assailing therein the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 22.12. 2008, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the Courts below were correct in declining the relief of specific performance to the appellant herein?

Substantial question of Law No.1:

8. Defendant No.2 despite prevalence at the relevant time of an agreement to sell qua the suit land executed inter se the plaintiff and defendant No.1 acquired title thereto under a registered deed of conveyance executed in her faovur by defendant No.1. Initially, the learned trial Court omitted to on the contentious pleadings of the parties at contest strike issues No.4(a) and 4(b). Both the aforesaid issues stood added under an order recorded on 8.10.2002 by the learned trial Court. The onus to adduce evidence thereupon was cast upon defendant No.2. She was directed to lead evidence thereupon on 17.12.2002. However, on 17.12.2002, the learned counsel appearing on behalf of defendant No.2 recorded a statement before the learned trial Court holding a communication therein of his not intending to lead evidence thereupon, whereupon the learned trial Court closed opportunity to defendant No.2 to adduce evidence in support of additional issues No. 4(a)and 4(b), whereupon onus in discharge thereof stood cast upon her. Imperatively, hence, defendant No.2 who during the currency of the relevant agreement to sell qua the suit land executed inter se the plaintiff and defendant No.1 had acquired titled thereto in pursuance to a registered deed of conveyance executed vis-a-vis her by defendant No.1, was enjoined to protect the relevant sale deed by making vivid pronouncements held in cogent evidence of probative worth qua hers being an ostensible owner qua the suit land. The apposite pronouncements qua the acquisition of title by her qua the suit land under a registered deed of conveyance executed vis-a-vis her by defendant No.1 holding validation were enjoined to hold invincible display qua hers being a bonafide purchaser of the suit land for value, the imperative

necessary proven ingredients whereof by adduction of unflinching evidence were qua hers preceding hers acquiring title qua the suit land hers holding an in depth incisive inquiry vis-a-vis the suit land specifically qua the trite factum qua existence thereat of a binding contractual agreement inter se the plaintiff and defendant No.1 qua the suit land, inquiry whereof unraveling disaffirmative elicitations whereupon alone she could be construed to be a bonafide purchaser of the suit land for value also thereupon she could hold an empowerment to validate the registered deed of conveyance executed qua the suit land during the currency inter se her and defendant No.1 a binding contractual agreement qua the suit land inter se them. However, she omitted to discharge the onus cast upon her qua issues No.4(a) and 4(b) which stand extracted hereinafter:-

> "4(a) Whether compromise deed dt. 16.7.1999 executed by the defendant No.1 in favour of the plaintiff is collusive, as alleged? OPD-2
>
> 4(B) Whether the defendant No.2 is a bonafide purchaser for consideration, as alleged, if so, its effect?OPD-2.

Her omission to adduce evidence on the aforesaid issues warranted a natural conclusion from both the learned Courts below qua hence hers not proving the trite factum qua hers preceding hers acquiring title to the suit land under a registered deed of conveyance executed vis-a-vis her by defendant No.1, hers holding an incisive in depth inquiry qua the suit land specifically qua the prevalence thereat of the relevant binding agreement to sell executed inter se the plaintiff and defendant No.1, yet hers standing disabled to unearth the aforesaid factum wherefrom the concomitant derivative is qua hers being not construable to be a bonafide purchaser qua the suit land for value nor hers being an ostensible owner thereof. Contrarily, for omission aforesaid she is to be construed to acquiesce to the factum of hers holding knowledge qua the prevalence at the relevant time of the relevant binding agreement to sell qua the suit land recorded inter se the plaintiff and defendant No.1. Corollary whereof, is qua hence, the registered deed of conveyance executed qua the suit property inter se her and defendant No.1 warranting invalidation. Both the learned Courts below even without defendant No.2 discharging onus qua additional issues No.4(a) and 4(b) subsequently struck under the orders of the learned trial Court had inaptly pronounced qua hers being construable to be a bonafide purchaser of the suit land for value. The compromise deed executed inter se the plaintiff and defendant No.1(since deceased) comprised in Ex. Px, whereupon both enjoined the learned trial Court to decree the suit of the plaintiff, though apparently stands coloured with a stain of collusiveness also visibly it stands recorded to defeat the interests of defendant No.2 in the suit land, especially when she acquired title thereto under a registered deed of conveyance recorded inter se her and defendant No.1, she dehors Ext.PX was also obliged to adduce the relevant germane evidence on trite issues No.4(a) and 4(b) qua hers hence being construable to be a bonafide purchaser of the suit land for value. Reiteratedly when she omitted to do so, the effect, if any of collusiveness occurring inter se the plaintiff and deceased defendant No.1 in the drawing up Ex. Px is rendered frail, whereas the omission of defendant No.2 to discharge the onus cast upon her qua additional issues aforesaid assumes paramount relevance. Since, onus thereto stood undischarged by her, the apt sequel thereof is qua defendant No.2 being not construable to be an ostensible owner of the suit land nor the registered deed of conveyance executed inter se the deceased defendant No.1 and defendant No.2 holding any validation. Also subsequent alienations of the suit land made by defendant No.2 in favour of respondents No. 3 to 10 herein also suffer from an alike stain of invalidation. All the aforesaid subsequent sale deeds are also quashed and set aside.

9. The above discussion unfolds the fact that the conclusions as stand arrived at by the learned first Appellate Court as also by the learned trial Court standing not based upon a proper and mature appreciation of the evidence on record. While rendering the apposite findings, the learned first Appellate Court as also the learned trial Court have excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the plaintiff/appellant and against the defendants/respondents.

10. In view of above discussion, the present Regular Second Appeal is allowed and the judgements and decrees rendered by both learned Courts below are set aside. Consequently,

the suit of the plaintiff is decreed for specific performance of contract of 18.12.1991 and the legal representative of deceased defendant No.1 i.e. respondent No.2 is directed to execute sale deed qua the suit land comprised in Khata Khatuni No. 37/48, khasra Nos. 1060, 1072 measuring 7-10.16 bighas situated in village Bhiarta, Illaqua Hatgarh Balh,Tehsil Sadar, District Mandi, H.P. in favour of the plaintiff within two months from today. The sale deed executed by defendant No.1 in favour of defendant No.2 is quashed and set aside. In sequel, subsequent alienations of the suit land made by defendant No.2/respondent No.1 herein in favour of respondents No.3 to 10 herein are also quashed and set aside. Decree sheet be prepared accordingly.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant.
Versus
Kamlesh Kumar & others. .....Respondents.

Cr. Appeal No. 434 of 2011.
Reserved on: 29.7.2016.
Date of decision: 28.10.2016.

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

Cases referred:
Girija Prasad vs. State of M.P., (2007) 7 SCC 625
Makhan Singh vs. State of Haryana, (2015) 12 SCC 247
Rakesh Kumar vs. State of H.P. 2005 (2) Sim. L.C. 332
Noor Aga vs. State of Punjab, (2008) 16 SCC 417

For the appellant :Mr. D.S. Nainta and Mr. Virender Verma, Addl. AGs.
For the respondents :Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

The learned Special Judge, (Fast Track Court) Kullu, Himachal Pradesh, has acquitted accused Kamlesh Kumar and accused Mahender Singh of the charge under Section 20(b)(ii) (c) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985

(hereinafter referred to as 'the Act' in short), whereas their co-accused Swaru Ram under Section 20(b)(ii) (c) read with Section 29 of the Act, vide impugned judgment dated 17.5.2011, passed in sessions trial No. 43 of 2010.

2. The allegations against accused Kamlesh Kumar, in a nut shell, are that on 22.3.2010, around 2:00 AM (midnight) at Khalara-nullah, District Kullu, during the course of checking of the bag he was carrying with him, charas weighing 2.500 kgs was recovered therefrom him whereas charas weighing 2.200 kgs from his co-accused Mahender Singh. Since accused Kamlesh allegedly was found to be in the possession of charas whereas facilitated the illicit trafficking of charas by his co-accused Mahender Singh, therefore stated to have committed an offence punishable under Section 20(b)(ii) (c) read with Section 29 of the Act. Similarly, charge against Mahender Singh is that he was not only found to be in possession of charas weighing 2.200 kgs but also facilitated the illicit trafficking of charas weighing 2.500 kgs. by his co-accused Kamlesh Kumar and thereby he has also committed an offence punishable under Section 20(b)(ii) (c) read with Section 29 of the Act. If coming to the allegations against their co-accused Swaru Ram, he allegedly facilitated the transportation of 2.500 kgs charas by accused Kamlesh Kumar and 2.200 kgs. of charas by accused Mahender Singh and thereby abetted the commission of offence by his co-accused and committed the offence punishable under Section 20(b)(ii) (c) read with Section 29 of the Act.

3. The record reveals that on 22.3.2010 around 1:00 AM in the midnight, a police party headed by PW-4 ASI Hem Raj of Police Station Sadar Kullu left towards village Bhadai on Lag Valley road for laying naka to detect the crimes. Rapat Ext. PW-2/A was entered in rapat Rojnamcha by PW-2 Constable Narender. The other members of the raiding party were PW-3 Const. Krishan Chand, HC Parmender Singh and Const. Khoob Ram. The official vehicle No. HP-34-A-9986 was being driven by HHG Aadh Nath. At about 2:00 AM, when the police party was present at Khalara nullah bridge, three persons were spotted coming down from village Bhadai towards Kullu side. They were seen with the help of search light. Accused Kamlesh and accused Mahender Singh were found to be carrying bags on their back whereas accused Swaru Ram was empty handed. They were spotted by the police and their antecedents ascertained. Accused Kamlesh Kumar was carrying military coloured bag with him whereas accused Mahender Singh was carrying cream coloured bag. The I.O. PW-4 ASI Hem Raj suspected that the accused might be carrying some narcotic drugs or psychotropic substance with them, therefore, the option was given to them for being searched either before a Magistrate or a Gazetted Officer, vide memos Ext. PW-3/A, PW-3/B and PW-3/C. They allegedly opted for being searched by the police officials present on the spot. On this, the I.O. first offered his own search vide memo Ext. D-1, however, nothing incriminating was recovered from him. Being odd hours and the place an isolated one, it was not possible to associate someone as independent witness, therefore, I.O. PW-4 ASI Hem Raj has associated Krishan Chand (PW-3) and HC Parminder as witnesses and conducted personal search of all the three accused. Nothing incriminating was found in their possession during their personal search. However, during the course of search of the bag allegedly military coloured, being carried by accused Kamlesh Kumar, one yellow coloured polythene bag was found kept therein. On search of the polythene bag, charas in the shape of sticks was found kept therein. The recovered charas was weighed and it was found to be 2.500 kgs. The same was again put in the same polythene envelope and in the same bag. Thereafter, the bag was wrapped in a piece of cloth (pulinda), which was sealed with seven seals of seal impression "A". During the course of checking of the bag being carried by accused Mahender Singh, one polythene bag was recovered therefrom. On the search of the said polythene bag, charas weighing 2.200 kgs. was recovered in the shape of sticks. The polythene envelope was put in the same bag and thereafter wrapped in pulinda, which was also sealed with seven impressions of seal "A". NCB-I form Ext. PW-1/C was filled in triplicate. Sample of seal Ext. PW-3/E was separately drawn on a piece of cloth. The parcels containing the recovered charas were thereafter taken into possession vide recovery memo Ext. PW-3/D. It is thereafter, rukka Ext. PW-4/A was prepared and sent through PW-3 Const. Krishan Chand to Police Station, Kullu for registration of the case. Site plan Ext. PW-4/B was also prepared and the statements of the witnesses recorded as per their version.

4. The accused were interrogated. The case file was brought to spot by PW-3 Constable Krishan Chand and received by IO PW-4 ASI Hem Raj at 6:15 AM. It is thereafter, the accused were arrested at 6:30 AM. Information qua the offence they committed and the provision for punishment therefor was given to all the three accused vide memos Ext. PW-3/F to Ext. PW-3/H and it is thereafter they were arrested.

5. On the completion of investigation on the spot, the I.O. along with the case property and accused came to Police Station, Kullu. The case property was produced before SHO Tej Ram (PW-7) along with sample of seal and NCB-I form in triplicate. PW-7 SHO Tej Ram has resealed both the pulindas with 3-3 impressions of seal "T". The relevant columns of NCB-I form Ext. PW-1/C were also filled in. The sample of seal "T" Ext. PW-7/B was also drawn separately. Thereafter, PW-7 SHO Tej Ram had handed over the case property along with documents to Ram Krishan, the then MHC, Police Station, Kullu. PW-1 has made the entries Ext. PW-1/A qua receipt of sealed pulindas in the malkhana register at Sr. No. 48. He handed over the case property vide RC No. 90/2010 Ext. PW-1/B to Const. Inder Dev PW-5 with a direction to deposit the same at FSL, Junga. Before that, the entries against sr. No. 12 of NCB-I form Ext. PW-1/C were made by him. Constable Inder Dev (PW-5) had deposited the case property in safe custody in the laboratory and produced the receipt on RC before PW-1, the MHC. The special report Ext. PW-6/A was prepared and handed over to Addl. SP, Kullu. PW-6, the then Reader to DSP (Hqs.) Kullu, has made entries Ext. PW-6/B in the relevant register in this regard.

6. On receipt of the report of the Chemical Examiner Ext. PW-8/A and on completion of the investigation, report under Section 173 Cr.P.C. was filed against all the three accused in the trial Court.

7. Learned trial Court, on consideration of the report and the documents annexed therewith as well as hearing the learned Public Prosecutor and also the defence counsel, has found a prima-facie case for the commission of offence punishable under Section 20(b)(ii) (c) read with Section 29 of the Act against all the three accused. The charge against them was, therefore, framed accordingly.

8. Since the accused persons have pleaded not guilty and claimed trial, therefore, the prosecution in order to sustain the charge framed against each of them, has produced on record oral as well as documentary evidence. The material prosecution witnesses are PW-3 Constable Krishan Chand and I.O PW-4 ASI Hem Raj. The remaining prosecution witnesses being police officials are also formal as they remained associated with the investigation of the case in one way or the other. Their testimony as such, at the most, can be used as a link evidence.

9. The learned Special Judge, after holding full trial and on analyzing the oral as well as documentary evidence available on record, has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. They all have, therefore, been acquitted of the charges framed against each of them. The State, being aggrieved and dissatisfied with the impugned judgment has questioned the legality and validity thereof on the grounds, inter alia, that the prosecution evidence has been appreciated by the learned trial Court in a slip shod and perfunctory manner. The trial Court has allegedly set unrealistic standards to evaluate the cogent and reliable evidence produced by the prosecution. The testimony of the prosecution witnesses has been discarded for untenable reasons in the absence of any proof of their enmity with the accused. The findings recorded by the Court below are stated to be based upon conjectures and surmises. Being so, the impugned judgment has been sought to be quashed and set aside and all the accused have been sought to be convicted and sentenced.

10. Learned Addl. Advocate General has vehemently argued that the testimony of police officials is as much good as that of any other independent person. Also that PW-3 Constable Krishan Chand and PW-4 IO ASI Hem Raj, while in the witness box, have made consistent statements qua material aspects of the case. Their testimonies have erroneously been brushed aside by learned trial Court and undue weightage has been given to non-joining of

independent witnesses by the I.O. The contradictions, minor in nature, are stated to be given undue weightage.

11. On the other hand, Mr. Ajay Chandel, learned defence counsel, has pointed out from the record that the contradictions in the statements of the prosecution witnesses as taken note of by learned trial Judge goes to the very root of the prosecution case. Therefore, in order to bring guilt home to the accused, it is not safe to place reliance upon the testimonies of official witnesses PW-3 Constable Krishan Chand and PW-4 IO ASI Hem Raj.

12. The only point need adjudication in this case is as to whether irrespective of prosecution having proved its case against the accused beyond all reasonable doubt, they have been erroneously acquitted of the charge framed against them.

13. In order to decide the fate of this case, the reappraisal of the evidence produced by the prosecution and the accused in their defence is required. However, before that it is desirable to note that an offence under the Act is not only heinous but serious in nature. An offence under the Act is not against an individual but against the Society, as a whole, because the illicit trafficking of drugs not only affects a particular individual but the public at large and in particular our young generation. The NDPS Act is a piece of social legislation enacted with the sole idea to curb illicit trafficking of drugs. A case registered under the Act, therefore, needs consideration, keeping in mind the above factors. At the same time, keeping in view there being provision of deterrent punishment against an offender, if ultimately held guilty, the provisions contained under the act to safeguard an offender from conviction and sentence also need to be looked into thoroughly so that any innocent person may not be convicted and sentenced.

14. The statute casts a duty upon the prosecution not only to prove beyond all reasonable doubts the commission of an offence by an offender, but additionally the compliance of various provisions mandatory in nature enshrined thereunder. Thus, law casts a duty on the Courts, seized of the case registered under the Act, to deal with it with all circumspect and caution and before recording the findings of conviction against an offender to satisfy itself about the compliance of procedural requirements and also the availability of cogent and reliable evidence connecting the accused with the commission of the offence.

15. The perusal of the judgment under challenge reveals that the pleas raised by the accused in their defence that the options under Section 50 of the Act has not been given to them in accordance with law and that on account of no independent person having been associated as a witness, they cannot be held guilty for the commission of the alleged offence, have been rejected by learned trial Court while concluding that there is no ambiguity in the matter of option for their search given by the I.O. ASI Hem Raj (PW-4), vide memos Exts. PW-3/A, PW-3/B and PW-3/C. Also that, being odd hours i.e. 2:00 AM (midnight) and the place where the accused were apprehended an isolated as well as witnesses PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj, both have stated that no one was available for being associated as independent witness, the non-joining of the independent witness in the instant case is stated t be not fatal to the prosecution case. The findings, so recorded by learned trial Court, have attained the finality, being not challenged by the accused persons by filing appeal(s) in this Court.

16. Learned trail Judge has recorded the findings of acquittal of the accused on being influenced by so called omissions and procedural irregularities and contradictions i.e. filling up of NCB-I form separately, availability of only one set of NCB-I form on record, there being no mention of parcel No. 1 and parcel No. 2 by the I.O. when the same were sealed after the recovery effected from accused Kamlesh and accused Mahender Singh whereas there is mention of parcel No. 1 and parcel No. 2 in the report of the chemical examiner Ext. PW-8/A, the I.O. failed to put any specific mark on the parcels to show as to which parcel contains the charas recovered from each of the accused and that in the NCB-I form, total weight of the charas has been mentioned and there is no mention as to how much charas was recovered from the bag recovered from the possession of accused Kamlesh and how much from that of accused Mahender Singh. The so called discrepancies in the statements of the witnesses PW-3 Const. Krishan Chand and PW-4

ASI Hem Raj qua the colour of the bag recovered from accused Kamlesh and one from accused Mahender Singh also weighed with learned trial Judge while recording the findings of acquittal against them. The plea in defence that one ITBP jawan had teased wife of *'rehriwala'* and that said Jawan was summoned to the Police Station where compromise was arrived at and it is accused Kamlesh who was one of the signatory to the compromise deed, as emerges from the trend of cross-examination of PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj, raised by the accused persons also weighed with learned trial Judge while acquitting the accused persons. Learned trial Judge after noticing such lapses, procedural irregularities and discrepancies in the prosecution evidence has acquitted all the accused from the charges framed against each of them. As regards the commission of offence punishable under Section 29 of the Act, learned trial Judge has concluded that no investigation was made to show the nexus, if any, between all the three accused. The evidence that there was meeting of mind and accused Kamlesh as well as accused Mahender Singh conspired with accused Swaru Ram and it is said accused Swaru Ram who had abetted the other co-accused in the commission of the offence under the Act is not available on record. The I.O. even is stated to have not recorded any confessional statement of accused Kamlesh and accused Mahender Singh regarding involvement of their co-accused Swaru Ram. It has rather been observed that merely accompanying accused Kamlesh and accused Mahender Singh in odd hours does not make accused Swaru Ram liable for the recovery of charas effected from them.

17. It is seen that learned trial Judge has rightly emphasized that the confessional statements of accused Kamlesh and accused Mahender Singh regarding involvement of accused Swaru Ram has not been recorded and as such no case under Section 29 of the Act has been found to be made out against accused Swaru Ram.

18. The present is a case of recovery of charas weighing 2.500 kgs. from the bag in possession of accused Kamlesh whereas 2.200 kgs from the bag in the possession of accused Mahender Singh during odd hours i.e. 2:00 AM (midnight). Learned trial Judge, after taking note of the procedural irregularities, discrepancies and contradictions in the prosecution evidence has concluded that the recovery of charas from the conscious and physical possession of the accused is not proved.

19. Be it stated that the recovery of the contraband from the exclusive and conscious possession of the accused is *sine qua non* to bring guilt home to him. This aspect needs evidence, cogent and reliable. The joining of independent persons to witness the search and seizure is always in the interest of fair trial. Anyhow, in this case learned trial Judge, has already concluded that it was not possible to join the independent person as a witness and also observed that the testimony of official witnesses, if inspire confidence, can also be relied upon to bring the guilt home to the accused. The Apex Court in ***Girija Prasad vs. State of M.P., (2007) 7 SCC 625*** has held that the testimony of official witnesses is as much good as that of independent person, however, the same is required to be examined with all circumspection and caution. Similar is the ratio of the judgment of the apex Court in ***Makhan Singh vs. State of Haryana, (2015) 12 SCC 247.*** Being so and the findings recorded by learned trial Judge that it was not possible for the I.O to have associated independent person as witness in this case, the testimony of official witnesses, who are PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj, is worthy of credence or not, has to be adjudged vis-à-vis given facts and circumstances of the case and also the documentary evidence available on record.

20. The present is a case of recovery of huge quantity of charas from the conscious and physical possession of accused Kamlesh and accused Mahender Singh. They were apprehended along with their co-accused Swaru Ram during odd hours. We can make reference to Ext. PW-2/A, daily diary report to arrive at a conclusion that the police party headed by PW-4 ASI Hem Raj left the Police Station at 1:00 AM (midnight) for laying nakka towards village Badhai side on the Lag valley road. All the three accused were nabbed by the police at Khalara-nullah at 2:00 AM. It is not their defence that they were not nabbed at Khalara-nullah in the manner as claimed by the prosecution. The plea in defence that on 21.3.2010 accused Kamlesh Kumar was

present in the Police Station and that he had witnessed compromise-deed in a case of teasing of wife of some *'rehriwala'* by an ITBP jawan rather reveals that the accused were present in the Police Station for the reason that such suggestion was made to PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj on their behalf by the learned defence counsel representing them. Had they not been apprehended in the manner as claimed by the prosecution, they would have explained the reason of their presence in the Police Station. The plea of accused Swaru Ram that he was waiting for arrival of bus at bus stand Kullu also reveals that the said accused has also admitted his presence at Kullu. Since all the accused belong to different villages in Tehsil Padhar, Distt. Mandi, it is not known as to why they had gone to Kullu and more particularly why they were in the Police Station on 21.3.2010. As a matter of fact, recovery of the charas has also been made from them during the night intervening 21/22.3.2010. Therefore, it would not be improper to conclude that the accused were nabbed by the police party headed by PW-4 ASI Hem Raj during the night intervening 21/22.3.2010 at Khalara-nullah around 2:00 AM. Spot map Ext. PW-4/B can also be relied upon to substantiate the prosecution case in this regard.

21. Now, if coming to the search and seizure, there is no need to go into the question of compliance of Section 50 of the Act because the findings recorded by learned trial Judge qua this aspect of the matter has attained finality. The search memo Ext. PW-3/D, rukka Ext. PW-4/A, FIR Ext. PW-7/A and the special report Ext. PW-4/C substantiate the prosecution case qua accused Kamlesh was carrying military coloured bag whereas accused Mahender Singh cream coloured bag. True it is that the cream coloured bag is Ext. P-2 whereas military coloured bag is Ext. P-6. No doubt, PW-3 Const. Krishan Chand has identified the bag Ext. P-2 to be the same which according to him was recovered from accused Kamlesh Kumar whereas bag Ext. P-6 from accused Mahender Singh. However, he seems to have confused himself because cream coloured bag Ext. P-2 as per the prosecution case supported by his own testimony in his examination-in-chief and the documents, search memo Ext. PW-3/D, rukka Ext. PW-4/A, FIR Ext. PW-7/A and the special report Ext. PW-4/C, was being carried by accused Mahender Singh whereas military coloured bag Ext. P-6 by accused Kamlesh. If coming to the testimony of PW-4 ASI Hem Raj, he has specifically stated that military coloured bag Ext. P-6 was being carried by accused Kamlesh whereas cream coloured bag Ext. P-2 by accused Mahender Singh. Therefore, the statement of PW-3 Const. Krishan Chand that cream coloured bag was being carried by accused Kamlesh whereas green (military) coloured bag by accused Mahender Singh is not a contradiction of such a nature to belie the prosecution case, which finds support from the testimony of PW-4 ASI Hem Raj and also the documentary evidence referred to hereinabove. Therefore, it would not be improper to conclude that the bag Ext. P-6 was being carried by accused Kamlesh Kumar whereas cream coloured bag Ext. P-2 by accused Mahender. We are, therefore, not in agreement with the findings to the contrary recorded by learned trial Judge.

22. This very set of evidence i.e. search memo Ext. PW-3/D, rukka Ext. PW-4/A, FIR Ext. PW-7/A and the special report Ext. PW-4/C as well as testimonies of PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj leave no manner of doubt that charas weighing 2.500 kgs. was recovered from a green coloured polythene bag i.e. rucksack (bag) Ext. P-6 which was being carried by accused Kamlesh Kumar with him. Also that charas weighing 2.200 kgs. was recovered from a polythene white coloured bag which was found to be kept in the rucksack (bag) Ext. P-2 being carried by accused Mahender Singh. The recovered charas was weighed by the I.O. and thereafter put in the same polythene bag and thereafter in the rucksacks (bags) Ext. P-6 and P-2, which were sealed in a parcel of cloth with 7-7 seals of impression "A".

23. If coming to filling up of NCB-I form, the findings recorded by learned trial Judge that two separate NCB-I forms were filled in are misconceived for the reason that no doubt in the seizure memo Ext. PW-3/D and rukka Ext. PW-4/A, there is mention of filling up of NCB-I form twice i.e. firstly after recovery of charas from the bag which was being carried by accused Kamlesh and secondly after the recovery of charas from the bag which was with accused Mahender Singh. NCB-I form Ext. PW-1/C also reveals that against column No. 2, name of both the accused numbering them as 1 & 2 i.e. 1-Kamlesh Kumar and 2- Mahender Singh, also find mention in the same form. However, it cannot be inferred from the above documentary evidence

that NCB-I forms were filled in separately. Merely that the I.O. has made reference of making entries in NCB-I form, in the seizure memo and also other documents referred to hereinabove at two different occasions i.e. firstly on the recovery of charas from the bag of accused Kamlesh and secondly after the recovery of charas from the bag of accused, could have not taken to infer that the NCB-I form qua recovery of charas from both the accused were filled in separately and that one set of NCB-I form is missing. True it is that the I.O. in order to rule out every doubt should have filled in NCB-I form separately, as though of late, directed by this Court in a recent judgment dated 2.8.2016 rendered in Cr. Appeal No. 332 of 2011, titled State of H.P. vs. Vijender Singh. However, such requirement of law in the given facts and circumstances should have not been given undue weight age for the reason firstly that no such guidelines were formulated for being followed by the I.Os. at the relevant time and secondly in view of cogent and reliable evidence which supports the recovery of charas from the bags accused Kamlesh and Mahender were carrying with them. Therefore, one set of NCB-I form which is Ext. PW-1/C was filled by the I.O and both accused numbered as 1 & 2 with necessary particulars, such as their name, parentage and address etc. therein. Against column No. 4, the quantity of charas recovered from them has been mentioned as 4.700 grams whereas its shape like sticks (batties). The non-mentioning of the quantity of the charas recovered from both the accused separately in the NCB-I form in view of the discussion hereinabove is also not fatal to the prosecution case for the reason that in the documentary evidence, as discussed hereinabove, the total quantity of charas i.e. 4.700 grams finds mention. Even the I.O. PW-4 ASI Hem Raj has clarified this aspect of the matter in his cross-examination that no separate NCB-I forms were prepared after effecting recovery from accused Kamlesh Kumar but both recoveries were mentioned in the single NCB-I form. The I.O. even has clarified that after making recovery from accused Mahender, NCB-I form was not filled in as a whole and rather few entries were added consequent upon such recoveries in the same form.

24. PW-3 Const. Krishan Chand has taken the rukka Ext. PW-3/D to the Police Station. It is thereafter FIR Ext. PW-7/A was registered. All the documents prepared before registration of the case find mention of the number of FIR in red ink.

25. The production of parcels containing case property along with sample of seal “A” and NCB-I form in triplicate stands proved from the perusal of daily diary rapat Ext. PW-2/B and also from the testimony of I.O. PW-4 ASI Hem Raj as well as that of the SHO Tej Ram (PW-7). Not only this, such evidence, if available on record, also substantiate the prosecution story qua resealing of the case property by SHO Tej Ram (PW-7) with 3-3 impressions of seal “T”. The impression of seal “T” has also been drawn and the same is Ext. PW-7/B. PW-1 HC Ram Krishan is MHC. It is with whom the SHO Tej Ram (PW-7) has entrusted the sealed parcels containing the recovered charas along with the NCB-I form in triplicate, sample of seals “A” and “T” and also the copy of seizure memo. He had received the same and entered at Sr. No. 48 of the malkhana register. The extract of such entries is Ext. PW-1/A. The parcels of case property were deposited with PW-1 Ram Krishan on 22.3.2010. The same were forwarded by him to Forensic Science Laboratory on 22.3.2010 through PW-5 Constable Inder Dev vide RC No. 90 of 2010 Ext. PW-1/B. The case property was received in the laboratory on 23.3.2010 as per the endorsement encircled red at point ‘A’ on the R.C. This aspect of the prosecution case finds support from the testimony of PW-1 MHC Ram Krishan and also PW-5 Constable Inder Dev. Now, if coming to the report of Forensic Science Laboratory Ext. PW-8/A, two parcels sealed with seals “A” and “T” along with samples of seals and NCB-I form were received in the laboratory. Merely that in the report against column No. 7, there is mention that parcels were marked as 1 & 2, is again not fatal to the prosecution case.

26. Above all, both the accused have been numbered as 1 & 2 in the NCB-I form as noticed, hereinabove. The I.O. may have numbered the parcels also as 1 & 2, however, omitted to make mention thereof in the documentary evidence i.e. seizure memo and recovery memo etc. Such a lapse, in our opinion, is not of such a serious nature so as to render the recovery of charas from the accused doubtful. At the most, it is a procedural lapse and also is the result of faulty investigation. If coming to the result of the chemical analysis, the report Ext. PW-8/A

reveals that the exhibits 1 & 2 which were sent for chemical analysis were found containing the extracts of cannabis and as such were samples of charas.

27. The non-mentioning of some specific marks on the parcels has also weighed with learned trial Judge, as in his opinion, without there being any such marks, it cannot be inferred as to which parcel contained the charas recovered from accused Kamlesh Kumar and which parcel from accused Mahender Singh. We, however, are not in agreement with such findings recorded by learned trial Judge also for the reason that the charas recovered from accused Kamlesh was 2.500 kgs. whereas from accused Mahender Singh, 2.200 kgs. In the Forensic Science Laboratory when both the exhibits were weighed, the same were found to be 2.188 kgs & 2.492 kgs which is 12 grams short so far as charas recovered from accused Mahender Singh and 8 grams short from accused Kamlesh. Such minor variation in weight on account of weighing the same at two different occasions and with two different set of scales and weights, is bound to occur. Therefore, the report of chemical examiner also indicate the separate quantity of charas, sealed in the parcels hence, it would not be improper to conclude that the exhibits sent for analysis i.e. 2.188 kgs in weight was the charas recovered from accused Mahender Singh whereas 2.492 kgs. from accused Kamlesh Kumar. The law laid down by a Single Bench of this Court in ***Rakesh Kumar vs. State of H.P. 2005 (2) Sim. L.C. 332*** relied upon by learned trial Judge is not applicable in this case and rather in the given facts and circumstances of the case, distinguishable.

28. True it is that a suggestion was given on behalf of accused to the prosecution witnesses i.e. PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj that one ITBP jawan was brought to the Police Station, Sadar Kullu as he allegedly had teased the wife of one *'rehriwala'* on 21.3.2010 and that the compromise was arrived at and accused Kamlesh was associated as one of the signatory thereto. The SHO Tej Ram (PW-7) though had admitted that one ITBP jawan was brought to Police Station, however, as per his version not in connection with some complaint against him qua teasing wife of *'rehriwala'* rather on account of there being an altercation of that jawan with the police personnel in the hospital. As per his further version, a compromise was effected and written at the Police Station. He also made the statement while in the witness box as PW-7 that he can produce the said compromise before the Court during the course of trial. Therefore, he was examined by the accused in their defence as DW-1. In his examination-in-chief as DW-1, he expressed his inability to produce that compromise as according to him, no such record was available in the Police Station. The suggestion that the compromise is available, however, he has withheld the same was denied, being wrong. In his cross-examination conducted on behalf of accused Swaru Ram, he expressed his inability to tell that accused Kamlesh was one of the marginal witness to the compromise, however, the suggestion that he is withholding the said document from the Court initially and that all the accused were present in the Police Station as they were brought there for interrogation regarding some unclaimed bag, have been denied by this witness, being wrong. Interestingly enough, the suggestions, so given, amply demonstrate that all the accused were brought by the police to the Police Station and present there, however, in connection with their interrogation regarding unclaimed bag is a false plea raised only during the cross-examination of SHO Tej Ram (PW-7) aforesaid, because no such suggestion was given to PW-3 Const. Krishan Chand and the I.O. PW-4 ASI Hem Raj during their cross-examination. The accused belong to Mandi district and if it is believed that there was some unclaimed bag, it was at Kullu. Where was the occasion to the police to have called them for interrogation in connection with that bag. Therefore, the plea the accused raised in their defence is hardly of any help to them and rather implicates them in the commission of the offence.

29. This Court is oblivious to the legal principle that in a case of this nature, where there is stringent provision qua punishment of offenders, if held guilty, the Court must look forward for cogent and reliable evidence and the prosecution is under obligation to prove its case beyond all reasonable doubt. This Court is also alive to the legal principle that more serious is the offence, the stricter degree of proof is required to hold the offender guilty. However, in view of the evidence discussed hereinabove, we find the present a case where the prosecution has proved its case against accused beyond all reasonable doubt. The findings hereinabove recorded by us

on re-appraisal of the evidence available on record, brings this case out of the purview of the judgment of the apex Court in ***Noor Aga vs. State of Punjab, (2008) 16 SCC 417,*** relied upon by learned trial Judge to form an opinion that the evidence produced by the prosecution is not cogent and reliable and that the same rather suffers from discrepancies as well as contradictions. We rather find the present a case where the prosecution has been able to bring guilt home to accused Kamlesh and accused Mahender Singh with the help of cogent and reliable evidence. The minor discrepancies and procedural irregularities, as we noticed hereinabove, neither goes to the very root of the prosecution case nor can be treated fatal to it. As a matter of fact, the present at the most, can be said to be a case of faulty investigation, hence does not render prosecution story doubtful. The testimonies of both the witnesses i.e. PW-3 Const. Krishan Chand and PW-4 ASI Hem Raj are consistent and corroborate the entire prosecution case. Mere confusion that which of the bag was being carried by which of the accused, as highlighted hereinabove, is also of no help to the accused for the reason that the documentary evidence and also the testimony of PW-4 ASI Hem Raj, the I.O amply demonstrate that bag Ext. P-6 was being carried by accused Kamlesh whereas bag Ext. P-2 by accused Mahender Singh. Both the bags, when taken out from the parcels, were found to be green (military) coloured and creamish in colour. The prosecution case is also that accused Kamlesh was carrying military coloured bag i.e. green and accused Mahender Singh was carrying cream coloured bag.

30. The prosecution has been able to prove the recovery of charas weighing 2.500 kgs. from the exclusive and conscious possession of accused Kamlesh whereas 2.200 kgs. from that of accused Mahender Singh. Therefore, it was for the accused persons to have explained their innocence as envisaged under Section 35 and 54 of the Act. The present, as such, is a case where presumption as envisaged under Sections 35 and 54 of the Act has to be drawn against accused and as they failed to explain their innocence, hence on this score also, it would not be improper to conclude that the charas weighing 2.500 kgs and 2.200 kgs. has been recovered from their exclusive and physical possession. The findings to the contrary, as recorded by learned trial Judge, are neither legally nor factually sustainable.

31. Now if coming to the involvement of accused Swaru Ram in the commission of offence punishable under Section 29 of the NDPS Act, no evidence is forth coming to show that the said accused has abetted the commission of offence punishable under Section 20 of the NDPS Act by his co-accused Kamlesh Kumar and Mahender Singh. As a matter of fact, in order to bring the guilt home to an accused for the commission of offence under Section 29 of the NDPS Act, some positive evidence to show that all the accused conspired with each other and as a result of such conspiracy, abetted the commission of offence under the Act, can be said to have committed the offence punishable under Section 29 of the Act. In the case in hand, the I.O., PW-4 ASI Hem Raj, in his examination-in-chief, has not uttered even a single word that any such evidence with regard to meeting of mind having taken place in this matter and all the accused conspired with each other and as a result thereof, accused Swaru Ram agreed to accompany them to arrange for a buyer, to whom his co-accused could have sold the charas in their possession. True it is that in the cross-examination of this witness and also constable Krishan Chand PW-3, all the three accused during the course of their interrogation had canvassed that accused Swaru Ram agreed to arrange for a buyer so that his co-accused could sell the charas in their possession and for that his co-accused had agreed to pay Rs. 2,000/- to him. The I.O. in his cross-examination conducted on behalf of the accused Swaru Ram has admitted that no statement in this regard was recorded during the course of the investigation. Had it been so, it is not understandable as to what prevented the I.O. PW-4 ASI Hem Raj from recording such confession, if made by the accused persons. Learned trial Judge has also taken into consideration the provisions contained under Section 10 of the Indian Evidence Act, 1872 and also the case law attracted in such a situation. Therefore, in our opinion, the findings so recorded, call for no interference in the present appeal.

32. A perusal of the evidence available on record and also the given facts and circumstances as well as law cited at the Bar, make it crystal clear that the present is not a case where it can be said that the prosecution has failed to prove its case against accused Kamlesh

Kumar and Mahender Singh, beyond all reasonable doubts. No doubt, the witnesses are police officials, because as rightly observed by learned trial Judge, it was not possible to associate independent person as witness being odd hours of the night. However, the evidence as has come on record by way of testimony of official witnesses is consistent, categoric, cogent as well as reliable. The prosecution, as such, has discharged the onus to prove that the charas has been recovered from the exclusive and conscious possession of accused Kamlesh Kumar and Mahender Singh. As already observed, the present is a fit case where the presumption as envisaged under Section 35 and 54 of the Act can also be drawn against the accused because onus to prove otherwise that they were neither apprehended nor charas recovered from them stood shifted on them.

33. Both the accused, the residents of District Mandi have failed to explain as to what they were doing at Khalara-nullah and that too in odd hours during the night intervening 21/22.3.2010. The trend of the cross-examination of the prosecution witnesses and also that of DW-1 reveal that on that day, they were present in the Police Station. Why they would have been called from their native place in district Mandi for interrogation in connection with recovery of the so called unclaimed bag also remained unexplained. The accused, as such, have failed to discharge the onus upon them. Therefore, in view of the ratio of the judgment of the Hon'ble Apex Court in ***Noor Aga's*** case (supra), the presumption under Sections 35 and 54 of the Act is drawn against both of them. It being so, the only inescapable conclusion would be that the commission of offence punishable under Section 20 of the Act is proved against accused Kamlesh Kumar and accused Mahender Singh. They are, therefore, convicted accordingly. However, no case for the commission of offence punishable under Section 29 of the Act is made out against accused Swaru Ram. The findings of his acquittal as recorded by learned trial Judge are thus upheld. His personal bond is cancelled and surety discharged.

34. Convict Kamlesh Kumar and convict Mahender Singh, however, to surrender to their bail bonds and appear before this Court on 17.11.2016 at 10:00 AM for being heard on the quantum of sentence. Learned counsel representing the convicts submits that it may not be possible for him to contact them and ensure their presence in this Court on the date fixed. Being so, issue production warrants against convict Kamlesh Kumar and convict Mahender Singh for the date fixed and the Superintendent of Police, Kullu District to ensure the execution of the same upon them. List on 17.11.2016.

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

The State of H.P. and another .....Petitioners

Versus

Sh. Parveen Kumar .....Respondent

CWP No. 4073/2012
Reserved on : October 24, 2016
Decided on : October 28, 2016

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

Cases referred:
Central Bank of India v. S. Satyam, (1996) 5 SCC 419
Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157

For the petitioners	Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.
For the respondent	Mr. Bhuvnesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Petitioner-State (hereinafter, 'State') being aggrieved with passing of Award dated 15.6.2011 by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Dharamshala, HP in Ref. No. 207/2007, has preferred the instant petition under Articles 226/227 of the Constitution of India, praying therein for the following reliefs:

> "(a). That the impugned award may be quashed and set aside on limitation grounds.
>
> (b). That seniority and continuity of service from the date of termination awarded vide judgment passed by the Labour Court-Cum-Industrial Tribunal in Reference No. 207/2007 decided on 15.6.11 may kindly be quashed and set aside.
>
> (c). The relevant record be called from Labour Court-Cum-Industrial Tribunal for perusal.
>
> (d). The cost of petition may kindly be awarded to the petitioners."

2. Briefly stated the facts as emerge from the record are that the appropriate Government vide reference under Section 10(1) of the Industrial Disputes Act (herein after, 'Act'), framed following terms of reference for adjudication:

> "Whether the termination/retrenchment of Mr. Parveen Kumar S/o Mr. Ishwar Dass Village-Nangal Chowk, P.O. Guranwar, Tehsil Dehra, Distt. Kangra, H.P. by the Executive Engineer, I&PH, Division, Dehra, District Kangra, vide Assistant Engineer, I&PH, Sub division, Dada Siba letter No. 709-10 dated 31.07.2000 is legal and justified, if not, what amount back wages, seniority, past services benefits and compensation the above worker is entitled to?"

3. Respondent-workman (herein after, 'workman'), by way of statement of claim, filed before the learned Tribunal below, claimed that he was engaged by the Executive Engineer as daily wage Fitter in 1994 in Dada Siba Division, Tehsil Dehra, District Kangra, and as such, he continued to work till 2000. Workman further stated that he was a diploma holder in Fitter trade from ITI Nadaun and State had sufficient work available with it but despite that he was not allowed to complete 240 days in all calendar years except 1997 and 1998. On 31.7.2000, his services were disengaged by the State without any rhyme or reason, that too, without following procedure envisaged under Section 25 of the Act. Workman further claimed that the department had sufficient work of fitter at the time of illegal disengagement of his services and junior persons were retained. It is further averred that the Department has engaged other junior persons on daily wages on the said post. Workman also averred that for the redressal of his grievances, he earlier filed OA No. 3032/2000 before the Himachal Pradesh Administrative Tribunal, which was dismissed for want of jurisdiction. Workman by way of aforesaid claim, as discussed herein above, claimed reengagement with consequential benefits including seniority and continuity.

4. State refuted the claim of the workman by way of a detailed reply by stating therein that services of the workman were not utilized by the State till 31.7.2000 as claimed by workman, rather he was engaged subject to availability of work and funds and thereafter, vide

letter dated 31.7.2000, workman was informed that his services were not required due to non-availability of work. State further claimed that services of petitioner were disengaged by resorting to the principle of 'last come, first go' and no junior, as claimed by workman, was retained at the time of his retrenchment. In the aforesaid background, State prayed for dismissal of the claim put forth by the workman. The learned Tribunal below framed following issues for determination on 22.10.2008:

"1. Whether the termination of services of the petitioner by the respondent is unlawful. If so, what relief of service benefits and the amount of compensation the petitioner is entitled to? OPP

2. Whether the petitioner was engaged on daily wages basis subject to availability of work and funds. If so, whether there existed no work or funds at the time of termination of his services. OPR.

3. Relief."

5. However, the fact remains that on the basis of pleadings of the parties as well as evidence adduced on record by the respective parties, learned Tribunal below held workman entitled to reengagement as Fitter Grade II and accordingly issued directions to the department to reengage the workman as Fitter Grade II forthwith and to give benefit of seniority and continuity in service from the date of illegal termination but without back wages. In the aforesaid background, State approached this Court, by way of instant petition, praying therein for quashing and setting aside of Award dated 15.6.2011 passed by the Tribunal below.

6. Mr. P.M. Negi, Ld. Additional Advocate General duly assisted by Mr. Ramesh Thakur, Ld. Deputy Advocate General, vehemently argued that impugned award is not sustainable in the eyes of law since it is not based on correct appreciation of evidence available on record as well as law and as such same deserves to be set aside being contrary to the record as well as law. Mr. Negi, with a view to substantiate his aforesaid argument, invited attention of the Court to impugned Award passed by the Tribunal below to demonstrate that learned Tribunal has misread and mis-interpreted the evidence adduced on record by the department, as a result of which, undue benefit has been extended to the workman, who at no point of time was able to prove that his services were not disengaged by department by resorting to the provisions of the Act. Mr. Negi further contended that the department by way of leading cogent and convincing evidence proved on record that workman was appointed on daily wage basis subject to availability of work and funds and as such his services were rightly disengaged after 31.7.2000, due to non-availability of work and funds. Mr. Negi, while concluding his arguments also stated that findings recorded that principle of 'last come, first go', was not adhered to by the department while disengaging services of workman, is also contrary to the record because no person junior to the workman was engaged as fitter, after disengagement of the workman and as such, Award being contrary to the record is liable to be set aside.

7. Mr. Bhuvnesh Sharma, counsel appearing for the workman, supported the impugned award. Mr. Sharma, while referring to the award passed by the Tribunal below strenuously argued that the Award is based on correct appreciation of evidence adduced on record by the respective parties. There is no scope for interference by this Court, especially in view of the findings of fact recorded by the learned Tribunal below. Mr. Sharma, further argued that bare perusal of award suggests that each and every aspect of the matter has been dealt meticulously by the Tribunal below while upholding the claim of the workman. Mr. Sharma, while concluding his arguments forcefully contended that there is ample evidence on record suggestive of the fact that services of workman were disengaged without resorting to Section 25 of the Act. Similarly, principle of 'last come, first go' was bid goodbye while disengaging services of the workman because it stands duly proved on record that one Shri Ajay Kumar, who was junior to the workman was retained as Fitter Grade II in the Department.

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

9. After perusing the record made available to this Court, it is undisputed that workman was appointed as daily wage fitter in 1994 in Sub Division Dada Siba, Tehsil Dehra, District Kangra, by Executive Engineer of the Department, where he continued to work till 2000. It is also not disputed that at that point of time, workman was having required qualification of diploma in fitter trade from ITI Nadaun. State, while refuting the claim put forth on behalf of the workman, stated that workman was engaged subject to availability of work and funds but it nowhere refuted the claim of the workman that he kept on serving the Department till 31.7.2000, when his services were illegally dispensed with, without resorting to the provisions contained in Section 25 of Act. State claimed that services of workman were not required due to non-availability of work and funds and principle of 'last come, first go' was adhered to. But this Court carefully perused impugned Award as well as documents available on record, which clearly suggests that Department was not able to prove on record that services of the workman were disengaged on 31.7.2000 after following due procedure as prescribed under the Act. Similarly, this Court found that State failed to adhere to the principle of 'last come, first go' because it stands duly proved on record that two persons junior to the workman were retained against the post of Fitter after disengagement of workman. State has nowhere disputed that workman was engaged as Fitter Grade II in 1994. Department, with a view to substantiate that no junior person was retained after disengagement of the workman, placed on record seniority list of Fitters and Beldars as RW-1/D, which shows that Ashok Kumar son of Om Prakash and Ajay Kumar son of Vidya Sagar, were engaged as Fitter Grade II in 1987-88 and regularized w.e.f. 1.1.1998, whereas, admittedly, workman was appointed as daily wage fitter in 1994. As per Department, workman was disengaged strictly on the principle of 'last come, first go', as per Section 25-G of the Act, whereas learned Tribunal below, on the basis of record made available by the workman, i.e. photocopy of muster roll pertaining to 1994, wherein person namely Ajay Kumar, son of Vidya Sagar, has been reflected as Pipeline Man in 1994, came to conclusion that juniors to workman were retained at the time of illegal disengagement of workman.

10. Workman by leading cogent and convincing evidence before learned Tribunal below established beyond doubt that Ajay Kumar son of Vidya Sagar, was initially engaged as Pipeline Man in 1987-88 and thereafter he was engaged as Fitter Grade II in 1998 i.e. after workman, who was admittedly appointed as Fitter Grade II in 1994. Since workman by way of placing copy of muster roll pertaining to 1994 successfully proved on record that Ajay Kumar son of Vidya Sagar was initially appointed as Pipeline Man in 1987-88, meaning thereby, his retention, if any, as Fitter Grade II, after disengagement of workman i.e. 31.7.2000, was completely in violation of Section 25-G of the Act and principle of 'last come, first go'.

11. Perusal of Award clearly suggests that it had occasion to peruse the original record produced by the department, wherein, in para-14 of the Award, learned Tribunal below has clearly stated that perusal of muster roll of Ajay Kumar son of Vidya Sagar, clearly suggests that he was engaged as Beldar. Similarly, muster roll of 1994 shows that till 1994, Ajay Kumar was reflected as Pipeline Man and muster roll of 1998 further demonstrates that Ajay Kumar was Fitter Grade II meaning thereby Ajay Kumar became Fitter Grade II in 1998 i.e. definitely after the workman, who was appointed as Fitter Grade II in the year 1994.

12. Hence, this Court sees no illegality and infirmity in the findings returned by Tribunal, which are based on correct appreciation of record made available to it that Ajay Kumar was initially engaged as Beldar and till December, 1998, he was working as Pipeline Man. Since, Ajay Kumar, referred to herein above, was made Fitter in 1998, learned Tribunal below, while placing reliance upon the muster roll pertaining to 1994, placed on record by the respondent workman, has rightly come to the conclusion that Ajay Kumar was junior to the respondent workman, in the category of Fitter Grade II.

13. At the cost of repetition, it may be again stated that it is undisputed that respondent workman was engaged as Fitter Grade II in 1994 i.e. prior to Ajay Kumar, learned Tribunal below, on the basis of record made available, has returned categorical findings that initially Ajay Kumar son of Vidya Sagar, was engaged as Beldar and thereafter, he was working as

Pipeline Man till December, 1994. Record further reveals that aforesaid Ajay Kumar was engaged as Fitter Grade II in the year 1994, hence, this Court sees no force in the contentions put forth by the State that findings returned by the Tribunal are contrary to records.

14. Similarly, perusal of the Award passed by Tribunal below suggests that State was not able to prove on record by way of convincing evidence that services of respondents were disengaged for want of work and funds. Shri Rohit Dubey, while appearing as RW-1 though stated that no fresh hand was engaged after disengagement of respondent but failed to render explanation, if any, as far as retention of Ajay Kumar, Fitter Grade II, after disengagement of workman, is concerned. To demonstrate that services of workman were disengaged for want of funds, State has placed reliance upon Ext. RW-1/E but the Tribunal below has categorically concluded that perusal of extract RW-1/E shows that total budgetary allocation under the repair and maintenance head during the financial year 2000-01 was Rs.345.00 Lakh, which was inclusive of the expenditure i.e. labour, material and vehicles. As per the said extract, the scheme was still being run under repair and maintenance head since the time of its completion.

15. Close scrutiny of pleadings as well as findings returned in the Award makes it crystal clear that the workman was appointed as Fitter Grade II in 1994, whereas, Shri Ajay Kumar though was appointed as daily wager in 1987-88 but, admittedly, he was appointed as Fitter Grade II in 1998 i.e. after the appointment of workman. Since workman was senior to Ajay Kumar in the cadre of Fitter Grade II, his services could not have been disengaged by retaining Ajay Kumar, who was admittedly junior to workman, rather, retention of Ajay Kumar, Fitter Grade II, strengthens the claim of the workman that at the time disengagement of workman, work of Fitter Grade II was available with the Department and services of workman were illegally dispensed with, in violation of the principle of 'last come, first go'.

16. It is well settled by now that principle of 'last come, first go', as contained in Section 25G of the Act, is not confined to the workmen, who have been in continuous service for not less than one year. Reliance is placed upon the judgment rendered by their lordships of Hon'ble Apex Court in **Central Bank of India** v. **S. Satyam**, reported in (1996) 5 SCC 419, wherein it has been held as under:

> "8. Rule 77 requires the employer to maintain a seniority list of workmen in that particular category from which retrenchment is contemplated arranged according to the seniority of their service. The category of workmen to whom Section 25-F applies is distinct from those to whom it is in applicable. There is no practical difficulty in maintenance of seniority list of workmen with reference to the particular category to which they belong. Rule 77, therefore, does not present any difficulty. Rule 78 speaks of retrenched workmen eligible to be considered for filling the vacancies and here also the distinction based on. The category of workmen-can be maintained because those falling in the category of Section 25-F are entitled to be placed higher than those who do not fall in that category. It is no doubt true that persons who have been retrenched after a longer period of service which places them higher in the seniority list are entitled to be considered for re- employment earlier than those placed lower because of a lesser period of service. In this manner a workman falling in the lower category because of not being covered by Section 25-F can claim consideration for re-employment only if an eligible workman above him in the seniority list is not available. Application of Section 25-H to the. Other retrenched workmen not cove-red by Section 25-f does not, in Any manner, prejudice those covered by Section 25-F because the question of consideration of any retrenched workman not covered by Section 25-F would arise only, if and when, no retrenched workman covered by Section 25-F is available for re-employment. There is, thus, no reason to curtail the ordinary meaning of 'retrenched workmen' in Section 25-H because of Rules 77 and 78, even assuming the rules framed- under the Act could have that effect.
>
> 9. The plain language of Section 25-H speaks only of re- employment of 'retrenched workmen'. The ordinary meaning of the expression 'retrenched workmen must relate to

the wide meaning of 'retrenchment' given in Section 2(oo). Section 25-F also uses the word 'retrenchment' but qualifies it by use of the further words 'workman' who has been in continuous service for not less than one year'. Thus, Section 25-F does not restrict the meaning of retrenchment but qualifies the category of retrenched workmen covered therein by use of the further words workman. Who has been in continuous service for not less than one year. It is clear that Section 25-F applies to the retread a workman who has been in continuous service for not less: one year and not to any workman who has bean in continuous service for less than one year; and it does not restrict or curtail the meaning of retrenchment merely because the provision therein is made only for the retrenchment of a workman who has been in continuous service for not less the one year. Chapter V-A deals with all retrenchments while Section 25-F is confined only to the mode of retrenchment of workmen in continuous service for not less than one year. Section 25-G prescribes the principle for retrenchment and applies ordinarily the principle of 'last come first so' which is not confined only to workmen who have been in continuous service for not less than one year, covered by Section 25-F.

10. The next provision is Section 25-H which is couched in wide language and is capable of application to all retrenched workmen not mere; covered by Section 25-F. It does not require curtailment of the ordinary meaning of the word 'retrenchment' used therein. The Provision for re-employment of retrenched workmen merely gives performance to a retrenched workmen in the matter of re-employment over other persons. It is enacted for the benefit of the retrenched workmen and there in no reason to restrict its ordinary meaning which promotes the object of the enactment without causing any prejudice to a better placed retrenched workman.

17. In view of aforesaid, this Court sees no reason to disagree with the findings of learned Tribunal below which appear to be based on correction appreciation of evidence, led on record by the respective parties.

18. Hence, this Court, after carefully examining the Award passed by the Tribunal below, sees no reason to interfere in the findings recorded by the Tribunal, which are otherwise also based on correct appreciation of evidence led on record by the parties, as such, impugned award deserves to be upheld. It is well settled law that the Courts while examining correctness and genuineness of award passed by Tribunal have very limited powers to re-appreciate the evidence led before the Tribunal below, especially the findings of fact recorded by the Tribunal below. Apart from above, findings of fact recorded by learned Tribunal below on the basis of appreciation of evidence cannot be questioned in writ proceedings and writ court cannot act as an appellate court. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case titled ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157***. It is profitable to reproduce paras 16, 17 and 18 of the judgment herein:

> "16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for

questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

17. The judgments mentioned above can be read with the judgment of this Court in Harjinder Singh's case (supra), the relevant paragraph of which reads as under:

> 21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and / or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:
>
> > 10.... The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State.

18. A careful reading of the judgments reveals that the High Court can interfere with an order of the Tribunal only on the procedural level and in cases, where the decision of the lower Courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant." ***[Emphasis added]***

19. Consequently, in view of the aforesaid discussion, there is no merit in the present petition and the same is dismissed. Pending applications, if any, are also dismissed.

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

Tikka Maheshwar Chand ..Appellant/Defendant
Versus
Ripudaman Singh ..Respondents/plaintiff.

RSA No. 441 of 2004.
Reserved on : 25/10/2016
Date of decision: 28/10/2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit, which was compromised – a mutation was sanctioned on the basis of compromise – an appeal was filed, which was dismissed – a civil suit was filed against these orders – the suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held in second appeal that the jurisdiction of the Civil Court to go into the question, where adequate remedy has been provided under the H.P. Land Revenue Act is barred – a remedy of approaching Financial Commissioner was available to the plaintiff – the Appellate Court had wrongly discarded this reasoning of the trial Court- appeal allowed – the judgment of the Appellate Court set aside and that of the trial Court restored. (Para- 7 and 8)

For the appellant: Mr. Aman Deep Sharma, Advocate.
For the respondent: Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

This appeal stands directed against the impugned rendition of the learned District Judge, Hamirpur, whereby he reversed the decree of dismissal of suit of the plaintiff wherein the plaintiff had claimed a decree for declaring valid the order pronounced by the Assistant Collecto 2nd Grade, Nadaun, whereby under the latters' orders mutation stood attested qua the suit property, orders whereof recorded by the Assistant Collector 2nd Grade, Nadaun stood anvilled on a compromise decree comprised in Ext.P-1, orders whereof recorded by the Assistant Collector 2nd Grade, Nadaun, stood rescinded by the Sub Divisional Collector, Nadaun, orders whereof of the Sub Divisional Collector, Nadaun, attained affirmation from the Divisional Commissioner under the latters' orders recorded on 6.8.1992, latter orders whereof stand canvassed to be declared to be null and void. The effect of the judgement of the learned District Judge, Hamirpur pronounced in reversal to the verdict of the learned trial Court is qua mutation qua the suit property attested on 10.02.1983 by the Assistant Collector 2nd Grade, Nadaun, on anvil of Ext.P-1 acquiring validation.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiff filed Civil Suit No. 45 of 1978 against the defendant which was compounded by the parties leading to compromise decree dated 3.11.1981 by the learned Sub Judge(I), Hamirpur. On the basis of compromise decree Assistant Collector 2nd Grade, Nadaun, sanctioned mutation qua the suit property in favour of the plaintiff. The plaintiff was exclusively possessing the suit land as owner but the defendant later on filed an appeal against the mutation order before the Sub Divisional Collector, Hamirpur, who set-aside the mutation wrongly on the ground that mutation could not have been sanctioned qua 'Gair Mumkin Land because the suit property never formed part of the compromise decree in Civil Suit No. 45 of 1978. Against it, the plaintiff went in appeal before the Divisional Commissioner, who also rejected the appeal vider order dated 6.8.1992. Both the orders of the Sub Divisional Collector and Divisional Commissioner are claimed to be wrong, illegal and against the law by the plaintiff in this appeal.

3. The defendant admitted passing of compromise decree in a suit brought by the plaintiff. He claimed that the mutation on the basis of compromise decree was wrongly

sanctioned by the A.C. IInd Grade, Nadaun and has rightly been reversed in appeal by the Sub Divisional Collector and also affirmed rightly by the Divisional Commissioner and claimed that the defendant is exclusive owner in possession of Gair Mumkin land of Patwar Circle, Dhaneta, Nauhngi, Choru and Sproh i.e. the suit property nor it was subject matter of previous suit. As the suit property never formed part of the suit, so it could not have been transferred without registration under Section 17 of the Registration Act. Therefore, orders of the Collector and Divisional Commissioner are legal and binding and suit deserves to be dismissed.

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

1. Whether the plaintiff is entitled to the relief of declaration, as prayed? OPP.

2. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff whereas the learned First Appellate Court allowed the appeal preferred therefrom before it by the plaintiff.

6. Now the defendant/appellant herein has instituted before this Court the instant Regular Second Appeal wherein he assails the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 22.03.2005, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

"1. Whether the facts as established and proved on record of the case particularly the compromise decree Ext.PC and the statements of the parties Ext.PA and Ext.PB do establish the creation of new rights in favour of the plaintiff.

2. Whether during the pendency of the lis before the Revenue Courts, the Civil Courts have jurisdiction qua the same subject matter.

3. Whether the suit of the plaintiff/respondent is within limitation?"

Substantial questions of law.

7. Uncontrovertedly, Ext.P-1 holds therein a compromise decree recorded inter partes thereat who likewise are contestants hereat besides is qua suit property which is also the subject matter of contest in the instant suit. Also uncontrovertedly Ext.P-1 stands recorded not only qua suit property which fell for contest inter se the litigating parties thereat rather holds therewithin depictions besides reflections qua property which was not the subject matter of contest in the previous civil suit inter se the parties at lis hereat. Even though before the learned First Appellate Court an argument stood espoused qua the mandate of Section 17 of the Registration Act ordaining compulsory registration of instruments other than testamentary instruments besides instruments of gifts especially when the relevant instruments other than testamentary dispositions or instruments of gifts, operate to create, declare, assign limit or extinguish, whether vested or contingent of the value of Rs.100/- and upwards, to or in immovable property mandate whereof held therewithin stood enjoined to be read in conjunction with the provisions embodied in clause (Vi) of sub section (2) of Section 17 of the Registration Act (hereinafter referred to as the Act) wherein though a mandate stands encapsulated qua the diktat of the provisions engrafted in sub section (1) of Section 17 of the Act standing excluded qua any decree or order of the Court as is Ext.P-1 nonetheless with it also therewithin carving an exception to the exclusion of the mandate of sub section (1) of Section 17 of the Act qua any decree or order of a Civil Court, wherewithin a compromise stands enunciated interse the combatants therein qua a suit property vis.a.vis whereof no relief apposite to it stood canvassed therebefore whereupon a concomitant espousal was made qua with Ext.P-1 standing pronounced qua property whereupon the contestants thereat were not at lis, it hence warranting compulsory registration, whereas it remaining unregistered rendered the order of attestation of mutation of the Assistant Collector 2nd Grade, Nadaun, when read in consonance therewith warranting its standing pronounced to be set-aside, contrarily the orders recorded by the Collector, concerned whereupon he rescinded the relevant orders of mutation attested by the Assistant Collector 2nd

Grade, Nadaun, orders whereof attained affirmation from the Commissioner concerned rather warranting validation. The provisions of the Registration Act are extracted hereinafter:

> **17. Documents of which registration is compulsory**
>
> 1. (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property;
>
> xxx. xxx.. xxx...
>
> 2. (vi) any decree or order of a court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding;] or

8. On analogy of various judicial pronouncements the learned First Appellate Court discounted the submission addressed herebefore by the learned counsel for the defendants. However, the reasoning as stands assigned by the learned First Appellate Court to on anvil thereof dispel the vigour of the aforesaid contention addressed herebefore by the learned counsel for the defendant, lacks in legal sinew nor also any dependence by it upon judicial pronouncements is apt, given the attraction hereat with aplomb, the relevant mandate of the provisions of the Registration Act, provisions whereof evidently extantly stand infringed. Irrefutably the mandate of Order 23 Rule 3 of the CPC, which stands extracted hereinafter:

> (3). Compromise of suit:
>
> Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties), or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit."

empowers the Civil Court concerned to pronounce a compromise decree not only qua a subject matter which stands espoused in the apposite plaint besides qua a subject matter which remains unespoused in the apposite plaint constituted therebefore by the plaintiff. Though the mandate of the Order 23 Rule 3 of the CPC does hold leverage to a Civil Court to in the manner aforesaid record a verdict compromising the lis inter se the relevant contestants also the mandate of the apposite decree recorded by the Civil Court concerned when put therebefore for execution is enjoined to be meted deference by the authority concerned, nonetheless the mandate of the aforesaid provisions of the Code of Civil Procedure are enjoined to be read in conjunction with the mandate of clause (VI) of sub section(2) of Section 17 of the Act wherewithin a preemptory dictate is held qua a compromise decree being enjoined to be compulsorily registered predominantly when it holds therewithin recitals qua immoveable property whereagainst no contest occurred inter se the relevant contestants thereat. The learned First Appellate Court has excluded from consideration the mandate of clause (VI) of sub section (2) of Section 17 of the Act whereas it enjoined compulsory registration of Ext.P-1 significantly when it held therewithin pronouncements qua its recording a compromise vis.a.vis. the parties hereat qua immoveable property which was not in litigation inter se the contestants thereat. The reliance placed on judicial pronouncements by the learned First Appellate Court stands belittled by the aforesaid trite factum besides when the authority concerned on standing seized with an execution petition constituted therebefore stood enjoined to mete deference to Ext.P-1 yet meteing of deference thereto by it would stand sparked only when preceding thereto the parties to the lis mete deference also to the mandate of the relevant provisions of the Registration Act besides thereupon alone the relevant authority concerned held empowerment to record an order attesting mutation qua the suit property whereas evidently with Ext.P-1 standing unregistered prior to the Assistant

Collector 2nd Grade, Nadaun, recording an order attesting mutation qua the suit property, naturally rendered the relevant pronouncement recorded by the Assistant Collector 2nd Grade, Nadaun, to stand afflicted with a malady of invalidation fostered by non adherence of the apposite statutory mandate by the relevant contestants. Contrarily, the pronouncement in reversal thereto recorded thereon by the Sub Divisional Collector concerned, pronouncement whereof attained affirmation on 6.8.1992 from the Divisional Commissioner concerned warranted vindication, whereas the learned First Appellate Court holding contrarily has committed an illegality in undermining the impact of the relevant provisions of the Registration Act vis.a.vis. Ext.P-1 besides by slighting the impact of the relevant provisions of the Registration Act vis.a.vis the provisions of the Order 23 Rule 3 of the CPC significantly when both the statutory provisions aforesaid are complementary also when hence both warrant meteing of deference thereto, whereas evidently with deference remaining unmeted to the relevant provisions of the Registration Act, the impugned order of the Assistant Collector 2nd Grade, Nadaun, warranted interference. Contrarily it standing pronounced to be valid enjoins this Court to interfere with the verdict of the learned First Appellate Court. Dehors the aforesaid discussion, the learned trial Court concluded qua the suit of the plaintiff being barred by the mandate of Section 171 of the H.P.Land Revenue Act, mandate whereof excludes the jurisdiction of the Civil Court qua a lis qua which the aforesaid Act prescribes a remedy under Section 14 thereof, remedy prescribed therein is qua the plaintiff instituting before the Financial Commissioner an appeal against the order recorded by the Divisional Commissioner, remedy whereof remaining un-availed, whereupon it concluded of the suit of the plaintiff being statutorily barred. The aforesaid reasoning is well merited. The learned First Appellate Court in discarding the aforesaid reasoning has committed an illegality comprised in its misappreciating the aforesaid statutory provisions of the H.P.Land Revenue Act. The effect of the above discussion is of substantial questions of law No.1, 2 and 3 warranting theirs standing answered in favour of the appellant herein. Consequently, the appeal preferred by the defendant/appellant herein is allowed. The judgement and decree rendered by the learned first Appellate Court is set-aside and the judgement and decree rendered by the learned trial Court is maintained and affirmed. Consequently, the suit of the plaintiff is dismissed. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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

Balkar Singh ...Appellant.

Versus

Babar and others ...Respondents.

FAO No.502 of 2010.
Reserved on : 19.10.2016.
Decided on: 01.11.2016.

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

Case referred:

Raj Kumar vs. Ajay Kumar and another (2011) 1 Supreme Court Cases, 343

For the appellant : Mr. Jagdish Thakur, Advocate.
For the respondents : Nemo for respondent No.1.

Respondent No.2 stands deleted.
Mr. Ratish Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1988, is maintained by the appellant/claimant/petitioner (hereinafter referred to as the 'petitioner') for enhancing the amount awarded by learned Motor Accident Claims Tribunal, Una, H.P, in MAC Petition No.18 of 2008, vide award dated 10.9.2010.

2. Brief facts giving rise to the present appeal are that the petitioner maintained a petition under Section 166 of the Motor Vehicles Act, for compensation on account of the injuries he suffered due to rash and negligent driving by respondent No.2 of the vehicle owned by respondent No.1, in an accident on 26.2.2008. As per the petitioner, respondent No.2, who was driving the offending vehicle rashly and negligently and struck it against the front right side of the tanker being driven by the petitioner, as a result of which, he suffered multiple injuries on his left femur right knee, right ankle and multiple fractures. The petitioner had been taken to local hospital for medical aid, thereafter referred to PGI, Chandigarh on 27.2.2008 and discharged on 9.4.2008. The petitioner had again been admitted in PGI, Chandigarh, on 22.4.2008. The petitioner had been under continuous medical treatment and spent a sum of Rs. 1 lac. Even after medical treatment of months together, the petitioner had not been keeping fit. The petitioner had not been able to earn after the alleged accident. He stood crippled for the rest of his life and had turned dependent on others. Respondent No.1 was registered owner of the truck bearing No. UP11T0884. Respondent No.1 was vicariously liable for rash and negligent act of his driver. Respondents No.1 and 2 have resisted the petition. They have admitted the ownership and possession of respondent No.1 of vehicle bearing No. UP11T0884. As per them, on 26.2.2008 respondent No.2 driving the truck with due care and caution and the accident had not taken place on account of rash and negligent driving of respondent No.2. The petitioner had not suffered any injury due to the act of respondent No.2. Respondent No.3 also resisted and contested the petition. Respondent No.3 provided insurance cover to vehicle bearing No. UP11T0884 for the period from 24.8.2007 to 23.8.2008. It has been averred that respondent No.2 had not been in possession of a valid and effective driving licence at the time of accident. Respondent No.1 plying his vehicle in contravention of the terms and conditions of the insurance policy.

3. The learned Tribunal below framed the following issues on 18.1.2010 :

"1. Whether Sh. Balkar Singh had suffered injuries on account of rash and negligent driving of vehicle bearing No.UP11T0884 by respondent No.2 ? OPP.

2. If Issue No.1 is proved to what amount and from whom is the petitioner entitled to ? OPP.

3. Whether the respondent No.2 had not been in possession of a valid and effective driving licence, if so with what effect? OPR-3.

4. Whether the respondent No.1 had contravened the conditions of the insurance policy and registration certificate, if so with what effect ? OPR-3.

5. Relief."

4. After deciding Issue Nos.1 and 2 in favour of the petitioner, Issue Nos.3 and 4 against the respondents, the learned Tribunal below awarded compensation of Rs.5,60,000/- to the petitioner.

5. Learned counsel appearing on behalf of the petitioner has argued that the compensation as awarded by the learned Tribunal below is in on very lower side, as the learned

Tribunal below has not taken the disability qua the petitioner correctly. He has further argued that the disability was 100% qua the petitioner.

6. On the other hand, learned counsel appearing on behalf of respondent No.3 has argued that the disability as per the Doctor in Ex.PW4/B was not permanent disability and the same was temporary disability of 25%. As per the Doctor, it would have reduced to 10% later on. He has further argued that the impugned award is on the higher side, but he has admitted that no appeal has been filed by the Insurance Company.

7. In rebuttal, learned counsel appearing on behalf of the petitioner has argued that no interest on the awarded amount has been granted by the learned Tribunal below.

8. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record of the case carefully.

9. The only question which requires determination is that whether the disability for the purpose of calculating the compensation has been rightly taken by the learned Tribunal below or not. The income of the driver is proved to be Rs.4,000/- per month. Now, coming to the disability, PW-4, Dr. N.S. Dogra, Orthopedic Surgeon, had medically examined the petitioner on 20.6.2009 and 21.8.2010. He has issued disability certificates Ex.PW4/A and Ex.PW4/B. He has stated that the left leg of the petitioner had turned short by 1 ½ inch. The petitioner had suffered muscular injury to left leg, right patella and right ankle. The petitioner shall not be able to commute long distance and carry weight. In his cross-examination, he has stated as follows :

> "It is correct that disability assessed by me on 21.8.2010 is temporary in character. Voluntarily stated that even after second operation disability of left femur would persist in any case upto 10%. Now the petitioner is on crutches and had been so observed by me on 21.8.2010 and today. After the rod implanted to the left femur had broken the petitioner is on crutches. It is wrong that the petitioner would be completely cured of the injury after second operation. Voluntarily stated that reduction of disability after second operation would depend upon the nature and successful character of the operation. In case the second operation fails the disability would persist or may increase as well. It is wrong that disability is of left femur alone. Voluntarily stated that disability of both lower limbs."

10. Learned counsel appearing on behalf of the petitioner has relied upon the judgment in ***Raj Kumar vs. Ajay Kumar and another (2011) 1 Supreme Court Cases, 343,*** wherein it has been held that in case the right hand was amputated and vision was affected of a person, who is a Engineering student is permanent disablement to be assessed as 70%. Considering the above judgment to the facts of the present case, this Court finds that even if, the disability is not permanent and is likely to be reduced in future, but taking into consideration the nature of job performed by the petitioner, no interference is required with a view of learned Tribunal below taking the disability of 35%.

11. From the above, it is clear that the disability can be reduced with a passage of time. The learned Tribunal below has taken disability from 25% to 35% and awarded an amount of Rs.2,75,000/-, on account of the loss of future income, loss of amenities of life and loss of expectation of life. Even if, the income of the petitioner is Rs.4,000/- per month, as claimed by him and is permanently disabled to the extent of 35%, the multiplier of 15 is applied. The amount of compensation for loss of income comes to Rs.2,52,000/-, but the learned Tribunal below has awarded an amount of Rs.2,75,000/-, so this Court finds that the impugned award is reasonable and requires no interference. At the same point of time, this Court finds that the learned Tribunal below has not granted any interest on the impugned award. The petitioner is definitely entitled for the interest, which is required to be granted to the petitioner. No other points argued so, needs no consideration.

12. Accordingly, the petition is partly allowed. Since, the vehicle was admittedly insured by respondent No.3, as such, respondent No.3 is directed to deposit the amount of interest at the rate of 7.5% per annum on the awarded amount from the date of filing the petition, till the deposit of the award amount to the petitioner. The appeal is accordingly disposed of. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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

Dola Ram & others. .....Appellants.

Versus

Ganga Singh & others. .....Respondents.

RSA No. 378 of 2004 and
Cross Objection No. 583 of 2004
Reserved on: 05.10.2016
Decided on: 01.11.2016

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

(Para-13 to 50)

Cases referred:

Venkati Rama Reddi and others vs. Pillati Ram Reddi and others, AIR 1917 (4) Madras 27 (Full Bench)

P. Venkatachalam Chetty vs. P.S. Govindasawmi Naicker, AIR 1924 Madras 605

Murikipudi Ankamma vs. Tummalacheruvu Narasayya and others, AIR (34) 1947 Madras 127

Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and others, AIR 1967 Supreme Court 878

Amarsing Ratansing and another vs. Gosai Mohangir Somvargir and others, AIR 1972 Gujarat 74 (V 59 C 14)

Mst. Samrathi Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140

Afsar Shaikh Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140

P. Saraswathi Ammal vs. Lakshmi Ammal alias Lakshmi Kantam, AIR 1978 Madras 361

Munni Devi vs. Smt. Chhoti and others, AIR 1983 Allahabad 444

Savithramma vs. H. Gurappa Reddy and others, AIR 1996 Karnataka 99

Upasna & others vs. Omi Devi, 2001(2) Current Law Journal (Himachal Pradesh) 278,

Kripa Ram and others vs. Smt. Maina, 2002(2) Shimla Law Cases 213

N.V. Srinivasa Murthy vs. N.V. Gururaja Rao and others, (2005) 10 Supreme Court Cases 566

Jeet Kumar and another versus Jai Chand and another, 2013 (3) Him L.R. 1463

Moti vs. Roshan and others, AIR 1971 Himachal Pradesh 5 (V 58 C2)

Ku. Sonia Bhatia vs. State of U.P. and others, AIR 1981 Supreme Court 1274

Mallo vs. Smt. Bakhtawari and others, AIR 1985 Allahabad 160,

Digambar Adhar Patil vs. Devram Girdhar Patil (died) and another, AIR 1995 Supreme Court 1728
Rajendra Tiwary vs. Basudeo Prasad and another, AIR 2002 (89) Supreme Court 136
Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others, (2004) 9 Supreme Court Cases 468
Ashwani Kumar Rana vs. Gaur Hari Singhania and others, 2005(2) SLJ 1243
Hari Shankar Singhania and others vs. Gaur Hari Singhania and others, (2006) 4 Supreme Court Cases 658,
Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel and others, (2006) 8 Supreme Court Cases 726
M. Venkataramana Hebbar (Dead By LRs vs. M. Rajagopal Hebbar and others, (2007) 6 Supreme Court Cases 401
Bhagwan Krishan Gupta (2) vs. Prabha gupta and others, (2009) 11 Supreme Court Cases 33

For the appellants: Mr. K.D. Sood. Sr. Advocate, with Mr. Rajnish K. Lall, Advocate.
For the respondent: Mr. G.D. Verma, Sr. Advocate, with Mr. B.C. Verma, Advocate, for respondents No. 1, 3(a), 3(f), 4 to 6 & 14(a) to 14(g).

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellants/defendants (hereinafter referred to as "the defendants") laying challenge to the judgment and decree passed by the learned Additional District Judge, Mandi, in Civil Appeal No. 40 of 2002, dated 29.06.2004, whereby the learned District Judge, Mandi, has partly modified the judgment and decree, dated 31.12.2001, passed by learned Sub Judge 1st Class, Karsog, District Mandi, H.P., in Civil Suit No. 60-1 of 1994.

2. Brief facts giving rise to the present appeal are that the plaintiffs/respondents (hereinafter referred to as "the plaintiffs") filed a suit for declaration against the defendants. As per the plaintiffs, land comprised in Khatta No. 4, Khatauni No. 4, 5 to 7, Kita 54, measuring 63-12-2 bighas, situate at Village Shoungi, Illaqua Janubi Pargna, Tehsil Karsog, District Mandi, H.P. is recorded in joint ownership of the parties and the same has been wrongly recorded so. The land stands partitioned, in a family partition prior to 1940. It is further contended that as per the private partition, the land, as entered against Khewat Khatauni No. 4/4, Kitta-2, measuring 0-1-16 bighas in Khasra No. 140 & 142 and land entered against Khatauni No. 5, Khasras No. 6, 7, 29, 31, 32, 34, 63, 72, 143, 153, 164, 169, 180, 192, 199, 201, 207, 226, 236, 249, 262, 274, 276, 288, measuring 30-1-1 bighas fell to the share of the defendants. Consequent upon the private partition, the defendants have been recorded in separate possession of this land and the plaintiffs are not recorded in possession of the above land. On account of partition of the land, the defendants are in exclusive ownership of the land and the entries contrary to the claim of the plaintiffs are wrong and illegal. It is further contended that the land entered in Khata No. 4, Khatauni No. 6, Khasras No. 18, 20, 27, 28, 18, 65, 66, 68, 76, 152, 154, 155, 177, 178, 179, 188, 222, 223, 230, 235, 245, 247, 257, 275, 284, 289, Kitta 26, measuring 31-2-5 bighas and the land entered against Khewat Khatauni No. 7/7, Khasras No. 96, measuring 1-19-4 bighas and Khasra No. 75 measuring 0-8-16 bighas fell in the share of plaintiffs and now they are absolute owners-in-possession of this land and the adverse revenue entries are wrong and illegal. After the private partition, the plaintiffs and defendants have been put to their exclusive and separate possession of the shares.

3. The plaintiffs have further pleaded that deceased, plaintiff Ragu Ram, remained ill and was not able to move and walk. Defendants No. 1 and 2 by taking undue advantage of ill health of deceased, plaintiff Raghu Ram, swayed him that the suit land has since been

partitioned, but the revenue record has not been corrected to that extent in harmony with private partition. Defendants No. 1 and 2 took deceased, plaintiff Raghu Ram, to Tehsil office at Karsog and got some papers prepared, contents whereof were not disclosed. The papers were prepared on the pretext that revenue entries qua the joint Khatta were to be corrected. The deceased plaintiff, Raghu Ram, was taken to a Document Writer and under the bona fide belief that the revenue record is to be corrected consequent upon the private partition, he signed the requisite papers. Thus, defendants No. 1 and 2 executed a gift deed No. 414, dated 17.08.1993, through which 1/6th share of the land in Kheweat Khatauni No. 4/4 to 8, Kita 54, measuring 63-13-2 bighas was gifted to defendants No. 1 and 2. The gift deed, so executed, was the result of misrepresentation and fraud being played by defendants No. 1 and 2 on deceased, plaintiff Raghu Ram. As per the plaintiffs, deceased, plaintiff Raghu Ram, neither had an occasion to make a gift deed to defendants No. 1 and 2, nor he was competent, as the property is ancestral property and the deceased was not in possession of the land entered in Khewat Khataunis No. 4 and 5. Thus, the possession could not be delivered. Lastly, the plaintiffs prayed for a decree of declaration, declaring them as owners-in-possession of the land, mentioned in Khewat Khatauni No. 4, 6, 7 and 8, Kitta 28, measuring 33-10-5 bighas at Kauja Shoungi, Tehsil Karsog, District, Mandi, H.P., (hereinafter referred to as "the suit land"). A simultaneous prayer for correction in the revenue entries and declaring the gift deed No. 414, dated 17.08.1993 null and void, is also made.

4. The defendants, by filing the written statement, resisted the claim of the plaintiffs and took preliminary objections viz., valuation of the suit and estoppel. On merits, the defendants contended that the revenue entries are correct and the suit land is still joint and unpartitioned. The factum qua private partition has been denied and it is further contended by them in case there had been a private partition then a separate Khewat would have been created during the settlement operation. As per the defendants, the revenue entries, depicting the plaintiffs in possession of the suit land are not correct. The deceased, plaintiff Raghu Ram, executed a gift deed with his own free will and he was not ever tempted by the defendants. In fact, deceased, plaintiff Raghu Ram, himself asked the defendants to come to Karsog and he came with the revenue record from the Patwari. The gift deed was the result of love and affection. The deed was prepared through a Document Writer and the deceased, plaintiff Raghu Ram, also acknowledged the execution of the deed before the Sub Registrar, Karsog, who attested the same. The defendants have contended that deceased, plaintiff Raghu Ram, was having every right qua execution of a valid gift deed, which he had exercised voluntarily.

5. The learned Trial Court on 20.10.1994 framed the following issues for determination and adjudication:

> "1. Whether the plaintiff is absolute owner in possession of the suit land by way of private family partition between the parties, as alleged? OPP
>
> 2. Whether the gift deed No. 414 dated 17.08.1993 is illegal, wrong and void as alleged due to mis-represendation/fraud and fraud played upon the plaintiff? OPP
>
> 3. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD
>
> 4. Whether the plaint has not been prop0erly signed and verified as alleged? OPD
>
> 5. Whether the plaintiff is estopped to file the present suit by his own act and conduct? OPD
>
> 6. Relief."

6. It will be apt to highlight that initially the suit was dismissed by the Trial Court, vide its judgment dated 31.05.1996. The said judgment and decree were assailed and the learned First Appellate Court, vide judgment dated 11.05.2001 remanded the matter back to the learned Trial Court for recording the findings on the following two additional issues:

"5-A Whether the suit property inherited by plaintiff is ancestral in nature? OPP

5-B If issue No. 5-A is proved in affirmative, whether plaintiff was not competent to execute gift deed in favour of respondents No. 1 & 2 (defendants) as alleged? OPP."

After deciding the issues No. 1 and 2 against the plaintiffs, issues No. 3 and 4 against the defendants, issue No. 5 against the plaintiff and issues No. 5-A and 5-B against the plaintiffs, the suit of the plaintiffs was dismissed. Consequently, the plaintiffs laid challenge to the judgment and decree of the learned Trial Court before the learned First Appellate Court and the learned First Appellate Court vide its judgment and decree dated 29.06.2004, partly accepted the appeal qua issue No. 2 and the impugned judgment and decree of the learned Trial Court was modified to that extent, hence the present regular second appeal, which was admitted for hearing on the following substantial question of law:

"1. Whether the findings of the Court below are perverse, based on mis-reading of oral and documentary evidence, pleadings of the parties and the basic document of title Ex. DA?"

7. After the filing of the appeal by the appellants herein, the respondents herein filed Cross Objections (Cross Objections No. 583 of 2004) which were also admitted for hearing on the following substantial questions of law:

"1. Whether plea of private partition of the property in suit as raised on behalf of the Objectors has not been decided in accordance with Law and findings on this account are as a result of mis-reading and mis-construction of the pleadings of the parties and oral and documentary evidence on record?

2. Whether the findings as recorded by the learned District Judge against the Objectors are vitiated on account of mis-construction and misreading of oral as well as documentary evidence on record?

3. Whether the presumption of correctness as attached to the entries in the revenue record with respect to land in suit have been rebutted and in any case, the claim of the appellants about the partition of land in suit stand proved."

8. I have the learned counsel for the parties and also gone through the record in detail.

9. The learned Senior counsel for the appellants has argued that the findings recorded by the learned Lower Appellate Court are against the evidence which has come on record and the same are perverse. The law is not correctly applied by the learned Lower Appellate Court and, therefore, the present regular second appeal is required to be allowed. To support his arguments, the learned Senior counsel has relied upon the law, as settled by the Hon'ble Courts in the following judicial pronouncements:

1. Venkati Rama Reddi and others vs. Pillati Ram Reddi and others, AIR 1917 (4) Madras 27 (Full Bench),
2. P. Venkatachalam Chetty vs. P.S. Govindasawmi Naicker, AIR 1924 Madras 605,
3. Murikipudi Ankamma vs. Tummalacheruvu Narasayya and others, AIR (34) 1947 Madras 127,
4. Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and others, AIR 1967 Supreme Court 878,
5. Amarsing Ratansing and another vs. Gosai Mohangir Somvargir and others,AIR 1972 Gujarat 74 (V 59 C 14),
6. Mst. Samrathi Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140,
7. Afsar Shaikh and another vs. Soleman Bibi and others, AIR 1976 Supreme Court 163 (Patna),

8. P. Saraswathi Ammal vs. Lakshmi Ammal alias Lakshmi Kantam, AIR 1978 Madras 361,
9. Smt. Munni Devi vs. Smt. Chhoti and others, AIR 1983 Allahabad 444,
10. Savithramma vs. H. Garappa Reddy and others, AIR 1996 Karnataka 99,
11. Upasna & others vs. Omi Devi, 2001(2) Current Law Journal (Himachal Pradesh) 278,
12. Shri Kripa Ram and others vs. Smt. Maina, 2002(2) Shimla Law Cases 213,
13. N.V. Srinivasa Murthy vs. N.V. Gururaja Rao and others, (2005) 10 Supreme Court Cases 566 and
14. Jeet Kumar and another vs. Jai Chand and another, 2013(3) Himachal Law Reporter 1463.

10. On the other hand, the learned Senior counsel representing respondents No. 1, 3(a), 3(f), 4 to 6 and 14(a) to 14(g) has argued that the gift was never executed by the plaintiff, Raghu Ram, and in fact, the defendants by their cleverness had made plaintiff, Raghu Ram, to understand that some documents are to be executed with respect to family partition, which took place in the year 1940, and on that basis they persuaded him (Raghu Ram) to execute a gift deed without making him to understand the contents of the same. Learned Senior counsel has further argued that the cross-objections filed by the respondents are required to be allowed and the suit may be decreed in toto. To support his arguments the learned Senior Counsel has relied upon the law, as laid down in the following judicial pronouncements:

1. Moti vs. Roshan and others, AIR 1971 Himachal Pradesh 5 (V 58 C 2),
2. Ku. Sonia Bhatia vs. State of U.P. and others, AIR 1981 Supreme Court 1274,
3. Smt. Mallo vs. Smt. Bakhtawari and others, AIR 1985 Allahabad 160,
4. Digambar Adhar Patil vs. Devram Girdhar Patil (died) and another, AIR 1995 Supreme Court 1728,
5. Rajendra Tiwary vs. Basudeo Prasad and another, AIR 2002 (89) Supreme Court 136,
6. Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others, (2004) 9 Supreme Court Cases 468,
7. Ashwani Kumar Rana vs. Balsharan Gautham and others, 2005(2) SLJ 1243,
8. Hari Shankar Singhania and others vs. Gaur Hari Singhania and others, (2006) 4 Supreme Court Cases 658,
9. Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel and others, (2006) 8 Supreme Court Cases 726,
10. M. Venkataramana Hebbar (dead) By LRs vs. M. Rajagopal Hebbar and others, (2007) 6 Supreme Court Cases 401 and
11. Bhagwan Krishan Gupta (2) vs. Prabha Gupta and others, (2009) 11 Supreme Court Cases 33.

11. In rebuttal, the learned Senior Counsel for the appellant has argued that the gift deed was executed by the plaintiff, Raghu Ram, in favour of the defendants out of love and affection, as they were his nephews. He has further argued that the plaintiff, Raghu Ram, was fully aware about the consequences of the gift. He purchased the stamp papers and took the defendants to the Tehsil office at Karsog and executed a gift deed. He has argued that the appeal may be allowed.

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

13. At the very outset, as far as gift deed is concerned, the same is admitted by the plaintiffs, but it is argued that the defendants took undue advantage of the old age of deceased plaintiff (Raghu Ram) and they make him to understand that the document executed is with respect to family partition, which took place prior to the year 1940. This is how the defendants got the gift deed executed from deceased plaintiff (Raghu Ram).

14. In order to prove their case, the plaintiffs have examined nine witnesses, including Raghu Ram, who had executed a gift deed, Gauria, Man Singh, Shyam Singh, Lachmi Ram, Ganga Singh, H.Y. Sharma, Meer Singh and Prem Lal. On the other hand, the defendants, in order to prove their case, have examined four witnesses, namely, Dola Ram, Harish Chand, Chet Ram and D.S. Chandel.

15. The parties are co-owners of the suit land, however, they are in exclusive possession over certain portions of the land. Mere exclusive possession without the khata being dismembered is nothing, but it is still a joint possession of other co-owner.

16. The original deceased plaintiff, Shri Raghu Ram, has appeared in the witness-box as PW-1 and deposed that he is under treatment from P.G.I., Chandigarh. The defendants, who are from his in-laws' family, and the land, which is 63-64 bighas was partitioned 60 years ago, during the time of the ancestors. The defendants on the pretext that the partition will be given effect in the record got his signatures on the gift deed by mis-representation/fraud and when he came to know about this, he immediately filed the civil suit. In his cross-examination, nothing favourable to the defendants has come with regard to the gift deed. PW-2, Shri Gauria, had deposed with respect to separate possession of the parties after the settlement. PW-3, Shri Man Singh, has corroborated the statement of PW-2, Gauria. PW-4, Shri Shyam Singh, has also deposed with regard to the separate possession of the parties. PW-5, Shri Lachmi Ram, deposed that though he has signed gift deed, Ex. DA, as a witness, but the same was with respect to the settlement of the partition. In his cross-examination, this witness has stated that he does not know whether Ex. DA was read-over to Raghu Ram (deceased plaintiff). PW-6, Shri Ganga Singh, is the son of the plaintiff, who substituted the plaintiff. He has further stated that the land was partitioned during the time of the ancestors and he has produced on record the pedigree table to prove that he is successor. PW-8, Shri Meer Singh, is also one of the co-sharer, who has stated that they had separate possession on the land. He has shown his ignorance with respect to Ex. DA. PW-9 Shri Prem Lal, who has translated the documents from Urdu to Hindu.

17. On the other hand, the defendants have examined four witnesses, namely, Dola Ram, Harish Chand, Chet Ram, D.S. Chandel and Dola Ram was also re-examined.

18. DW-1, Shri Dola Ram (defendant No. 1), has stated that Raghu Ram has given 10½ bighas of land by making a gift deed. This witness tried to prove Ex. DA. To the similar effect he has examined other witnesses, that is, DW-2 Shri Harish Chand (Document Writer), DW-3 Chet Ram (Clerk) and DW-4, Shri D.S. Chandel (sub Registrar). DW-3, Shri Chet Ram, Clerk, sub Treasury, Karsog, was examined to prove the registration of the gift deed. From the above, it is clear that there was no occasion for Raghu Ram (deceased plaintiff) to have filed the civil suit after executing gift deed, Ex. DA, had he executed the gift deed.

19. Now this Court is faced with two situations, firstly, there is a registered gift deed and on the other hand the donor is claiming that he signed the documents taking into consideration the fact that the document is with regard to family partition, which took place 60 years before, as the defendants made him understand that by executing this document their position on the land, as per the family partition, will be recorded.

20. Adverting to the available revenue record, it unequivocally demonstrate that the parties are recorded as co-owners, however, it further reveals that the contesting parties are recorded in exclusive possession over some portions of the land. The land can be partitioned legally through an instrument of partition and the status of co-sharer in the revenue record is treated in the legal parlance as *"community of possession and unity of title of all co-sharers",* although they are depicted in the revenue record in exclusive possession over the separate

portions of the land. Precisely, exclusive possession of the contesting parties cannot at all be termed/treated as *"family partition",* which is contended to have taken place inter se the predecessor-in-interest of the parties about 60 years back. As a matter of fact, no documentary evidence qua family partition has come on record. Moreover, even if we presume that *"khangi taksim"* took place between the predecessor-in-interest of the parties, then for such a long period of 50-60 years any of the parties should have taken steps to legally validate the same. Admittedly, there is no evidence on record which demonstrates that at any point of time steps were taken for recording the alleged private partition. Even the law mandates for legal validation of the private partition. No overt act is shown which proves that steps were taken for recording that private partition (Khangi taksim). In case the said private partition was legally validated, then the entries qua that should have been recorded in the revenue record, however, it is not so. For this reason only, the parties are still litigating. *Khangi taksim* is to be affirmed as per the provisions mandated by law. Separation of khata *inter se* the co-owners is the only mode to effect severance.

21. In the case in hand, as *Khangi taksim* was not recorded in the revenue record, the version of the plaintiff (deceased Raghu Ram), who appeared as PW-1, that papers of Ex. DA was signed by him assuming that the family partition is to be registered in the revenue record, has force. The original plaintiff (deceased Raghu Ram) immediately maintained a suit before the Court of law, by engaging an Advocate, when he came to know about the Ex. DA (gift deed). In these circumstances, the law, as cited by the learned Senior Counsel for the appellants, is required to be examined.

22. The Hon'ble Full Bench of Madras High Court in case titled as ***Venkati Rama Reddi and others vs. Pillati Ram Reddi and others, AIR 1917 (4) Madras 27 (Full Bench),*** has held that registration of a gift deed after the death of the donor is valid and the registration by the donor is not at all necessary. It has also been held in the judgment (supra) that execution of instrument duly signed is sufficient and the gift on registration takes effect from the date of its execution. However, this judgment is not applicable to the facts of the case in hand, as the executant has himself immediately maintained a suit with respect to mis-represendation/fraud made by the defendants, which he has also proved on record by leading cogent and convincing evidence.

23. The Hon'ble High Court of Madras in yet another case titled as ***P. Venkatachalam Chetty vs. P.S. Govindasawmi Naicker, AIR 1924 Madras 605,*** has held that a deed which disposes of any immediate interest in property is not a gift but a will, relevant text of the judgment is extracted as under:

> " … …*It is contended that it is in effect a deed of gift operating in presenti and not a will at all and that as it is a deed of gift in respect of immoveable property which has not been registered, it is void and has no effect. A will is defined in Section 3 of the Probate and Administration Act (V of 1881), as "the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death." This document which, as I have said, is described as a gift deed purports to dispose of part of a house. The relevant portions of the document are as follows:*
>
> *"You shall yourself after my lifetime use and enjoy the two rooms built on the ground of the house Municipal No. 11……I shall myself enjoy the rent in respect of those two rooms as long as I may be alive. You shall yourself use and enjoy after my lifetime that rent and that ground and the two rooms from son to grandson and so on in succession with power to gift, mortgage, exchange and sale. No one has any right to or interest in those rooms. To this effect is the gift deed document executed and given in respect of the aforesaid two rooms and their grounds."*
>
> *In the form it is a deed of gift and not a will, but in fact it is a declaration of the intentions of the donor with respect to her property which she desires to be*

carried into effect after he death, because there is no disposal of any immediate rights of possession or any immediate interest in the property. The fact that the document purports to reserve a life interest in the property to the donor is an argument against its being a will, but as was pointed out by the Privy Council in ***Thakur Ishri Singh vs. Thakur Baldeo, (1884) 10 Cal 792 (P.C.),*** *no great attention need be paid to that, because it is a frequent thing in this country to find documents which are in fact wills in terms making clear that the person disposing of the property reserves a life or immediate interest in the property."*

This judgment is not applicable to the facts of the present case.

24. The Hon'ble High Court of Madras in ***Murikipudi Ankamma vs. Tummalacheruvu Narasayya and others, AIR (34) 1947 Madras 127,*** has held that without there being any express reservation of a power of revocation in the gift deed, a donor does not have any right to revoke the gift and the only custody by the donor of the gift deed does not lead to any adverse conclusion against the donee, especially where the entire conduct of the donee shows that he accepted the gift and the document was kept in the family box to which the donee also had access. It has also been held that where the donor has the power to revoke and he validly exercises the same, he becomes the absolute owner of the property in question and in case he has no power of revocation, he ceases to have any interest or right in the property in question. However, this judgment is also not applicable to the facts of the present case, as the plaintiffs have proved mis-representation/fraud of the defendants and the deed writer with respect of Ex. DA (gift deed).

25. The Hon'ble Supreme Court in ***Subhas Chandra Das Mushib vs. Ganga Prosad Das Mushib and others, AIR 1967 Supreme Court 878,*** has held that in cases of undue influence the Court must consider relations between the donor and the donee and has the donee used that position to obtain an unfair advantage over the donor, Court must also scrutinise the pleadings to ascertain whether undue influence was exercised or not. In the judgment (supra) the meaning of expression 'collusion' was expounded as "secret agreement for illegal purposes or a conspiracy and implies that a man does something evil designedly". Apt paras of the judgment are reproduced below:

"3. Under s. 16 (1) of the Indian Contract Act a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. This shows that the court trying a case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor and (2) has the donee used that position to obtain an unfair advantage over the donor'?

... ...

7. The three stages for consideration of a case of undue influence were expounded in the case of ***Ragunath Prasad v. Sarju Prasad and others, 51 Ind App 101: (AIR 1924 PC 60)*** *in the following words :-*

"In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached - namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The

first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?

… … … … … …

10. Before, however, a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6, Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal, (1964) 1 SCR 270: (AIR 1963 SC 1279) above referred to. In tht case it was observed (at p. 295) (of SCR): (at p. 1288 of AIR):

"A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other."

… … … … … …

12. It will at once be noted from the above that the two portions of the extracts from paragraph 4 are in conflict with each other. According to the first portion the plaintiff's father Prasanna colluded with his sister on the advice of his brother to execute the deed of gift. The word "collusion" means a secret agreement for illegal purposes or a conspiracy. The use of the word "collusion" suggests that Prasanna knew what he was about and that he did it secretly or fraudulently with the object of depriving the plaintiff. According to the second portion of the extract, Prasanna, because of his old age, was subject to senile decay and could not discriminate between good and evil. This hardly fits in with the case of collusion which implies that a man does something evil designedly. There is no suggestion in this paragraph of the plaint that Prasanna was under the domination of Balaram and that Balaram exercised his power over Prasanna to get the document executed and registered by Prasanna. It will be remembered that nominally the property stood in the name of the sister who was also a party to the document and according to the extract quoted above Balaram had exercised undue influence over her also.

… … … … … …

25. There was practically no evidence about the domination of Balaram over Prasanna at the time of the execution of the deed of gift or even thereafter. Prasanna, according to the evidence, seems to have been a person who was taking an active interest in the management of the property even shortly before his death. The circumstances obtaining in the family in the year 1944 do not show that the impugned transaction was of such a nature as to shock ones conscience. The plaintiff had no son. For a good many years before 1944 he had been making a living elsewhere. According to his own admission in cross- examination, he owned a jungle in his own right (the area being given by the defendant as 80 bighas) and was therefore possessed of separate property in which his brother or nephew had no interest. There were other joint properties in the village of Parbatipur which were not the subject- matter of the deed of gift. It may be that they were not as valuable as the Lokepur properties. The circumstance that a grand -father made a gift of a portion of his properties to his only grandson a few years before his death is not on the face of it an unconscionable transaction. Moreover, we cannot lose sight of the fact that if Balaram was exercising undue influence over his father he did not go to the length of having the deed of gift in his own name. In this he was certainly acting very unwisely because it was not out of the range of possibility that Subhas after attaining majority might have nothing to do with his father."

This judgment is not applicable to the present case, as mis-representation/fraud on the part of the defendants stands cogently proved by the plaintiffs.

26. The Hon'ble High Court of Gujarat in ***Amarsing Ratansing and another vs. Gosai Mohangir Somvargir and others, AIR 1972 Gujarat 74 (V 59 C 14),*** has held that in cases of gift or will where the executant of the same intended to convey and confer immediate title on a person subject to his right of resident for the life time and no right of revocation was reserved, the document is "gift" and not a "will". Relevant paras of the judgment are reproduced below:

> *"6. Applying the twin tests to the document Ex. 45, what we find is that the said document is engrossed on a stamp-paper of the erstwhile State of Baroda and it was registered with the Registrar of document, the suit property was given in gift to the plaintiff No. 3, but the said deceased Bai Andar reserved a right to reside in the said property till her lifetime. It was, therefore, further directed that the plaintiff No. 3 and his heirs or assignees were entitled to use and enjoy and to transfer the same by mortgage, sale, gift or otherwise after her death and at that time the other heirs of the executant would have no relation or concern with it. The plaintiff No. 3 further directed to mutate the suit property in the Municipals office after her death and the plaintiff No. 2 should pay the taxes thereafter. On these conditions the suit property was given in gift to the plaintiff No. 3 and in spit of this document, if any heir or person claiming interest caused any obstruction or raise any objection, the executant would at her cost and expense remove the said objection or obstruction. It was further directed that the documents constituting title in respect of the said property were to be collected by the plaintiff No. 3 after the death of Bai Andar. On considering the above gist of the document, it is very clear that the deceased Bai Andar intended to convey and confer the title on plaintiff No. 3 immediately subject to her right of residence for the lifetime. It was, therefore, nothing more than reservation of life interest in the property. The mere fact of reservation of life interest in property would not convert a deed of gift into a testamentary instrument. The other test. Viz, there is any right of reservation, impliedly or expressly, for revocation of an instrument, I have been able to find none and Mr. Shah has not been able to point out any relevant provision in the document, Ex. 45, from which it could be suggested, remotely, that there was an intention to reserve the right of revocation. It was, however, contended by Mr. Shah that if it is held that this is a sill, then right of revocation is implicit in it. I am of the opinion that the last contention does not reserve any consideration because in order to determine that the instrument is a testamentary instrument, the various tests as suggested by the High Court of Bombay. AIR 1947 Bom 49, should be satisfied and the two main tests were, whether the arrangement was to be effective in praesenti and whether there is any right of revocation express or implied. On both these tests Mr. Shah has not been able to satisfy me that the document. Ex. 45, was in nature of a will I am therefore, of opinion that both the learned Judges were right in holding that the document, Ex. 45, was not a will but a deed of gift.*
>
> *7. The second contention of Mr. Shah that even if it is assumed that Ex. 45 is a deed of gift, it was not validly and legally attested also should be rejected. In the first place, in the written statement the defendants have not raised this plea of want of proper and legal attestment of the document in question. No issue has been raised by the trial Court, secondly no material has been brought out in cross-examination of the attesting witness which would show that the attestation was not legal and proper, I have been taken through the evidence of attesting witness and I have not been able to find any material from which it could be said that the attestation by the witnesses was not made as required by Section 3 of the Transfer of Property Act. On the contrary the evidence of the attesting witness Chandulal Bapalal, Ex. 41, shows that the persons signing on behalf of the executant as well as the other attesting witness, viz. Chimanlal Shyamlal, had put their signatures in his presence. The other attesting witness Chimanlal Shyamlal*

has died and therefore, it was not possible for the plaintiffs to examine him. In the cross-examination nothing has been brought out which would show that the attestation was not according to the law. Both the Courts below have also found that the document was attested and executed. The learned trial Judge has further found from the evidence that the defendant No. 1 has admitted in his cross-examination that he knew that Bai Andar had made a will in favour of plaintiff No. 3 and, therefore, apart from the question; whether the nature of document was a gift or a will, it was found by the Court that the deceased Bai Andar had executed the document. According to Section 68 of the Evidence Act the necessity of examining an attesting witness would arise only when a document which is required by law to be attested is sought to be used in evidence and the execution thereof is questioned. Here, it has been found by the learned trial Judge that the defendant No. 3 and had admitted that such a document was in fact executed in favour of plaintiff No. 3. In that view of the matter, therefore, the second contention of Mr. Shah should fail."

The judgment is not applicable to the facts of the present case.

27. The Hon'ble High Court of Patna has held as under in ***Mst. Samrathi Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140,*** that the fact of the deed being handed over by the donor to the donee is sufficient evidence of his having accepted the gift and the acceptance of the said document is a relevant fact to prove the acceptance of the gift by him. In the judgment (supra) it has also been held that in second appeal matter relating to realm of fact, which was not raised earlier, cannot be permitted to be raised. Apt paras of the judgment are extracted below:

"7. Before proceeding to consider the various contentions raised by learned counsel appearing for the respective parties, I do not feel any difficulty to hold that the reason of the learned Munsif for holding that defendant No. 1 had, no right to execute the deed of gift in favour of the plaintiff as she was only a maintenance holder is unsustainable in law. In view of his own finding that defendant No. 1 was in adverse possession over the suit properties and had acquired a title thereby in her own rights, her status from a mere maintenance holder had changed, she having already perfected her title on that account. Accordingly, she was perfectly competent to deal with the properties in question in whatever manner she liked as the full owner of the same. The deed of gift executed by defendant No. 1 in favour of the plaintiff was, therefore, not correctly considered and appreciated. The only ground on which the said document was challenged by the defendants was fraud and coercion exercised on defendant No. I. In this court, Mr. Prem Lal, learned counsel appearing for the respondents, also invited my attention to the various recitals of fact in the said document, such as, the description of the plaintiff as the own daughter of defendant No. 1 and that she was living with her and nursing her which, according to the learned counsel, were not factually correct. Be that as it may, as already stated, the deed in question was not challenged by the defendants on these grounds at any stage. These are all matters relating to the realm of fact; and, if the defendants wanted to challenge the document on these materials, it was open to them to challenge this document on these grounds also and to establish as a fact that the testamentary disposition by defendant No. 1 was intended to take place and motivated due to the said factors. In this court, it is too late for them to urge these questions of fact for which no material was brought on the record.

8. Mr. Premlal, however, contended that the transfer by way of gift in favour of the plaintiff purported to have been made under the document (Ext. 5) was not complete as the same was not accepted by the plaintiff, and she herself had stated to this effect in the impugned document (Ext. D). It is true that a transaction of gift in order to be complete must be accepted by the donee during

the lifetime of the donor. The fact of acceptance, however, can be established by different circumstances, such as by the donee's taking possession of the property or by possession of the deed of gift alone. There are numerous authorities in support of the proposition that if a document of gift after its execution or registration in favour of the donee is handed over to him by the donor which he accepts, it should amount in law to be valid acceptance of the gift. In support of this proposition, Mr. J. C. Sinha relied upon a decision of the Judicial Committee in the case of ***Kalyanasundaram Pillai v. Karuppa Mooppanar****, (AIR 1927 PC 42). In this case, their Lordships approved the view of the Full Bench of the Bombay High Court in* ***Atmaram Sakharam v. Vaman Janardhan****, (AIR 1925 Bom 210) (FB) that where the donor of immovable property handed over to the donee an instrument of gift duly executed and attested, it would amount to the acceptance of the gift by the donee, and the donor had no power to revoke the gift even if the registration of the instrument had not taken place. This court also in* ***Ram Chandra Prasad v. Sital Prasad****, (AIR 1948 Pat 130) took a similar view and held that the fact of the deed being handed over by the donor to the donee was sufficient evidence of his having accepted the gift, and that the acceptance of the said document was a relevant fact to prove the acceptance of the gift by him. To the same effect is the view of the High Court of* ***Travancorc and Cochin in the case of Esakkimadan Pillai v. Esakki Amma,*** *(AIR 1953 Trav-Co 336). It is not necessary to multiply authorities in support of this proposition. From the above, discussion, it must be held that the deed of gift executed by defendant No. 1 in favour of the plaintiff was a valid and binding document resulting in a complete transfer of the interest of defendant No. 1 in respect of the suit properties to the plaintiff."*

The judgment is not applicable to the facts of the present case, as no new matter is raised by the in the present regular second appeal.

28. The Hon'ble High Court of Patna in ***Afsar Shaikh Devi vs. Parasuram Pandey and others, AIR 1975 Patna 140,*** has held it is question of fact where a person is in a position to dominate the will of another and procure certain deed by undue influence and the same cannot be reopened in second appeal, if decided in accordance with prescribed procedure. Separate pleadings qua "undue influence" are necessary and general allegation cannot spell out undue influence. Apt paras of the judgment (supra) are reproduced hereinbelow:

"15. While it is true that `undue influence', `fraud', `misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, r.2, of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court.

16. The High Court has tried to spell out a plea of undue influence by referring to paragraph 7 of the written statement in which the defendant inter-alia stated that he was "looked after and brought up by the plaintiff as his son and he became very much attached to the plaintiff and since his infancy till the middle of this year this defendant always lived with the plaintiff and used to treat him as his father helped him and looked after all his affairs." This paragraph, according to the learned Judge, contains "a clear admission of the intimate relationship between the two indicative of the position of dominating the will of the plaintiff by defendant No. 1".

17. *We are, with due respect, unable to appreciate this antic construction put on the defendants' pleading. All that has been said in the written statement is that the relationship subsisting between the plaintiff and the defendant was marked by love and affection, and was akin to that of father and son. Normally, in such paternal relationship, the father, and not the son, is in a position of dominating influence. The defendant's pleading could not be reasonably construed as an admission, direct or inferential, of the fact that he was in a position to dominate the will of the plaintiff. In spelling out a plea of undue influence for the plaintiff by an `inverted' construction of the defendants' pleading, the High Court overlooked the principle conveyed by the maxim secundum allegatae probata, that the plaintiff could succeed only by what he had alleged and proved. He could not be allowed to travel beyond what was pleaded by him and put in issue. On his failure to prove his case as alleged, the court could not conjure up a new case for him by stretching his pleading and reading into it something which was not there, nor in issue, with the aid of an extraneous document. Thus considered, the High Court was in error when by its judgment, dated October 16, 1963, it remanded the case to the first appellate Court with a direction to determine the question of undue influence "on material already on record."*

... ...

19. *It is well settled that a question whether a person was in a position to dominate the will of another and procured a certain deed by undue influence, is a question of fact, and a finding thereon is a finding of fact and if arrived at fairly, in accordance with the procedure prescribed, is not liable to be reopened in second appeal* ***(Satgur Prasad v. Har Narain Das, 59 Ind App 147 = (AIR 1932 PC 89); Ladli Parshad v. Karnal Distillery Co. Ltd., (2964) 1 SCR 270 = (AIR 1963 SC 1279).***

... ...

21. *The law as to undue influence in the case of a gift inter vivos is the same as in the case of a contract. It is embodied in s. 16 of the Indian Contract Act. Sub-section (1) of s. 16 defines 'undue influence' in general terms. It provides that to constitute 'undue influence' two basic elements must be cumulatively present. First, the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other. Second, the party in dominant position uses that position to obtain an unfair advantage over the other. Both these conditions must be pleaded with particularity and proved by the person seeking to avoid the transaction.*

22. *In view of this sub-section, the Court trying a case of undue influence of the kind before us, must, to start with, consider two things, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor? and (2) has the donee used that position to obtain an unfair advantage over the donor ? (Subhas Chandra v. Ganga Prasad). 1 SCR 331 at p. 334 = (AIR 1967 SC 878 at p. 880).*

23. *Sub-section (2) of s. 16 is illustrative as to when a person is considered to be in a position to dominate the will of the other. It gives three illustrations of such a position, which adapted to the facts of the present case, would be (a) whether the donee holds a real or apparent authority over the donor, (b) whether he stands in a fiduciary relation to the donor, or (c) whether he makes the transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.*

24. *Sub-section (3) contains a rule of evidence. According to this rule, if a person seeking to avoid a transaction on the ground of undue influence proves-*

(a) that the party who had obtained the benefit was, at the material time, in a position to dominate the will of the other conferring the benefit, and

(b) that the transaction is unconscionable, the burden shifts on the party benefitting by the transaction to show that it was not induced by undue influence. If either of these two conditions is not established the burden will not shift. As shall be disussed presently, in the instant case the first condition had not been established, and consequently, the burden never shifted on the defendant.

25. In Subhas Chandra's case (ibid), this Court quoted with approval the observations of the Privy Council in Raghunath Prasad v. Sarju Prasad, 51 Ind App 101 = (AIR 1924 PC 60) which expounded three stages for consideration of a case of undue influence. It was pointed out that the first thing to be considered is, whether the plaintiff or the party asking relief on the ground of undue influence has proved that the relations between the parties to each other are such that one is in a position to dominate the will of the other. Upto this point 'influence' alone has been made out. Once that position is substantiated, the second stage has been reached - namely, the issue whether the transaction has been induced by undue influence. That is to say, it is not sufficient for the person seeking the relief to show that the relations of the parties have been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. "More than mere influence must be proved so as to render influence in the language of the law, 'undue' (Poosathurai v. Kappanna Chettiar, 47 Ind App 1 = (AIR 1920 PC 65)). Upon a determination of the issue at the second stage, a third point emerges, which is of the onus probandi". If the transaction appears be unconscionable, then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

"Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of the parties. Were they such as to put one in a position to dominate the will of the other".

… … … … … …

28. Thus, even the slander shred in the plaint from which the High Court tried to spell out a whole pattern of fiduciary relationship between the parties and a position of dominant influence for Afsar, was torn and destroyed by the plaintiff himself in the witness-stand.

29. In the context of the first-stage consideration, the District Judge found on the basis of the evidence on record, that although the plaintiff was an old man-and he had intentionally, far overstated his age yet he was quite fit to look after his affairs. On this point, the District Judge accepted the version of the plaintiff's own witness (PW 7) which was to the effect, that the plaintiff himself yokes the bullocks, and unaided by anybody else, ploughs his lands. In the face of such evidence, the District Judge was right in holding that Ebad plaintiff, though old, was physically fit to carry on his affairs. There was no evidence to show that the mental capacity of the donor was temporarily or permanently affected or enfeebled by old age or other cause, so that he could not understand the nature of deed or the effect and consequences of its execution. The mere fact that he was illiterate and old, was no proof of such mental incapacity. None of the circumstances mentioned in sub-section (2) of s. 16, had been proved from which an inference could be drawn that the donee was in a position to dominate the will of the donor."

As mis-representation/fraud on the part of the defendants stands cogently proved by the plaintiffs, the judgment is not applicable to the facts of the present case.

29. The Hon'ble High Court of Madras in ***P. Saraswathi Ammal vs. Lakshmi Ammal alias Lakshmi Kantam, AIR 1978 Madras 361,*** has held that 'bargain is tainted by undue influence and it is only after particulars are made available and a reasonable proof thereof has been given, the onus would shift on the so called 'person of domination'. Until then the burden is on the complainant to establish it is so. The Court must scrutinize the pleadings and evidence to ascertain undue influence or coercion. Relevant paras of the judgment are reproduced hereinabove in extenso:

> *"11. The plea of undue influence as raised in the pleadings rests upon the following facts urged by the plaintiff. According to the plaintiff she came to understand that the defendants have taken undue advantage of the dominant position which they and the first daughter and the husbands of both the sisters occupied with reference to her and it was in that atmosphere she was compelled to execute the challenged sale deed. The second objection is that the consideration said to have been paid under the document is ridiculously low, the third contention is that the document is a sham one not intended to be acted upon. To further this contention, the plaintiff would allege that she was told that the mother was taking a loan and that she should attest the document and she believed her mother and signed the same. She would also add that the document on the face of it is unconscionable and gives the first defendant unfair advantage. But the telling irreconcilable part of it is that in the alternative, the plaintiff accepts the document partially and she is prepared to redeem the properties without payment of the consideration mentioned therein, if the Court ultimately holds that the money was lent under the document. She claims that she is not liable to pay any amount for such redemption, since the first defendant was in possession and enjoyment of the properties till the date of suit. In a case where a litigant intends to overlook and bypass a registered document under which prima facie certain rights have become vested and under which third parties have acquired indefeasible rights, then the challenging party should be in a position to give such particulars about such undue influence which should form the basis of her complaint. The primary ground on which the plea of undue influence is founded is based on relationship. It is axiomatic that mere proof of relationship however near it may be, is not sufficient for a Court to assume that one relation was in a position to dominate the will of the other. Such bonds of kinship which are universally felt should not be mistaken as equivalent to saying that one kinsman could unduly influence the other in the circuit of such bondage. Even if any advice is given it may be influence but not undue influence. The tie of relationship need not necessarily be used unwisely, injudiciously and unhelpfully so as to gain an unfair advantage by the relation who is advising the other relation. Particularly in a Hindu family a widowed mother, who would rather be fairly and affectionately inclined to an unmarried daughter would not make undue preferences in favour of a married one who has already been provided for and who was well set in life. The sentiment, the traditional features of a Hindu Home, the love and affection of a mother towards her natural and last child which is a always in one way unless there are very extraneous circumstances to assume otherwise should always prompt a Court to raise the reasonable presumption that any advice or influence which a parent brought to bear on his own child is not to gain an advantage for herself or to see that an unfair advantage is gained by another child of hers in preference to the challenging child. There is also one other important and salient feature which ought to be established on materials pleaded and acts established that the 'bargain is tainted by undue influence' and it is unconscionable that it could reasonably be said that the person to obtain unfair advantage for himself and so as to cause injury to the person sought relying upon his authority or aid. It is only after such particulars are made available and a reasonable proof thereof has been given, the*

onus probandi would shift on the so-called 'person of domination'. Until then the burden is on the complainant to establish it is so.

12. *In the instant case, the particulars given are not so appealing and telling. It is essential that in a case where fraud, undue influence or coercion is put at the forefront the complaining party should set forth the facts in full and give such essential particulars instead of making general allegations. That this is the legal requirement as provided for in Order 6, Rule 4, C.P.C. is reiterated by the Supreme Court in* ***Subhas Chandra v. Ganga Prosad*** ***(AIR 1967 SC 878)*** *. The Supreme Court said that the Court must scrutinize the pleadings to find out that a plea has been made out and that full particulars thereof have been given before examining Whether undue influence was exercised or not. In the light of this, the pleadings and the evidence let in should be scrutinized.*

13. *Before doing so, it would be convenient to refer to the plaintiff herself and her ability and capability. She had her early education in an Anglo Indian School and studied up to Pre-University Class in the Nirmala College, Coimbatore. She is, therefore, an educated lady and not an illiterate or a person, who could be said to be incapable of acting on her own. In cases where a person suffers from an infirmity or backwardness, then standards of proof regarding undue influence or coercion may be slightly different. The case cited by the learned counsel for the respondent in* ***Nibaran v. Nirupama (AIR 1921 Cal 131)*** *deals with the transaction of a Pardanashin lady. They divided the decisions on the subject under two groups as follows:*

> *"..... First, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in fiduciary character or in some relation of personal confidence; and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically".*

A fortiori therefore, in a case where the challenging litigant is capable and literate and the parties are parent and child, the Courts, must be doubly careful and would certainly demand strict proof of the misuse of confidence and influence said to have been exercised by the other party when the other party is none else than the mother. P. Ws. 1, 2 and 3 do not convincingly refer to any unfair practice indulged in by the mother when she joined with the plaintiff to sell the property to the sister of the plaintiff. P. W. 4, the plaintiff's father-in-law, does not even wisper about undue influence having been exercised by the mother or any other member of the family. He would only ask us to draw some inference from surrounding facts. He would say that Dr. Punnaivanam, the husband of the first defendant took active part in arranging the marriage of the plaintiff and that the husband chosen was according to the choice of the plaintiff herself and that considerable sums were spent for her marriage. It is in this background of total lack of particulars of undue influence that we should read the evidence of P. W. 5, the plaintiff herself. She admits that she might have read the document Ex. B-2. This necessarily means that she has read it, since there is no denial of it. Her case is that she was not aware that she was executing a sale deed. Her specific particulars which she gives in the witness box about the practice of undue influence are that her mother, the second defendant, her elder sister, the first defendant, and Punnaivanam, the husband of the first defendant, informed her that another family house had been brought to sale in Court auction and that in order to save the property she must sign the document. There is no corroboration about this extraordinary version. The first defendant as D. W. 6 speaking to the contrary would say that the property had to be sold in order to secure money for purpose of the marriage of the plaintiff

and since she was inclined to purchase the property she bargained for and fixed a fair price of Rs. 10,000/- and purchased the property under Ex. B-2. No doubt the mother whose act has been challenged and who is obviously in an embarrassing position, did not choose to get into the box. D. W. 5 is characterised by the lower court as a respectable person. He deposed that Ex. B-2 was read over and after it was so read over only, the plaintiff signed Ex. B-2, But the trial Judge thought that D. W. 5 should have expressed an opinion besides having spoken the truth. He was of the view that D. W. 5 should have specifically stated that the plaintiff signed the document after knowing the true nature of it. We are unable to share the view of the trial court in this behalf. When once a person placed in the position of the plaintiff who is not an illiterate and who could be said to have such experience in life and matters to understand things it is very difficult to infer that the plaintiff has discharged her burden. She would say in the witness box that she signed because she wanted to avoid a sale of another property of the family. She improves her case in the witness box so as to satisfy the legal requirement about the particulars of undue influence by saying that she believed her mother and her elder sister and signed the document. She would pretend that she signed as a witness to some document. She also would say that there was no necessity for sale, since there were family jewels and other monies of her father which was available for celebrating her marriage. The document is of the year 1964. Her mother was sending her regularly some amounts by way of pocket money and there was therefore no ill-feelings or any difference of opinion in the family. It is only in 1969, when she was in Coimbatore, she came to know that her property has been sold. Excepting for this evidence that it was P. W. 3 who told her about it no other speak about it, P. W. 3 was examined on 23-3-1971 and P. W. 5 was examined on 24-3-1971. There is no consistent version which is acceptable even as regards the information said to have been given by P. W. 3 in 1969. P. W. 3 would not specifically refer to the meeting at Coimbatore in 1969, whilst P. W. 5 the plaintiff refers to it very vaguely. In the suit notices which were exchanged under Exs. A-4 and A-2 there is no specific reference to the plaintiff having been unduly influenced by her mother. One other important feature Which has to be borne in mind in the instant case is that the plaintiff should be deemed to have understood the challenged deed and signed it. The plea of non est factum is therefore not available to her. She says "PADITTHU ERUKKALAM" but she does not say " PADIKKAVILLI". The fair assumption is that she read it, understood it and signed it. To quote the observations of the Privy Council in ***Martin Cashin v. Peter j. Cashin (AIR 1938 PC 103):***

"In a case where the person executing the deed is neither blind nor illiterate, Where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of non est factum is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him not because he has read it or understands it, but because he has chosen to execute it".

Mr. Thiagarajan referred to various decisions. Narayanadoss Balakrishna Doss v. Buchrai Chordia Sowcar (53 Mad LJ 842) : (AIR 1928 Mad 6); Rama Patter v. Lingappa Gounder (69 Mad LJ 104) : (AIR 1935 Mad 726); Mannankatti Ammal v. Vaiyapur Udayar (1961-2 Mad LJ 367); Abdul Malick Sahib v. Md. Yousuf Sahib and other cases to show that this is a case where the plaintiff should be deemed to have been unduly influenced. In all those cases the following principles were laid down.

"(1) Where confidential relations exist, those standing in such relations cannot entitle themselves to hold benefits unless they can show that the persons who have conferred the benefits had competent and independent advice. In this case,

neither does the age nor the capacity of the person conferring the benefit affect the principle".

"(2) Age and capacity are considerations which may be important in cases where no confidential relation exists".

There can be no quarrel relating to such accepted and general proposition. But each case has to depend upon its facts. In the instant case, the parties are parent and child. The document was executed at a time when the marriage negotiations of the plaintiff were going on. According to us, the plaintiff understood that it was sale of her property for consideration. The story that there were other moveable properties such as jewels and cash which ought to have been sufficient for the conduct of her marriage though spoken to vaguely has not been established. No such evidence has been placed before us either. The normal circumstance of securing competent and independent advice would not enter for consideration in this case because it was all arranged in a family council in which there was no distrust or mistrust as between the one and the other. What was sold did not belong to the plaintiff at all on the date of sale. She had only a bare right of expectancy; it may be a vested right. The subject-matter of the sale was not fully appreciated by the trial court. Both life interest of the mother as well as the ultimate remainder vested in the plaintiff were act (sic) of the second defendant after freely exercising her independent will and mind. The case relied on by Tyagarajan in Lancashire Loans Ltd. v. Black (1934-1 KB 380) which, of course, is a case as between a daughter and a mother, is certainly distinguishable. There, the daughter, who did not understand the transaction, signed the document at the request of her mother. The only advice which the daughter received was that of a Solicitor, who also acted for the mother and the money-lenders, who duped the daughter and who prepared the documents. It was in those circumstances the Court of Appeal held that the daughter was under the undue influence of her mother when she entered into the transaction in question and as the money-lenders had notice of the facts which constituted undue influence on the part of the mother, the transaction must be set aside. The facts of our case are entirely different.

14. *Learned counsel for the first respondent rests his case in the alternative on the inadequacy of consideration which was more or less the sole ground on which the lower Court found a case of undue influence. The Court thought that the price paid under Ex. B-2 was ridiculously low. We have already referred to the fact that the plaintiff came to Court with inconsistent plea and she was not able to substantiate her case of undue influence, by concrete evidence. The sale is both the life estate and the vested remainder. But the lower court did not have this in mind and went on evaluating the property on some uncertain evidence regarding the income which it fetched and came to the conclusion that the price paid was ridiculously low, and therefore, the document should be set aside. Ex. A-17 dated 3-3-1965 furnished data with reference to some other property but said to be similar. This was proved by P. W. 2, who asserts that the suit land would fetch an annual rent of Rs. 5,000/-. Reliance is also placed on Ex. A-37 which is a diary said to have been written by the second defendant. Apart from the fact that this diary appears to be a book, which cannot be relied upon in a Court of law, the entry therein does not show that the amount mentioned therein related to one year's period only. But according to the Court below Ex. A-41 dated 1'4-12-1950 and Exs. A-60 dated 25-1-1962 and A-61 provided clinching evidence about the income. The mother was a party to Exhibits A-60 and A-61. The lower Court accepted the materials furnished under Exs. A-41, A-60 and A-61 and came to the conclusion that the annual rent yield from the property would be about Rs. 3,500/- to Rs. 4,250/-. Prima facie it appears that a sale of a property for a sum of Rs.*

10,000/- when its annual yield is in the range of Rs. 3,000/- to Rs. 4,000/-is not a fair transaction. But as we said, the second defendant, who is a party to Ex. B-2 had a life-interest over the property and she was selling her life-interest also under it. The second defendant is still alive. The document is of the year 1964, Even now she is reported to be hale and healthy. For six years, therefore, that is, six years before the suit, she lost her annual income of Rs. 4,000/- subsequent to the institution of the suit, she has lost another like sum. In cases where it is necessary to take subsequent events into consideration, the Court is not powerless to view those events also and weigh the reality of the situation or the equity of the bargain. If the mother has lost Rs. 48,000/- so far which ought to form part of the consideration, then the property should be deemed to have been sold for a sum of Rs. 60,000/- in 1964. This is not an unfair price even if the annual yield was about Rs. 4,000/-. This was not borne in mind by the learned Judge. The lower Court apparently was of the view that it was the plaintiff and the plaintiff alone who was entitled to the property on the date of sale and it is in that light, it considered the issue whether the price paid was ludicrously low. The plaintiff's case is that the property could have fetched only a sum of Rs. 40,000/-. Even on the date of suit, the consideration which should be deemed to have passed under the sale was very near that amount. But this is not all. The entirety of the transaction must be taken into consideration and the necessity for the sale, are all factors which should necessarily be borne in mind before a transaction could be set aside on the ground that the price paid therein is so low that it could be said to have been tainted by undue influence. In A. S. No. 644 of 1972 this Division Bench held :

"When once it is proved that the properties in question were sold for a consideration by the vendor without being influenced either by coercion or by undue influence then the question as to why he had sold the property may not loom large. More so in the instant case when the father of the vendor himself had attested the said document ... ..."

For the above reasons, we are unable to share the view of the trial court that Ex. B-2 should automatically fail and be held as an inoperative document on the only ground that prima facie the consideration is not adequate.

... ...

16. On the ground that what was sold was the life-interest and the ultimate remainder of the plaintiff in the property and that the price, therefore, paid therein cannot be said to be inadequate, for the mother parted with her life-interest, the value of which is considerable and on the ground that the mother cannot be said to have exercised any undue influence over her daughter and lastly on the ground that the suit itself should be held to be barred by limitation, we accept the dismissal of the suit made by the court below and would also hold that the plaintiff has failed to prove that Exhibit B-2 has to be set aside or cancelled on the ground that her mother or any of her near relations unduly influenced her to be a party to it."

The above referred judgment is also not applicable to the facts of the present case, as the alleged gift deed, Ex. DA, was executed by Raghu Ram (deceased original plaintiff) presuming that the same is a document giving effect to private family partition and when he came to know about the mis-representation/fraud committed by the defendants on him, he immediately maintained a suit by engaging an Advocate.

30. The Hon'ble High Court of Allahabad in ***Smt. Munni Devi vs. Smt. Chhoti and others, AIR 1983 Allahabad 444,*** has held that promise is not enforceable in law where a gift deed of property executed by mother in favour of only daughter with promise by daughter of being looked after and maintained throughout her life. Apt para of the judgment is reproduced hereinbelow:

"7. The plaintiff-respondent's allegation that the defendant-appellant was residing with her and was solicitous of her comfort and assured to look after her and maintain her throughout her life was probably true, for the defendant-appellant was the plaintiff-respondent's only daughter, so too the desire of the defendant-respondent to settle her property on the defendant-appellant by way of gift-deed which was executed on 6th Dec. 1963. There was nothing unnatural or improbable in the plaintiff-respondents' expectation that in case of need the defendant-appellant would look after her and maintain her though at the same time the plaintiff-respondent hoped that she would never have to look to her daughter for maintenance and for that purpose she had four bighas of land reserved with her. It, however, appears that some two years before the suit the defendant-appellant shifted to her husband's place. Probably, that was the proper thing for her to do. But the plaintiff-respondent transferred the remaining four bighas of land to her brother. It may be that her brother got that sale-deed executed by some sort of undue influence or it may be that the plaintiff-respondent thought that that was the best thing for her to do. Nevertheless, this act of the sale of the remaining property by the plaintiff-respondent to her brother seems to have annoyed the defendant-appellant, at any rate her husband and that seems to have led to the litigation. The facts so far did not admit of much controversy. The question is of their legal effect and the rights of the parties. The plaintiff-respondent undoubtedly had the right to sell off the remaining four bighas of land to whomsoever she pleased. That sale could not detract from her right to maintenance against the defendant-appellant in case she had any such right in law. So far as the plaintiff's claim for cancellation of the gift-deed was concerned, that was clearly barred by limitation. Under the circumstances, the only claim that could properly be considered by the Court was the plaintiffs claim for maintenance that was made in the alternative. The foundation of that claim is to be found in S. 20 of the Hindu Adoptions and Maintenance Act, 1956. The assurance or the promise, which the plaintiff might have had or might have believed to have had from the defendant-appellant of being looked after and maintained throughout her life when she made the gift is not enforceable as such in law, because the gift must have been made on account of natural love and affection and not in consideration of the said assurance or promise."

The judgment is applicable to the facts of the present case.

31. The Hon'ble High Court of Karnataka in ***Savithramma vs. H. Gurappa Reddy and others, AIR 1996 Karnataka 99,*** has held allegation of fraud and misrepresentation are high allegations and it can be rated on par with criminal trial. Relevant para of the judgment (supra) is extracted below:

"8. In need to dispose of this aspect of the matter which 1 propose to do on a very clear cut consideration. The position that emerged was that after the death of Kalappa Reedy, it was necessary that the legal heirs be brought on record. The wife and the sons were infact impleaded and it is true that the remaining family members were not impleaded, particularly the four married daughters. The position would have been entirely different if the remaining family members were impleaded and only the present applicant was not in which case there might have been some basis for the allegations that have been made. Furthermore, what needs to be stated is that the matter came to be negotiated and it is impossible for any court to attribute dishonesty, mala fides or any other such imputations to the parties in the absence of very strong and cogent material. To my mind, had the matter been compromised in a manner whereby only the land belonging to the present applicant was conceded to Gurappa Reddy, there might have been some warrant for the allegations. On an examination of the facts, I find that an even larger portion of the land belonging to the other heir has been made a part of the

compromise. This clearly indicates that there was neither any hostility, ill will nor any form of involvement but that the negotiation for whatever it was worth, was carried on and that it was according to the best judgment of the parties who were before the Court at that time that the compromise was carved out and recorded. It is a well settled law that even within the province of civil litigation when an allegation of misrepresentation or fraud is made, that the level of proof required is extremely high and is rated on par with a criminal trial. On the basis of the material before the Court here, it would therefore be impossible to uphold the charge that the compromise decree stood vitiated on grounds of either misrepresentation or fraud. To my mind, therefore that contention cannot be upheld."

In the case in hand, the allegation of mis-representation/fraud has been sufficiently proved by the plaintiff without any doubt, therefore, the judgment is not applicable to the present case.

32. The Hon'ble High Court of Himachal Pradesh in ***Upasna & others vs. Omi Devi, 2001(2) Current Law Journal (Himachal Pradesh) 278,*** document of gift deed has been found to be valid and proper. Apt text of the judgment is as under:

"*17. …. … … … …the allegation of fraud, coercion and undue influence could not be proved by the plaintiffs and as such both the Courts below have rightly held that the plaintiffs have failed to prove that the gift deed was as a result of fraud, coercion and undue influence. The possession of the land in dispute was given to the defendant and the mutation of entry in the revenue record in her name was made by the Patwari in the presence of Beli Ram during his life time. The execution of the gift deed was the personal right of the donor and since Beli Ram had not assailed the gift made by him in favour of the defendant during his life time, the plaintiffs have failed to establish that the donee had not rendered any service to the donor during his life time. The gift has been validily made by the donor in favour of the donee voluntarily and with his free will and accepted by the donee it cannot be said that the gift was induced by undue influence under Section 16(2) & (3) of the Indian contract Act, 1872 and was as a result of fraud as defined under Section 1 of the Act. The ratio of the judgment in Ladli Parshad Jaiswal vs. The Karnal Distillery Co., Ltd. Karnal & ors.. Air 1963 Supreme Court 1279 strongly relied on by the learned counsel for the plaintiffs in my view does not advance the case of the plaintiffs that the gift in question was as a result of undue influence under S. 16(2) & (3) of the Contract Act, 1872. In Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib & ors., AIR 1967 Supreme Court 878, it has been observed that law under Section 122 of the Transfer of Property Act, 1882 as to undue influence is the same in case of a gift inter vivos as in case of a contract. It has further been held that the court trying a case of undue influence under Section 16 of the Contract Act, 1872 must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these issues a third point emerges, which is that or the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. The judgment further proceeded to observe that merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. In this view of the matter, as noticed hereinabove, the plaintiffs have miserably failed to establish that the gift deed was executed by donor in favour of the donee under undue influence or fraud. … …*

In the present case, the plaintiffs have proved on record that gift deed, Ex. DA, was the result of mis-representation/fraud, therefore, the judgment is of no help to the defendants.

33. The Hon'ble High Court of Himachal Pradesh in ***Shri Kripa Ram and others vs. Smt. Maina, 2002(2) Shimla Law Cases 213,*** has held there is presumption of correctness of endorsement on a document. Relevant paras of the judgment are extracted hereunder:

> *"10 Section 60 of the Registration Act specifically provides that certificate endorsed on the document, registered by the Registrar, shall not only be admissible in evidence for the purpose of proving that document has duly been registered in the manner provided under the Act but also that the facts mentioned in the document referred to in Section 59 have taken place as mentioned therein.*
>
> *It is now well settled that presumption of due execution of a document arises from the endorsement of the Sub Registrar under Section 60 of the Act. As far back as in 1928 Privy Council in Sennimalai Goundan and another v. Sellappa Goundan and others, AIR 1929 Privy Council 81, interpreting the provisions of Section 60 (2) read with Section 115 of the Evidence Act held that where a person admits execution before the Registrar after the document has been explained to him, it cannot subsequently be accepted that he was ignorant of the nature of transaction. In that case, the plaintiff alleged that his father and brothers, with an intention of defrauding the plaintiff of his legitimate share in the family properties, entered into a fraudulent collusive partition. The trial Court found that plaintiff's case was proved and he decreed the suit. In appeal, it was held that the plaintiff failed to make out the alleged fraud and allowed the appeal. The decree of the trial Court was set aside. The Subordinate Judge had found that the partition was unequal because the land allotted to the plaintiff was less than allotted to other brothers. It was found that contemporaneously with the partition, some land that fell into the share of plaintiff Karuppa were conveyed to his second wife Nachakkal by a registered sale deed. Nachakkal gave evidence that the transaction was bogus, as she never paid the consideration for the sale though she admitted execution of the sale deed before the Registrar. Her story that she was ignorant of the nature of the transaction, it was held, cannot be accepted as she had admitted the execution of the sale deed before the Registrar.*
>
> *… … … … …*
>
> *13. A Single Judge of this Court in Rewat Ram Sharma v. Munish Ram (RSA No. 242 of 1994) decided on December 13, 2001, relying upon Kanwarani Madna Vati, Sennimalai Goundan (supra) and Dinesh Chauhan Chandra Guha v. Satchindannanda Mukhereji, AIR 1972 Orissa 235, held that admission of signatures on the endorsement made by the Registrar by an executant of the document in the absence of anything else to the contrary, would lead to the inference that the plaintiff was present before the Sub Registrar when the document was presented for registration and the onus to rebut the presumption under Section 60(2) of the Registration Act was heavily on the plaintiff which the plaintiff did not discharge. In that case, the case of the plaintiff was that he had borrowed some money from the defendant and had agreed to mortgage his property in favour of the defendant. The plaintiff was taken to the Tehsil Headquarters for the purpose of execution of the mortgage deed. His signatures were obtained by the defendant by making him to believe that it was a mortgage deed and later on, the defendant proclaimed that the property has been gifted to the defendant and plaintiff realized that instead of mortgage deed, gift deed was executed from him fraudulently by the defendant. He repudiated the gift deed and filed a suit that the gift deed was a result of misrepresentation, fraud and undue influence on the part of the defendant. It is in this context that the Court held that*

Section 60(2) of the Evidence Act raises presumption as to the correctness of the endorsements made on the document by the Registering Officer."

Again, the judgment referred hereinabove is of no help to the defendants as the alleged gift deed, Ex. DA, has been found to be tainted with mis-representation/fraud.

34. The Hon'ble Apex Court in ***N.V. Srinivasa Murthy vs. N.V. Gururaja Rao and others, (2005) 10 Supreme Court Cases 566,*** has held that jurisdiction under Section 100 can only be exercised in second appeal on the basis of said question of law framed at the time of admission or modified or substituted later, then the appeal is to be heard and decided only on the basis of such duly framed substantial question of law. As the mis-representation/fraud is a question of fact and now of law, so the judgment referred to hereinabove is of no help to the defendants.

35. In ***Jeet Kumar and another versus Jai Chand and another, 2013 (3) Him L.R. 1463,*** *this Hon'ble High Court held as under:*

"24. The learned Single Judge ***in Subramanian Asari and another*** *Vs.* ***Kanni Ammal Velamma****, A.I.R. 1953 T.C. has held that to attract Section 126 of the Transfer of Property Act, the conditions to be satisfied are: (1) that the donor and the done must have agreed that the gift shall be suspended or revoked on the happening of a specified event; (2) such event must be one which does not depend on the will of the donor; (3) that the donor and the done must have agreed to the condition at the time of accepting the gift and (4) that the condition should not be illegal or immoral and should not be repugnant to the estate created under the gift. The learned Single Judge has held as under:*

"2. It is not disputed that if an absolute and indefeasible estate was created in favour of the done under Ex. II, the sole heir to succeed to that estate on the death of the done is the plaintiff. But it is argued on behalf of the appellants that the documents read as a whole will show that only a life estate was intended to be created in favour of the done. This contention does not gain any support from the clear and definite expressions used in Ex.II. The donor has unequivocally stated in the document that he is transferring all his right over the property to the done and that she is being put in possession of the property forthwith. It is also stated that from the date of the gift the done is to enjoy the property for ever with absolute powers to deal with the same and that she is to obtain Pattah for the property in her own name and to pay the tax due in respect of the property. No rights of any kind have been reserved in favour of the donor. Thus there is no scope for contending that only a life estate was created in favour of the done. On the other hand, it is clear that the demise under Ex. II was absolute. The gift was accepted by the done and she obtained Pattah for the property and continued to pay the tax in her own name. Reference to these facts is made in the hypothecation bond Ex. I to which the donor was also a party and as such it is clear that the gift came into effect.

All the same it is seen from the gift deed Ex. II that after conveying the property absolutely to the done, the donor has inserted a clause in the document intending to regulate the devolution of the property on the death of the done. That clause is to the effect that on the death of the done, the property shall not devolve on any of her heir but that it is to revert back to the donor himself. It is argued on behalf of the appellants that this provision amounts to a condition subsequent and that a demise subject to such a condition can be validly made. Section 126, Transfer of Property Act, is relied on in support of this contention. That section lays down that "the donor and the done may agree that on the happening of any specified

event which does not depend on the will of the donor, a gift shall be suspended or revoked."

In order to attract this provision, the conditions to be satisfied are: (1) that the donor and the done must have agreed that the gift shall be suspended or revoked on the happening of a specified event, (2) such event must be one which does not depend on the will of the donor, (3) that the donor and the done must have agreed to the condition at the time of accepting the gift and (4) that the condition should not be illegal or immoral and should not be repugnant to the estate created under the gift."

25. *The learned Single Judge in **M. Venkatasubbaiah** Vs. **M. Subbamma and others**, AIR 1956 Andhra 195 has held that gift cannot be revoked for neglecting to maintain donor under Section 126 of the Transfer of Property Act. The learned Single Judge has held as under:*

"9. The present case cannot be brought within the ambit of the section firstly for the reason that there is no agreement between the parties that the gift should be either suspended or revoked; and secondly this should not depend on the will of the donor. Again, the failure of the donee to maintain the donor as undertaken by him in the document is not a contingency which could defeat the gift under Ex. A-4.

All that could be said is that the default of the done in that behalf amounts to want of consideration of a document of gift for failure of consideration. If the donee does not maintain the donor as agreed to by him, the latter could take proper steps to recover maintenance etc. It is not open to a settler to revoke a settlement at his will and pleasure and he has to get it set aside in a Court of law by putting forward such pleas as bear on the invalidity of gift deed."

29. *In **Mst. Samrathi Devi** Vs. **Parasuram Pandey and others** AIR 1975 Patna 140, the learned Single Judge has held that handing over a gift deed to done amounts to valid acceptance of gift. The learned Single Judge has held as under:*

"8. Mr. Premlal, however, contended that the transfer by way of gift in favour of the plaintiff purported to have been made under the document (Ext. 5) was not complete as the same was not accepted by the plaintiff, and she herself had stated to this effect in the impugned document (Ext. D). It is true that a transaction of gift in order to be complete must be accepted by the donee during the lifetime of the donor. The fact of acceptance, however, can be established by different circumstances, such as by the donee's taking possession of the property or by possession of the deed of gift alone. There are numerous authorities in support of the proposition that if a document of gift after its execution or registration in favour of the donee is handed over to him by the donor which he accepts, it should amount in law to be valid acceptance of the gift. In support of this proposition, Mr. J. C. Sinha relied upon a decision of the Judicial Committee in the case of Kalyanasundaram Pillai v. Karuppa Mooppanar, (AIR 1927 PC 42). In this case, their Lordships approved the view of the Full Bench of the Bombay High Court in Atmaram Sakharam v. Vaman Janardhan, (AIR 1925 Bom 210) (FB) that where the donor of immovable property handed over to the donee an instrument of gift duly executed and attested, it would amount to the acceptance of the gift by the donee, and the donor had no power to revoke the gift even if the registration of the instrument had not taken place. This court also in Ram Chandra Prasad v. Sital Prasad, (AIR 1948 Pat 130) took a similar view and held that the fact of the deed being handed over by the donor to the donee was

sufficient evidence of his having accepted the gift, and that the acceptance of the said document was a relevant fact to prove the acceptance of the gift by him. To the same effect is the view of the High Court of Travancorc and Cochin in the case of Esakkimadan Pillai v. Esakki Amma, (AIR 1953 Trav-Co 336). It is not necessary to multiply authorities in support of this proposition. From the above, discussion, it must be held that the deed of gift executed by defendant No. 1 in favour of the plaintiff was a valid and binding document resulting in a complete transfer of the interest of defendant No. 1 in respect of the suit properties to the plaintiff."

30. *The learned Single Judge in **Kasi Ammal** Vs. **Vellai Gounder and another** 1980 Vol. 2 Madras Law Journal 232 has held that first requirement is that a gift of immovable property should be made by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses and the second requirement is that there must be acceptance of the gift by the done. The learned Single Judge has held as under:*

"2. Under Section 123 of the Transfer of Property Act, a gift of immovable, property should be mad(c) by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. The second requirement is there must be acceptance of the gift by the donee. In the instant case there is no dispute regarding the compliance of the first condition. Regarding the compliance of the second condition viz., acceptance of the gift by the donee, the plaintiff herein, the appellate Court has held, that there, is no acceptance of the gift by the donee and even the original of Exhibit A-1 was not handed over to her. Exhibit A-4 recites: (Editor: The text of the vernacular matter has not been reproduced. Thus Exhibit A-1 clearly recites that the possession of the property covered under it has been handed over to the donee, the plaintiff herein. Apart from the recitals in Exhibit A-1, P.Ws. 2 and 3, the attestors to Exhibit A-1 have also given evidence that plaintiff has accepted the gift under Exhibit A-l. Thus the twin requirements of valid execution of the gift deed and acceptance of the gift by the decree, are clearly established by the evidence on record. Exhibit A-1 shows that it is an irrevocable deed and the plaintiff's husband Seetharama Goundar has not reserved any power of revocation under Exhibit A-l. On the other hand, Seetharama Goundar has clearly stated in Exhibit A-1, that he would not revoke the settlement deed (Exhibit A-l) for any reason whatsoever. The recitals in Exhibit A-1, thus clearly establish that it is an unconditional, absolute gift in favour of the plaintiff. When there is a valid gift under Exhibit A-1 and the property has vested in favour of the plaintiff, Seetharama Goundar is not competent to execute Exhibit B-5 and revoke the settlement deed which he had executed under Exhibit A-1. Exhibit B-5, is therefore an invalid instrument and has been rightly ignored as not affecting the rights of the plaintiff to the suit property which she got under the original of Exhibit A-l."

As noticed hereinabove, in this case, the donee, i.e. Jai Chand has also signed the gift, i.e. Ex. PW2/A.

32. *In **Smt. Shakuntla Devi** Vs. **Smt. Amar Devi**, AIR 1985 Himachal Pradesh 109, the Division Bench of this Court has held that the gift not based on fraud, undue influence or misrepresentation, the cancellation of the same is not valid. Their Lordships have further held that the acceptance of a gift can be either expressed or implied. The Division Bench has held as under:*

"6. It is contended by Shri D.D. Sud, vice Shri Chhabil Dass, learned counsel for the appellant that the gift made by Shri Sansar Singh being void, he as also his legal representatives were entitled to redeem the

mortgage. It is stated by him that the gift was rightly cancelled by Shri Sansar Singh as the donees failed to fulfil the conditions contained in the gift deed. It is also urged that the possession of the property was not delivered to the donees as also the gift was not accepted by them. He has placed reliance on a decision in Mt. Anandi Devi V. Mohan Lal, AIR 1932 All 444. It is convenient to extract relevant observations made in the said decision:

".....We accept the findings of the learned Judge as regards the value to be attached to the oral evidence called on behalf of the plaintiff and his finding that an express acceptance by Mt. Kapuri has not been proved. The learned Judge however merely finds acceptance not proved, because he disbelieves the actual case set up by the plaintiff as regards express acceptance. He never directed his mind to the vital question as to whether there was proof of acceptance within the meaning of S. 3, Evidence Act. It has been argued here by counsel for the respondents that the only acceptance under S. 122, T.P. Act, contemplated by that section is an express acceptance. We however do not find anything in the section to limit acceptance to an express acceptance, and we must take it that acceptance may be either express or implied. As the learned Judge has not considered the question of an implied acceptance based upon circumstantial evidence at all, we must consider it. It has been argued by counsel for the appellant that the law in India based upon S. 122, T.P. Act, is similar to the Common Law of England with regard to acceptance. There is no doubt that in England the law is that acceptance of a gift will be presumed unless dissent is shown. That would mean that in this case, it would be for the defendants to prove that Mt. Kapuri had dissented from the gift. Lord Halsbury in his Laws of England (Vol. 15, P. 418) says:

"Express acceptance by the done is not necessary to complete a gift. It has long been settled that the acceptance of a gift by the done is to be presumed until his dissent is signified, even though he is not aware of the gift, and this is equally so although the gift be of an onerous nature or of what is called an onerous trust."

This rule of law has been applied to India by a Single Judge of the Patna High Court in the case of Muhammad Abdul Nayeem V. Jhonti Mahton. We however are not prepared to go so far. If S. 122 stopped short at saying that the gift must be accepted by or on behalf of the done as it would be natural for any person to accept a non-onerous gift, we might be prepared to hold that the English law applied in India."

The aforesaid observations in the above quoted decision do not help the appellant. The acceptance of a gift can be either express or implied. In fact, there is no evidence on record to show that the donees had dissented from accepting the gift."

33. *The learned Single Judge of this Court in **Mool Raj** Vs. **Jamna Devi and others**, AIR 1995 Himachal Pradesh 117 has held that failure of donee to render services to donor or to maintain donor not specified to be a condition for revocation, in gift deed, the same cannot be revoked being not conditional. The learned Single Judge has held as under:*

"27. Thus, the present gift deed, whether considered as an outcome of custom or of general law, cannot be said to be revocable one on the ground that it was executed for past and future services. When no specific condition for revocation has been made in the deed itself in the event of

failure of the donee to render services to the donor or maintain the donor, the gift cannot be revoked.

29. As held above, the gift under reference was not a conditional one and could not be revoked. But on the other hand the donor could ask for maintenance from the defendants. To the donor to get maintenance through the Court would amount to perpetuate her agony in case the donees were not rendering any service and were not maintaining donor. The donees in the present case are none else but donor's husband's brother's sons. It is expected of them to look after the donor who happens to be their uncle's wife. Under the circumstances, it would be essential, in the interests of justice, to direct the donees to maintain and look after the donor properly throughout her life. Such an obligation, otherwise also rested upon the defendants and their father and this obligation becomes legal when the defendants have bound down themselves to render services to the donor throughout her life on account of the averments made in the gift deed. The defendants, as such, are directed to render proper services and maintain the plaintiff-donor throughout her life failing which the donor shall be at liberty to take such legal action against the donees as would be permissible to her under the law."

34. Their Lordships of the Hon'ble Supreme Court in ***Khushal Chand Swarup Chand Zabak Jain, Jalgaon*** *Vs.* ***Sureshchandra Kanhaiyalal Kochar and another****, 1995 Supp. (2) Supreme Court Cases 36 have held that once execution of the gift deed is admitted, due execution under Registration Act is presumed to have been done, it being a registered document. Their Lordships have further held that the testator having divested herself of her title to the property by gift in favour of respondent after due execution and registration of the gift deed, subsequent will executed by her in favour of the appellant would not confer any right in the bequeathed property on the appellant. Their Lordships have held as under:*

"4. Section 68 of the Evidence Act prescribes proof of execution of the document required by law to be attested. It says that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there by an attesting witness alive and subject to the process of the Court and capable of giving evidence: Provided that it shall not be necessary to call the attesting witness in proof of execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, unless its execution by the person by whom it purports to have been executed is specifically denied.

5. It is seen from the pleadings that the execution of the document has not been denied. On the other hand the recitals in the Will executed by Raja Bai establish that she admitted the execution. However, she stated therein that it has been obtained by fraud and misrepresentation. Fraud and misrepresentation have been specifically dealt with and rejected by the learned Single Judge of the High Court as well as by the Division Bench. Once the execution of the document has been specifically admitted, the due execution under the Registration Act is presumed to have been done as the gift is admittedly a registered document. Moreover in this case, as seen from paragraph 7 of the judgment of the High Court, one attesting witness has been examined on behalf of the appellant who admitted in the cross-examination that he attested the document. Son of another attesting witness and also the son of the scribe of the document have also been examined on behalf of the respondent. That evidence was considered and

the High Court found that the document has been duly proved. Under these circumstances it must be concluded that due execution of the gift deed has been proved by the respondent. It is no doubt clear from the evidence that Raja Bai retained the possession of the property. Obviously the beneficial enjoyment of the property has been retained by her for her lifetime. Under these circumstances Raja Bai having divested (sic herself) of her title to the property after due execution and registration of the gift deed, she has been divested of her right and interest except her beneficial right to enjoyment of the property during her lifetime. Therefore, the Will executed in favour of the appellant is a document which does not confer any right in the bequeathed properties on the appellant and is inconsequential. The appeal is, therefore, dismissed with costs."

35. *In **Kamakshi Ammal** Vs. **Rajalakshmi and others,** AIR 1995 Madras 415 the Division Bench has held that when there is a specific recital in deed that possession is given, the presumption of acceptance arises. The Division Bench has held as under:*

"21 Further, paragraphs 3 and 4 of the plaint specifically says that Pavunambal accepted the settlement. Further, the plaint also says that the original settlement deeds are also filed along with the plaint. As against this particular allegation regarding the original settlement deeds being filed by the plaintiff, the written statement only states that the original settlement deeds were always with the 7th defendant and they were never in the custody of Pavunambal or plaintiff or defendants 1 to 6. In other words, there was no allegation a all in the written statement that the original settlement deeds were stolen by the plaintiff's father (1st defendant) from the 7th defendant. The suggestion comes in only when PW 1 is examined. Further, DW 1, the 8th defendant does not at all depose so. We cannot accept the story of plaintiff's father or the plaintiff stealing away the original settlement deed from the 7th defendant. Once that story is not acceptable there could be the necessary inference that the original settlement deeds were given over to the donee Pavunambal at the time of the gifts. In Samrathi v. Parasuram (AIR 1975 Pat 140) also it has been held, relying on Kalyana-sundaram Pillai v. Karuppa Moopanar (AIR 1927 PC 42) and Atmaram Sakharam v. Vaman Janardhan (AIR 1925 Bom 210 (FB)), that the fact of the gift deed being handed over by the donor to the donee, was sufficient evidence of his having accepted the gift. Learned counsel for the appellant was vehemently contending that despite the settlement deed, the 7th defendant alone continued to possess and enjoy the property and that there was also no mutation of names in the Municipal register pursuant to the settlements. According to him, from this, it can be inferred that there was no acceptance of the gift by the donee. But, we are unable to accept this contention. Even assuming that the 7th defendant continued to possess and enjoy the property alter the above referred to settlements, that by itself would not necessarily lead to the inference that there was no acceptance by the donee of the gifts. Even after accepting the gifts, the donee Pavun-ambal could have allowed her father, the 7th defendant to enjoy the income from the properties settled in view of the relationship of father and daughter between the donor and donee. Further, Exs.A.3 and A.4 specifically recite that possession has been handed over to the donee. When such recital is there, a presumption arises that possession has been handed over to the donee. (Vide Fatima Bibi v. Khairum Bibi (AIR 1923 Mad 52). No doubt, it may be rebuttable presumption. But, in the present case, delivery of possession of the gifted

property is not absolute requirement, for the completeness or the validity of the gift as found in Muslim Law of Gifts. All that we have to find in the present case is whether there was acceptance of the gift by the donee. Even assuming that the donor continued to be in possession and enjoyment of the property gifted, from that alone, it cannot be necessarily inferred that acceptance by the donee of the gift was not there. No doubt in Venkatasubbamma v. Narayana-swami (1954) 1 Mad LJ 194: (AIR 1954 Mad 215) it was held that the facts relied on to draw an inference of acceptance must be by acts of positive conduct on the part of the donee, and not merely passive acquiescing such as standing by when the deed was executed or registered. But, the facts in the present case are different as mentioned above and there are enough features as mentioned above to at least hold that there was implied acceptance of the gifts in question. Even (1954) 1 Mad LJ 194 (supra) has held that law requires acceptance, which may even be implied. Therefore, we concur with the Court below in holding that Exs.A.3 and A.4 settlements are valid."`

36. *In* ***Naramadaben Maganlal Thakker*** *Vs.* ***Pranjivandas Maganlal Thakeer & Ors****. 1997(1) S.L.J. 80, their Lordships of the Hon'ble Supreme Court have held that execution of a registered gift deed, acceptance and delivery of property together make the gift complete. Their Lordships have held as under:*

"3. It is now well settled legal position that a document has to be read harmoniously as a whole giving effect to all the clauses contained in the document which manifest the intention of the persons who execute the document. The material part of the gift deed reads as under:

"The said immovable property as described above with the ground floor and with the ways to pass and with the water disposal and with all other concerned rights, titles is gifted to you and the possession whereof is handed over to you under the following conditions to be observed by you and your heirs and legal representatives as long as the Sun and the Moon shine. Therefore, now I or my heirs or legal representatives have no right on the said property. You and your heirs and legal representatives have no right on the said property. You and your heirs and legal representatives have become the exclusive owners of the same. You and your heirs and legal representatives are entitled to enjoy, to transfer or to use the said property as you like under the conditions mentioned in this deed. id immovable property as described above with the ground floor and with the ways to pass and with the water disposal and with all other concerned rights, titles is gifted to you and the possession whereof is handed over to you under the following conditions to be observed by you and your heirs and legal representatives as long as the Sun and the Moon shine. Therefore, now I or my heirs or legal representatives have no right on the said property. You and your heirs and legal representatives have no right on the said property. You and your heirs and legal representatives have become the exclusive owners of the same. You and your heirs and legal representatives are entitled to enjoy, to transfer or to use the said property as you like under the conditions mentioned in this deed. Except myself, there is nobody's right, title, interest or share on the said property: I have not mortgaged the same by any document. Yet however anybody comes forward to claim the fight, I shall remove the same. The said property is gifted to you on such conditions that and you are made owners by the gift deed of said property on such conditions that there are 15 rooms on the said property at present. I am rightful to receive the rents and the mesne

profit whatsoever accused from the said rooms throughout my life. I am only entitled to receive the mesne profit of the said property till I live. Therefore, I, the executants, shall be entitled to let out the said buildings (rooms), to receive the rent amount to make all the other arrangement throughout my life. Similarly, the said property shall be in my possession till I live. Therefore, I have gifted this property to you by reserving permanently my rights to collect the mesne profit of the existing rooms throughout my life. And by this gift deed the limited ownership right will be conferred to you till I live. After my death you are entitled to transfer the said property. I shall not give in any way my right to anybody to collect the mesne profit. You may get transferred the said property in your name in support of this deed. This gift deed is executed to you under the aforesaid conditions."

4. The material part of the cancellation deed reads as under:-

"I have, on 15.5.65, executed a conditional gift deed of Rs.9,000/- in words Rupees nine thousand in favour of you. The said deed has been presented in the office of the Sub Registrar, Baroda at Sr. No. 2153 of the book no. 1 and it is registered on 15.5.65. The description of the property mentioned in the said deed is as under:

"I executed to you a conditional gift deed of the said property from sky to earth. You had promised me to fulfil the oral conditions between us. But immediately after making the gift accordingly, you denied to fulfil the said conditions. The possession of the gifted property is not handed over to you. So in fact you have not accepted the conditional gift of the property and I am also not willing to act according to the conditional gift. It is also mentioned in the said conditional gift deed that the possession shall be kept with me. And so accordingly my possession is continued. My possession is from the beginning and it is permanent. You are not ready to act according to our conditions. Therefore, I have to execute immediately this deed of cancelling the conditional gift deed between us. Therefore, I hereby cancel the conditional gift deed dated 15.5.65 of Rs.9,000/- in words rupees nine thousand presented at the serial no. 2153 on 15.5.65 in the office of the Sub Registrar Baroda for registration. Therefore, the said conditional gift deed dated 15.5.65 is hereby cancelled and meaningless. The property under the conditional gift has not been and is not to be transferred in your name."

6. Acceptance by or on behalf of the done must be made during the life time of the donor and while he is still capable of giving.

7. It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the done becomes the absolute owner of the property. The question is: whether the gift in question had become complete under Section 123 of the TP Act? It is seen from the recitals of the gift deed that Motilal Gopalji gifted the property to the respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent-donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the

mesne profits. It would thus be seen that the enjoyment of the property during his life time. The recitals in the cancellation deed is consistent with the recitals in the gift deed. He had expressly stated that the respondent had cheated him and he had not fulfilled the conditions subject to which there was an oral understanding between them. Consequently, he mentioned that the conditional gift given to him was cancelled. He also mentioned that the possession and enjoyment remained with him during his life time. He stated, " I have to execute immediately this deed of cancelling the conditional gift deed between us. Therefore, I hereby cancel the conditional gift deed dated 15.5.65 of Rs. 9000/- in words rupees nine thousand presented at the Serial no. 2153 on 15.5.65 in the office of the Sub-Registrar Baroda for registration. Therefore, the said conditional gift deed dated 15.5.65 is hereby cancelled and meaningless. The property under the conditional gift has not been and is not to be transferred in your name." Thus, he expressly made it clear that he did not hand over the possession to the respondent nor did the gift become complete during the life time of the donor. Thus the gift had become ineffective and inoperative. It was duly cancelled. The question then is: whether the appellant would get the right to the property? It is not in dispute that after the cancellation deed dated June 9, 1965 came to be executed, duly putting an end to be conditional gift deed dated May 15, 1965, he executed his last Will on May 17, 1965 and died two days thereafter."

In the instant case, the gift deed is registered and the possession as per recital contained in the gift has been handed over to the done, i.e., Jai Chand.

37. *The learned Single Judge in **Tokha** Vs. **Smt. Biru and others** AIR 2003 Himachal Pradesh 107 has held that once the possession of immovable property viz land delivered to done, the gift is complete and when no condition of revocation in gift deed in case services were stopped to be rendered by done, the gift deed cannot be termed as conditional and revocable one. The learned Single Judge has held as under:*

> *"22. In the case in hand there is no specific condition either for giving maintenance or for revoking of the gift deed in case services are stopped to be rendered by the donee. Anyway, the fact remains, as has been stated in the deed of gift that the gift was in lieu of services meaning thereby that the donee had to render services to the donor-plaintiff but in the absence of any specific condition in the event of failure of the donee to render services, the gift could not be revoked. Thus, the deed of gift Ext. D-1 if considered as an outcome of general law cannot be said to be revocable one when no specific condition for its revocation has been made in the deed Itself in the event of failure of the donee to provide services to the donor or maintain the donor, the gift cannot be revoked.*
>
> *23. In that view of the matter, and in the light of the above said decisions of various High Courts, the first appellate Court acted illegally in considering the document of gift to be conditional and revocable one. The above first question of law accordingly stands answered in favour of the defendants and as a consequence thereof it is held that deed of gift Ext. D-1 was unconditional, it could not be revoked on account of the failure of donee (since deceased) to render services or to maintain the plaintiff.*
>
> *29. In Thakur Raghunath Ji Maharaj v. Ramesh Chandra, (2001) 5 SCC 18 : AIR 2001 SC 2340 the facts were that land was gifted for a specific charitable purpose for constructing a Degree College building thereon with the condition attached to it that if the building was not*

constructed within six months the deed would come to an end and donor would become entitled to the property. An agreement was also executed on the same day when the deed of gift was executed. In the facts of that case their Lordships held that relationship between the donor and donee was fiduciary nature, donee continued to be trustee and donor could claim back the property on breach of the conditions mentioned therein and donee having failed to fulfil the conditions the suit for possession filed by the donor was rightly decreed by the first appellate Court. The ratio of this judgment is not applicable in the facts of the present case. In the case on hand the agreement Ext. PW-3/A was not executed on 12-1-1984 when the deed of gift was executed by the plaintiff in favour of donee Singh whereas the alleged agreement was only executed on 5-3-1984 just one day prior to the registration of the deed of gift on 6-3-1984 and in these circumstances the deed of gift and the agreement would not form part of the same transaction and cannot be read together and given effect to as held by the first appellate Court."

38. *The learned Single Judge in **Balai Chandra Parui** Vs. **Smt. Durga Bala Dasi and others**, AIR 2004 Calcutta 276 has held that in the absence of coercion, fraud and undue influence, the gift deed could not be revoked. The learned Single Judge has held as under:*

"31. Now, let me come to the submissions of the learned counsel for the respective parties as well as the document on record. From the evidence on record and from the judgments and decrees passed by the Court-be-low it appears that there are some facts which are admitted. Such as Smt. Durga Bala Devi executed the deed of gift in favour of Mr. Balai Chandra Parul that is the defendant/said Balai Chandra Parui accepted the deed of gift. In the said deed of gift there remains three attesting witnesses. One Sri Ganesh Chandra Das, the deed writer, another Sri Patitosh Chakraborty and the third is Sri Sarada Charan Das. In the last line of the deed it has been written in Bengali Sri Balai Chandra Parui read and explain the purport of the deed of gift to Smt. Durga Bala Devi the donor herein. Up to this stage everything is admitted and/or comes out of record. Now, let me see the provisions of Section 42 and Section 126 of the Transfer of property Act, Both the Sections are quoted hereinbelow :-

"42. Transferred by person having authority to revoke former transfers - where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of power."

"126. When gift may be suspended or revoked -the donor and donee may agree that on the happening of any specified which does not depend on the Will of the donor a gift shall be suspended or revoked; but a gift which the parties agreed shall be irrevocable wholly or impart, at the mere Will of the donor, is void wholly or impart, as the case may be.

Gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract it might be rescinded. Save as aforesaid, a Gift cannot be revoked. Nothing contained in this section shall be deemed to effect the rights of transferees for consideration without notice."

33. *The above being the position there I is no scope in normal course for revocation of a deed of gift when the said deed of gift i was executed by the donor accepted by the ! donee and registered by the registering authority. From the provisions of*

Registration Act it is clear that the registering authority I shall enquire . This term "shall Enquirer" is really important and most relevant here. The Transfer of Property Act also provides that normally a deed of gift cannot be revoked. The Registration Act as referred to above also provides that the registering officer will satisfy himself about the identity of the parties. Therefore, identification and enquiry about the execution of deed of gift completes the deed.

34. Reading the provisions of Section 42 and Section 126 of the Transfer of Property Act the ratio which comes out is that the deed of gift can be revoked if there is an agreement for revocation. In such circumstances the deed of gift is not at all a gift because if somebody agrees to gift some property to anybody at the same time the donor retains the power to revoke the deed then it cannot be termed to be a deed of gift.

34A. The deed of gift however can be revoked :-

(i) If there is any prior condition that the gift can be revoked or if the deed of gift has been executed under undue influence or donee commits fraud. The Registration Act also give support to the conditions that Registration or execution of the deed-is done after the satisfaction of the registered regarding identification.(ii) If the donee obtain the deed of gift executing under influence or committing fraud. These are the three conditions 'in which the deed of gift can be revoked. Let me now see whether either of the three conditions successfully prevailing over the first deed of gift which was executed and registered.

35. Second question remains the question of coercion. This coercion is not the point involved in the instant case inasmuch as it is nobody's case that the first deed 'of gift executed in favour of the defendant was done under undue influence."

*39. Their Lordships of the Hon'ble Supreme Court in **Asokan** Vs. **Lakshmikutty and others** (2007) 13 Supreme Court Cases 210 have held that in order to constitute a valid gift acceptance thereof is essential. Their Lordships have further held that there may be various means to prove acceptance of a gift. The document may be handed over to a done, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. Their Lordshps have also held that once a gift is complete, the same cannot be rescinded. And for any reason whatsoever, the subsequent conduct of a done cannot be a ground for rescission of a valid gift. Their Lordships have further held that when a registered document is executed and the executors are aware of the terms and nature of the document, a presumption arises in regard to the correctness thereof. Their Lordships have held as under:*

"11. Mr. M.P. Vinod, learned counsel appearing on behalf of the appellant, submitted that the first Appellate Court as also the High Court committed a serious error in arriving at the aforementioned findings insofar as they failed to take into consideration the fact that the deeds of gift being not onerous ones and the factum of handing over of possession of the properties which were the subject matter of the gift, having been stated in the deeds of gift themselves, it was not necessary for the appellant to prove that he accepted the same. It was furthermore urged that keeping in view the provisions of Sections 91 and 92 of the Indian Evidence Act, no plea contrary to or inconsistent with the recitals made in the deeds of gift is permissible to be raised.

13. We have noticed the terms of the deeds of gift. Ex facie, they are not onerous in nature.

The definition of gift contained in Section 122 of the Transfer of Property Act provides that the essential elements thereof are:

(i) the absence of consideration;

(ii) the donor;

(iii) the donee;

(iv) the subject matter

(v) the transfer; and

(vi) the acceptance.

14. *Gifts do not contemplate payment of any consideration or compensation. It is, however, beyond any doubt or dispute that in order to constitute a valid gift acceptance thereof is essential. We must, however, notice that the Transfer of Property Act does not prescribe any particular mode of acceptance. It is the circumstances attending to the transaction which may be relevant for determining the question. There may be various means to prove acceptance of a gift. The document may be handed over to a donee, which in a given situation may also amount to a valid acceptance. The fact that possession had been given to the donee also raises a presumption of acceptance. [See Sanjukta Ray v. Bimelendu Mohanty AIR 1997 Orissa 131, Kamakshi Ammal v. Rajalakshmi, AIR 1995 Mad 415 and Samrathi Devi v. Parsuram Pandey AIR 1975 Patna 140]*

16. *While determining the question as to whether delivery of possession would constitute acceptance of a gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the defendants contend that the donee was to perform certain obligations, is itself indicative of the fact that the parties were aware thereabout. Even a silence may sometime indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.*

18. *Mr. Iyer, however, submitted that it would be open to the donors to prove that in fact no possession had been handed over. Strong reliance in this behalf has been placed on S.V.S. Muhammad Yusuf Rowther and another v. Muhammad Yusuf Rowther and other [AIR 1958 Madras 527] and Alavi v. Aminakutty & Others [1984 KLT 61 (NOC)].*

22. *Section 91 of the Indian Evidence Act covers both contract as also grant and other types of disposal of property. A distinction may exist in relation to a recital and the terms of a contract but such a question does not arise herein inasmuch as the said deeds of gift were executed out of love and affection as well as on the ground that the donee is the son and successor of the donor and so as to enable him to live a good family life.*

23. *Could they now turn round and say that he was to fulfill a promise? The answer thereto must be rendered in the negative. It is one thing to say that the execution of the deed is based on an aspiration or belief, but it is another thing to say that the same constituted an onerous gift.*

What, however, was necessary is to prove undue influence so as to bring the case within the purview of Section 16 of the Indian Contract Act. It was not done. The deeds of gift categorically state, as an ingredient for a valid transaction, that the property had been handed over to the donee and he had accepted the same. In our opinion, even assuming that the legal presumption therefore may be raised, the same is a rebuttable one but in a case of this nature, a heavy onus would lie on the donors.

26. *It will bear repetition to state that we are in this case concerned with the construction of recitals made in a registered document.*

30. Once a gift is complete, the same cannot be rescinded. For any reason whatsoever, the subsequent conduct of a donee cannot be a ground for rescission of a valid gift."

*40. The learned Single Judge in **Bakhtawar Singh and others** Vs. **Jagdish and another**, Himachal Law Reporter 2012 (2) 6 has held that delivery of possession is only one of the means but not the sole mean of accepting the gift. The learned Single Judge has held as under:*

"9. Be that as it may, for the reasons stated above I am of the considered view that delivery of possession is only one of the means but not the sole mean of accepting the gift. This answers the third question now framed."

The judgment referred to hereinabove is of no help, as the gift deed, Ex. DA, here in the present case is proved to be the result of mis-representation/fraud.

36. Now the law, as cited by the learned Senior Counsel for respondents No. 1, 3(a), 3(f), 4 to 6 & 14(a) to 14(g), is required to be scanned in depth.

37. In ***Moti vs. Roshan and others, AIR 1971 Himachal Pradesh 5 (V 58 C2),*** this Hon'ble High Court has held that the Trial Court should not only ascertain the matters really at issue between the parties but also see that the evidence given by each of the parties corresponds to the claim or right pleaded by them. Apt para of the judgment (supra) is extracted hereinbelow:

"*11. The Trial Court should not only ascertain the matters really at issue between the parties, but it should also take care to see that the evidence given by each party corresponds to the claim or right pleaded by the party. In other words, it has to see that the pleadings and proof correspond. In the instant case, the trial Court failed to perform that elementary duty. The plaintiff cannot take advantage of it and ask this Court to hold that the gap in evidence had been filled up because neither the plaintiffs nor the defendants had seen it earlier."*

In the present case, the plaintiff has convincingly and conclusively proved on record that the original plaintiff (Raghu Ram) was mis-represented/defrauded by the defendants in execution of alleged gift deed, Ex. DA.

38. In ***Ku. Sonia Bhatia vs. State of U.P. and others, AIR 1981 Supreme Court 1274,*** the Hon'ble Supreme Court has held gift is a transfer without consideration and in fact where there is consideration it ceases to be a gift. Love, affection spiritual benefit etc. are held to be filial considerations and not the legal considerations as understood by law. Monetary consideration are held to be completely foreign to the concept of gift having regard to the nature, character and the circumstances under which such a transfer takes place. Relevant para of the judgment is extracted below:

"*20. from a conspectus, therefore, of the definitions contained in the dictionaries and the books regarding a gift or an adequate consideration, the inescapable conclusion that follows is that 'consideration' means a reasonable equivalent or other valuable benefit passed by the transferor to the transferee, similarly, when the word 'consideration' is qualified by the word 'adequate', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case. It has also been seen from the discussions of the various authorities mentioned above that a gift is undoubtedly a transfer which does not contained any element of consideration in any shape or form. In fact, where there is any equivalent or benefit measured in terms of money in respect of a gift the transaction ceases to be a gift and assumes a different colour. It has been rightly pointed out in one of the books referred to above that we should not try to confuse the motive or the purpose of making a gift with the consideration which is the subject matter of the gift. Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by*

law. It is manifest, therefore, that the passing of monetary consideration is completely foreign to the concept of a gift having regard to the nature, character and the circumstances under which such a transfer takes place. Furthermore, when the legislature has used the word 'transfer' it at once invokes the provisions of the Transfer of Property Act. Under Section 122 of the Transfer of Property Act, gift is defined thus:

> *" 'Gift' is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.*
>
> *Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.*
>
> *If the donee dies before acceptance, the gift is void."*

In the present case, there is no question with respect to donee not accepting the gift, so the judgment is of no help to the plaintiffs.

39. The Hon'ble High Court of Allahabad in ***Smt. Mallo vs. Smt. Bakhtawari and others, AIR 1985 Allahabad 160,*** has held that mere admission by executant donor about the existence of gift deed obtained by fraud did not dispense with proof of attestation. Apt para of the judgment (supra) is reproduced below:

> *"13. In AIR 1972 Gauh 44 it was held that the 'Attestation' and 'Execution' are two different acts, one following the other in the order stated. Attestation is meant to ensure that the executant was a free agent, and not under pressure nor subject to fraud while executing the same.*
>
> *13.A. In view of law laid down it has now to be seen as to whether the witnesses for attestation were required to be produced. In the present case the validity of the gift deed was specially denied, in the sense that the document had no effect in law. In such circumstances it was necessary for the donee to have produced the attesting witnesses of the gift-deed. The appellate Court on the assessment of evidence found that the attestation of gift deed in question was not proved rather it was dispro9ved. In view of that finding the Appellate Court correctly held that the gift-deed in question did not confer any right on donee the defendant-appellant in respect to the property in question."*

The judgment referred to hereinabove is applicable to the facts of the present case, as the plaintiff has proved on record that the alleged gift deed, Ex. DA, was the result of mis-representation/fraud.

40. The Hon'ble Apex Court in ***Digambar Adhar Patil vs. Devram Girdhar Patil (died) and another, AIR 1995 Supreme Court 1728,*** has held that entries in records of rights maintained in official course of business is a relevant piece of evidence in case where there is requirement of proof qua factum of partition. Relevant para of the judgment is extracted hereunder:

> *"5. We find no force in the contention. Section 32B clearly postulates that the land held as an owner or as a tenant alone should be taken into consideration to determine ceiling limit and if the land held as owner or tenant is within the ceiling limit, he shall be entitled to purchase the land held by him as a tenant. Admittedly, the respondent held the land as an owner to the extent of 36 acres 1 gunta. The area of dispute is only in respect of the land held by his minor son and the land allotted at a partition to his brother Ram Chander. With regard to the land held by the son, even assuming that it is a joint family property for the purpose of the Act and it is includable in his holding yet he is within the ceiling limit, namely, 43 acres 35 guntas. As rightly held by the High Court he cultivated it on behalf of his minor*

son. As to the land allotted to the brother of the respondent, the Tribunals below negatived it on two grounds, namely, in the cultivation column of the Revenue records, it was shown that the respondent had cultivated the land and no documentary evidence of partition was produced before the authorities. The Tribunals below did not advert to the entries in the Record of Rights or to the factum of partition, while the High Court has taken this factor into consideration, which in our considered view had rightly been taken into account. The entries in the Record of Rights regarding the factum of partition is a relevant piece of documentary evidence in support of the oral evidence given, by the respondent and his brother to prove the factum of partition. Even in the evidence of Ram Chander, he dearly stated that there was a partition but he could not give the date and year in which the partition was effected nor the deed of the partition was produced. Under the Hindu Law, it is not necessary that the partition should be effected by a registered partition deed. Even a family arrangement is enough to effectuate the partition between coparceners and to confer right to a separate share and enjoyment thereof. Under those circumstances, when the factum of partition was evidenced by entries in the Record of Rights, which was maintained in official course of business, the correctness thereof was not questioned, it corroborates the oral evidence given by the brother and lends assurance to accept it."

The judgment is not applicable to the facts of the present case.

41. The Hon'ble Supreme Court in another case titled as ***Rajendra Tiwary vs. Basudeo Prasad and another, AIR 2002 (89) Supreme Court 136,*** has held that where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief, Order VII, Rule 7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted. Apt para of the judgment (supra) is extracted in extensor as under:

"14. Where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief, Order VII, Rule 7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted."

The judgment (supra) is not applicable to the facts of the present case as the relief of possession to the plaintiffs is a separate relief, which the plaintiffs have not claimed and it has come on record that the land was in the possession of the defendants, therefore, it is correct that relief can be enlarged, but a new relief of possession cannot be granted in a suit for declaration. In this context, I had considered the arguments of the learned Senior counsel for the plaintiffs that the relief is required to be enlarged for the plaintiffs, but as the relief of possession was not prayed for in the suit, this relief cannot be granted. Therefore, without their being pleadings and evidence to that effect, this Court cannot grant the relief of possession. Thus, the findings recorded by the learned Lower Appellate Court on this account, needs no interference.

42. The Hon'ble Supreme Court in ***Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others, (2004) 9 Supreme Court Cases 468,*** has held that a person in a fiduciary relation has a duty to protect the interest of the person under his care and when the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the fiduciary relation to show that the transaction is perfectly fair and reasonable and no advantage has been taken of his position. This principle is embodied in Section 1 of the Evidence Act, 1872, and the corollary to this principle is incorporated in Section 16(3) of the Contract Act, 1872. Relevant paras of the judgment is extracted as under:

"12. As has been pointed out by the High Court, the first Appellate Court totally ignored the relevant materials and recorded a completely erroneous finding that

there was no material regarding age of the executant when the document in question itself indicated the age. The Court was dealing with a case where an old, ailing illiterate person was stated to be the executant and no witness was examined to prove the execution of the deed or putting of the thumb impression. It has been rightly noticed by the High Court that the courts below have wrongly placed onus to prove execution of the deed by Dasu Charan Kul on the plaintiffs. There was challenge by the plaintiffs to validity of the deed. The onus to prove the validity of the deed of settlement was on defendant No. 1. When fraud, mis-represendation/fraud or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with zealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been engrained in Section 111 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places a confidence in him is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void ipso facto, nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is cast upon the person in whom the confidence has been reposed. The rule applies equally to all persons standing in confidential relations with each other. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The Section requires that the party on whom the burden of proof is laid should have been in a position of active confidence. Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger equity will not set aside a voluntary deed or donation, however, improvident it may be, if it be free from the imputation of fraud, surprise, undue influence and spontaneously executed or made by the donor with his eyes open. Where an active, confidential, or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person gains a great advantage over another by a voluntary instrument, the burden of proof is thrown upon the person receiving the benefit and he is under the necessity of showing that the transaction is fair and honest.

… … … … … …

14. *It is now well established that a Court of Equity, when a person obtains any benefit from another imposes upon the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. The proposition is very clearly started in Ashburner's Principles of Equity, 2nd Ed., p. 229, thus :*

"When the relation between the donor and donee at or shortly before the execution of the gift has been such as to raise a presumption that the donee had influence over the donor, the Court sets aside the gift unless the donee can prove that the gift was the result of a free exercise of the donor's will.

15. The corollary to tht principle is contained in sub-section (3) of Section 16 of the Indian Contract Act, 1872. "

The judgment is fully applicable to the facts of the present case, as the defendants have mis-represented/defrauded the original plaintiff (deceased Raghu Ram), so the gift deed, Ex. DA, is *non est* and non-existent in the eyes of law.

43. The Hon'ble High Court of Punjab and Haryana in ***Ashwani Kumar Rana vs. Gaur Hari Singhania and others, 2005(2) SLJ 1243,*** has held that the tenant has no right to challenge the family settlement. Apt para of the judgment (supra) is extracted in extensor as under:

*"5. After hearing the learned counsel for the parties, I am of the considered view that the tenant-petitioner has no right to challenge the family settlement as has been held by this Court in the case of **Ram Lal vs. Harbhagwan Dass 1995(2) Rent Law Reporter 557.** It has been repeatedly held by the Supreme Court that even oral partition of Hindu Undivided Family property is not prohibited. Reference in this regard could be made to the judgments of the Supreme Court in the cases of **Nani Bai vs. Gita Bai AIR 1958 SC 706 and Roshan Singh vs. Zile Singh AIR 1988 SC 881 and Hans Raj Agarwal vs. CII 2003(2) SCC 295.** Moreover, oral partition to which reference has been made has been implemented as is evident from the fact that landlord-respondent No. 1 has to run his clinic from the passage and that father of landlord-respondent No. 1 has not been paid rent by the tenant-petitioner after 7.4.1995 i.e. after the judgment and decree passed on the basis of family settlement. In such a situation no doubt can be entertained with regard to the genuineness of the oral partition. Moreover, both the Courts below have concurrently found that the need of the landlord-respondent No. 1 is bona-fide and it has to be considered as covered by Section 13(3)(a)(i) of the Act as interpreted by the Supreme Court in the case of **Harbilas Rai Bansal vs. State of Punjab (1996) 1SCC 1.** In **Harbilas Rai Bansal's (supra)** it was categorical held that the amendment incorporated by Punjab Act No. 29 of 1956 was ultra vires of Article 14 of the Constitution as it deleted the right of occupation of commercial building on the ground of personal necessity while retaining the same in respect of residential building."*

The judgment (supra) is not applicable to the facts of the present case.

44. The Hon'ble Supreme Court in ***Hari Shankar Singhania and others vs. Gaur Hari Singhania and others, (2006) 4 Supreme Court Cases 658,*** has held that a family settlement is treated differently and it meets with approval of the Courts and they are also governed by a special equity principle where the terms are fair and bona fide, taking into account the wellbeing of a family. Relevant paras of the judgment are reproduced as under:

"Family Arrangement/Family Settlement:-

42. Another fact that assumes importance at this stage is that, a family settlement is treated differently from any other formal commercial settlement as such settlement in the eyes of law ensures peace and goodwill among the family members. Such family settlements generally meet with approval of the Courts. Such settlements are governed by a special equity principle where the terms are fair and bona fide, taking into account the well being of a family.

43. The concept of 'family arrangement or settlement' and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation etc should not be put at risk of the implementation of a settlement drawn by a family,

which is essential for maintaining peace and harmony in a family. Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered into ally disputes existing or apprehended and even any dispute or difference apart, if it was entered into bona fide to maintain peace or to bring about harmony in the family. Even a semblance of a claim or some other ground, as say affection, may suffice as observed by this Court in the case of Ram Charan v. Girijanandini Devi, AIR 1966 SC 323.

… … … … … …

53. Therefore, in our opinion, technical considerations should give way to peace and harmony in the enforcement of family arrangements or settlements."

The judgment referred hereinabove, is also not applicable to the facts of the case in hand.

45. The Hon'ble Supreme Court in yet another case titled as ***Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel and others, (2006) 8 Supreme Court Cases 726,*** has held as under:

"35. We may proceed on the basis that the MoU answers the principles of family settlement having regard to the fact that the same was actuated by a desire to resolve the disputes and the courts would not easily disturb them as has been held in ***S. Shanmugam Pillai vs. K Shanmugam Pillai, (1973) 2 SCC 312, Kale vs. Dy. Director of Consolidation, (1976) 3 SCC 119 and Hari Shankar singhania vs. Gaur Hari Singhania, (2006) 4 SCC 658."***

The judgment (supra) is also not applicable to the facts of the present case.

46. The Hon'ble Supreme Court in ***M. Venkataramana Hebbar (Dead By LRs vs. M. Rajagopal Hebbar and others, (2007) 6 Supreme Court Cases 401,*** has held that before the court rejects a claim for partition of joint family property, at the instance of all the co-owners, it must be established that there had been a partition by metes and bounds. Apt para of the judgment (supra) is as under:

"11. For the purpose of this case, we will proceed on the assumption that the said deed of family settlement was not required to be compulsorily registered, in terms of Section 17 of the Registration Act as by reason thereof, the relinquishment of the property was to take effect in future. But there cannot be any doubt whatsoever that before the court rejects a claim of partition of joint family property, at the instance of all the co-owners, it must be established that there had been a partition by metes and bounds. By reason of the family settlement, a complete partition of the joi9nt family property by metes and bounds purported to have taken place. One of the co-sharer, however, did not join in the said purported family settlement."

The judgment (supra) is applicable to the facts of the present case, as the family partition was not validated/affirmed legally by effectuating the entries in the revenue record, it stands fully established by the plaintiffs, by leading cogent evidence, that the original plaintiff (deceased Raghu Ram) had signed alleged gift deed, Ex. DA, taking it as a document for enforcing the private family partition, which was contended to be entered into between the predecessor-in-interest of the parties 60 years ago.

47. The Hon'ble Apex Court in ***Bhagwan Krishan Gupta (2) vs. Prabha gupta and others, (2009) 11 Supreme Court Cases 33,*** has held that the doctrine of family settlement may not be applicable in *stricto sensu* in cases of property being self-acquired one. However, where both brother declare each other to be owners of the property having equal shares, arrangement like family settlement is permissible in law, such settlement was not only in relation to the title of the property, but also to the use and possession thereof. Relevant paras of the judgment (supra) is extracted as under:

"12. To the Revenue Authority for the purpose of mutation in respect of the premises in question, the testator issued a letter which reads as under:

"I, Murari Lal Gupta S/o Late Sri Ganga Ram hereby informed that I and late Girdhari Lal Gupta are real brothers from late Shri Ganga Ram, House No. C-11, Green Park Extension, New Delhi-110016 is owned jointly by myself and my aforesaid brother Late Sri Girdhari Lal Gupta. My share in the aforesaid house is one half i.e. ground floor and the other one half share i.e. Ist floor and Barsati Floor belongs to my brother late Sh. Girdhari Lal Gupta. The completion plan of the house showing the details is enclosed herewith. The share belonging to me has been shown in red whereas the share belonging to my brother Late Shri Girdhari Lal Gupta has been shown in green.

It is requested that the division of property be made in my name & in the name of my brother's wife Smt. Subz Kali since my brother has expired. The house tax bill of the property be sent separately in future.

... ...

15. Although when a property is a self-acquired one, the doctrine of family settlement stricto sensu may not be applicable but in a case of this nature where both the brothers declare each other to be owners of the property having equal share therein, an arrangement between them by way of a family settlement is permissible in law. Such a family settlement was not only in relation to the title of the property but also in relation to the use and possession thereof."

The above referred judgment is not applicable to the facts of the case in hand.

48. In the light of what has been discussed hereinabove, this Court finds that the findings arrived at by the learned Lower Appellate Court are after appreciating the oral and documentary evidence, pleadings etc. to their right and true perspective and the findings call for no interference, hence the only substantial question of law, which was framed by this Court for determination and adjudication of the present appeal and substantial questions of law framed in cross-objections are answered as under:

Substantial question of law:

The findings of the learned Courts below are just and reasoned and gift deed, Ex. DA, has been properly appreciated by the Court below. It stands convincingly proved on record that the original plaintiff (deceased Raghu Ram) was mis-represented/defrauded by the defendants in making him believe that Ex. DA, is a document for recording private family partition. The substantial question of law is answered accordingly.

Substantial question of law No. 1 in Cross-objection::

The plea of family partition has been rightly decided by the learned Court below, as the plaintiffs have failed to prove the partition and it is the case of the plaintiffs themselves that document was executed to record partition, though they have proved that the parties are enjoying separate possession. A coparcener can be at separate possession without any partition, so the plaintiffs have failed to prove the partition, the cross-objection is answered holding that the Court below has appreciated the pleadings, oral and documentary evidence to their right and true perspective and law has been rightly applied.

Substantial question of law No. 2 in Cross-objection::

As the pleadings and documents have been properly appreciated, so the judgment and decree, passed by the learned Lower Appellate Court is just and reasoned and needs no interference.

Substantial question of law No. 3 in Cross-objection::

As the factum of family partition has not been proved conclusively, the cross-objection is answered accordingly.

49. One more substantial question of law arises for determination and adjudication in the cross-objection, which is as under:

"Whether the Court below should have passed a decree for possession after enlarging the claim."

It is found that there was no pleadings/prayer/suit for possession and simple in the suit for declaration, the Lower Appellate Court was right in dismissing the prayer of the appellant for possession.

50. In view of what has been discussed hereinabove, the judgment of the learned Lower Appellate Court does not suffer from any infirmity and the same is legally sustainable. Thus, the net result of the discussion made hereinabove is that the appeal and cross objection, being devoid of merits, deserve dismissal and are accordingly dismissed. However, parties are left to bear their own costs in the facts and circumstances of the case. Pending application(s), if any, stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Sh. Jagdish Raj and another .....Petitioners.
Versus
Smt. Dhali Devi .....Respondent.

CMPMO No. 210 of 2016
Date of decision: 1st November, 2016

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

(Para-7 to 9)

Case referred:
State of Rajasthan V. T.N. Sahani and others (2001) 10 Supreme Court Cases 619

For the petitioners: Mr. Bimal Gupta, Senior Advocate with Mr. Vineet Vashisth, Advocate.
For the respondent: Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

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

Order dated 10.05.2016 passed by learned District Judge, Kullu in an application under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure registered as Civil Miscellaneous Application No. 144 of 2015, is under challenge in this petition. Learned lower appellate Court has allowed the application and permitted the respondent-plaintiff to produce the documents i.e. sale deeds and gift deeds executed by Poshu, a co-sharer in the suit land measuring 4-4-0 bighas entered in Khasra No. 576, Khata Khatauni No. 104/166 to the extent of 68/672 shares situated at Phati Balh Kothi Maharaja, Tehsil and District, Kullu.

2. The respondent (hereinafter referred to as the 'plaintiff') claims herself to be the owner in possession of the suit land, as according to her Shri Poshu has gifted away the same to her. The petitioners (hereinafter referred to as the 'defendants') when allegedly started causing interference in the suit land, she filed a suit in the Court of learned Civil Judge (Senior Division), Kullu, District Kullu, Himachal Pradesh for the decree of permanent prohibitory injunction on several grounds, however, mainly that in view of alienation of the suit land by said Shri Poshu, partly in favour of defendant No. 2 and partly in favour of Sunita Kumari, Dushyant Thakur and Khekh Ram by way of sale deeds and also the gift deeds, he was not left with any land for being gifted away to the plaintiff.

3. On the pleadings of the parties issues including as to whether plaintiff is neither owner nor in possession of the suit land came to be framed in the suit in the trial Court. The parties were put to trial. After having taken on record the evidence produced by the parties on both sides and affording opportunity of being heard, learned trial Judge has dismissed the suit.

4. The plaintiff is now in appeal before learned lower appellate Court. It is during the pendency of the appeal, an application under Order 41 Rule 27 of the Code of Civil Procedure has been filed, which has been accepted by learned lower appellate Court vide order under challenge in this petition.

5. On behalf of the petitioners-defendants, it is canvassed that onus to prove issue No. 4, no doubt, was on them and they discharged the same satisfactorily. The plaintiff, however, has failed to produce any rebuttal evidence at an appropriate stage during the course of proceedings in the suit. Now the application having been filed at a belated stage, that too, without any explanation as to what prevented her from producing the evidence at an appropriate stage, the application has been sought to be dismissed. Mr. Bimal Gupta, learned Senior Advocate has also urged that otherwise also, the application should have been considered along with the main appeal at the time of final hearing and not in isolation.

6. On the other hand, Mr. Rajiv Jiwan, learned counsel representing the plaintiff has contended that the documents being certified copies of the sale deeds and gift deeds have rightly been allowed to be produced in additional evidence by learned lower appellate Court. According to Mr. Jiwan, the order under challenge calls for no interference in these proceedings.

7. Having gone through the record of the case and also analyzing the rival submissions, no doubt, a party to the *lis* can be allowed to produce additional evidence, however, before the commencement of trial. The proviso to Order 41 Rule 27 provides for seeking such permission even after the commencement of trial also, however, before allowing the application the Court ceased of the matter should record its satisfaction that the party seeking the permission to produce additional evidence failed to do so at an appropriate stage despite due diligence. In the application Annexure P-2, no plausible explanation except for that it is despite due diligence, the plaintiff has failed to produce the evidence, has come on record. Any how, without going into this controversy, I switch over to the alternative submissions made on behalf of the petitioners-defendants that the application should have been considered and decided at the time of final hearing of the appeal. The submissions so made find support from the judgment of the Hon'ble Apex Court in ***State of Rajasthan*** V. ***T.N. Sahani and others (2001) 10 Supreme Court Cases 619***.

> "4. It may be pointed out that this Court as long back as in 1963 in K. Venkataramiah v. Seetharama Reddy pointed out the scope of unamended provision of Order 41 Rule 27 (c) that though there might well be cases where even though the court found that it was able to pronounce the judgment, on the state of the cord as it was, and so, additional evidence could not be required to enable it to pronounce the judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. This is entirely for the court to consider at the time of

hearing of the appeal on merits whether looking into the documents which are sought to be filed as additional evidence, need be looked into to pronounce its judgment in a more satisfactory manner. If that be so, it is always open to the court to look into the documents and for that purpose amended provision of Order 41 Rule 27(b) CPC can be invoked. So the application under Order 41 rule 27 should have been decided along with the appeal. Had the Court found the documents necessary to pronounce the judgment in the appeal in a more satisfactory manner it would have allowed the same; if not, the same would have been dismissed at that stage. But taking a view on the application before hearing of the appeal, in our view, would be inappropriate. Further the reason given for the dismissal of the application is untenable. The order under challenge cannot, therefore, be sustained. It is accordingly set aside. The application is restored to its file. The High Court will now consider the appeal and the application and decide the matter afresh in accordance with law."

8. In the given facts and circumstances of this case also, the appropriate course available to learned lower appellate Court was to have considered the application along with the main appeal at the time of final hearing and not to decide the same in isolation. Therefore, subject to the rights and contentions of the parties with respect to the merits of the case, the impugned order is quashed and set aside. There shall be a direction to learned lower appellate Court to consider and decide the application afresh at the time of final hearing of the appeal. The parties through learned counsel representing them are directed to appear in learned lower appellate Court on ***5th December, 2016***. The record of the case be sent back so as to reach there well before the date fixed.

9. The petition stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

10. The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case.

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

Papinder Singh ...Appellant.

Versus

Gokal Chand (Now deceased) through his LR's and others. ...Respondents.

RSA No.53 of 2007.
Reserved on : 19.10.2016.
Decided on: 01.11.2016.

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

For the appellants Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.
For the respondent : Mr. G.D. Verma, Sr. Advocate with Mr. Vipul Sharda, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal under Section 100 of the Code of Civil Procedure is maintained by the appellant against the judgment and decree passed by learned Additional District Judge (Presiding Officer, Fast Track Court) Solan, District Solan, H.P, in Civil Appeal No.22FT/13 of 2006, dated 17.11.2006, vide which the learned Appellate Court has partly modified the judgment and decree passed by learned Civil Judge (Senior Division), Kasauli, District Solan, H.P, in Civil Suit No.303/1 of 2002, dated 20.6.2006.

2. Briefly stating facts giving rise to the present appeal are that appellant/plaintiff (hereinafter referred to as 'the plaintiff') has succeeded to the original plaintiff Neelam, maintained a suit against the respondents/defendants (hereinafter referred to as 'the defendant') claiming that plaintiff is owner-in-possession of land and building comprised in Khata/Khatauni No.19/40 and 41, Khasra Nos.853, 854, 855, Kitas 3, measuring 144.33 sq. meters, situated in mauza Dangyar, Tehsil Kasauli, District Solan, H.P (hereinafter referred to as 'the suit land'). The alleged property was owned and possessed by Fakir Chand, who sold it to the plaintiff in the year 1985. It is alleged that the plaintiff is owner-in-possession of the same since 1979, but the sale deed was executed in the year 1985. The dispute is with regard to '*gair mumkin gali'* of defendant No.1 in Khasra No.850, which is in the shape of staircase of the plaintiff, which is being used by the plaintiff as approach to reach the ground floor of his building. So, the 'gali' is claimed as path on the ground of easement of necessity as well as on the basis of easement by prescription. As per the defendants, the plaintiff purchased only two biswas of vacant land denoted as Khasra No.80/2/2/1 (6 karms x 6 karams) from Fakir Chand through sale deed No.186, dated 6.8.1985. The husband of the plaintiff, who is property dealer manipulated the things and instead of showing the measurement of two biswas, which is 84 square meters, shown 144 sq. meters of the land in her ownership and possession. The existence of building on the spot for the last more than 50 years is denied. It is further submitted that the plaintiff has constructed the building and the same has been renovated and the staircase from the first floor to the ground floor has been removed. The door and windows from the back side of the building have been closed and additional *godown* has been added in the back side of the building towards the vacant land. It is further alleged that defendant No.1 is owner-in-possession of said '*gair mumkin gali'* situated in Khasra No.850. Defendants constructed his building in the year 1971-72 and they had left the vacant space, as the set back which was duly fenced and possessed by the defendants and their family members. The plea of easementary rights through the 'gali' by way of necessity is denied. Further submitted that the plaintiff does not reside in Parwanoo and settled in Mumbai with her family, her husband occasionally visits Parwanoo. As per the defendants, the plaintiff recently removed the staircase, which was on the back side of the first floor and is claming the 'gali' on the basis of easement.

3. The learned trial Court framed following issues on 21.5.2003 :

"1. Whether the plaintiff is owner-in-possession of the property i.e. land and building, as alleged?

2. Whether the building and the suit property is existing for the last more than 50 years, as alleged? OPP

3. Whether the suit property was owned and possessed by Sh. Fakir Chand s/o Sh. Bhagi Ram, who had sold the same to the plaintiff in the year 1985, as alleged ? OPP

4. Whether in the year 1985 the plaintiff has renovated and reconstructed the building at the spot, as alleged? OPP

5. Whether the defendants are stranger to the suit property and have no concern with the suit property? OPP

6. Whether the disputed gali is the only path which leads to the ground floor of the building of the plaintiff and without which path/gali the plaintiff cannot approach and reach to the ground floor, as alleged? OPP

7. Whether the plaintiff has been using the disputed gali as path for the last more than 50 years by herself and through her predecessors in interest openly, continuously and without any interruption, obstruction, as alleged? OPP

8. Whether the plaintiff has been using the disputed gali as easement of necessity for going to the ground floor of the building, as alleged? OPP

9. Whether the defendants in connivance and in collusion with each other had illegally constructed a brick wall towards eastern side of the disputed gali touching Khasra No. 628, as alleged? OPP

10. Whether the defendants have also put up a grill gate towards western side of the disputed gali and had put up a lock on the said grill gate, as alleged? OPP

11. Whether the plaintiff is entitled to a decree of mandatory injunction directing the defendants to open the lock of the grill gate and remove the grill gate from the western side of the disputed gali and also to dismantle and remove the brick wall from the eastern side of the disputed gali, as alleged? OPP

12. Relief."

4. The learned trial Court has decided Issue No.1 partly in favour of the plaintiff, Issues No.2, 6, 7, 8, 10 and 11 against the plaintiff, Issue No.3 in favour of the plaintiff, Issue No.4 and 9 not pressed and dismissed the suit. Thereafter, the appeal was maintained before learned Addl. District Judge, (Presiding Officer Fast Track Court), Solan, has partly allowed the appeal of the plaintiff and set aside the judgment and decree of the learned Court below, but upheld the findings of learned Court below to the extent that the plaintiff has no easementary right to use the 'gali' of the defendants. Against the findings of the learned lower Appellate Court that the plaintiff has no easementary right to use the 'gali' of the defendants, the plaintiff has come in appeal before this Court. No cross appeal is maintained by the defendants. Hence, the present regular second appeal, which was admitted on the following substantial question of law:

> "Whether the Courts below have misappreciated and misconstrued the evidence and the provisions of law?"

5. Mr. Bhupinder Gupta, learned Senior Counsel for the plaintiff has argued that report of Local Commissioner clearly shows that there is no other path to go to the lower storey of the house of the plaintiff and the findings of the learned lower Appellate Court to this extent holding that the plaintiff has no right to use the 'gali' is required to be set aside. He has further argued that these perverse findings are required to be set aside.

6. On the other hand, Mr. G.D. Verma, learned Senior Counsel for the defendants has argued that there was a staircase from the back side of his house in the first floor to go to the lower side, which he has removed and claiming the 'gali' of the defendants on the basis of easement of necessity, therefore, the appeal deserves to be dismissed.

7. In rebuttal, learned Senior Counsel appearing on behalf of the plaintiff has argued that the easement of necessity still subsists, as per the report of Local Commissioner, therefore, the appeal requires to be allowed and suit be decreed in totality.

8. To appreciate the arguments of learned Senior Counsel for the parties, I have gone through the record in detail.

9. The only question which arises determination in this appeal is that whether the findings of the learned Appellate Court are perverse in not holding that the plaintiff has easementary right to use the 'gali' in the nature of staircase for going to his ground floor, as rest of the suit of the plaintiff is decreed by the learned lower Appellate Court and no cross objections or cross appeal is there and rest of the findings attained finality. Now, as far as the staircase in

the form of 'gali' is concerned, the same is admittedly on the land of the defendants. It is proved on record that the plaintiff is neither entitled to claim the path by way of necessity nor by prescription. The plaintiff is not entitled for claiming the easementary rights either by necessity or by prescription. It is admitted fact that the said 'gali' is owned and possessed by defendant No.1. Once the property is owned by defendants, it is the 'sweet will' of the defendants to raise construction as desire by them. The defendants illegally constructing the brick wall towards eastern side of the disputed 'gali' touching Khasra No.628, does not give any fruitful purpose to the plaintiff to claim demolition of the said wall. The case of the plaintiff fails by its own force and has no right to point against the defendants those had constructed the wall upon their own land. Further, there is no deposition of plaintiff and her witnesses to show the illegality in the said wall.

10. From the above, it is clear that the plaintiff was having stairs from inside the house and also an alternative path through the plot from its back side of the plaintiff's building. So, in these circumstances the findings of the learned Appellate Court to the extent that the plaintiff has no right to use the staircase/'gali' of the defendants, needs no interference, as the same have been arrived at after appreciating the facts to its true perspective and the law has been applied correctly. It is again reiterated that rest of the suit of the plaintiff was decreed by the learned lower Appellate Court. There is neither any cross objections nor any appeal has been filed against the said decree, therefore, the same has attained finality. The substantial question of law, as framed by this Court, is answered holding that the findings arrived at by the learned lower Appellate Court are just, reasoned and after appreciating the facts, which has come on record, to its true perspective and the law has been correctly applied.

11. With these observations, the appeal of the appellant/plaintiff being without any merit deserves dismissal, hence the same is dismissed. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sh. Shiv Singh and others ...Petitioners

Versus

State of H.P. and others . ...Respondents.

CWP No. 2159 of 2016
Judgment reserved on: 22.10.2016
Date of Decision : 01 November, 2016.

Constitution of India, 1950- Article 226- Petitioners had been continuously representing to the Government to construct link road- they also donated their lands by executing gift deeds – no objection certificates were issued by various authorities – family of Pardhan objected to the construction of the road- a notification was issued by the Government proposing to acquire the land for the construction of the road through different village – representations were filed but in vain - respondents stated that two factions of the villagers want the road to be constructed from different areas – it would not be proper to construct the road from the place specified by the petitioners- held, that the Government has issued the instructions that road would be constructed only if the land is donated by the Villagers – Government can deviate from the instructions on the basis of valid reasons – the decision to construct road from different place was taken to save the trees from being axed, which is in the larger public interest – family of Pardhan was not arrayed as party and no order can be passed without hearing them- the Court cannot examine the correctness of the decision, unless, it is arbitrary or contrary to the statute – the petition has been filed to satisfy the ego and not in the larger public interest- petition dismissed. (Para-9 to 18)

Case referred:
Rajan Singh and others vs. State of Himachal Pradesh and others 2016 (3) Him. L.R. 1571

For the Petitioners	Mr. Ramakant Sharma Senior Advocate, with Mr. Basant Thakur, Advocate.
For the respondents	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals and Mr. J.K.Verma, Dy. Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The instant writ petition has been filed seeking direction against the respondents to construct the link road from Saur-Ruhil Dhar via Guttu and not via Kuper as is proposed in the notifications dated 8.12.2015 (Annexure P-18) and 29.7.2016 (Annexure P-25) issued for some other land under the 'Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 2013 Act) and have further sought quashment of such notifications.

2. It is averred that the petitioners had been continuously representing to the Government for construction of link road from Saur-Ruhil Dhar via Guttu and had even donated their lands by executing gift deeds in favour of Public Works Department annexed with the petition as Annexures P-1 to P-8, respectively. It is averred that the 'No Objection Certificate' by Forest Rights Committee had been issued on 7.6.2014 and even the Deputy Commissioner in the meeting held on 9.9.2014 had recommended the aforesaid road. Thereafter, the other authorities including the Gram Panchayat have also issued No Objection Certificates. However, when the proceedings were conducted by the Sub Divisional Officer, Rohru on 4.11.2015 for arriving at a consensus for construction of this link road all except one family of the Pradhan, Gram Panchayat, Nandpur objected to this construction as he was interested to see that the road instead of passing via 'Guttu' is constructed through Kuper.

3. On 8.12.2015 the respondents issued a notification under Section 11 of the 2013 Act proposing to acquire the land for construction of the Saur –Ruhil Dhar road via Kuper, constraining the petitioners to make a representation to their elected representatives i.e. MLA, Jubbal and Kotkhai –cum- Chief Parliamentary Secretary (Agriculture) to the Government of H.P., who in turn, vide his communication dated 3.5.2016 wrote to respondent No.1 and requested him to intervene and withdraw the notification in view of the fact that the petitioners had already executed gift deeds for construction of the link road via Guttu.

4. Respondent No.1, in turn, vide its communication dated 9.5.2016 informed respondent No.2 that as per the Government Policy, objections would be entertained only where the land owners offer or gift the land free of cost to the Government and, therefore, follow up decision be taken up strictly in accordance with the instructions already issued on 12.6.2001.

5. It is averred that despite the petitioners having repeatedly objected to the construction of the link road via 'Kuper', the respondents proceeded to issue notification under Section 19 of the 2013 Act, whereby it proposed to acquire 250 meters of land which is contrary to the policy issued by the Government on 12.6.2001 and is further against the H.P. Road Construction Policy framed by the respondent pursuant to the directions issued by this Court in CWPIL No. 9 of 2013.

6. The respondents have opposed the petition by filing reply wherein it has been stated that there are two groups of local people in Village Ruhil, who are in conflict with each other with respect to alignment and survey of the road. One group of the local inhabitants wants the road to be constructed from Bus Stand Ruhil to Village Ruhil via Guttu, whereas the other

faction wants the road to be constructed via Kuper. It was after analyzing the various factors like distance of the road from Bus Stop Ruhil Dhar to Village Ruhil , impact on environment, involvement of forest area, number of land holdings of the villagers and other factors that the respondents decided to construct the road from Ruhil Dhar Bus Stoppage to Ruhil via Kuper. This decision has been taken keeping in view the fact that no forest area is involved in construction of road via Kuper, whereas there is thick forest of various species of trees on the alignment/land towards place via Guttu. In case the road is constructed through place Guttu, the same will destroy and damage the ecology of the area as large number of trees will be required to be axed. On the other hand, there are no trees on the land via Kuper through which the road is proposed to be constructed.

7. It is further averred that all the local inhabitants whose land will be used for construction of the road via Kuper have surrendered their land in favour of the respondents for construction of the road and only a path of 250 mtr. in length at the initial point has been objected by its owner and for the purpose of acquiring the said small portion of the land, proceedings under the 2013 Act have already been initiated.

8. It is lastly averred that it would not be in larger public interest to construct the road in question via Guttu and such decision of the respondents is uninfluenced by any extraneous factors and the same has been taken only in the larger public interest.

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

9. A perusal of the notification dated 12.6.2001 shows that the same was issued in the backdrop of the Budget Speech of 1998-99 wherein the Hon'ble Chief Minister had announced as under:

> *"New Roads to be constructed only if communities give land free of cost, work to start only after the land is transferred to the Government. Alternative land to be allotted to those who become landless or otherwise eligible, subject to availability of land with the Government."*

10. It was as a follow up of this speech that these instructions were issued and the relevant portion of the instructions is extracted below:

> *"As you are already aware of the fact that the Government has been following the policy since the budget 1998-99 to the fact that the rural/arterial roads are to be constructed only if the rural community contribute the land free of cost. However, for the period prior to 1.4.98 back of cases for acquisition of land under Land Acquisition Act, 1894 are being received in the Department. These cases are required to have much stiffer scrutiny with a view to ensuring that land under the Act ibid is not required for acquisition in those cases where the work was started by the Public Works Department on the assurance of the people of the area that the land required for the road would be transferred free of cost to the Government.*
>
> *In view of the above, you are requested to examine all the cases prior to 1.4.98 pertaining to rural/arterial roads on case to case basis and the land acquisition proceedings would be initiated only when these are found to be absolutely necessary.*
>
> *These instructions would be complied with meticulously."*

11. Similarly, the Clause 8 (b) of the H.P. Road Construction Policy (for short Policy), reads as under:

> "**8(B). Construction stage:**
>
> *1. For construction of new roads, the alignment finalised earlier during the planning stages should strictly be followed. However, in private land, alignment*

may be changed, if necessary, provided alternate land is made available by the land owners free of cost."

Therefore, the moot question that arises for consideration is as to whether the respondents can in the larger public interest be permitted to deviate from its policy.

12. It cannot be disputed that once the Government has laid down the norms and policy, there must be valid reasons to deviate from that as it is the salutary duty cast upon it to comply with the terms of the policy. However, even then the Government is entitled to make pragmatic adjustments after all the extraordinary situations require extraordinary remedies and if so required, the Government can deviate from the letter and spirit of the instructions and provide relief in cases where it is so warranted. To hold as a matter of law that the Government cannot deviate even minutely from the policy would be to ignore the realities of life. The Government can always pass orders which would best serve the interest of the people and further qualify the test of reasonableness and non-arbitrariness as these are the core of our constitutional scheme and structure.

13. It is more than settled that the action by the State, whether administrative or executive, has to be fair, reasonable and non-arbitrary and even if there are no rules in force to govern the executive action still such action is stated functional, should be just, fair and transparent. The exercise of discretion, in line with principles of fairness and good governance, is an implied obligation upon the authorities. There has to be reasonableness and the State cannot be bogged down in every minuscule detail of a subordinate legislation, like a policy decision and it is open for it to depart, provided it fulfills the aforesaid test. The courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality in the respondents' action nor can the Court substitute their opinion for the bona fide opinion of the State executive. The Courts are not concerned with the ultimate decision, but only with the fairness of the decision making process.

14. Adverting to the facts, it would be noticed that the decision to have the road constructed via Kuper, has been taken to avoid axing of large number of trees that exist on the alignment/land towards via Guttu and this fact has not even been denied by the petitioners. There cannot be any denying of fact that the people have long referred to the trees as 'Earth's lungs' as they play a crucial role in our existence, consuming large quantities of carbon dioxide and producing oxygen which enables us to breathe. Apart from providing oxygen, they also cleanse the air and improve its quality, control climate, protect soil and support vast varieties of wildlife. It is universally accepted that deforestation is major contributing factor of climate change and that is why it is so important to protect trees and secure our natural landscapes for future generations.

15. In case the respondents have chosen to protect the pristine forest, obviously then the same has definitely been taken in the larger public interest and individual interest(s) has to give way. Though, the learned counsel for the petitioners would vehemently argue that the decision taken by the respondents is malafide and has taken to protect the interest of one family. However, we do not find it to be so, more particularly, when it has come on record that there are two groups of local people in Village Ruhil, who are in conflict with each other with respect to alignment and survey of the road. Whereas, the respondents have taken the decision to construct the road via Kuper in larger public interest after keeping in view the factors like distance of the road from Bus Stop Ruhil Dhar to Village Ruhil, impact on environment, involvement of forest area, number of land holdings of the villagers etc.

16. That apart, the petitioners have not even chosen to array the said family or any of its members as party-respondent and, therefore, no order can be passed behind the back of such family adversely affecting it and such an order if passed, is liable to be ignored being not binding on such party as the same would be passed in violation of the principles of natural justice.

17. In addition to the above, it is not for the Court to sit in appeal and examine correctness of decision taken by the respondents, more particularly, when the same has not been

shown to be unfair, arbitrary or against any statutory or non-statutory policy or tainted with malafide intent. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is only concerned with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers. There is a long line of decision of the Hon'ble Supreme Court on the subject and which has been followed and reiterated by this Court from time to time and reference in this regard can conveniently be made to a recent decision rendered by this Court in ***Rajan Singh and others vs. State of Himachal Pradesh and others 2016 (3) Him. L.R. 1571.***

18. It is evident from the pleadings as well the material placed on record that the instant petition has been filed out of ego problem rather than on the ground of violation of any right and we observe so because despite the pressure sought to be exercised by the petitioners through their elected representative, the respondents have stood their ground and taken decision in the larger public interest without succumbing to such pressure.

19. In view of the aforesaid detailed discussion, we find no merit in this petition and the same is accordingly dismissed, so also the pending applications, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Uttam Singh ...Appellant.

Versus

Tej Ram and others ...Respondents.

LPA No. 64 of 2011
Decided on: 01.11.2016

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

For the appellant: Mr. Maan Singh, Advocate, vice Mr. Tek Chand Sharma, Advocate.

For the respondents: Nemo for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

In terms of the note of the Registry, respondent No. 1 has been served after admission, has chosen not to appear. Hence, he is set ex-parte.

2. Challenge in this appeal is to judgment and order, dated 21st February, 2011, made by the learned Single Judge/Writ Court in CWP (T) No. 7364 of 2008, titled as Tej Ram versus State of Himachal Pradesh and others, whereby the writ petition filed by writ petitioner-respondent No. 1 herein was allowed and the appointment of writ respondent No. 4-appellant herein as Takniki Sahayak in Gram Panchayats Thachi, Murah, Kau came to be quashed (for short "the impugned judgment").

3. The writ record does disclose that the writ petitioner-respondent No. 1 herein has chosen to remain absent on 9th December, 2010 and 6th January, 2011. In terms of the mandate of Order IX of the Code of Civil Procedure (for short "CPC"), the writ petition was to be dismissed in default and the Writ Court had no occasion to grant the writ petition without hearing the writ petitioner. But despite the fact that nobody appeared on behalf of the writ petitioner-respondent No. 1 herein, the writ petition was allowed and the appointment of writ respondent No. 4-appellant came to be quashed.

4. Only on this count, the impugned judgment merits to be quashed.

5. It is also apt to record herein that the Writ Court, in para 4 of the impugned judgment, while recording the findings that "The experience certificate produced by respondent No. 4 does not seem to be genuine", has quashed the appointment of writ respondent No. 4-appellant herein without ordering for any inquiry or obtaining any expert opinion qua the genuineness of the experience certificate, which, on the face of it, is illegal and without any basis.

6. Having said so, the impugned judgment is set aside, the appeal is allowed, the writ petition is ordered to be restored to its original number and is transferred to the H.P. State Administrative Tribunal (for short "the Tribunal") with a request to the Tribunal to decide the matter on merits after hearing the parties.

7. Parties to cause appearance before the Tribunal on 28th November, 2016. The Tribunal is requested to issue notice to the writ petitioner-respondent No. 1 herein.

8. Pending applications, if any, are also disposed of accordingly.

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

Court on its own motion ...Petitioner.

Versus

The Chief Secretary and others ...Respondents.

CWPIL No. 21 of 2016
Decided on: 02.11.2016

Constitution of India, 1950- Article 226- A decision was taken to house the corporate office under one roof- in view of this decision, writ petition is disposed of with liberty to challenge the same, if so advised. (Para-2 to 5)

For the petitioner: Mr. Dilip Sharma, Senior Advocate, as Amicus Curiae, with Ms. Nishi Goel, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 to 3.

Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

A letter was received by the Secretariat of the Chief Justice, *suo motu* cognizance was taken by this Court on 8th September, 2016, and Mr. Dilip Sharma, learned Senior Counsel, was requested to assist this Court as Amicus Curiae.

2. Respondents No. 4 and 5 have filed the reply. It is apt to reproduce relevant portion of Annexure R-4/H herein:

> ***"Item No. 54.23 Shifting of Corporate Office, HPPCL along-with its allied offices from existing location to HIMFED Building at BCS, New Shimla.***
>
> *The Memorandum was discussed at length. The Director (Personnel) informed that presently, the offices of the Corporation at Shimla are housed in three/four buildings situated at different locations of the city. The access and approach to each other official hampers the working, while disposing off different issues particularly of urgent nature. Further, the congestion and traffic jams also add to poor efficiency.*
>
> *It was further explained that the accommodation presently occupied by the SJVNL at Himfed Building, Shimla is likely to be vacated by them after 6-8 months, which can be taken over by HPPCL on rent. The issue was discussed with the Himfed as well as with the SJVNL authorities. The SJVNL authorities have decided to shift the furniture lying in this building to their new office except fixed work stations and wood work etc. carried out by them. These work stations except a few, being in a dilapidated condition need replacement for which additional cost has to be borne by HPPCL. Further, appropriate cost of fixtures and other immovable fittings has to be negotiated with the SJVNL authorities.*
>
> *Various issues including concerns of the staff, data center, additions in the form of work stations and installation of elevator etc. by HPPCL in the existing Himfed Bhawan, on account of shifting of offices were also deliberated threadbare.*
>
> *Considering the proposal, the Board deemed it appropriate that to house the Corporate Office under one roof. The Board also debated that though the rent amount shall be more, shifting to Himfed Building shall infuse operational expediency in working apart from reducing maintenance/administrative expenditure and transactional cost. Accordingly, the Board agreed and approved the proposal. It was, however, decided that a committee of the HPPCL officers be constituted to interact with SJVNL in order to assess the cost of the fixtures and fittings, which need to be retained by the HPPCL in case of taking possession of the premises.*
>
> *The Managing Director/Director (Personnel) HPPCL was authorised to take further necessary action in this regard."*

3. It appears that the Board of Directors has taken the decision. We are not expressing any opinion on the correctness of the said decision. We leave this question open. If any person(s) is/are aggrieved, can seek appropriate remedy. In case any officer is involved here and there, it is for the concerned authority to draw action, if required.

4. In view of the above, these proceedings are dropped.

5. We place on record our gratitude for the valuable assistance rendered by Mr. Dilip Sharma, learned Amicus Curiae.

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

Hem Raj ...Appellant.

Versus

State of Himachal Pradesh and another ...Respondents.

LPA No. 374 of 2011
Decided on: 02.11.2016

Constitution of India, 1950- Article 226- Petitioner had filed original application, which was disposed of with the direction to give the appointment of T.G.T. (Arts)- petitioner was appointed in the year 1994- his past services were not counted- he filed another writ petition claiming the benefit of past services- held, that the petitioner is caught by the principle of Order 2 Rule 2 and also by the doctrine of estoppel and res-judicata – the writ Court had rightly held that reliefs cannot be granted to the petitioner, when they were not granted earlier- appeal dismissed.

(Para- 2 to 7)

For the appellant: Mr. Jitender P. Ranote, Advocate, vice Mr. B.S. Thakur, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K Verma & Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to judgment and order, dated 5th May, 2011, made by the Writ Court in CWP (T) No. 8453 of 2008, titled as Hem Raj versus State of H.P. and another, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (for short "the impugned judgment").

2. The appellant-writ petitioner had invoked the jurisdiction of the H.P. State Administrative Tribunal (for short "the Tribunal") in the year 1992 by the medium of OA No. 1111 of 1992, which came to be disposed of vide order, dated 17th September, 1992. It is apt to reproduce the relevant portion of the said order herein:

> *"The averments made in the application make out a case for giving service to the applicant in consonance with the judgments of the Tribunal in case No. OA-162/90 Lalita Kumari versus State of H.P. and OA-364/87 Joginder Singh versus State of H.P. and other similar cases.*
>
> *The respondents are directed to give him the appointment as T.G.T. (Arts) within a period of two months from today if found eligible.*
>
> *In view of the above, the application is disposed of accordingly."*

3. It appears that thereafter, having found eligible, the appellant-writ petitioner was appointed afresh in the year 1994. It is apt to record herein that there was no direction to the respondents, in terms of the order (supra), for appointment of the appellant-writ petitioner in continuation of the services rendered by him in the year 1989. He accepted the said appointment.

4. In the year 2002, he filed another Original Application, being OA No. 1042 of 2002, before the Tribunal, which, on the abolition of the erstwhile Tribunal, was transferred to this Court and came to be diarized as CWP (T) No. 8453 of 2008, seeking the following reliefs amongst others:

"a) That the respondents may be directed to count for the services as TGT (Art) of applicant at Rani Ratna Memorial High School, Gharwasra w.e.f. 9.1.87 till he was appointed on regular basis vide office order dated 28.10.1994 for seniority, promotion as well as monitory benefits and other benefits as provided under law for which the applicant is entitled to.

b) That the applicant be given all consequential benefits after counting for his services as TGT (Arts) at Rani Ratna Memorial High School, Gharwasra for which he is legally entitled to."

5. The appellant-writ petitioner is caught by the principle of Order II Rule 2 of the Code of Civil Procedure (for short "CPC") and also by the doctrine of estoppel and res judicata.

6. The Writ Court has rightly held that the appellant-writ petitioner cannot seek the said reliefs again when the same were not granted to him in the earlier Original Application.

7. Having said so, the impugned judgment is legal one and well reasoned, needs no interference.

8. Accordingly, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

Sohan Lal ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.305 of 2014
Reserved on : 31.8.2016
Date of Decision: November 2, 2016

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

Cases referred:

Deepak Kumar son of Late Shri Satveer Singh v. State of Himachal Pradesh, 2015(1) SLC 579
State of H.P. v. Kurban Khan, 2015 Cr.LJ 183
State v. Anil Kumar, Latest HLJ 2015(HP) 341
Shashi Kumar and another v. State of H.P., Latest HLJ 2015(HP) 596

Gurmeet Singh v. State of H.P., 2015(2) Him.L.R.766
Surender Kumar alias Teena and another v. State of Himachal Pradesh, 2016(1) Him L.R. (DB) 566
Mohan Lal V. State of Rajasthan, (2015) 6 SCC 222
Kulwinder Singh and another V. State of Punjab, (2015) 6 SCC 674
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139
Gian Chand & others v. State of Haryana, (2013) 14 SCC 420
Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353
Dangra Jaiswal vs. State of Madhya Pradesh, (2011) 5 SCC 123
Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312
Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327
Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC 777
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625)
Aher Raja Khima v. State of Saurashtra, AIR 1956 SC 217
Tahir v. State (Delhi), (1996) 3 SCC 338
Sanjeev Kumar v. State of H.P., 2016(3) Him.LR (DB) 1529
Rishi Pal v. State of Himachal Pradesh & connected matters, 2016(3) Him LR (DB) 1336
Des Raj & another v. The State of H.P. & connected matter, 2016(3) Him LR (DB) 1455
Sanju v. State of Himachal Pradesh, 2016(2) Him LR 1210
Kartik v. State of Himachal Pradesh, 2016(2) Him LR 1217
State versus N.S. God, (2013) 3 SCC 594
Dilip and another v. State of M.P., (2007) 1 SCC 450 (two Judges)
Union of India v. Shah Alam and another, (2009) 16 SCC 644 (two Judges)
State of H.P. v. Pawan Kumar, (2005) 4 SCC 350
State of Punjab v. Baldev Singh, (1999) 6 SCC 172
Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 60
State of Rajasthan v. Ratan Lal, (2009) 11 SCC 464
Union of India and another v. K.S. Subramanian, 1976 (3) SCC 677
Pyare Mohan Lal v. State of Jharkhand and others, 2010 (10) SCC 693
P. Ramchandra Rao v. State of Karnataka, 2002 (4) SCC 578

For the Appellant : Mr. Rajesh Mandhotra, Advocate.
For the Respondents : Mr. R.S. Verma, Additional Advocate General, Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Primarily, the following question of law arises for consideration in the present appeal:

As to whether this Court is obliged to follow the earlier decisions rendered by larger Bench(s) (three Judges), on identical facts, specifically laying down the principle of law, as against a different view taken subsequently by smaller Benches (two Judges) of the apex Court or not?

2. Appellant-convict Sohan Lal, hereinafter referred to as the accused, assails the judgment dated 19.6.2014/28.6.2014, passed by Special Judge, Solan, Distirct Solan, Camp at Nalagarh, Himachal Pradesh, in Sessions Trial No.13-S/7 of 2012, titled as *State of Himachal Pradesh v. Sohan Lal,* whereby he stands convicted for offence punishable under the provisions of Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs. 1,00,000/- and in default thereof, to further undergo simple imprisonment for a further period of one year.

3. It is the case of prosecution that on 7.8.2012, when SI Narain Singh, alongwith HC Om Parkash (PW-1), Constable Ram Krishan (PW-2) and other police officials, was on patrol duty. At about 10 p.m., a transport vehicle (HRTC Bus) bearing No. HP-10A-3968, which came from Rohru, was stopped for checking. Police party entered the Bus and SI Narain Singh instructed all the passengers to identify their luggage. Accused was found sitting on Seat No.17 and from the bag, so kept by him on his lap, police recovered 3 kgs of Charas, which was taken into possession vide Memo (Ex.PW-1/B) in the presence of a co-passenger Surinder Singh (PW-3), sitting on the adjoining Seat No.18, and Pramod Singh (PW-4) Conductor of the Bus. The recovered stuff was packed into a parcel and sealed with seal of impression 'M' and NCB form (Ex.PW-11/A) filled up in triplicate. Impression of the seal was taken on a piece of cloth (Ex.PW-1/A). Rukka (Ex. PW-11/C) taken by Constable Ram Krishan (PW-2), led to the registration of FIR No.156, dated 7.8.2012 (Ex.PW-10/A), for commission of offence, punishable under the provisions of Section 20 of the Act, at Police Station, Solan Sadar, District Solan, Himachal Pradesh. With the completion of proceedings on the spot, which were photographed and videographed, the case property entrusted to SHO Chaman Lal, who resealed the same with his own seal 'R' and deposited it with MHC Narender Parkash (PW-8). Kuldeep Kumar (PW-9) took the case property for analysis and deposited it at the Forensic Science Laboratory, Junga. On receipt of the report of the Chemical Examiner (Ex.PW-13/C) and with the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

4. The accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which he did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 13 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took plea of innocence and false implication.

6. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of the charged offence and sentenced him as aforesaid. Hence, the present appeal by the accused.

7. Assailing the judgment, learned counsel for the accused submits that – (a) in the search/recovery memo (Ex.PW-1/B), Om Parkash was introduced as a witness only to falsely implicate the accused. Such fact stands fortified from the absence of his name in Ruka (Ex.PW-11/C), wherein presence of only two independent witnesses Surinder Singh (PW-3) and Pramod Singh (PW-4) stands recorded. In support, reliance is placed on *Deepak Kumar son of Late Shri Satveer Singh v. State of Himachal Pradesh,* 2015(1) SLC 579. (b) Search Memo (Ex.PW-11/H) is illegal, as search carried out is in violation of law laid down by the apex Court in *State of Rajasthan v. Parmanand and another,* (2014) 5 SCC 345. (c) Prosecution case is rendered doubtful also by way of link evidence, for in the Malkhana Register, reference of the case property is in the shape of two bags and a sample seal, whereas recovery memo reveals recovery of only one bag, which, in any event, does not refer to the sample seal. (d) Absence of reference of NCB form and sample seal in the Road Certificate (Ex.PW-8/B) further renders the prosecution case to be doubtful. (e) Non-production of the original seal in the Court has rendered the prosecution case to be fatal. Reliance is sought on *State of H.P. v. Kurban Khan,* 2015 Cr.LJ 183; *State v. Anil Kumar,* Latest HLJ 2015(HP) 341. (f) There is no proof as to how the contraband substance, after analysis, was brought first to the Police Station and thereafter produced in Court. Absence of

such entries in the Malkhana Register renders the prosecution case to be fatal, in view of the decisions rendered by this Court in *Shashi Kumar and another v. State of H.P.,* Latest HLJ 2015(HP) 596; *Gurmeet Singh v. State of H.P.,* 2015(2) Him.L.R.766; and *Surender Kumar alias Teena and another v. State of Himachal Pradesh,* 2016(1) Him L.R. (DB) 566.

8. On the other hand Mr. R.S. Verma, learned Additional Advocate General, has supported the judgment for the reasons set out therein.

9. We have minutely gone through the testimonies of the witnesses and other incriminating material on record.

10. It is a settled proposition of law that presumption of culpable mental state, under Section 35 of the Act, arises only when prosecution has proved recovery of the contraband substance from the conscious possession of the accused. That such fact is to be proved beyond reasonable doubt is now well settled. (*Mohan Lal V. State of Rajasthan,* (2015) 6 SCC 222; and *Kulwinder Singh and another V. State of Punjab,* (2015) 6 SCC 674).

11. In *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608, the Hon'ble Supreme Court of India, held that the initial burden of proof of possession lies on the prosecution and once it is discharged, legal burden would shift on to the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence.

12. Offences under the Act, being more serious in nature higher degree of proof is required to convict an accused. It needs no emphasis that the expression "possession" is not capable of precise and completely logical definition of universal application in context of all the statutes. "Possession" is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18/20 of the Act once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption of possession of illicit articles.

13. Act creates legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and tested on this anvil. Once possession is established, the Court can presume that the accused had culpable mental state and committed the offence.

14. In somewhat similar facts, the Hon'ble Supreme Court of India, had the occasion to consider this question in *Madan Lal and another vs. State of H.P.*, 2003 (7) SCC 465, wherein it has been held that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. (See also: *Dehal Singh v. State of Himachal Pradesh,* (2010) 3 SCC (Cri) 1139); *Gian Chand & others v. State of Haryana*, (2013) 14 SCC 420; and *Kulwinder Singh (supra).*

15. The Apex Court in *Mohan Lal (supra)* has held that that the term "possession" for the purpose of Section 18 of the NDPS Act could mean physical possession with animus, custody or dominion over the prohibited substance with animus or even exercise of dominion and control as a result of concealment. The animus and the mental intent which is the primary and significant element to show and establish possession. Further, personal knowledge as to the existence of the "chattel" i.e. the illegal substance at a particular location or site, at a relevant time and the intention based upon the knowledge, would constitute the unique relationship and manifest possession. In such a situation, presence and existence of possession could be justified,

for the intention is to exercise right over the substance or the chattel and to act as owner to the exclusion of others.

16. Now let us apply the law to the given facts. Significantly, the accused in his statement, recorded under the provisions of Section 313 of the Code of Criminal Procedure, has admitted the prosecution case, so put to him in Questions No.2 to 15, about the presence of the police party on National Highway No.22, near Saproon; stopping of HRTC Bus bearing registration No.HP-10A-3968 of Rohru Depot for checking; entering of police officials into the bus from the front and the rear gates; checking of luggage of the passengers by Sub Inspector Narain Singh; his sitting on seat No.17 of the said bus; search of bag (Pithoo) and recovery of the incriminating articles, i.e. red and green coloured micron bag (Ex.P-6), Parcel (Ex.PW-7) and Charas (Ex.P-8) in the shape of wicks and balls; arranging of electronic weighing scale and weighing of contraband substance; placing of the contraband substance in the micron bag (Ex.P-6) and thereafter in a cloth parcel, and sealing of the parcel with seal of seal impression 'M'; preparation of NCB form (Ex.PW-11/A) in triplicate; taking into possession of the incriminating articles, including his clothes (Ex.P-3 to P-5) vide Memo (Ex.PW-1/B); conduct of videography (Ex.PW-1/C-1 to Ex. PW-1/C-7) of the proceedings on the spot; preparation of Rukka (Ex.PW-11/C), registration of FIR (Ex.PW-10/A), preparation of site plan (Ex.PW-11/D), recording of statements of witnesses, taking into possession and release of the HRTC Bus; his arrest vide Memo Ex.PW-11/G and intimation given to his wife; and taking into possession of his ticket (Ex.PW-4/A). But however, the accused has denied possession of any bag from him, stating that the bag (Pithoo) was recovered from the rack of the bus.

17. Hence, he only wants the Court to believe that such recovery came to be effected not from his personal possession but from an unclaimed bag which was kept on the rack above the seat over which he was sitting.

18. In *Raj Kumar v. State of Madhya Pradesh,* (2014) 5 SCC 353, Hon'ble the Supreme Court of India, held as under:-

> "22. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. [Vide: Ramnaresh vs. State of Chhattisgarh, (2012) 4 SCC 257; Munish Mubar vs. State of Haryana, (2012) 10 SCC 464: AIR 2013 SC 912; and Raj Kumar Singh vs. State of Rajasthan, (2013) 5 SCC 722.]
>
> 23. In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died.
>
> 24. In Prithipal Singh vs. State of Punjab, (2012) 1 SCC 10, this Court relying on its earlier judgment in State of W.B. vs. Mir Mohammad Omar, (2000) 8 SCC 382, held as under:
>
> > "53..... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section

> would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."
>
> (Emphasis supplied)
>
> [Also: Neel Kumar vs. State of Haryana, (2012) 5 SCC 766; and Gian Chand vs. State of Haryana, (2013) 14 SCC 420]"

19. Independent of the aforesaid admissions, we have examined the testimonies of the prosecution witnesses.

20. Noticeably, independent witnesses, namely Surinder Singh (PW-3) and Pramod Singh (PW-4) have not supported the prosecution case. They were declared hostile and extensively cross-examined by the learned Public Prosecutor. Before we deal with their testimonies, we shall first discuss how testimony of a hostile witness is to be appreciated. The law in this regard is now well settled.

21. The apex Court in Ashok alias *Dangra Jaiswal vs. State of Madhya Pradesh*, (2011) 5 SCC 123, has held that seizure witnesses turning hostile may not be very significant by itself, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS Act.

22. Further in *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat*, (2011) 6 SCC 312, the apex Court has held that evidence of a hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held that:

> "22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.
>
> 23. This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out." (Emphasis supplied)

23. Further in *Bhajju alias Karan Singh vs. State of Madhya Pradesh*, (2012) 4 SCC 327 the Court held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. It further held that:

> "36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other

reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

(a) Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624

(b) Prithi v. State of Haryana (2010) 8 SCC 536

(c) Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1

(d) Ramkrushna v. State of Maharashtra (2007) 13 SCC 525"

(Emphasis supplied)

24. In *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 the Court held that seizure/recovery witnesses though turning hostile, but admitting their signatures/thumb impressions on recovery memo, could be relied on by prosecution and that:

"23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

24. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)" (Emphasis supplied)

25. We now proceed to examine the prosecution case from the version so disclosed by the independent witnesses. Surinder Singh admits to be the passenger, sitting on seat No.18, at the time of checking of the bus by the police party. He also admits that accused was sitting as a passenger over seat No.17. He admits that the bus was searched by the police party. Only on the point of recovery, he states that police found one bag on the upper carriage of the bus, from which Charas was recovered. We do not find this version of his to be true, as we shall discuss hereinafter. He admits having signed recovery memo (Ex.PW-1/B) and parcel (Ex.P-2). He tries to explain the same by clarifying that since he was puzzled on account of illness of his child,

reluctantly he appended his signatures, but crucially he admits that the police had photographed the entire proceedings and the photographs Ex.PW-1/C-1 to Ex.PW-1/C-7 are the ones which were taken on the spot. He admits that in the photographs, accused is seen with a bag on his lap. Now significantly, this witness does not state that the police intimidated or threatened him of false implication in the case or that the documents were forged or falsely prepared. After all, luggage of all the passengers, including his, was checked. If he was puzzled, he could have refused to participate in the proceedings conducted by the police. For the first time in Court, he has narrated the factum of illness of his child. He admits recovery of Charas in the form of wicks and balls from the bag recovered by the police. This Charas kept in a micron bag was wrapped. He also did not make any complaint to any person of having signed the papers without knowing contents thereof, or his statement so recorded by the police, with which he was confronted to be unture.

26. We are of the considered view that only to help the accused, to a limited extent, he deposed contrary to the factual position. Hence, this part of his testimony can be discarded safely.

27. Pramod Singh is a Government employee. He was posted as a Conductor of the bus owned by a Public Sector Undertaking. He admits the police to have checked the bus at the relevant time. He admits that police instructed the passengers to identify their luggage. He also admits the police to have checked the luggage of the passengers. He tries to save the accused by deposing that from one unclaimed bag, which was lying on the shelf, Charas was recovered and when none claimed ownership thereof, under suspicion, since the accused was sitting immediately below such unclaimed baggage, police falsely implicated him. The witness is obviously not telling the truth. We find that the witness was cross-examined by the learned Public Prosecutor. He admits to have signed all the papers after noting contents thereof. He has studied upto 12th class and writes and reads in Hindi. He admits his signatures on the recovery memo. This was not under threat, pressure or coercion. He voluntarily signed the same. Also, he never made any complaint for unnecessary harassment of the passengers by the police. His statement (Mark-B), which he denies in Court, wherein he admits recovery of the contraband substance from the conscious possession of the accused, stands duly proved by the Investigating Officer. The witness is bound to disclose the truth, more so being a public servant. That he was associated by the police in the recovery proceedings, he does not deny. Why is it that he did not report false implication of the accused to any one? Why is it that he did not protest against false implication of an innocent person? Why is it that he immediately did not report the incident being false or fabricated, to any one of his superior officers? Why is it that he did not inform his superior officers of any unnecessary harassment caused, if any, on account of checking by the police officials? He was duty bound to do so. Under these circumstances, it would be only appropriate that action be taken against this witness, in terms of the judgment and order passed by a Coordinate Bench of this Court in Criminal Appeal No.417 of 1996, titled as *State of Himachal Pradesh v. Balak Ram.*

28. Even from the testimony of independent witnesses, it cannot be said that a case other than the one which the prosecution wants the Court to believe has emerged. It is not a case where we find two views to have emerged on record.

29. It is also a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of

his involving innocent people, in that event, no credibility can be attached to the statement of such witness.

30. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

31. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956 SC 217].

32. Apex Court in *Tahir v. State (Delhi),* (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

33. In the aforesaid background, we now proceed to examine the testimonies of police officials and the case unfurling on record.

34. Simply put, it is the case of the Investigating Officer Narinder Singh (PW-11) that on 7.8.2012, he alongwith other police officials, was on a patrol duty at Saproon (NH-22). At about 10 p.m., one bus bearing No.HP-10A-3968 was stopped for checking. Police officials entered the bus from both the gates, when he instructed the passengers to identify their luggage and keep it with them for checking. Accused, who was sitting on Seat No.17, was found having kept one *Khaki* colour "*Pithu*" (carry bag) on his lap. It was opened for checking, in the presence of the Conductor (PW-4) of the Bus and passenger (PW-3) sitting on Seat No.18. The *Pithu* contained a micron bag, from which another transparent envelope, wrapped in an adhesive tape, was found. This parcel contained black coloured substance, in the form of wicks and balls. On checking, it appeared to be Charas. As instructed, Ram Krishan (PW-2) brought the scales. When weighed, Charas was found to be 3 kgs. Entire stuff was packed in the very same manner, in which it was opened and sealed with four seals of seal impression 'M'. NCB form (Ex.PW-11/A) was filled up in triplicate and impression of seal 'M' embossed thereupon. Sample of the seal was separately taken on a piece of cloth (Ex.PW-1/A), which was signed by both the independent witnesses and Om Parkash as also the accused. Original seal was handed over to witness

Pramod Singh. Contraband substance was taken into possession vide Memo (Ex.PW-1/B). Entire proceedings were got photographed (photographs are Ex.PW-1/C-1 to C-7) and videographed (video CD is Ex.PW-1/C-8). Ram Krishan took Rukka (Ex.PW-1/C), which led to registration of the FIR (Ex.PW-10/A). Witness has testified to have recorded statements of independent witnesses Surinder Singh (Mark-A)(Ex.PW-11/E) and Pramod Singh (Mark-B)(Ex.PW-11/F). Accused was arrested vide Memo (Ex.PW-11/G) and as per his desire, information furnished to his wife over telephone. Thereafter, personal search of the accused was conducted vide Memo (Ex.PW-11/H) and certain articles taken into possession. Case property was produced before the SHO, who resealed it by affixing his own seal of impression 'R', whose signatures he has identified. Special Report (Ex.PW-2/A) so prepared was sent to the Superior Officer through Ram Krishan. He identifies the Charas parcel (Ex.P-2) and *Pithu* (Ex.P-1) to be the one which stood recovered by him, from the conscious possession of this accused. He has also identified the micron bag (Ex.P-6), *Khaki* tape (Ex.P-7) and other belongings of the accused.

35. The witness has clearly withstood the test of cross-examination. His statement is natural, clear, convincing and cogent. Suggestion put to this witness of having influenced other witnesses for appending signatures on various documents stands denied by him, so also the fact that police recovered Charas from the unclaimed bag, which was kept on the rack, above the seat and the accused having been falsely implicated.

36. We notice, police officials Om Parkash (PW-1) and Ram Krishan (PW-2) to have fully corroborated such version. Their testimonies are clear, cogent and consistent.

37. Having minutely observed the testimonies of the police officials, we do not find defence of the accused to have been probablized. Why would police officials falsely implicate the accused? There is no prior animosity. He was not the only passenger in the bus. Entire luggage, of all the passengers, was checked and recovery effected from the bag kept by him on his lap.

38. Rajinder Kumar (PW-5) testifies Ram Krishan (PW-2) to have brought the scales from his Dhaba.

39. Ram Krishan also testifies having carried the Rukka to the Police Station, which led to the registration of FIR by Hem Ram (PW-10), to which effect, even testimony of this witness is evidently clear.

40. SHO Chaman Lal (PW-13) has also testified having resealed the contraband substance with his own seal 'R', impression whereof, was taken on a piece of cloth (Ex.PW-1/A). Both Narinder Singh (PW-11) and Chaman Lal testify having filled up the NCB forms in triplicate.

41. Case property stood entrusted to Narender Parkash (PW-8), who clarifies that on 8.8.2012, one cloth parcel, having four seals of seal impression 'M' and three seals of seal impression 'R', one bag, sample seals of seals 'M' and 'R', NCB form in triplicate and one *Pithu*, containing clothes were entered in Malkhana register (Ex.PW-8/A). The parcel of Charas, containing seals 'M' and 'R', as also the NCB form were sent to the Forensic Science Laboratory, Junga through Kuldeep Kumar (PW-9), vide Road Certificate (Ex.PW-8/B). He has identified the parcel (Ex.P-2) to the one which stood deposited with them. Kuldeep Kumar (PW-5) has also deposed that the parcel handed over to him was deposited, as it is, with the Laboratory. Now significantly, both these witnesses have identified the case property, which remained with them untampered.

42. We also find that Special Report, so prepared by Narinder Singh (PW-11) came to be received in the office of Deputy Superintendent of Police by Devender Kumar (PW-7).

43. Hence, the prosecution case remains fully established, beyond reasonable doubt. It is in this backdrop, we observe that accused has failed to even probablize his defence, much less dislodge the statutory burden, so cast upon him, both under the provisions of the Act and Indian Evidence Act.

44. It is not the requirement of law that names of all the persons/witnesses, in whose presence search and seizure operations took place, must necessarily be mentioned in the Ruka. *Deepak Kumar (supra)* also does not lay down such a proposition.

45. That Om Prakash was present on the spot is evident from other ocular/documentary evidence on record. It definitely cannot be the case of the accused that prior to the filing of the challan, the Investigating Officer was already aware about the fact that independent witnesses would not support the prosecution. Hence, plea of Om Prakash being introduced as a witness only to falsely implicate the accused is farfetched.

46. Reliance upon the decisions rendered by learned Single Judge and a Coordinate Bench of this Court in *Gurmeet Singh (supra)* and *Shashi Kumar (Supra),* for the reason that malkhana register does not establish movement of the contraband substance from the Forensic Science Laboratory to the Police Station and thereafter to the Court is misconceived. Not only the decision is clearly distinguishable on facts, inasmuch as the Court found the genesis of the prosecution case to be extremely doubtful, but also the Bench subsequently took a different view in Cr.A No.201 of 2016, titled as *State of Himachal Pradesh v. Kishori Lal,* decided on 1.9.2016. Hence, earlier decisions rendered in *Sanjeev Kumar v. State of H.P.,* 2016(3) Him.LR (DB) 1529; *Rishi Pal v. State of Himachal Pradesh & connected matters,* 2016(3) Him LR (DB) 1336; *Des Raj & another v. The State of H.P. & connected matter,* 2016(3) Him LR (DB) 1455; *Sanju v. State of Himachal Pradesh,* 2016(2) Him LR 1210; and *Kartik v. State of Himachal Pradesh,* 2016(2) Him LR 1217 are also of no use to the accused.

47. It was for the accused to have established the prejudice caused to him on account of non-establishment of the movement of the contraband substance, after it came to be analyzed by the experts at the Forensic Science Laboratory. Now, once the prosecution has been able to establish the factum of recovery and seizure of the contraband substance from the conscious possession of the accused, beyond reasonable doubt, which after analysis was found to be Charas, onus to disprove the same heavily lied upon the accused, which in the instant case was not so done.

48. Police officials have deposed that on the spot two bags, i.e. one *Pithu* and one micron bag, were taken into possession. Their testimonies do not reveal such version to be false. In fact, these bags stand produced in Court. Simply because there is discrepancy in the number of bags in the Malkhana Register, that fact itself would not be sufficient enough to acquit the accused, more so when there is nothing on record to establish as to in what manner it has caused prejudice to him. Similar view stands taken by a Coordinate Bench of this Court in *Kishori Lal (supra) (*Cr.A No.201 of 2016).

49. A Coordinate Bench of this Court, by relying upon the decision rendered by the apex Court in *State versus N.S. God*, (2013) 3 SCC 594, further clarified its judgment, rendered in *Shashi Kumar (supra)* and *Gurmeet Singh (supra)*, that mere absence of entry of a particular fact in the Malkhana Register would not render the prosecution case to be fatal. Significantly, one of the Judges and author of *Surender Kumar alias Teena (supra)* was himself a party to the decision rendered in *Kishori Lal (supra).*

50. Absence of reference of NCB form as also the sample seal in the Road Certificate (Ex.PW-8/B), in no manner, renders the prosecution case to be doubtful. It has not caused any prejudice to the accused.

51. According to the accused, the bag was recovered from the rack immediately above his seat. It certainly did not belong to the co-passenger sitting on the adjoining seat. All the passengers, even according to the accused and witness Pramod Singh (PW-4), had identified their luggage. Under these circumstances, it was necessary for the accused to have explained, on the spot, that the bag did not belong to him.

52. Non-production of original seal in the Court also cannot be said to be fatal, for the police officials have fully established their case of having sealed the case property, both on the

spot and at the Police Station. There is no discrepancy about the number and nature of the seals. Also, there is no iota of evidence that they were either broken or tampered with. Report of the FSL (Ex.PW-13/C) is also evidently clear to such effect.

53. On this issue much reliance is placed on a decision rendered us in *Kurban Khan (supra)* and *Anil Kumar (supra)*, wherein it is held that non-production of original seals does render the prosecution case to be fatal. As authors of the said decisions, we ourselves clarify them to have been rendered in the given facts and circumstances, which fact, also subsequently stands clarified by another Coordinate Bench of this Court, by relying upon a judgment rendered by the apex Court in *State represented by Inspector of Police, Chennai v. N.S. Gnaneswaran,* (2013) 3 SCC 594, in *Kishori Lal (supra)* (Criminal Appeal No.201 of 2016), that the said decisions were rendered in the given facts and circumstances. Not only that, they further clarified that it was incumbent upon the accused to have established prejudice caused to him on account of non-production of the original seal(s) in the Court, particularly when otherwise there was sufficient evidence, linking the seal affixed on the sample and embossed on the documents to be the same and the case property to be the one so recovered from the conscious possession of the accused. The Court observed that "availability of other sufficient evidence renders non-production of originals seal as a technical defect, which does not vitiate trial unless prejudice is caused.....". "Purpose of production of original seal in the Court is to compare it with seal affixed on parcels of contraband and sample in the Court so as to prove that the parcels produced in the Court are the same which were prepared and sealed on the spot at the time of recovery from the accused and also to ensure that parcel sent for chemical examination and received back were the same which were seized and sealed on the spot."

54. In the instant case, the contraband substance came to be recovered not from the person, but from the *Pithu* of the accused. It is a matter of record that no notice in compliance of Section 50 of the Act came to be issued to the accused. It is also a matter of record that both the person, i.e. the body of the accused as also *Pithu* were searched by the police party.

55. The Apex Court in *State of H.P. v. Sunil Kumar,* (2014) 4 SCC 780, has extensively dealt with the issue of chance recovery. It stands clarified that mere suspicion, even if it is "positive suspicion" or "grave suspicion", cannot be equated with "reason to believe", as the concepts are completely different. Only where there is "reason to believe", the Investigating Officer is duty bound to follow the procedure, so prescribed under the Act. The Court was dealing with a case where the police officials accidently or unexpectedly came across drug carried by the passenger, travelling in the bus, of which there was no prior information or suspicion with regard thereto.

56. In the instant case, undisputedly, police had no prior information of the accused either dealing with or possessing the contraband substance. The police party per chance stumbled upon the recovery of the contraband substance from the bag held by the accused.

57. While contending that there has been infraction of provisions of Section 50 of the Act, our attention is invited to the decision rendered in *Parmanand (supra)*(two Judges.

58. The said decision is squarely inapplicable in the given facts and circumstances. In the said case, the Court was dealing with a case where though two persons were arrayed as accused, but recovery of the contraband substance came to be effected from a polythene bag carried by one of them. Though police had informed the accused of their statutory right and also issued notices, but the accused from whom such recovery came to be effected, contested, of not having independently consented for being searched by the police party, as the document did not bear his signatures. While holding that there was infraction of Section 50 of the Act, the Court referred to and relied upon its earlier decisions rendered in *Dilip and another v. State of M.P.,* (2007) 1 SCC 450 (two Judges); and *Union of India v. Shah Alam and another,* (2009) 16 SCC 644 (two Judges). What also weighed with the Court was the fact that the accused stood acquitted by the High Court.

59. Now, when we peruse the decision rendered in *Shah Alam (supra)*, we find the same to have been rendered in the given facts and circumstances, which is quite evident from Para-16 of the Report. Also what weighed with the Court was the otherwise uninspiring testimonies of the police officials, which never came to be corroborated by independent witnesses, who also were not examined in Court.

60. When we peruse the decision of *Dilip (supra)*, we find that though actual recovery of the contraband substance came to be effected from the Scooter, but the person of the accused was also searched. The Court found provisions of Section 50 of the Act to have been breached. Hence, the Court specifically did not deal with the proposition that though no recovery came to be effected, from the person/body but from a place/object under conscious control and possession of the accused, and the accused was searched, failure to comply with the provisions of Section 50 of the Act, would ipso facto vitiate the trial. We find the decision to have been rendered in the given facts and circumstances and thus clearly distinguishable having no binding effect to the instant facts. Observations made in Para-16 of the Report to the following effect, are moreso obiter in nature, considering the fact that earlier decision rendered by a three-Judge Bench of the Apex Court in *State of H.P. v. Pawan Kumar,* (2005) 4 SCC 350, was never brought to their Lordships notice. Also, such observations came to be made in the backdrop of the fact that the accused originally stood acquitted and there was serious infraction of Section 42 of the Act.

> "16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the person of the appellant was also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done."

61. At this juncture, it would be appropriate to reproduce the principles laid down by a Constitution Bench (Five-Judges), of the apex Court in *State of Punjab v. Baldev Singh,* (1999) 6 SCC 172, as under:

> "57. On the basis of the reasoning and discussion above, the following conclusions arise :
>
> (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-sec. (1) of Sec. 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> (2) That failure to inform the person concerned about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused.
>
> (3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Sec. 50 of the Act.
>
> (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is

important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the Court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Sec. 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Sec. 50 have been duly observed would have to be determined by the Court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Sec. 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Sec. 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Sec. 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-sec. (1) of Sec. 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Sec. 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under Sec. 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Sec. 50. An illegal search cannot entitle the prosecution to raise a presumption under Sec. 54 of the Act.

(9) That the judgment in Pooran Mal case (supra), cannot be understood to have Lald down that an illicit article seized during a search if a person, on prior information, conducted in violation of the provisions of Sec. 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search.

(10) That the judgment in AH Mustaffa case (supra), correctly interprets and distinguishes the judgment in Pooran Mal case, and the broad observations made in Pirthi Chanel case (supra) and Jasbir Singh case (supra), are not in turn with the correct exposition of law as Lald down in Pooran Mal case."

62. The said decision came to be considered by another Constitution Bench (five-Judges) in *Vijaysinh Chandubha Jadeja v. State of Gujarat,* (2011) 1 SCC 609, wherein the Court laid the following principles:

"29. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in

holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

"31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf." (Emphasis supplied)

63. In *Pawan Kumar (supra),* the apex Court was specifically dealing with an accused where both the accused and the bag carried by him were searched and even though no recovery was effected from the person but Charas was recovered from the bag. With these facts, the Court observed as under:

11. Section 50 of the Act prescribes the conditions under which search of a person shall be conducted. Sub-sec. (1) provides that when the empowered officer is about to search any suspected person, he shall, if the person to be searched so requires, take him to the nearest Gazetted Officer or the Magistrate for the purpose. Under sub-sec. (2) it is Lald down that if such request is made by the suspected person, the officer who is to take the search, may detain the suspect until he can be brought before such Gazetted Officer or the Magistrate. Sub-sec. (3) lays down that when the person to be searched is brought before such a Gazetted Officer or the Magistrate and such Gazetted Officer or the Magistrate finds that there are no reasonable grounds for search, he shall forthwith discharge the person to be searched, otherwise he shall direct that the search be made.

12. On its plain reading, Sec. 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Sec. 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the N.D.P.S. Act is also recovered, the requirements of Sec. 50 of the Act are not attracted."

"14. The above quoted dictum of the Constitution bench shows that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which he may be carrying."

"27. Coming to the merits of the appeal, the high Court allowed the appeal on the finding that the report of the Chemical Examiner had to be excluded and that there was non compliance of Section 50 of the Act. The learned Judges of this Court, who heard the appeal earlier, have recorded a unanimous opinion that the report of the chemical Examiner was admissible in evidence and could not be excluded. In view of the discussion made earlier, Section 50 of the Act can have no application on the facts and circumstances of the present case as opium was allegedly recovered from the bag, which was being carried by the accused. The High Court did not examine the testimony of the witnesses and other

evidence on merits. Accordingly, the matter has to be remitted back to the High court for a fresh hearing of the appeal." (Emphasis supplied)

64. The said decision came to be reiterated by another three-Judge Bench of the apex Court in *State of Rajasthan v. Ratan Lal,* (2009) 11 SCC 464.

65. Apart from the fact that the decision rendered in *Pawan Kumar (supra)* is squarely applicable to the given facts, there is yet another reason for us to follow the same and that being the law of binding precedents. The apex Court in *Union of India and another v. K.S. Subramanian,* 1976 (3) SCC 677, also observed as under:

> "12. We do not think that the difficulty before the High Court could be resolved by it by following what it considered to be the view of a Division Bench of this Court in two cases any by merely quoting the views expressed by large benches of this Court and then observing that these were insufficient for deciding the point before the High Court. It is true that, in each of the cases cited before the High Court, observations of this Court occur in a context different from that of the case before us. But, we do not think that the High Court acted correctly in skirting the views expressed by larger benches of this Court in the manner in which it had done this. The proper course for a High Court, in such a case, is to try to find out and follow the opinions expressed by larger benches of this Court in preference to those expressed by smaller benches of the Court. That is the practice followed by this Court itself. The practice has now crystallized into a rule of law declared by this Court. If, however, the High Court was of opinion that the views expressed by larger benches of this Court were not applicable to the facts of the instant case it should have said so giving reasons supporting its point of view." (Emphasis supplied)

66. The principle stands reiterated by a three-Judge Bench of the apex Court in *Pyare Mohan Lal v. State of Jharkhand and others,* 2010 (10) SCC 693, as under:

> "24. In view of the above, the law can be summarized to state that in case there is a conflict between two or more judgments of this Court, the judgment of the larger Bench is to be followed……."

67. Further, the Constitution Bench (five-Judge) of the Apex Court in *P. Ramchandra Rao v. State of Karnataka,* 2002 (4) SCC 578, has observed that:

> "……..Even where necessities or jurisdiction , if any were found therefore, there could not have been scope for such liberties being taken to transgress the doctrine of administration of justice and what is permissible even under such circumstances being only to have had the matter referred to for reconsideration by a Larger Bench of this Court and not to deviate by any other means……"
>
> [Also : *Pyare Mohan Lal (supra); Union of India v. Raghubir Singh, AIR 1989 SC 1933; N S Giri v. Corporation of City of Mangalore*, AIR 1999 SC 1958; *Director of Settlement, AP v. M.R. Apparao*, AIR 2002 SC 1598; *Hyder Consulting (UK) Ltd. V. Governor, State of Orissa and others*, (2015) 2 SCC 189]

68. Hence, we are bound by the decisions rendered by three Hon'ble Judges of the Apex Court in *Pawan Kumar (supra)* & *Ratan Lal (supra)*, and not *Parmanand (supra), Shah Alam (supra) & Dilip (supra),* rendered by two Hon'ble Judges of the same Court.

69. Hence, the contention that the search is illegal or that there has been violation of mandatory provisions of Section 50 of the Act is untenable in law.

70. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

71. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

72. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed.

73. We have noticed that the Courts below are often faced with the dilemma of dealing with different/various decisions rendered by this Court. As such, we direct the Registrar General of this Court to immediately send a copy of this judgment to every Judicial Officer of the State as also the Director, H.P. Judicial Academy, for appraisal, compliance and necessary action.

74. A copy of this judgment be also sent to the accused.

75. Assistance rendered by Mr. Rajesh Mandhotra, learned Legal Aid Counsel, is highly appreciable.

Appeal stands disposed of, so also pending application(s), if any.

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

State of H.P. .....Appellant.
Versus
Rajesh Kumar @ Bati .....Respondent.

Cr. Appeal No. 311 of 2008
Decided on: 2nd November, 2016.

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

For the Respondent: Mr. R.S Thakur, Additional Advocate General.
For the Respondent: Mr. Surender Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgment of 26.11.2007 rendered by the learned Additional Sessions Judge, Mandi, District Mandi, H.P. in

Criminal Appeal No. 30/2003, whereby the learned Additional Sessions Judge while reversing the findings of conviction recorded qua the respondent herein by the learned Additional Chief Judicial Magistrate, Sundernagar, District Mandi, acquitted him for the offences charged.

2. The brief facts of the case are that on 24.7.1996 the complainant Suresh Kumar alongwith Pal @ Dharam Singh were attending marriage at Sundernagar. In the evening they went to the hotel of Ram Singh situated at Bhojpur for dinner. When both of them came out of the hotel, 5-6 boys, who were drunk started abusing them and when Pal asked them as to why they are abusing them, the aforesaid 5-6 boys started beating Pal. When Suresh Kumar intervened and tried to rescue his friend Pal, they started beating Suresh Kumar. His friend Pal ran away. The boys aforesaid were beating Suresh kumar with a grip, broken bottle and knife on his head, face and shoulder. Suresh Kumar could identify only Rajesh Kumar @ Bati as one of the assailants as he was already known to him. The complainant also escaped himself from the assailants and ran away to his house situated at village Dhaneshari. Som Krishan, brother of the complainant took him to SDH, Sunderngar for medical treatment. On 25.7.1996 the Medical Officer informed the police on telephone that injured Suresh Kumar had been assaulted and was admitted in the hospital. ASI Suram Singh alongwith C Amar Singh went to SDH Sunderngar where he recorded statement of Suresh Kumar under section 154 Cr.P.C. FIR stands registered against the accused. On completion of all codal formalities and on conclusion of the investigation into the offence allegedly committed by Rajesh Kumar @ Batti (accused/respondent herein), Gagan and Surinder Kumar @ Sidhu challan was prepared and filed in the Court.

3. The accused Rajesh Kumar @ Batti, Gagan and Surinder Kumar @ Sidhu stood charged by the learned trial Court for theirs committing offences punishable under Sections 324, 325, 341 readwith Section 34 I.P.C to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they claimed false implication. However they did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction against the respondent herein for offences punishable under Section 325, 341 readwith Section 34 of IPC. Remaining accused stand acquitted by the learned trial Court.

6. In an appeal preferred therefrom by the respondent herein before the learned Additional Sessions Judge, Mandi, the latter Court while allowing the appeal preferred therebefore by the respondent herein reversed the findings of the conviction recorded qua the respondent herein by the learned trial Court.

7. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

8. The learned counsel appearing for the respondent has with considerable force and vigor contended qua the findings of acquittal recorded by the learned Appellate Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

9. This Court with the able assistance of the learned counsel for the parties has with studied care and incision, evaluated the entire evidence on record.

10. PW-3 Suresh Kumar (injured/complainant) had lodged an apposite report qua the occurrence before the police station concerned comprised in Ex. PW-3/A wherein he named Bati @ Rajesh Kumar to be one of the assailants in the assault perpetrated on his person. He received

injuries as stand reflected in MLC comprised in Mark-Y. A recital occurring in Mark Y reflects qua the Doctor, who prepared it referring the complainant for examination to the Radiologist.

11. PW-7 Dr. S.K Malhotra on a reference made to him by the Doctor who prepared Mark Y subjected the complainant to X-Ray examination, in sequel whereto X-Ray films comprised in Ex.PW-7/A to PW-7/C stood prepared, on discernment whereof he rendered his opinion comprised in Ex.PW-7/D holding a communication qua occurrence of fracture of left side frontal bone of skull of the complainant/injured. The Doctor who prepared MLC (Mark Y) on receiving the report of the Radiologist pronounced therein an opinion qua injury No.3 reflected in Mark Y being grievous.

12. The learned Appellate Court while reversing the findings of conviction recorded qua the respondent herein by the learned trial Court had assigned a reason, qua with PW-4 (Kashmir Singh) and PW-5 (Ram Singh) independent witnesses to the ill-fated occurrence not supporting the prosecution case also with PW-1 (Som Krishan) a witness to recovery memo Ext.PA whereunder grip allegedly wielded by the accused for inflicting injuries on the person of victim/complainant stood recovered, omitting to lend corroboration to the recitals occurring in the relevant memo, hence it standing prodded to record findings of acquittal qua the respondent herein.

13. The learned Appellate Court had concluded of with Dr. V.K Kapil who had prepared MLC Mark Y in sequel to his subjecting the complainant to medical examination not stepping into the witness box rendered the enunciations occurring therein to stand unproved. For all the reasons assigned hereinafter the reasons as stand propounded by the learned appellate Court are extremely feeble in legal vigor whereupon this Court is constrained to reverse the findings of acquittal recorded qua the respondent herein.

14. True it is that the independent witnesses to the occurrence omit to lend vigor to the prosecution case. However the mere factum of independent witnesses to the occurrence who testified as PWs 4 and 5 not supporting the prosecution version would not constrain this Court to omit to revere the testimony of the complainant who deposed as PW-3 unless his testification if read in its entirety displays qua his propagating therein a version ridden with falsity besides with a vice of his improving as well as embellishing upon his previous statement recorded in writing. A close and circumspect reading of the testification of PW-3 occurring both in his examination-in-chief also in his cross-examination discloses qua his in tandem with his previous statement comprised in Ex.PW-3/A making echoings therein qua the respondent herein whom he proceeded to identify in Court being a participant in the ill-fated occurrence. He also identified grip which stood recovered by the investigating Officer under memo Ex. PA.

15. The witnesses to recovery memos (Ex. PA and PB) who testified as PW-1 and PW-2 in their respective testifications unequivocally deposed qua grip standing taken into possession by the police on its standing produced at the Police Station by accused Rajesh @ Batti. The aforesaid unrebutted testifications of PW-1 and PW-2, the witnesses to the recovery memo Ext.PA whereunder grip stood produced by accused Rajesh before the Investigating Officer concerned, naturally hence hold visible loud unveilings of thereupon the efficacy of its recovery under the memo aforesaid holding vigor besides immense formidability also the effect of the aforesaid inference drawn by this Court is qua omission of PW-1 and PW-2 to lend succor to the prosecution case and the effect of theirs reneging from their pervious statements recorded in writing standing omnibusly subsumed besides the factum of independent witnesses not supporting the prosecution case also wanes and gets scuttled. Since the counsel for the respondent herein did not subject PW-1 and PW-2 witnesses to the relevant recovery memo to an efficacious cross-examination for thereupon his concerting to project qua grip recovered under memo Ex.PA sanding not produced by him before the police rather it prior to its recovery in the manner reflected in Ext.PA being available in the police station concerned. Consequently, omission of the aforesaid concert by the learned defence counsel to thereupon tear the efficacy of Ex. PA fosters an inference of the accused Rajesh at the relevant time wielding grip recovered under Memo Ext.PA also the factum of his producing it before the Investigating Officer concerned

being free from any taint of the investigating Officer concerned contriving the recitals occurring in Ex.PA.

16. The learned appellate Court while discounting the vigor of the prosecution case had unnecessarily emphasized upon the imperative requirement of independent witnesses to the ill-fated occurrence supporting the prosecution case whereas theirs not supporting it, it concluded of the prosecution failing to prove the charge against the respondent herein. However, the aforesaid reason as stands assigned by the learned appellate Court is for reasons afore-stated per se flimsy besides weak. Conspicuously, with proven efficacious recovery of grip recovered under memo Ext.PA concomitantly bespeaking the factum of its user upon the victim by the accused/respondent herein.

17. Be that as it may with the complainant deposing in tandem with his previous statement recorded in writing wherein he named the accused/respondent herein to be one of the assailants who perpetrated an assault upon him, in sequel whereto he suffered grievous injuries though was sufficient for the learned Additional Sessions Judge to proceed to affirm the findings of conviction rendered against the respondent herein by the learned trial Court yet he for specious reasons discounted its effect also his verdict for reasons ascribed herein-after suffers from an inherent fallacy. Since the learned defence counsel while holding the complainant to cross-examination had put suggestions to him holding portrayals therein qua availability of the complainant at the relevant site of occurrence also when the learned defence counsel while holding PW-3 to cross-examination put suggestions to him wherewithin echoings are held qua the respondent herein also being available at the relevant site of occurrence yet his concerting to proclaim therein qua there occurring no scuffle thereat inter-se him with the complainant, suggestions whereof obviously personify qua the defence acquiescing to the factum of the accused/respondent herein at the relevant time being available at the relevant site of occurrence. In aftermath, the effect of the defence hence acquiescing to the presence of the accused herein at the relevant time at the site of occurrence when read in conjunction with the proven efficacious recovery of the relevant weapon of offence under memo Ex.PA by the Investigating Officer on its standing produced before him by the accused concerned also when PW-3 in his previous statement recorded in writing wherein he has named the accused/respondent herein to be one of the assailants has testified in consonance therewith, consistent testimony whereof of PW-3 qua the aforesaid facet remaining un-concerted to be shred of its efficacy by the defence, is of its therein holding a visible imminent display qua the defence conceding to the testification of PW-3 occurring in his examination-in-chief wherein he makes an imputation qua accused Rajesh Kumar perpetrating an assault upon him.

18. The learned appellate Court had discounted the vigor of Mark Y merely on the score of the Doctor who prepared it remaining un-examined by the prosecution. The aforesaid reason as stands propounded by the learned Additional Sessions Judge while recording an order of acquittal, is permeated with a legal frailty, significantly when PW-7 to whom a reference was made by the Doctor who prepared mark Y to hold the victim to X-Ray examination, in sequel whereto Ex.PW-7/A to PW-7/C stood prepared wherewithin pronouncements are held qua the victim suffering fracture of left side frontal bone of skull, injury whereof stands opined by him to be grievous in nature also the Doctor who prepared Mark Y on receiving the opinion prepared by PW-7 comprised in Ex.PW-7/D, opining qua the relevant injury being grievous in nature, was hence a sufficient portrayal of the injuries sustained by the victim in sequel to his standing assaulted by the accused being grievous in nature, without any insistence being made upon the doctor who prepared the apposite MLC standing examined for his hence proving it. Consequently the insistence made by the learned Additional Sessions Judge qua Mark-Y which stands prepared by the Doctor concerned standing proven by the latter for hence sustaining the prosecution case of the complainant sustaining grievous injuries, is ridden with gross absurdity besides perversity.

19. For the reasons which have been recorded hereinabove, this Court holds that the learned appellate Court has not appraised the entire evidence on record in a wholesome and

harmonious manner apart therefrom the analysis of the material on record by it suffers from a perversity or absurdity of mis-appreciation and non appreciation of the evidence on record.

20. In view of the above, the impugned judgment is set aside. The conviction and sentence imposed upon the accused/respondent herein by the learned trial Court is maintained and affirmed. The pronouncement of this Court be put into execution with utmost promptitude. The records be sent back.

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

Surinder Singh ...Appellant.
Versus
New India Assurance Company Ltd. and another ...Respondents.

FAO No.: 297 of 2009.
Date of Decision : 02/11/2016

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

For the Appellant: Mr. Nimish Gupta, Advocate.
For the respondents: Mr. B.M.Chauhan, Advocate, forrespondent No.1.
Mr. Vikas Rathore, vice counsel for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (Oral)*

The instant appeal stands directed against the order of the learned Commissioner Workmen Compensation, Chamba, District Chamba, pronounced in 15/Compen/06 whereby the claim for compensation preferred therebefore by the claimant for his standing afflicted with 40% permanent disability in sequel to his suffering injuries during the course of his driving truck bearing No. HP-48-2827, truck whereof met with an accident near Tunnuhati while his standing engaged thereupon as a driver by respondent No.2, stood dismissed by the learned Commissioner.

2. This Court while hearing the learned counsel for the parties has framed for adjudication the following extracted substantial question of law:

> "Whether the learned Commissioner has erred in coming to the conclusion that the petitioner/appellant has failed to prove that the disability has been caused because of the accident."

3. Uncontrovertedly, the claimant/workman during the course of his performing employment as a driver in truck No. HP-48-2827 suffered injuries on his person in sequel to the truck aforesaid suffering an accident at Tunnuhati. In sequel to his sustaining injuries the apposite MLC stood prepared by the doctor concerned. The factum of the ill-fated occurrence also the factum of the claimant/workman in sequel thereto suffering injuries ear-marked in the apposite claim petition, stand acquiesced by the contesting respondents in their reply furnished to the claim petition. However, thereupon it is unbefitting to conclude, of disability certificate

comprised in Ext.PW-2/A, which stood prepared belatedly since the ill fated occurrence wherewithin pronouncements are held qua the claimant/workman standing entailed with 40% disability of right ankle whereupon he stands precluded to henceforth perform the avocation of a driver which hitherto he was performing, holding any vigour, for on anvil thereof assessing compensation qua the claimant, conspicuously when reiteratedly it stands prepared with gross in-proximity occurring vis.a.vis. the ill fated occurrence. The pleaded acquiescence of the contesting respondents qua the factum of the appellant suffering injuries on his person in the ill fated occurrence, cannot sustain the reflections occurring in Ext.PW-2/A especially when it stood prepared besides issued with an inordinate procrastinated delay occurring since the ill-fated occurrence. Even if the preparation of Ext.PW-2/A has occurred with gross improximity vis.a.vis. the ill-fated occurrence, yet the claim of the appellant would not thereupon stand ousted unless evidence stood adduced before the Commissioner in portrayal of the initial injury suffered by the claimant/workman in the ill fated occurrence ultimately sequelling the entailment upon him of a 40% disability of his right ankle, disability whereof stands pronounced in Ext.PW-2/A. However, the claimant workman has not adduced before the learned Commissioner the aforesaid relevant best evidence qua the initial injury suffered by him in the ill fated occurrence which occurred five years prior to the issuance of Ext.PW-2/A ultimately holding a nexus with the entailment upon him of a 40% disability of his right ankle, disability whereof stands pronounced in Ext.PW-2/A. Leaving aside the aforesaid lapse on the part of the claimant/workman, he has aggravated his omission to discharge the onus of proving the prime factum of a nexus occurring vis.a.vis. the initial injury sustained by him in the ill fated occurrence with the pronouncements occurring in Ext.PW-2/A prepared on five years elapsing therefrom, by his even failing to examine the doctor who initially issued the apposite MLC. Also the apposite MLC has remained unexhibited, whereform it is apt to conclude qua the revelations occurring therein remaining unsubstantiated wherefrom the ensuing sequel is qua the pleaded acquiescence if any of the employer of the claimant/workman qua the latter sustaining injuries in the ill fated occurrence holding no communication qua the injured workman also thereat suffering fracture of his right ankle, fracture whereof stands pronounced in the MLC which exists on record especially with its remaining unexhibited wherefrom it is apt to conclude of it remaining unproven by the doctor who issued it whereupon any reliance upon it is unwarranted. Consequently, the pleaded acquiescence if any of the employer of the claimant/workman qua the latter suffering injuries in the ill fated occurrence is not construable to hold the effect of it also proving the unexhibited MLC which exists on record and which stood prepared in prompt sequel to the ill fated occurrence. It is also apt to conclude qua the pronouncements occurring in Ext.PW-2/A not holding any co-relatability or nexus with the pleaded acquiescence of the employer of the injured/ workman qua his also suffering those injuries in the ill fated occurrence nor also it can be concluded of the injured claimant at the initial stage suffering any fracture of his right ankle besides its ultimately begetting the disability pronounced in Ext.PW-2/A. I find no merit in the appeal, which is accordingly dismissed. The substantial question of law is answered against the appellant. No costs.

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

Oriental Insurance Company .....Appellant

Versus

Shri Ram Prashad & Anr. .....Respondents.

FAO No. 336 of 2009
Decided on: 3.11.2016

Workmen Compensation Act, 1923- Section 4- Deceased died during the course of the duties- a claim petition was filed, which was allowed – held, that Workmen Compensation Commissioner had taken the wages of the deceased as Rs.7,000/- - the employer did not file the wages register

to prove the exact income – insurance cover was not adduced in the evidence – however, the penalty reduced from 25% to 5% of the compensation amount- appeal partly allowed.

(Para- 2 to 5)

For the Appellant: Ms.Shilpa Sood, Advocate.
For the Respondents: Ms. Tim Saran, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The respondent No. 1 being the dependent of deceased Pratap Sharma, on occurrence of demise of the latter during the course of his employment under his employer, preferred a petition for compensation against the relevant employee wherein he impleaded the appellant herein as a respondent. It is not controverted qua the demise of deceased occurring during the course of his employment under his employer nor also it is in dispute qua the employer of the deceased workman at the relevant time holding an insurance cover from the appellant herein covering the relevant liability towards compensation arising from occurrence of demise of workman/workmen during the course of his/their performing employment under his/their employer.

2. The learned counsel appearing on behalf of the appellant Insurance Company has contended qua the quantification by learned Commissioner of the deceased workman drawing wages in the sum of Rs.7000/- per mensem is not borne out from the evidence on record. She submits that the employer had in his apposite reply furnished to the claim petition made an espousal therein of the deceased workman drawing wages quantified at a rate of Rs.5000/- per mensem, amount whereof stands contended to be the relevant sum of money whereto the relevant statutory principles were enjoined to be applied for arriving at the compensation amount payable to the father of the deceased workman whereas the learned Commissioner in his impugned award depending upon the relevant testifications adduced in support of the claim petition wherewithin bespeakings occur of the deceased workman drawing from his employment under his employer wages quantified at a rate of Rs.7000/- per mensem his hence committed an illegality. However, the aforesaid submission is unacceptable to this Court as the mere occurrence of the aforesaid factum in the pleadings of the appellant herein unless testified would not hold any probative worth nor would it constrain this Court to on anvil thereof reverse the findings recorded by the learned Commissioner qua the deceased workman drawing wages quantified at a rate of Rs.7000/- per mensem. Also the employer has omitted to adduce the relevant register of wages maintained by him personifying his defraying to the deceased workman wages quantified at a rate of Rs.5000/- per mensem whereas it constituted the best evidence for dispelling the testification of the claimant qua his deceased son drawing wages quantified at a rate of Rs.7000/- per mensem from his employment as a driller under respondent No.1, omission whereof renders the testification of the claimant qua the facet aforesaid to be credible also reliance thereupon being warranted. Consequently, this Court holds qua the learned Commissioner not moving astray while relying upon the testifications of AW-1 and AW-2 qua the aforesaid factum.

3. The learned counsel for the appellant contends qua the fastening in the impugned order of liability of interest upon the appellant not warranting its standing countenanced by this Court. The best evidence to succor her submission was constituted in the relevant insurance cover executed inter se respondent No.1 with the appellant herein. However, the aforesaid insurance cover holding manifestations therein qua the liability of interest qua the compensation amount assessed under the Act being unfastenable upon the appellant remained un-adduced in evidence whereupon this Court is constrained to conclude of the relevant liability of interest fastened upon the appellant herein by the learned Commissioner not warranting any interference. Nonetheless, for want of the appellant not discharging within the time mandated

therein the relevant liability fastened upon it, the learned Commissioner had quantified the relevant penalty imposable upon it @ 25% of the compensation amount. The aforesaid portion of the award hence fastening an exorbitant liability of penalty upon the insurer for want of its within the time mandated therein discharging the apposite liability fastened upon it in the impugned award warrants interference.

4. Consequently, the delay, if any, on the part of the appellant to discharge the apposite liability fastened upon it under the impugned award shall entail upon the insurer, liability of penalty at the rate 5% of the compensation amount.

5. In view of the above, the present appeal stands partly allowed. Impugned order/award is to the extent aforestated modified. All pending applications stand disposed of accordingly.

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

Bakhtawar Singh ....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 295 of 2015.
Decided on : 3/11/2016

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

For the Appellant: Mr. Sanjeev K. Thakur, Advocate.
For the Respondent: Mr. R.S.Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge, Oral

The instant appeal is directed against the judgement rendered on 30.5.2015 recorded by the learned Special Judge, Ghumarwin, District Bilaspur, Himachal Pradesh, Camp at Bilaspur, in Sessions trial No. 11/3 of 2013, whereby the appellant stands convicted and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.25,000/- and in default to undergo simple imprisonment for six months for commission of an offence punishable under Section 20(b) (ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

2. The prosecution story, in brief, is that Lakvir Singh, Inspector alongwith police party were present near Kali Mata Temple on patrolling duty on 18.4.2013 in an official vehicle. At about 1.15 p.m. the accused came from the opposite side wearing a purple coloured T-shirt and a black pant. On seeing the police party he turned back and tried to flee away. On suspicion, the accused was chased by the police party and was nabbed. On inquiry the accused disclosed his name as Bakhtawar Singh. The personal search of the accused was conducted. From the right pocket of the pant, a plastic envelop was recovered. On being opened, it was found to be containing a black coloured substance in stick shapes. Inspector Lakhvir Singh had tested the said substance by burning a small piece and it was found to be charas. Memo regarding identification of charas was prepared. Thereafter the case property was taken into

possession and after completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Charge stood put to the accused by the learned trial Court for his committing offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 7 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He chose to lead evidence in defence and examined three witnesses in defence.

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

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

7. On the other hand, the learned Additional Advocate General, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, standing based on a mature and balanced appreciation of evidence on record and hence theirs not necessitating interference rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

9. Charas weighing 230 grams stood purportedly recovered from the conscious and exclusive possession of the accused under memo Ext.PW-2/B. A perusal of the aforesaid memo whereunder charas stood recovered unveils of its recovery standing effectuated from the pocket of the pants worn by the accused. The learned trial Court on traversing the evidence on record had concluded of the prosecution successfully substantiating the trite factum aforesaid. The conclusion aforesaid formed by the learned trial Court stood anvilled upon the factum of the prosecution witnesses deposing in tandem unbereft of any inconsistency qua the preparation of recovery memo Ext.PW-2/B whereunder recovery of charas stood effectuated in the manner delineated therein, occurring at the site of occurrence divulged therein. However, the learned counsel appearing for the appellant has submitted with force that the recitals disclosing therein qua the preparation of Ext.PW-2/B occurring at the site of occurrence standing belied by the factum of (i) a communication occurring in the testimony comprised in the cross-examination of PW-2 qua a temple existing in close proximity to the site of occurrence, temple whereof stands testified by him to be manned by its priest Raja Ram who is echoed therein to remain present thereat till 6.00 in the evening whereas the relevant occurrence taking place at 1.15 p.m warranted his association in the relevant proceedings whereas his standing omitted to be associated thereat renders suspect the preparation of Ext.PW-2/A. (ii) With occurrence of a communication in the deposition comprised in the cross-examination of PW-2 qua the accused after his standing nabbed and searched his standing taken to his house besides his also voicing therein qua the Investigating Officer also holding the search of his house likewise rendering suspect the factum of recovery of the relevant item of contraband in the manner reflected in the relevant memo aforesaid.

10. Even though there is no imperative necessity for the Investigating Officer to associate independent witnesses in the relevant proceedings also non association of independent witnesses by the Investigating Officer in the relevant proceedings would not scuttle the vigour of the prosecution version rather conspicuously, when the testifications of official witnesses omit to

unravel any occurrence therein of any blatant interse or intra se contradictions, the factum of non solicitation of independent witnesses by the Investigating Officer in the apposite proceedings despite their availability would not assume any paramount significance. However, when a police official PW-2 has in his testimony made an unequivocal articulation qua the accused after standing nabbed at the relevant site of occurrence his standing accosted by the Investigating Officer to his house besides his also testifying qua the house of the accused also standing subjected to search, significantly when thereupon the testifications of official witnesses stand stained with a vice of intra se contradiction, it was a peremptory obligation cast upon the investigating officer concerned to for belying the efficacy of intra se contradictions occurring in the testifications of official witnesses qua the facet aforesaid, to hence associate independent witnesses in the relevant proceedings which purportedly occurred at the site mentioned in the relevant memo whereat the accused stood subjected to a search whereupon the vigour of the prosecution case would stand enhanced. Moreover, the aforesaid articulation made by PW-2 in his cross-examination did for dispelling, the factum qua the effectuation of recovery of the relevant item of contraband from the conscious and exclusive possession of the accused in the manner reflected in the relevant memo not hence occurring at the relevant site of occurrence, warrant the association by the Investigating Officer of independent witnesses in the relevant proceedings, especially when for reasons aforesaid they were available in close proximity thereof. However, he omitted to do so. The prosecution witnesses consistently in their testifications denied the factum of DW-1 owner of a Dhaba adjoining the relevant site of occurrence not holding his commercial establishment in proximity to the site of occurrence whereupon it is submitted by the learned Additional Advocate General of his association in the relevant proceedings being unsolicitable rendering hence his non association in the relevant proceedings to be insignificant. Also he contends qua with the prosecution witnesses consistently denying the suggestion put to them of Tarsem Singh and Dina Nath taking tea at the Dhaba of Sodhi Ram similarly rendered their non association in the apposite proceedings to be irrelevant. However, Sodhi Ram and Dina Nath stepped into witness box as defence witnesses. They in their respective testifications deposed with intra se corroboration qua the relevant factum qua effectuation of recovery of the relevant item of contraband pronounced in the relevant memo not occurring in proximity to the Dhaba of DW-1 contrarily they proceeded to consistently pronounces in their depositions qua theirs witnessing the police officials to accost the accused to his house. The aforesaid testifications unraveled by defence witnesses acquire a virtue of veracity also their testimonies are undiscardable given their relevant testifications remaining unrepulsed during the course of an inexorable cross-examination to which they stood subjected to besides when the testifications of defence witnesses stand on a pedestal coequal to the testifications of prosecution witnesses whereupon conspicuously when their relevant propagations for reasons aforesaid acquire sinew in sequel thereto the depositions of defence witnesses warrant imputation of credence thereto preeminently when PW-2 in his cross-examination has also supported the aforesaid factum wherefrom imperatively the ensuing sequel is of a pervasive doubt seeping the prosecution version qua recovery of the relevant item of contraband standing effectuated in the manner propagated in the relevant memo. Significantly also given the evident availability of the aforesaid witnesses in proximity to the relevant site of occurrence when stands unbelied by the prosecution rendered hence imperative their association in the relevant proceedings whereas theirs standing unassociated in the relevant proceedings spurs an inference of the prosecution failing to dispel the factum of the relevant seizure occurring at a place other than pronounced in the relevant memo. The prosecution case would stand on a solemn pedestal only when the Investigating Officer concerned had associated in the relevant proceedings the priest of the temple who as deposed by PW-2 was available at the relevant time in proximity to the relevant site of occurrence. However, with the priest of the temple located in close proximity to the site of occurrence remaining unassociated by the Investigating Officer concerned in the relevant proceedings begets an inference qua the Investigating Officer hence concerting to smother the truth of the prosecution version. Also therefrom an inference arises qua his concealing besides camouflaging the factum of effectuation of recovery of the relevant item of contraband not occurring at the relevant site of occurrence rather its recovery occurring elsewhere whereupon the

propagation made by the prosecution qua its recovery standing effectuated in the manner spelt in the relevant memo loosing its vigour and credibility. The learned trial Court while relying upon the depositions of the prosecution witnesses has omitted to appreciate the import of the aforesaid testifications. Consequently its discarding the import of the aforesaid echoings occurring in the testification of PW-2 besides in the testifications of defence witnesses has sequelled its drawing erroneous findings qua the accused.

11. Also a perusal of the report of FSL concerned comprised in Ext.PW-4/D reveals of its standing detected to be in the form of sticks and one ball. However, when the relevant case property stood produced in Court for its standing shown to PW-1 theirs occurs a testification of it being only in the form of sticks. Consequently, when PW-1 to whom the case property stood shown in Court has omitted to testify in tandem with the manifestations occurring in the report of the FSL concerned comprised in Ext.PW-4/D prods an inference qua the case property as produced in Court not constituting the one whereupon an opinion stood rendered by the FSL nor it can be concluded of its constituting the relevant case property which stood purportedly recovered under memo Ext.PW-2/B from the alleged conscious and exclusive possession of the accused. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

12. In view of above discussion, the appeal is allowed and the impugned judgment rendered by the learned Special Judge, Ghumarwin, is set aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

13. The Registry is directed to send the record forthwith, prepare forthwith in conformity with the judgment the release warrants of the accused and send the same to the Superintendent of the jail concerned.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Smt. Deepika Vashisht daughter of Dharam Dutt and another. .....Revisionists/Defendants.

Vs.

Rakesh Singh son of late Sh Des Raj and another .....Non-revisionists/Plaintiffs.

Civil Revision No. 3 of 2016.
Order reserved on: 22.9.2016.
Date of Order: November 3,2016.

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

Cases referred:

M/s Hulas Raj Vs. K.B.Bass, AIR 1968 SC 111
Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality Vs. K.N.Palsikar, AIR 1969 SC 580
P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao, AIR 1995 SC 1357

Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 SC 1003

For revisionists: Mr. Tara Singh Chauhan, Advocate.
For Non-revisionists. Mr. Rahul Mahajan, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed under Section 151 of Code of Civil Procedure 1908 against order dated 29.9.2015 passed by learned Civil Judge Junior Division Court No.1 Una HP in civil suit No. 232 of 2014 whereby civil suit filed by plaintiffs was dismissed as withdrawn unconditionally under order XXIII rule I code of civil procedure 1908 and consequently application filed under section 151 CPC by defendants was also dismissed by learned Trial Court.

BRIEF FACTS OF CASE:

2. Rakesh Singh and another plaintiffs filed suit for permanent injunction restraining defendants from raising any sort of construction over suit land. In alternative relief of mandatory injunction also sought. It is pleaded that co-defendant No.1 is co-sharer in suit land and co-defendant No.2 is stranger to the suit land and co-defendant No.1 has no right to change existing nature of suit land by way of raising construction over suit land. It is further pleaded that co-defendant No.1 is daughter-in-law of co-defendant No.2. It is further pleaded that defendants are threatening to raise construction over suit land forcibly. It is further pleaded that plaintiffs have requested the defendants not to raise construction over suit land but defendants did not accept the request of plaintiffs. Prayer for decree of suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of defendants pleaded therein that plaintiffs have no cause of action to file suit and plaintiffs have suppressed the material facts from Court. It is further pleaded that co-defendant No.1 is in separate possession of suit land. It is further pleaded that plaintiffs did not file correct site plan. It is further pleaded that plaintiffs lavelled false allegation against defendants. Prayer for dismissal of suit sought.

4. During the pendency of civil suit plaintiffs also filed application under Order XXXIX rules 1 and 2 code of civil procedure 1908 for grant of ad interim injunction. Learned Trial Court granted ad interim injunction on dated 18.9.2014 and directed the parties to maintain status quo qua raising construction causing interference in any manner over suit land. Learned Trial Court further directed that compliance of order XXXIX Rule 3 CPC be effected and thereafter show cause notice be issued to revisionists as to why order be not made absolute till disposal of civil suit.

5. Defendants filed response to application under order XXXIX rules 1 and 2 code of civil procedure 1908 and also filed application under section 151 code of civil procedure for initiating legal proceedings against plaintiffs for filing false affidavit in judicial proceedings. On dated 15.1.2015 learned Trial Court held that it is not expedient in the larger interest of justice to initiate any criminal proceedings against plaintiffs for few omissions and learned Trial Court restrained itself from passing any order under section 151 code of civil procedure 1908 and disposed of the application filed under section 151 CPC by defendants.

6. Feeling aggrieved against order passed by learned Trial Court dated 15.1.2015 upon application filed by defendants under section 151 code of civil procedure 1908 defendants filed CMPMO No. 80 of 2015 before Hon'ble High Court of HP and the same was disposed of on 23.7.2015. Hon'ble High Court of HP vide order dated 23.7.2015 quashed order and directed learned Trial Court to consider and decide application filed under section 151 CPC by defendants afresh in accordance with law. Hon'ble High Court of HP also directed parties to appear before learned Trial Court on 3.9.2015. Thereafter parties appeared before learned Trial Court and

thereafter learned Trial Court fixed application filed under section 151 CPC by defendants for consideration. On 29.9.2015 learned Advocate appearing on behalf of plaintiffs sought permission of Court to withdraw civil suit under order XXIII rule 1 CPC unconditionally. Learned Advocate appearing on behalf of defendants submitted that although civil suit filed by plaintiffs be permitted to be withdrawn unconditionally but application filed under section 151 CPC by defendants in civil suit be kept pending for order. Learned Trial Court did not agree with the submission of learned Advocate appearing on behalf of defendants. Learned Trial Court held that if civil suit is withdrawn unconditionally under order XXIII rule I CPC then pending applications filed in civil suit would automatically be deemed to be dismissed. Thereafter learned Trial Court dismissed the application filed under section 151 CPC by defendants.

7. Feeling aggrieved against the order dated 29.9.2015 whereby learned Trial Court dismissed application of defendants filed under section 151 CPC in civil suit defendants filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionists and learned Advocate appearing on behalf of non-revisionists and also perused entire record carefully.

9. Following points arise for determination in present revision petition:

1. Whether revision petition filed by revisionists is liable to be accepted as mentioned in memorandum of grounds of revision petition?.

2. Relief.

Findings upon point No.1 with reasons:

10. Submission of learned Advocate appearing on behalf of revisionists that non-revisionists filed false affidavit in judicial proceedings and learned Trial Court has committed grave illegality by way of not initiating legal proceeding against non-revisionists for filing false affidavit in judicial proceedings and on this ground revision petition be accepted is rejected being devoid of any force for reasons hereinafter mentioned. The allegations against non-revisionists are that non-revisionists have committed offence of perjury by way of filing false affidavit in judicial proceedings. It is well settled law that whenever any false affidavit is filed in judicial proceedings then criminal complaint for perjury can be filed by concerned Judicial Officer only before competent authority of law. It is proved on record in present case that before passing order upon application filed under section 151 CPC on merits in civil suit plaintiffs have withdrawn civil suit under order XXIII rule 1 CPC unconditionally.

11. It is well settled law that right of withdrawal of suit unconditionally under order XXIII rule 1 CPC is unfettered right of plaintiffs. It is well settled law that defendants cannot insist that plaintiffs must be compelled to proceed with suit. Party which has initiated judicial proceedings is entitled to withdraw judicial proceedings at any stage of case unconditionally. It is well settled law that counter claim filed by defendants would be proceeded despite withdrawal of suit by plaintiffs under order VIII rule 6-D of CPC vide amendment in CPC w.e.f. 1.12.1977. It is well settled law that when main civil suit is withdrawn unconditionally under order XXIII rule 1 of code of civil procedure 1908 by plaintiffs then all miscellaneous applications filed in civil suit either by plaintiffs or defendants automatically becomes infructuous except counter claim filed by defendants under order VIII rule 6-A code of civil procedure 1908 as per provision of order VIII rule 6-D vide amendment w.e.f. 1.2.1977. Defendants did not file any counter claim under order VIII rule 6-A in the present suit. See AIR 1968 SC 111 title M/s Hulas Raj Vs. K.B.Bass.

12. It is well settled law that in revision petition High Court cannot set aside the order of learned Trial Court unless order of learned Trial Court is perverse ipso facto. See AIR 1991 SC 455 title Masjid Kacha Tank Nahan Vs. Tuffail Mohammed. See AIR 1969 SC 580 title Indore Municipality Vs. K.N.Palsikar. See AIR 1995 SC 1357 title P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao. See AIR 2002 SC 1003 title Gurdial Singh Vs. Raj Kumar Aneja. In view of above stated facts and case law cited supra it is held that order of learned Trial Court is not perverse nor illegal. Point No.1 is answered in negative.

Point No.2 (Relief).

13. In view of findings on point No.1 revision petition is dismissed. Parties are left to bear their own costs. File of learned Trial Court along with certify copy of order be sent back forthwith. Revision petition is disposed of. Pending application(s) if any also disposed of.

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

Himachal Pradesh General Industries Corporation Ltd. ....Appellant.

Versus

M/s Hari Singh Harpal Singh ... Respondent.

RSA No. 320 of 2008.
Reserved on: 28.10.2016.
Decided on: 03.11.2016.

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

For the appellant. : Mr. Hemant Vaid, Advocate.
For the respondent : Mr. Satya Vrat Sharma, Advocate for the respondent.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge.

By way of this second appeal, the appellant/defendant has challenged the judgment and decree passed by the Court of learned Senior Sub Judge, Shimla in Civil Case No. 182/1 of 1997, dated 27.09.2001, vide which said Court decreed the suit of respondent-plaintiff for recovery of Rs. 1,52,464.80/- alongwith interest as well as judgment and decree passed by the Court of learned Additional District Judge, Shimla in Civil Appeal No. 13-S/13 of 2007 dated 25.03.2008 vide which learned Appellate Court while dismissing the appeal filed by the present appellant upheld the judgment and decree passed by the learned trial Court.

2. Brief facts necessary for the adjudication of this case are that respondent/plaintiff (hereinafter referred to as 'plaintiff') filed a suit for recovery of amount of Rs. 1,52,464.80/- with interest on the grounds that the plaintiff which was a partnership concern was awarded contract for transportation of Rectified Spirit fort for the year 1993-94 from various Distilleries to the Country Liquor Bottling Plant, Mehatpur, District Una, H.P by the defendant for which an amount of Rs. 50,000/- was deposited by the plaintiff towards security which was refundable. As per the plaintiff, it transported alcohol/Rectified Spirit from various distilleries to Bottling Plant at Mehatpur during the year 1994 and submitted its bills/G.Rs to the General Manager of the Country Liquor Bottling Plant of the defendant, a part of which remained unpaid. Further as per the plaintiff, the outstanding amount was claimed by it vide notice dated 01.03.1995 and payment of the same was delayed by the defendant on one pretext or the other and despite assurance no payment was made. In these circumstances, plaintiff filed suit for

recovery of an amount of Rs. 1,52,464.80/- which included outstanding amount alongwith interest as well as refund of security deposit and earnest money.

3. The claim of the plaintiff was contested by the defendant interalia on the ground that plaintiff had failed to comply with clause 6 of the contract and had supplied defective spirit to the defendant Country Liquor Bottling Plant, Mehatpur which was unfit for human consumption. As per the defendant, the amounts which were due from them to plaintiff were adjusted against the losses which were caused by the plaintiff to the defendant and on these bases, the claim of the plaintiff was refuted.

4. In replication, the stand so taken by the defendant was denied by the plaintiff. It was stated therein by the plaintiff that one tanker bearing No. HR-01-2991 belonging to the plaintiff loaded with the rectified spirit met with an accident and defendant was reimbursed by the Oriental Insurance Company for the loss caused to it on account of said accident. On these bases, it was stated by the plaintiff that the defendant/Corporation could not withhold the payment of the plaintiff on the said pretext as it had already recovered the insured amount from the insurance company. Rest of the averments of the written statement were also not admitted in the replication by the plaintiff.

5. Before proceeding further, it is pertinent to mention here that paragraph 5 of the plaint, contained contents with regard to cause of action and the same is being reproduced as under:-

> *"5. That the cause of action arose to the plaintiff against the defendant on 3.6.94, 22.7.94 and 1.3.95 onwards on each date of demand within the jurisdiction of this court where also the defendant works for gain and hence this court is competent to try this suit."*

6. The reply to the said paragraph of the plaint as it find mention in the written statement is reproduced as under:-

> *"Calls for no reply."*

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

> *"1.Whether the plaintiff is entitled for the recovery of the suit amount as alleged? OPP.*
>
> *2. Whether the suit is within limitation? OPP.*
>
> *3. Relief."*

8. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective cases, the issues so framed were answered by the learned trial Court in the following manner:-

> *"Issue No.1 : Yes.*
>
> *Issue No. 2 : Yes.*
>
> *Relief :Suit decreed as per operative part of the Judgment."*

9. Learned trial Court vide its judgment and decree dated 27.09.2001 decreed the suit of the plaintiff for recovery of Rs. 1,52,464.80/- alongwith interest at the rate of 6% per annum. Learned trial Court held that plaintiff had proved on record that it had sent bills to the defendant/Corporation and receipt of same was not denied by the defendant. Learned trial Court also took note of the fact that as per the contention of the defendant, the bills in question were withheld as the plaintiff firm had not complied with terms and conditions laid down in Clause 6 of the contract/agreement entered into between the plaintiff and defendant. Learned trial Court also took note of the fact that DW-1 Shri J.K. Lakhanpaul stated that plaintiff had agreed to get adjusted the loss suffered by the defendant on account of accident of the tanker out of the security amount of Rs. 50,000/-. It was held by the learned trial Court that neither defendant examined anyone from the Excise Department to either certify or prove that spirit which was

transported by the plaintiff firm was not fit for human consumption nor it was controverted by the defendant that it (defendant) had received the claim on account of loss suffered by it from the Insurance Company. It was further held by the learned trial Court that no Counter Claim was filed by the defendant to claim any damages or losses allegedly suffered by it due to accident of the tanker. On these bases, it was held by the learned trial Court that defendant had failed to substantiate its contention that the plaintiff had violated the terms and conditions of the agreement. It was further held by the learned trial Court that even if plaintiff had violated the terms of the agreement then also the proper course for the defendant was not to withhold the outstanding payment, security amount and earnest money but right course was to file a suit for recovery of damages allegedly suffered by it. On these bases, learned trial Court allowed the suit for recovery so filed by the plaintiff alongwith interest @ 6% per annum. On the issue of limitation, it was held by the learned trial Court that during the course of arguments it was not explained on behalf of defendant/Corporation as to how the suit was not within limitation. It further held that in the written statement no such objection was raised that the suit was time barred. It was accordingly held by the learned trial Court that the suit was within limitation.

10. In appeal, learned Appellate Court while upholding the judgment and decree passed by the learned trial Court, dismissed the appeal filed by the present appellant against the judgment and decree of the learned trial Court. It was held by the learned Appellate Court that defendant had not disputed that a sum of Rs. 50,000/- was received as security and a sum of Rs. 10,000/- as earnest money by it from the plaintiff. Learned Appellate Court further held that it was also not disputed that plaintiff had submitted bills for an amount of Rs. 39,120/- on account of transportation of spirit which bills were not paid by the defendant on the ground that plaintiff caused loss to it and therefore, it had adjusted the loss against the amount of security etc. It was further held by the learned Appellate Court that the onus to prove loss caused to defendant by the plaintiff was upon the defendant and defendant had failed to prove the same. Learned Appellate Court held that the factum of 16,000/- litres of spirit having been spilled in the accident was not in dispute. It further held that it was contemplated in clause 9 of the agreement Ext. DW1/A that transit insurance of rectified spirit was to be arranged by the defendant, which meant that it was agreed that if any loss is caused to the spirit during the transit, plaintiff shall not be liable to pay for the same and that defendant would get itself indemnified by the Insurance Company. Learned Appellate Court further held that contention of the defendant that the spirit was found unfit for human consumption could not be accepted because if that was the case, then there was nothing on record to suggest as to what happened to the spirit and where had the said spirit gone and whether or not it was destroyed. It further held that it was not so stated that the defendant has handed over the same to the plaintiff. On these bases, it was held by the learned Appellate Court that no loss on account of alleged contamination of spirit was proved and as the defendant had failed to prove any loss caused to it by the plaintiff, it was not justified in realizing the same out of security amount, earnest money and payment of bills which were due to the plaintiff. On these bases, learned Appellate Court while upholding the judgment and decree passed by the learned trial Court, dismissed the appeal of the defendant.

11. Feeling aggrieved by the findings so returned by both the learned Courts below, defendant has filed the present appeal.

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

13. This appeal was admitted on following substantial questions of law on 28.07.2008:

> *"1. Whether is the effect of the absence of the pleading in the plaint regarding the respondent/plaintiff firm having been registered and whether the court will have the right to exercise the jurisdiction in the matter in the absence of such pleading in the plaint and whether in such circumstances the suit was required to be dismissed?*

2. Whether in the facts and circumstances of the case the suit of the respondent/plaintiff was barred by time?"

14. I will deal with both these questions separately.

Question No. 1:-

"1. Whether is the effect of the absence of the pleading in the plaint regarding the respondent/plaintiff firm having been registered and whether the court will have the right to exercise the jurisdiction in the matter in the absence of such pleading in the plaint and whether in such circumstances the suit was required to be dismissed?"

15. Copy of partnership deed dated 01.04.1993 is on record as Ext. PW1/A. Certificate of Registration of the said partnership firm under Section 58(1) of the Indian Partnership Act dated 08.08.1996 is on record as PW1/B. There is no objection taken in the written statement to the effect that plaint filed was not maintainable it its present form. No issue was framed with regard to maintainability of the suit on the ground on which substantial question No. 1 has been framed. There was definite averment in the plaint that the plaintiff was a partnership concern and memo of parties demonstrated that the suit was filed in the name of partnership concern through its partner Harpal Singh. Not only this, the factum of a contract having been entered into between the defendant and plaintiff firm has also not been disputed by the defendant. Accordingly, in my considered view, there is no merit in the contention which has been raised by the appellant in the present second appeal by way of substantial question No. 1 especially when it is a matter of record that the plaintiff firm was a registered concern and as such, it had the locus to file and maintain the case and that the trial Court was having both pecuniary and territorial jurisdiction to adjudicate upon the same. There is no averment made in the written statement that the suit filed was not maintainable on the ground that trial court had not jurisdiction to try the same. Not only this, it is a matter of record that partnership firm is a duly registered firm and same stood registered before the suit was filed by the partnership firm. Therefore also, not only the suit was maintainable on behalf of partnership firm but the learned trial Court was having the jurisdiction in the matter to adjudicate upon the same on merit. The substantial question of law is answered accordingly.

Question No. 2:-

"2. Whether in the facts and circumstances of the case the suit of the respondent/plaintiff was barred by time?"

16. As I have already mentioned above with regard to accrual of cause of action, the plaintiff had stated about the same in paragraph 5 of the plaint which is being reproduced as under:-

"5. That the cause of action arose to the plaintiff against the defendant on 3.6.94, 22.7.94 and 1.3.95 onwards on each date of demand within the jurisdiction of this court where also the defendant works for gain and hence this court is competent to try this suit."

17. The reply to the said paragraph of the plaint as it find mention in the written statement is reproduced as under:-

"Calls for no reply."

18. While deciding Issue No. 2 it was held by the learned trial Court that at the time of arguments it was not explained as to how the suit was not within limitation and in the written statement there was no such objection that the suit was time barred. In my considered view, the findings so returned by the learned trial Court cannot be faulted with. This Court is not oblivious to the fact that the question of limitation can be raised at any stage but then there has to be some foundation laid by a party who is challenging the maintainability of a suit on the basis of limitation in the written statement. Coming to the facts of this case, as I have already mentioned above, the factum of plaint/suit being within limitation has been admitted in the written

statement by the defendant. Even during the course of arguments, learned counsel for the appellant could not point out as to how the suit was barred by limitation when it stood admitted in the written statement that cause of action accrued in favour of plaintiff 3.6.94, 22.7.94 and 1.3.95 onwards. Even from the evidence which has been led by the defendant both ocular as well as documentary it could not be substantiated by the learned counsel for the appellant that the suit filed by the plaintiff was barred by limitation. Therefore, in my considered view, it cannot be said that in the facts and circumstances of the case, suit of the plaintiff was barred by time. The substantial question of law is answered accordingly.

In view of the discussion held above, I do not find any merit in the present appeal and the same is dismissed with costs, so also pending miscellaneous application(s), if any.

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

Karam Chand .....Petitioner.

Versus

Prem Sagar Marwah .....Respondent.

CMPMO No.289 of 2016.
Date of decision: 03.11.2016.

Code of Civil Procedure, 1908- Order 17 Rule 1- Five adjournments were granted to the petitioner – he could not produce the evidence on the date fixed as his mother fell ill – his evidence was closed by the order of the Court- held, that time and place of illness cannot be predicted – adjournment was sought on the ground of unavoidable reason – the Court should have been more compassionate - the fact that five adjournments had already been granted should not have been the sole ground to decline the adjournment – petition allowed- the order set aside on the payment of cost of Rs. 5,000/-. (Para-3 to 8)

For the Petitioner : Mr.G.R.Palsra, Advocate.
For the Respondent : Mr.Dheeraj Vashisht, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned Civil Judge (Senior Division), Kullu, District Kullu, on 30.06.2016 (for short 'impugned order') whereby the evidence of the petitioner came to be closed by order of the Court.

2. It is not in dispute that the petitioner has already been granted as many as five opportunities. However, his explanation for not leading evidence on the date fixed was that his mother, who is more than 100 years old, was seriously ill and as such he stayed at Mandi to look after her and was, therefore, unable to appear before the Court.

3. A perusal of the order passed by the learned Court below would go to show that the version put-forth by the petitioner for not leading his evidence was not even doubted by the Court, yet his evidence was closed only on the ground that as many as five opportunities had already been granted to him to lead his evidence and despite this he had not led his evidence even though the order had been made subject to cost of Rs. 1,000/-.

4. To say the least, the order passed by the learned trial Court is clearly unsustainable. The learned trial Court has erred in not taking into consideration that no one has the volition in the matter of falling ill. The time and place of illness cannot be predicted.

Admittedly, the petitioner has sought adjournment only on the ground of unavoidable reason. The same ought to have been dealt with more compassion and the mere fact that the petitioner had already been granted five opportunities to lead his evidence could not have been the sole ground to reject the application, more particularly, when the Court itself did not disbelieve the ground of illness set up by the petitioner.

5. It has to be remembered that the Judiciary is respected not only on account of its powers to legalize justice on technical grounds, but because of it being capable of removing injustice and is expected to do so.

6. Having said so, the impugned order passed by the learned Court below cannot withstand judicial scrutiny and is accordingly set aside.

7. However, since the respondent has been dragged un-necessarily and otherwise in an avoidable litigation, he is required to be compensated by the petitioner. Though, the petition has been allowed, however, the same shall be subject to cost of Rs. 5,000/- which shall be paid by the petitioner to the respondent on or before the next date of hearing.

8. The parties through their counsel(s) are directed to appear before the learned trial Court on **21.11.2016** on which date the Court would fix a date for recording the entire evidence of the petitioner and shall also provide all necessary assistance for summoning the witnesses proposed to be examined. It is made clear that no further opportunity under any circumstance shall be provided to the petitioner for this purpose.

9. The petition is allowed in the aforesaid terms. Pending application, if any, also stands disposed of.

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

State of H.P. ....Appellant.
Versus
Sandeep Kumar .....Respondent.

Cr.Revision No.38 of 2010
Decided on: 3.11.2016

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

For the Appellant: Mr.R.S.Thakur, Additional Advocate General.
For the Respondent: Mr.Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant revision petition stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 05.10.2009, by the learned Principal Magistrate, Juvenile Justice Board, Una, District Una, H.P. in Criminal Inquiry No. 10/03 whereupon he announced an order of acquittal qua the respondent herein for his allegedly committing an offence under Section 376 of the Indian Penal Code.

2. Briefly stated the case of the prosecution is that on 16.5.2003, at about 4.00 p.m. the prosecutrix PW-1 (name not disclosed) was grazing her goats in the jungle near her house. In the meanwhile, Sandeep @ Gollu (hereinafter referred to as the juvenile) came there and caught hold of her arm. The prosecutrix PW-1 tried to raise hue and cry, however, the juvenile gagged her mouth and took her to nearby bushes and opened the string of her Salwar and forcibly committed rape on her. The juvenile was seen by BImla Devi PW-5, the grand mother of the prosecutrix PW-1 while leaving the spot. On inquiry, the prosecutrix disclosed the incident to her grand mother, Bimla Devi PW-5. Bimla Devi took her to house. The father of the prosecutrix namely Parvesh Kumar had gone to Pathankot. Parvesh Kumar PW-2 came late in the night as such the prosecutrix PW-1 as well as her grand mother Bimla Devi PW-5 disclosed the incident to him in the next morning whereafter, Parvesh Kumar PW-2 took her to hospital at Nurpur, however, the doctor asked them to report the matter to the police. Thereafter, Parvesh Kumar PW-2 alongwith prosecutrix PW-1 rushed to P.S.Nurpur where the prosecutrix PW-1 lodged FIR Ex.PW-1/A against the juvenile. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the respondent challan was prepared and filed in the Board.

3. Notice of accusation stood put by the learned Principal Magistrate, Juvenile Justice Board, Una to the respondent for his committing an offence punishable under Section 376 of I.P.C, to which he pleaded not guilty and claimed inquiry.

4. In order to prove its case, the prosecution examined 11 witnesses. On closure of prosecution evidence, the statement of the respondent under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned Principal Magistrate, Juvenile Justice Board, Una returned findings of acquittal in favour of the juvenile/respondent herein.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Principal Magistrate, Juvenile Justice Board, Una standing not based on a proper appreciation by him of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigor contended qua the findings of acquittal recorded by the learned Principal Magistrate, Juvenile Justice Board, standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The prosecutrix by cogent evidence comprised in Ex. PW-4/A stands provenly subjected to forcible sexual intercourse. However, the embodiments occurring in Ex. PW-4/A would not constrain this Court to reverse the findings of acquittal recorded by the learned Principal Magistrate, Juvenile Justice Board qua the respondent herein unless evidence of immense probative sinew emanates qua the respondent herein provenly holding the relevant inculpatory role. Contrarily, the factum of the respondent purportedly holding any inculpatory role in the ill fated occurrence stands negated by the prosecutrix who in her testification has made an unequivocal deposition therein qua hers holding no knowledge qua the identity of the respondent herein, rather she testifies qua hers acquiring knowledge qua his name and identify from revelations made to her by Smt. Bimla Devi, who however, has omitted to corroborate the aforesaid factum testified by the prosecutrix by hers deposing qua hers not being aware of the name of the respondent nor hers recognizing any person except her son. The factum of the prosecution hence failing to establish the identity of the respondent herein gets fortifyingly

established by the prosecutrix testifying qua hers not recognizing the respondent on the date of occurrence. In sequel thereof, the preeminent conclusion is of the prosecution version qua inculpation of the respondent in the alleged offence being wholly surmisal besides arising from concoction and invention on the part of the Investigating Officer concerned.

10. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned Principal Magistrate, Juvenile Justice Board, Una not suffering from any perversity and absurdity nor it can be said that the learned Principal Magistrate, Juvenile Justice Board, Una in recording findings of acquittal has committed any legal misdemeanor, in as much, as, his mis-appreciating the evidence on record or his omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned Principal Magistrate, Juvenile Justice Board merit any interference.

14. In view of the above discussion, I find no merit in this petition, which is accordingly dismissed and the judgment of the learned Principal Magistrate, Juvenile Justice Board, Una, District Una, H.P. is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh .....Appellant.
Versus
Devi Lal .....Respondent.

Cr. Appeal No. 453 of 2011
Date of decision: November 03, 2016.

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

(Para-9 to 14)

Case referred:
State of Himachal Pradesh vs. Laje Ram and ors., 2011(2) Him. L.R (DB) 597

For the appellant Mr. Virender Verma, Addl. AG.
For the respondent Mr. Ramakant Sharma, Sr. Advocate with Ms. Anita Dogra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

The prosecution is aggrieved by the judgment dated 4.6.2011 passed by learned Judicial Magistrate, First Class, Court No. 2, Nalagarh, District Solan in Criminal Case No. 10/2 of 2009/04, whereby the respondent (hereinafter referred to as the accused) has been acquitted of

the charge framed against him under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code.

2. The record reveals that a case under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code was registered against the accused in Police Station Ramshahar, District Solan vide FIR No. 62/2003 on 8.9.2003 with the allegation that in the month of July, 2002, one Devi Ram (PW-7) has invested a sum of Rs. 40,000/- for a period of three years in TD account and entrusted this amount to the accused, who at the relevant time, was Branch Post Master (BPM) at Post Office Mitian. On being requested time and again, the accused made over one TD Pass book of MSY Account in January, 2003 stamped with date and seal dated 26.1.2003 to PW-7 Devi Ram. In the pass-book, there were entries qua deposit of Rs. 40,000/-. PW-7 Devi Ram allegedly produced the said pass-book on 26/27.8.2002 before the complainant PW-1 Rupinder Singh, Inspector Post Offices, who had come to Branch Post Office, Mitian for inspection. PW-1 Rupinder Singh on verification of the record had found the pass-book having been issued against vague and fictitious account No. 555243. The date of deposit was manually written as 26/27.8.2002. No opening form i.e. 3 T.D. account was filled in nor any SB-26 receipt issued. No entries were found to be made in T.D. Journal and DO Account regarding the deposit of Rs. 40,000/-. Subsequently, the sum of Rs. 40,000/- plus Rs. 4,000/- as interest was credited by the accused into UCR on 11.7.2003. PW-1 Rupinder Singh after checking the records found that the accused had issued a fictitious pass-book and misappropriated the government money and thereby cheated Postal Department. He allegedly used the forged and fictitious pass-book as genuine document. Therefore, application Ext. PW-1/B was made by PW-1 Rupinder Singh to the police of Police Station Ramshahar, District Solan for registration of the case against the accused. Consequently, FIR Ext. PW-9/B came to be registered against the accused.

3. The I.O. PW-9 Surinder Pal, the then SHO Police Station Ramshahar, has conducted the investigation in the case. The reports Ext. PW-2/A and PW-2/B were taken into possession in the presence of the witnesses vide seizure memo Ext. PW-2/C. The appointment letter Ext. PA and declaration form Ext. PB in respect of accused were also taken into possession vide seizure memo Ext. PW-2/D. The B.O. account Ext. PC to PF were also taken into possession vide seizure memo Ext. PW-2/E. The forged pass-book Ext. PG and TD journal Ext. PH were also taken into possession vide seizure memo Ext. PW-2/F. The receipt Ext. PW-4/A was taken into possession in the presence of the witnesses vide seizure memo Ext. PW-4/B. The receipt Ext. PW-1/A was also taken into possession vide seizure memo Ext. PW-5/A. The specimen signatures and hand writing of the accused were also taken during the investigation of the case. Admitted signatures, hand writing and question documents sent for examination to State Forensic Science Laboratory, Junga were found to be in the hands of the same person vide report Ext. PW-9/A. The reasons in support of the report are Ext. PW-11/A. The statements of the witnesses associated by the Investigating Officer were also recorded under Section 161 Cr.P.C.

4. On perusal of the report under Section 173 Cr.P.C. filed against the accused and the documents annexed therewith as well as finding a prima-facie case having been made out against the accused under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code, charge against him was framed accordingly.

5. The prosecution in order to sustain the charge against the accused has examined 11 witnesses in all. The material prosecution witnesses are the complainant Rupinder Singh (PW-1), PW-2 Naresh Sood, PW-7 Devi Ram and I.O. PW-9 Surinder Pal. Learned trial Magistrate, on appreciation of the evidence available on record, has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. He has, therefore, been acquitted of the charge as pointed out at the outset.

6. The legality and validity of the impugned judgment has been questioned by the respondent-State on the grounds, *inter alia* that the prosecution evidence has been appreciated in a slipshod and perfunctory manner. As a result thereof, the findings recorded are based on hypothesis, surmises and conjectures. The testimony of the material prosecution witnesses has been discarded for untenable reasons. No reason has been assigned while discarding the

prosecution evidence. The entrustment of Rs. 40,000/- during the year 2002-03 to accused for deposit in the Post Office stands satisfactorily proved from the oral as well as documentary evidence available on record. Such evidence, however, is stated to be erroneously ignored since the accused had received this amount from PW-7 Devi Ram, therefore, it is for this reason he had deposited the same together with interest in the Post Office. Irrespective of such evidence, the findings that no case against the accused is made out, are stated to be highly illegal and erroneous.

7. Learned Addl. Advocate General, while taking us through the evidence available on record has vehemently argued that the testimony of PW-7 Devi Ram as well as that of the complainant PW-1 Rupinder Singh, supported by documentary evidence i.e. the reports Ext. PW-2/A and PW-2/B and also the pass-book Ext. PG leave no manner of doubt that the accused has misappropriated a sum of Rs. 40,000/- invested by PW-7 Devi Ram for three years in TD account for depositing the same with the accused, who at the relevant time was working as Branch Post Master (BPM), Mitian. According to Mr. Verma, the entrustment of Rs. 40,000/- with the accused stands satisfactorily explained and as he has forged the record and also issued fictitious pass-book, therefore, there was ample evidence warranting his conviction in the instant case.

8. On the other hand, Mr. Ramakant Sharma, Sr. Advocate, while inviting our attention to the statement of PW-7 Devi Ram, has pointed out that the entrustment of Rs. 40,000/- with the accused in July, 2002 is not at all proved. PW-7 Devi Ram has expressed his ignorance that this amount was deposited by him with the accused in July, 2002 rather as per his version, this amount was most probably deposited by him on 11.7.2003. The pass-book Ext. PG was also not handed over to him by the accused and rather received through bus. It has, therefore, been urged that the testimony of PW-7 Devi Ram demolishes the entire prosecution case and as such, no findings of conviction can be recorded against him.

9. What constitutes an offence punishable under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code has been discussed in detail by learned trial Magistrate in the impugned judgment. That part of the judgment reads as follows:

> "25. To hold a person guilty u/s 409 of IPC, Prosecution has to establish that accused was either a Public Servant, a Banker, a merchant, or broker or Attorney, or agent. Further, it has to be established by the prosecution that he was enthused with the property in question with any domain over it. Lastly, prosecution has to establish that he committed criminal breach of trust with respect to the amount so entrusted. To make out a case for criminal breach of trust, it has to be proved that there was a entrustment of property or a domain over property. It must be proved that there was dishonest misappropriation or conversion by a person to his own use of that property or that there was dishonest use or disposal of that property in violation of any direction of law prescribing the mode in which such trust was to be discharged, or of any legal contract expressed or implied, which he has made touching the discharge of such trust, or that he willfully suffered any other person to do so. To hold a person guilty under Section 420 of IPC, Prosecution has to establish that 1) That there should be fraudulent or dishonest inducement of a person by deceiving him, 2) that the person so deceived should be induced to deliver any property to any person or to consent that person shall retain any property, 3) the person so deceived should be intentionally induced to do so or omit to do anything, 4) the act for omission should be one which causes or is likely to cause damage or harm to the person induced and the person induced to deliver the property or valuable security. To establish a case under 467 of IPC prosecution has to prove that document in question was a forgery; that the accused forged if and that document is one of the kinds mentioned in the section. For proving a case under section 468 of IPC apart from forgery it has to be established that in forging accused intended that it shall be used for the purpose of cheating. In order to

prove a case under section 471 of IPC the prosecution require to prove that there must be a fraudulent or dishonest user of a document as genuine and the knowledge or reasonable belief on the part of the person using the document that it is a forged one."

10. Admittedly, the accused at the relevant time was serving as Branch Post Master (BPM) at Mitian. His appointment letter is Ext. PA and the declaration form, he filled in, is Ext. PB. The prosecution case that PW-7 Devi Ram has deposited a sum of Rs. 40,000/- with the accused in the month of July, 2002 is not at all proved beyond all reasonable doubt for the reason that said Sh. Devi Ram himself, while in the witness-box as PW-7, did not support the prosecution case qua this aspect the of the matter at all and rather expressed his ignorance qua date etc. as to when this amount was deposited by him with the accused. If coming to his cross-examination, the amount in question was stated to be deposited by him with the accused about 2 ½ years ago. Since he was examined on 20.4.2006, therefore, if his testimony is believed to be true, the amount in question was deposited somewhere in the end of year 2003 or beginning of the year 2004. In his cross-examination, he further tells us that he did not recollect the date and month when such deposit was made by him, however, as per his version, most probably the amount in question was deposited by him on 11.7.2003.

11. Now, if coming to the issuance of pass-book Ext. PG by the accused, this aspect of the matter is also not at all proved beyond all reasonable doubt because the testimony of PW-7 Devi Ram reveals that the pass-book was not handed over to him by the accused on the same date when he had made the deposit of Rs. 40,000/- with him. The same, according to him, was sent to him by someone and he expressed his inability to disclose the identity of that person who had sent the pass-book to him. He has denied the issuance of receipt Ext. PW-1/A by the official of the Postal Department to whom he had handed over the pass-book Ext. PG. According to him, he did not hand over any document to the police during the investigation of the case nor he was interrogated. He expressed his ignorance as to who had prepared the pass-book Ext. PG and also that pass-book Ext. PG is the same which was handed over by him to the police.

12. True it is that the complainant PW-1 Rupinder Singh, while in the witness-box, has supported the prosecution case qua entrustment of Rs. 40,000/- by PW-7 Devi Ram to the accused in the month of January, 2002 and while in the witness-box has also deposed that the accused failed to account for this amount in the records of the Post Office and thereby not only cheated the Postal Department and rather caused wrongful loss to the department and wrongful gain for himself. He further tells us that the pass-book Ext. PG was produced before him by PW-7 Devi Ram and on enquiry, the same was found to be not genuine and rather forged and fictitious. The record produced by PW-2 Naresh Sood was also pressed into service in order to substantiate this part of the prosecution case. However, when PW-7 Devi Ram himself has not supported the prosecution case qua entrustment of a sum of Rs. 40,000/- to the accused in the month of July, 2002, nor that the pass-book Ext. PG was handed over to him by the accused, such evidence as has come on record by way of the testimony of PW-1 Rupinder Singh and PW-2 Naresh Sood, is hardly of no help to the prosecution case. The report Ext. PW-2/A does not pertain to the present case. If coming to the report Ext. PW-2/B, in view of the statement of PW-7 Devi Ram on the basis thereof also, it cannot be said that a sum of Rs. 40,000/- was deposited by PW-7 Devi Ram with the accused in the month of July, 2002.

13. As per the scientific investigation got conducted during the investigation of the case, the pass-book Ext. PG is in the hands of the accused. We can make a reference here to the report Ext. PW-9/A qua this aspect of the matter and also the reasoning Ext. PW-11/A in support thereof given by Mr. Visheshwar Sharma, Asstt. Director, Regional Forensic Science Laboratory, Dharamshala (PW-11). However, such evidence is hardly of any help to the prosecution case for the reason that the specimen hand writing of the accused was obtained during the investigation of the case and not during the course of trial of the accused. As a matter of fact, in order to place reliance on the report of the hand writing expert, the specimen hand writing of the accused as well as questioned documents are required to be obtained during the course of proceedings in the

case before the trial Court and not during the investigation of the case. Learned trial Magistrate, while placing reliance on the judgment of this Court in ***State of Himachal Pradesh vs. Laje Ram and ors., 2011(2) Him. L.R (DB) 597,*** has rightly discarded such evidence as has come on record by way of testimony of PW-11 Visheshwar Sharma and also the report Ext. PW-9/A as well as the reasons in support thereof Ext. PW-11/A.

14. Therefore, in view of the re-appraisal of the evidence available on record and for the reasons stated hereinabove, it would not be improper to conclude that the prosecution has miserably failed to prove its case against the accused beyond all reasonable doubt. The accused has, therefore, rightly been acquitted of the charge framed against him.

15. Consequently, the judgment under challenge, being legally and factually sustainable, is hereby affirmed. In view of what has been stated hereinabove, this appeal fails and the same is accordingly dismissed. Personal and surety bonds are cancelled/discharged.

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

Des Raj @ Raj Kumar ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Cr. Appeal No.: 81 of 2016.
Date of Decision: 04.11.2016.

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

For the Appellant: Mr.Sat Parkash, Advocate vice Mr.Naveen K.Bhardwaj, Advocate.
For the respondent: Mr.R.S.Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal is directed against the judgement rendered on 30.12.2015 by the learned Special Judge, Chamba, District Chamba, Himachal Pradesh in Sessions Trial No.30 of 2015, whereby the appellant stands convicted and sentenced to undergo imprisonment in the following manner:-

Sr.No.	Section	Sentence imposed.
1.	342 IPC	The appellant/accused was sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.1000/- and in default of payment of fine, the convict was to undergo further imprisonment for one month;
2.	506 IPC	The appellant/accused was sentenced to undergo simple

		imprisonment for a period of two years and to pay a fine of Rs.2000/- and in default of payment of fine, the convict was to undergo further imprisonment for two months; and
3.	Section 4 of the Protection of Children from Sexual Offences Act, 2012.	The appellant/accused was sentenced to undergo simple imprisonment for a period of seven years and to pay a fine of Rs.5000/- and in default of payment of fine, the convict was to undergo further imprisonment for six months.

All the sentences were ordered to be run concurrently.

2. The prosecution story, in brief, is that on 24.3.2015, the victim along with her parents reported the matter to the police that on 23.3.2015 at about 10 AM, she went to Shakti Nallah for grinding maize grain along with her brother Sunil Kumar aged 5 years. The victim went to the Gharat of Shri Firozu where one person named Singh R/o village Saloga was grinding his maize grain. Thereafter, the maize grain of the victim was poured in the Gharat for grinding. After some time, accused also came there and gave money to her brother for bringing some sweet from the shop. When the brother of the victim refused, he slapped him and thereafter her brother went to the shop while weeping. Then accused bolted the door of the Gharat and forcibly put off the Pajami as also his Pants and thereafter committed wrong act with her (sexual intercourse). It was 12 noon when the victim cried, accused gagged her month with his hand. Thereafter, accused tried to give her money not to disclose the incident. When she refused to take money, then the accused threatened her to do away with her life in case she discloses the incident to any one. It is further story of the prosecution that thereafter the accused went to the Gharat of one Mussadi. When the victim was weeping, one Deep son of Shri Chatter Singh R/o village Kathla came there and asked her as to why she was weeping. Then she narrated the incident to him. Thereafter, she went to her house with the flour and narrated the incident to her uncle and aunt. The victim again came with her uncle and aunt towards Shakti Nallah where her parents met them. However, due to night, they returned to their house and only then the matter was reported to the police on the next day and showed their willingness for medical examination of the victim. On this complaint, FIR came to be registered against the accused. Case was investigated. Victim as well as accused were got medically examined. Sttement of victim was also got recorded before the learned Judicial Magistrate 1st Class, Chamba and on completion of investigation, challan was prepared for the aforesaid offences against the accused.

3. On completion of investigation into the offences allegedly committed by the accused a report under Section 173 Cr.P.C. stood prepared and filed in the competent Court.

4. The accused-appellant herein stood charged for his allegedly committing offences punishable under Sections 342, 376, 506 of the Indian Penal Code and Section 3(a) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012. The accused-appellant pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 17 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure stood recorded wherein he pleaded innocence and claimed false implication. He did not adduce any evidence in defence.

6. The accused-appellant stands aggrieved by the judgment of conviction recorded by the learned trial Court. The learned counsel appearing for the appellant, has concerted to vigorously contend before this Court qua the findings of conviction, recorded by the learned trial Court, standing not anvilled on a proper appreciation by it of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General appearing for the State has with considerable force and vigour contended qua the findings of conviction recorded by the Court below being based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

9. Ext.PW-13/A and Ext.PW-13/B respectively constitute the birth certificate and an abstract of the Parivar Register of the prosecutrix wherewithin a display occurs qua the prosecutrix at the relevant time holding an age of 13 years. Consequently, consent, if any, meted by her to the penal misdemeanors perpetrated upon her by the accused holds no vigour.

10. The learned counsel for the appellant has contended of with the prosecutrix besides her parents not supporting the prosecution case, it was grossly inapt for the learned trial Court to record an order of conviction upon the accused/appellant herein. True it is that qua the prosecutrix besides her parents omitting to support the prosecution case yet the aforesaid factum cannot override the testification of PW-16 who recorded her statement made before him under Section 164 Cr.P.C., statement whereof stands comprised in Ext.PW-16/A wherein the prosecutrix has explicitly inculpated the accused/appellant. The vigour of the testification of PW-16 besides of the reflections occurring in Ext.PW-16/B would stand belittled only when the defence had emphatically established qua the recitals occurring in Ext.PW-16/B not emanating from a pure volition of the prosecutrix arising from the factum of her standing pressurized by the Investigating Officer concerned to record it before the Magistrate concerned. However, a close reading of the deposition of PW-16 unveils qua the recording of Ext.PW-16/B by him being free from any stain of it not emanating from the pure volition of the prosecutrix besides it unveils of the prosecutrix in recording it her standing bereft of any exertion upon her of any duress by the Investigating Officer. The aforesaid testification of PW-16 occurring in his examination-in-chief has remained uneroded of its sinew even when he faced the ordeal of a rigorous cross-examination. Consequently, the recitals occurring in Ext.PW-16/B acquire probative worth of immense sinew whereupon efficacy of the deposition of the prosecutrix besides of the deposition of her parents stands benumbed. It appears qua in the prosecutrix reneging from the recitals embodied in the relevant F.I.R. while hers testifying in Court also in her parents not lending sustenance to the prosecution version theirs standing prodded by extraneous considerations whereupon their testifications do not hold any sway nor their testifications countervail the taintfree deposition of PW-16 wherebefore whom Ext.PW-16/B evidently stood volitionally recorded by the prosecutrix, corollary whereof is qua no conclusion other than qua the prosecution hence succeeding in proving the charge stands generated.

11. The further reason for this Court to conclude of the recitals occurring in Ext.PW-16/B holding a paramount virtue of truth ensues from the factum of the relevant MLC prepared qua the prosecutrix comprised in Ext.PW-8/A making vivid unfoldments of the prosecutrix standing subjected to forcible sexual intercourse. Apart therefrom, the report of the FSL concerned comprised in Ext.PX makes a loud communication therein of human semen standing detected in Ext.1a, the Pajami of the prosecutrix, also it pronounces qua human semen standing detected in Ext.3a, the underwear worn by the accused. However, though there occurs no pronouncement therein qua human semen borne thereon being relatable to the accused, yet any omission qua the aforesaid pronouncement therein would not negate the factum of Ext.1a whereon it occurs not at the relevant time not standing worn by the prosecutrix or of Ext.3a not belonging to the accused unless there occurred visible display in cogent evidence qua the exhibits aforesaid not respectively standing worn by the aforesaid. An inference qua the aforesaid pronouncements standing blunted would spur on the defence concerting to assail the efficacy of the relevant recovery memos whereunder they stood recovered. However, the aforesaid concert remained un-assayed by the defence whereupon obviously the relevant best evidence for benumbing the aforesaid inferences is amiss. Consequently, the existence of human semen

thereon is to stand concluded to belong to the accused thereupon it is apt to conclude of the accused at the relevant time perpetrating forcible sexual intercourse upon the prosecutrix.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

13. In view of the above, there is no merit in this appeal which is accordingly dismissed. The judgment impugned before this Court stands maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

Cr.A. No. 408 of 2014 with
Cr.A. No. 507 of 2015
Judgments reserved on: 21.10.2016
Date of decision: 4th November, 2016

Cr.A. No. 408 of 2014

Gaurav Rana ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Cr.A. No. 507 of 2015

Rajesh Singh ...Appellant

Versus

State of Himachal Pradesh ...Respondent

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

(Para-59 to 94)

Cases referred:

U.P. vs. Krishna Gopal and Anr, 1988 4 SCC 302

State of Punjab Vs. Jagir Singh, 1974 3 SCC 277.

Shivaji Sahebrao Bobade & Anr. Vs. State of Maharashtra, 1973 2 SCC 793

Appabhai and Anr. Vs. State of Gujarat, 1988 Supp1 SCC 241

Lakhwinder Singh and Ors. Vs. State of Punjab AIR 2003 Supreme Court 2577

Ravi alias Ravichandran vs. State represented by Inspector of Police, (2007) 15 Supreme Court Cases 372

OMA @ Omparkash & Anr. Vs. State of Tamil Nadu, 2013 (3) SCC 440

Motilal Yadav Vs. State of Bihar, (2015) 2 SCC 647
C.Muniappan and Others Vs. State of Tamil Nadu, 2010 9 SCC 567

For the Appellants	:	Mr. Y.P.S. Dhaulta, Advocate for the appellant In Cr. Appeal No. 408 of 2014 and Mr. Chander Sekhar Sharma, Advocate, for the appellant in Cr. A. No. 507 of 2015.
For the Respondent	:	Mr. Vikram Thakur, Deputy Advocate General with Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

These appeals are directed against the judgment of conviction and sentence passed by the learned Additional Sessions Judge-II, Una, District Una, in Session Trial No. 30/2011, whereby the appellants have been convicted and sentenced to undergo imprisonment for life and to pay fine Rs.10,000/- each under Section 302 of the Indian Penal Code (for short 'Code') and in default of payment to further undergo rigorous imprisonment for a period of one year. They are further sentenced to undergo rigorous imprisonment for a period of five years and pay fine Rs.3000/- each under Section 392 of the Code and in default to further undergo simple imprisonment for six months. All the sentences shall run concurrently and the period of detention undergone has been ordered to be set of under Section 428 Cr.P.C.

2. The prosecution story, in brief, is that on 26.4.2011, at about 11:30 p.m., Pardhan of Gram Panchyat, Bathri telephonically informed the police that a woman had been stabbed by some unknown persons who came on motorcycle and after stabbing the lady had fled away towards Punjab side. On the basis of this information rapat Ex.PW2/A entered in Police Station, Haroli and SI/SHO Shakti Singh Pathania (PW48) alongwith ASI Ashok Kumar, PSI Nishant Kumar, C. Deepak Kumar and HHG Piare Lal proceeded to the spot in the government vehicle No. HP-20C-0507 and visited the spot. They found a woman stained with blood and injuries on her stomach and other parts of the body lying on the bed box in the verandah of sweet shop of Chaman Lal (PW1) by that time the woman had already died. Chaman Lal, husband of deceased got his statement Ex.PW1/A recorded under Section 154 Cr.P.C. to the effect that he is running a shop of halwai in bus stand, Bathri for the last 12-13 years and he used to sleep in the shop daily during the night. On 26.4.2011, at around 9:30 p.m. his wife (deceased) had come to the shop for providing dinner to him and after taking dinner he had gone to answer the call of nature at the distance of about 100 meters from the shop and while he was washing his hands at a distance of about 50 meters from the shop, he heard the cries of his wife Swarni Devi and he rushed to the shop where he saw two boys coming out of the shop who then fled away on motorcycle towards Garhshankar side. He went inside the shop and found his wife lying in blood stained condition and the Galla (chest) of the shop was opened and on checking it was found that Rs. 2000/- to Rs.2500/- were missing from the Galla. Thereafter, his Babhi Bholi Devi came on the spot and they both put Swarni Devi on the bed box but she had died. Lateron, the villagers and Pardhan of lower panchayat also came to the spot. On the statement of complainant case under Sections 392, 302 read with 34 of the Code was registered vide FIR Ex. PW33/A at Police Station, Haroli. SHO Shakti Singh Pathania conducted the investigation of the case on 27.4.2011. Ashok Kumar Videographer (PW13) visited the spot and conducted the videography of the spot. Site plan was prepared by the I.O. Ex.PW48/B on the identification of the witnesses. The blood stained leaves, ball pen, one coin of 50 paise and currency note of Rs.10/- were found and put in plastic container and were taken into possession vide memo Ex.PW2/A. Control sample of concrete was lifted from the spot and put in plastic contained vide memo Ex.PW2/B. The blood was lifted from the shop and verandah and taken into possession vide memo Ex.PW2/C. The wooden box (galla) was taken into possession vide Ex.PW2/D. Specimen of the seal Ex.PW2/E was taken on piece of cloth and seal after use was handed over to witness Satish Kumar (PW2).

Dead body was examined through LC. Ramana (PW26) and form Nos. 25, 35 A & B Ex.PW4/A and application for postmortem Ex.PW25/A was prepared. The postmortem was conducted by PW29 Dr. Sanjay Mankotia, which reveal that deceased died due to hemorrhagic shock subsequent to multiple wounds and duration between death and postmortem was within 18 hours. The probable duration between injury and death was few minutes to an hour. The doctor had preserved the viscera in a jar and blood sample and clothes for chemical examination were separately packed in a parcel and handed over to the police and the doctor had issued PMR Ex.PW29/A. The doctor on receipt of FSL report Ex.PW29/B has given final opinion Ex.PW29/C. HC Vipan Kumar (PW32) on 27.4.2011 had received viscera, clothes of deceased from LC Ramana Devi and entered the same at Sl. No. 575/11 of Malkhana register. He further received case property from the I.O. and entered at Sl. No. 576/11 of Malkhana register.

3. On this very day i.e. 26.4.2011, information had been received that in lower Bathri two boys who were on motorcycle had caused injuries to one person with sharp edged weapon and had snatched Rs.400/- and one mobile. On receipt of such information ASI Prem Chand (PW44) had been deputed for investigation of the case FIR No. 91/2011, dated 27.4.2011, registered under Section 392, 326, 323 read with 34 of the code at Police Station, Haroli. SI Prem Chand visited the spot and recorded the statement of Rajnish and thereafter the mobile phone was put under observation for tracking its location and on 12.5.2011 location of the mobile was found in the village Samundra, District Hoshiarpur and the Mobile was found to have been issued in the name of Amrit Pal, resident of Chak Guru, District Hoshiarpur. Regarding the investigation of this fact, team comprising police officials HC Suresh Kumar (PW23), HC Sanjay (Pw20) were sent to village Samundra and during investigation Amrit Pal revealed that mobile phone being used for Sim No. 98035-91723 had been purchased by him from the appellant Gaurav Rana for Rs. 200/- and after minor repair, Amrit Pal had further sold the mobile to Jagtar Singh for Rs. 400/-. During investigation, it was found that both the appellants – Gaurav Rana and Rajesh were in judicial lock-up in Punjab as they were involved in FIR No. 34/2011, dated 27.4.2011, registered under Section 394/34 IPC, registered in P.S. Nurpur Bedi. Production warrants of both the appellants were obtained from the Court and on 20.5.2011, both the appellants were produced before the Court and police remand was obtained. During police custody, the appellant Rajesh on 20.5.2011 made disclosure statement Ex.PW14/A and appellant Gaurav Rana made disclosure statement Ex.PW14/B in presence of witnesses Jaswant Singh and C. Ram Gopal and on 21.5.2011 appellant Gaurav Rana got recovered Capri and T-shirt from his house at Samundra which were packed in a cloth parcel Ex.PW15/A and sealed with three seals of 'J' and sample of seal 'J' was handed over to witness Vijay Singh. On the same day appellant-Rajesh got recovered from his house a lower (Pyjama) of blue colour and T-shirt black in colour which were kept in a parcel Ex.PW20/B after sealing the same and taking into possession vide memo Ex.PW20/A. On 26/27.4.2011, the appellants after committing the murder and causing injuries to a person at lower Bathri had stayed in the hotel named Oasis, Garhshankar and had paid Rs.1000/- for staying their. On 23.5.2011, Rs.1000/- paid by the appellants to the waiter was got recovered and taken into possession vide Ex.PW16/A. The medical examination of both the appellants was got conducted and their blood on FTA cards was handed over to MHC. Articles recovered from the appellants and other case property had been deposited with MHC.

4. On 31.5.2011, an application was moved to SDJM, Anandpur Sahib for taking case property and custody of the appellants and on 5.6.2011 MHC Nurpur Bedi handed over motorcycle without number, one Kritch sealed with seal impression DS and photocopy of register No. 19, which had been taken in possession vide memo Ex.PW24/A. On the same day, ASI Darshan Singh produced copy of Zimini order dated 17.5.2011, photocopy of sketch of Kritch, Photocopies of disclosure statements, recovery memo of motorcycle and photocopies of MLCs of both the appellants which had been taken into possession vide Ex.PW24/B.

5. The appellants on 21.5.2011 had led the police party to the place of occurrence and had identified the place where they committed crime and memo Ex.PW4/B as per disclosure statement was prepared.

6. Statements of the witnesses under Section 161 Cr.P.C. was recorded and finally on receipt of the chemical reports Ex.PW48/J to Ex.PW48/L challan was prepared and presented in the Court of learned Judicial Magistrate Ist Class, Una on 23.8.2011 and copy of the challan was supplied to the appellants and committed the case to the Court of learned Sessions Judge, Una vide order dated 13.9.2011 and the learned Sessions Judge, Una, thereafter vide order dated 20.9.2011 assigned the case for trial to the Court of learned Additional Sessions Judge-II, Una. The charges were framed and the appellants were made to stand trial for the commission of offence under Sections 392, 302 read with 34 IPC, in which trial appellants were eventually convicted as aforesaid.

7. The prosecution in order to prove its case examined as many as 49 witnesses and closed its evidence on 4.3.2013. Thereafter, the appellants were examined under Section 313 Cr.P.C. in which they pleaded innocence and claimed to be falsely implicated. As per them, they have not committed any murder and robbery. The appellants in defence examined one witness Varinder Singh DW1 and closed the evidence.

8. Learned counsel for the appellants S/Shri Chander Sekhar Sharma and Y.P.S. Dhaulta have vehemently argued that the instant case is a case of no evidence where the so-called eye witnesses i.e. PW1, PW3, PW5 and PW39 are none other then the close relatives of the deceased, whereas no independent witness has been examined in the case. That part, they have vehemently argued that once it is the admitted case of the prosecution that the appellants were unknown persons, then it was imperative upon the prosecution to have conducted an identification parade and in absence thereof the entire trial stand vitiated. It is further argued that apart from their being material inconsistency in the statements of the witnesses examined by the prosecution, they have been marked improvement and padding in the prosecution case on the basis of which conviction cannot be sustained. Lastly, it is vehemently argued that the prosecution has failed to establish the presence of the appellants at the scene of the crime and this fact in itself is sufficient to acquit the appellants.

9. On the other hand, Shri Vikram Thakur, Deputy Advocate General assisted by Shri J.S. Guleria, Assistant Advocate General, vehemently argued that the identification parade is not *sine qua non* can definitely for convicting a person, more particularly, when the prosecution has led clear, cogent and convincing evidence to establish not only the identity of the appellants but their acts of committing crime, which has been duly proved in the statement of PW1, PW3, PW5 and PW39 and there is no reason whey the statements should be discarded only on the ground that they were related to deceased, especially, when their credibility remains intact. It is further argued that in such scenario there is no necessity to have examined independent witnesses. Before appreciating the rival contentions of the parties, it would be necessary to advert to the evidence led by the prosecution.

10. PW1 Chaman Lal, husband of the deceased, who lodged the FIR, in question, stated that on 26.4.2011 at about 9:30 p.m. his wife came to shop with dinner and after taking dinner he had gone to answer the call of nature at a distance of 100 meter. While he was washing his hands at a distance of about 50 meters from the shop, he heard cries of his wife and accordingly rushed to the shop and found two boys one of whom was tall and other of medium height running out of his shop, who went towards Garhshankar side on a black motorcycle. He raised hue and cry upon which Bholi, Raghnandan, Leela Devi came on the spot and later on the Pardhan Suman Devi also came there. He identified the appellants in the Court as being the same who had fled away on the motorcycle. He further stated that he found Rs.2000/- to Rs.2500/- missing from the Galla and claimed that the appellants had murdered his wife. Up-Pardhan had informed the police and he had reported the matter to the police vide Ex.PW1/A. The police recovered various items like ball pen, blood stained leaves, coin of 50 paisa and blood stained concrete pieces from the spot. He further deposed that on 21.5.2011, the police had brought the appellants to his shop and appellants had identified the shop. He also stated that body of his wife has been taken to the hospital for postmortem and he identified the clothes of his wife Ex.P1 to Ex.P6. During cross-examination, he stated that his house is at a distance of about half kilometer

from the shop and admitted that thresher was working in nearby field at the distance of 40 meters. He further stated that he had chased the boys up to 10 meters. He denied that the appellants were seen by him for the first time on 21.5.2011. He did not dispute that there was no street light, however, there was a light in the shop.

11. PW3 Rajinder Kaur alias Bholi identified the appellants in the Court and stated that she had seen two boys aged about 20-22 years and 25-26 years respectively. She claimed that the younger boy was wearing green colour T-shirt and small pant whereas the other boy was wearing black colour T-shirt and blue lower. She on hearing the cries of Swarna Devi had rushed to the shop alongwith Leela Devi, the appellants had fled away on the motorcycle towards Garhshankar side and the taller boy was possessing black colour type article. They found Swarna Devi in an injured condition on the floor as she had sustained injuries on her abdomen and arms. The appellants, as per information given by PW1 Chaman Lal, had taken away money from the cash box. During examination, she had stated that except khokha of vegetable of Piare Lal, no other shop was opened at the time of occurrence. She denied that she had not visited the shop or that she had not seen the appellants on the spot.

12. PW5 Master Jaswinder, the Court after being convinced that this witness was mature enough to give statement, recorded his statement on 21.1.2012. This witness has stated that on 26.4.2011, he alongwith his younger sister was sitting in the shop of his father at Bathri. At about 10:30 p.m, the appellants, whom he identified in the Court came on the motorcycle. They went towards Garhshankar side and thereafter came back. His uncle Chaman Lal left his shop to answer the call of nature, however, his wife Swarna Devi remain in the shop. The appellants purchased a bottle of soda from Smt. Swarna Devi and gave her Rs.500/- currency note. She went inside the shop to give balance to the appellants, in the meanwhile, the taller appellant went inside the shop and other remain outside the shop. When Swarna Devi was giving balance amount to the appellant the taller boy got hold of the wooden cash box and Smt. Swarna Devi tried to snatch the same, thereafter taller appellant stabbed Swarna Devi with some sharp edged object and thereafter both the appellants fled away on the black motorcycle. Smt. Swarna Devi had been crying and this witness claimed to have seen the entire incident from his shop and raised noise and call his father. He further stated that the motorcycle was without number and he had seen the occurrence as there was electricity bulb in his shop and also in the shop of Chaman Lal. During cross-examination, he denied that he had been directed by Bholi Devi to give the statement in the Court. He also denied that there was no witness to the scene of the crime and he was deposing falsely.

13. PW 39 Smt. Leela Devi stated that on 26.4.2011, she alongwith her Devrani Rajinder Kaur were returning to their house after threshing wheat around 10:30-11:00 p.m. While they were near the Panchayat ghar, they have heard noise from the shop of Chaman Lal. The cries were of Swarna Devi (deceased). They went to shop and found two boys coming out of the shop out of whom one was of medium height and while the other one was tall in stature. The medium stature boy had worn green T-shirt and capri (half pant) while the other boy had worn the blue lower and black T-shirt. The taller boy was having black colour weapon in his hand. She further stated that Chaman Lal had gone to answer the call of the nature and was washing his hands near the well. Chaman Lal had raised noise and they had found Swarna Devi in the floor of the shop and blood was spreading on the spot and because of the attack Swarna Devi had become unconscious. She was lifted and laid on the wooden bed. She further stated that appellants had parked the motorcycle near the kokha and had fled away towards the Garhshankar side on a motorcycle, which was without number and black in colour. She claimed that Swarna Devi received injuries on the chest, arm and stomach. The articles were lying here and there in the shop and the Galla (wooden chest) was empty. The appellants had fled away after taking the money from the Galla by attacking Swarna Devi with some weapon. She identified both the appellants in the Court and stated that they were the same who attacked/murdered Swarna Devi in the shop and had taken money from the Galla. She further deposed that she had seen the kritch which the taller appellant in stature was having in his hand. During cross-examination, she stated that she and her Devrani were carrying bags of 40-40 kgs each at that time and all the

lights of the Panchayat ghar, shops and houses were on. She claimed to be at a distance of about 50 meter from the Panchayat ghar and 100 meter away from the shop when they heard noise. She denied that the shop of Chaman Lal was not visible from the Panchayat ghar and voluntarily stated that at that time they were near the Panchayat ghar. She denied the suggestion that she alongwith her Devrani had not visited the shop or not seen the appellants who eventually fled from the spot. She further denied that she had identified appellants in the Court at the instance of the police.

14. PW2 Satish Kumar, ex Pardhan stated that he had been associated in the investigation and on 27.4.2011 he alongwith Sansar Chand had visited the shop of PW1 where the police had taken into possession ball pen, blood stained leaves, coin of 50 paise, currency note of Rs.10/-, concrete etc. These articles were put in a plastic container and thereafter taken into possession vide Ex.PW2/A which bore his signature. Similarly, the police had also taken into possession concrete and tar coal vide memo Ex.PW2/B and likewise the stain of blood lying on the spot vide Ex.PW2/C. The police also took into possession currency note and coin from the cash box amounting to Rs. 123.50 paise and wrapped in cloth parcel vide memo Ex.PW2/D. However, this witness denied that the seal had been given to him by the police and thereafter this witness was declared hostile. In cross-examination by the defence counsel, the witness denied that seal 'P' was affixed by the police on the parcels and claimed that all the recovery memos were prepared on 27.4.2011. He further stated that Rs.10/- currency note and 50 paise coin were recovered by the police out of which the currency note was recovered near the electric pole near the shop of the complainant whereas 50 paise coin was recovered in front of khokha on the road about 10 meters away from the shop of the complainant. He admitted that there are many shops in the market and people frequently visit there as it was main Bathri-Garhshankar road. However, he denied the suggestion of appellants that no recovery had been effected nor any memo have been prepared and that his signature has been obtained on a blank paper.

15. PW4 Balbir Singh, Up-Pardhan was at the relevant time in village Bathri and stated that about 10:30 p.m. he had heard noise of cries from the shop of Chaman Lal. When he reached there he found Chaman Lal, Bholi Devi, Leela Devi and many other persons were present at the spot. He saw Swarna Devi in an injured condition and clothes were blood stained. She was kept on wooden kot and he touched the body and found that she was dead. Chaman Lal had told him that two boys had killed his wife and had thereafter fled away on the motor cycle. He informed the police on telephone about the occurrence and on reaching the spot had prepared the inquest report Ex.PW4/A, which was signed by him and by Chaman Lal. Police took the dead body for postmortem to R.H., Una and he alongwith Chaman Lal and other family members accompanied the police. Subsequently on 21.5.2011, the police brought the appellants, who were present in the Court and had stopped vehicle at a distance of 50 meters from the shop and thereafter the appellants had identified the spot and narrated the entire exercise made by them while committing the offence. They also identified the place where the motorcycle was parked by them. Memo Ex.PW4/B was prepared by the Investigating Officer which bore his signature and also the signatures of Sansar Chand and the appellants and one police official also signed the memo. In cross-examination, this witness stated that there are many shops in the abadi in and around the place of occurrence. There were 4-5 halwai shops, three confectionary shops, two barber shops, two clothes shops and two mechanic shops, however, at the time of occurrence none of the shop was opened except the shop of Chaman Lal. He did not dispute that Panchayat ghar is towards western side from the rain shelter, however, it is denied that shop of Chaman Lal is not visible from panchyat ghar. He further reiterated that police had prepared the site plan at the spot on the basis of the information given by the appellants.

16. PW6 Jarnail Singh is the person who claimed to have been attacked by the appellants on 26.4.2011 while he was walking at village Keluan near Bathri. He stated that at about 8:30 p.m. he had gone inside the shop to recharge his mobile alongwith Rajnish, Pawan and one another boy and while going back to their quarter two boys i.e. appellants present before the Court came on their motorcycle and hit him with the motorcycle and thereafter inflicted injuries with the sharp edged weapon on his right arm, back and chest duly shown to the Court

below, the appellants had abused him and asked him to give whatever he had. Thereafter the appellants had taken away his mobile bearing No. 98160-63345 and Rs. 400/- and because of the injuries this witness had become unconscious. When he regained the conscious, he was in the hospital at Una and thereafter got registered FIR. During cross-examination, he denied that due to darkness he had failed to recognize the appellants and rather voluntarily stated that he identified them with the help of the light of the motorcycle. He further stated that appellants were not got identified by the police and were identified by him in the Court.

17. PW7 Swaran Singh stated that Sim Card No. 98160-63345 was in the name of his mother and he had given the same to Jarnail Singh who had come to Una for service. During cross-examination, he stated that the same had been purchased by him from M/s Rana General Store, Durana.

18. PW8 Sansar Chand has proved recovered memo Ex.PW2/A, PW2/D and identified Galla Ex.P1, Ball Pen Ex.P7, currency note of Rs.10/- Ex.P8, coin 50 paise Ex.P9, bandage pieces Ex.P10, concrete Ex.P11, leaves Ex.P12, concrete Ex.P13, bandage Ex.P14, currency notes of Rs.20, Ex.P15 and P16 and articles Ex.P1 to Ex.P7 which had been taken into possession by the police. In cross-examination, he did not dispute that there were many shops in and around the area and even buses halt there at night. However, it is denied that pilgrims stayed during the night.

19. PW9 HC Rajesh Kumar stated that on 22.9.2011 case property, in case, FIR No. 91/2011, dated 27.4.2011 of Police Station, Haroli was deposited with him by HHG Dilbagh Singh vide R.C. No. 284/2011 alongwith packet containing mobile, keypad and two sim cards. The parcels were sealed with seals M & J and entered in Malkhana register at Sl. No. 3204/11. During cross-examination, he denied the suggestion that no parcel had been deposited with him and he had been deposing falsely.

20. PW 10 Amrit Pal Singh is running mobile repair shop in the name and style of M/s Jaskaran Telecom at village, Samundra, Garhshankar. He deposed that in the year 2011 the appellant Gaurav Rana present before the Court had come to his shop saying that he is in need of money and wanted to sell mobile model Nokia 1202, which he checked and purchased for Rs.200/-. He thereafter changed the key pad and put in sim card of Aircel bearing No. 98035-91723, which was a demo sim. He later on sold the mobile phone to Jagtar Singh for Rs.400/- and he had handed over the mobile phone to the police Ex.P18, keypad Ex. P19 and sim card Ex.P20. During cross-examination, he admitted that he did not give any receipt for the purchase of the mobile and however, he denied the suggestion that the appellant Gaurav had not visited and stated that he had sold the mobile after replacing its keypad but had not issued any receipt of sale while selling the same to the Jagtar Singh.

21. PW11 HC Surjeet Singh had stated that on 17.5.2011, he alongwith ASI Darshan Singh remained associated in investigation of case FIR No. 34/11, registered against the appellants under Section 394 IPC at Police Station Nurpur Bedi. Appellant Gaurav Rana in his presence had made a disclosure statement Ex.P24/E before ASI Darshan Singh of P.P. Kalma to the effect that on 26.4.2011 during night he alongwith appellant Rajesh at lower Bathri had injured one person with Kritch and snatched Rs.400/- and a mobile and thereafter murdered a woman with Kritch and snatched Rs.2500/- from the Galla (chest) at a shop at Bathri. He alongwith Nasib Singh Lambardar and Sarpanch Harket Singh had put signatures on the memo Ex.PW24/F and later on Gaurav Rana had got recovered the Kritch and Rs.20,600/-, which were taken into possession vide Ex.PW24/F. Rough sketch of Kritch Ex.PW24/D was prepared. The motorcycle used for the commission of the crime was recovered vide memo Ex.PW24/G. During cross-examination, he stated that he had joined investigation on 17.5.2011 and denied that at that time appellants were in custody. He also denied that no statement had been given by the appellant Gaurav Rana on the basis no recovery had been effected. He also denied that no recovery of currency notes had been effected at the instance of the disclosure statement of appellant Gaurav Rana.

22. PW12 Suman Kumari is Pardhan of Gram Panchayat Bathri and has stated that the shop had been given to Chaman Lal without rent as he was a poor person and in the shop on 26.4.2011 his wife was murdered. During cross-examination, she denied that there was no shop in the Sarai.

23. PW 13 HC Ashok Kumar deposed that he on 27.4.2011 on the directions of the superior officers had conducted photography of the spot at village Bathri. He found dead body lying in the verandah of the shop and there was blood lying outside the shop, on the road and on the leaves. He further stated that there were Rs.10/- note, 50 paise coin and ball pen lying outside the shop. He photographed these articles and handed over the CD to I.O. in a sealed condition with seal 'R'.

24 PW14 Jaswant Singh ex-Pardhan of Gram Panchayat Bhadiaran, deposed that on 20.5.2011 appellant Rajesh had disclosed to the police in his presence and in presence of C. Ram Gopal that on 26.4.2011, he alongwith Gaurav Rana during the night had murdered a woman with Kritch (Dagger) and identified such place and the place where they parked the motorcycle. He also disclosed that he can get recovered his T-shirt and lower from his house, which he had been wearing at the time of murder. Disclosure statement of the appellant Gaurav Rana was Ex.PW14/A. During cross-examination, he denied that the statement of the appellants had already been recorded by the police and he had only put his signatures. He admitted that the appellants had disclosed to the police that they could identify the place of murder, however, this witness was confronted with the memo Ex.PW14/A and Ex.PW14/B, wherein, this fact has not been mentioned. He further denied that neither any statement was made by the appellants nor he was present with the police on the said date.

25. PW15 Vijay Singh deposed that the clothes had been recovered at the instance of the mother of appellant Gaurav Rana and he was also present there. He was declared hostile and during cross-examination conducted by the learned P.P., he admitted that he had put his signature on memo Ex.PW15/A after going through the contents. Appellant Gaurav Rana had taken the police party to his house and got recovered his Capri and T-shirt from his house. These clothes were put in a parcel and sealed with seal 'J' and sample of seal had been taken separately. He further admitted that sample of seal Ex.PW15/B had been taken on a piece of cloth, which bore his signature and memo Ex.PW15/A had been signed by him, the appellant and another witness. He also admitted that the clothes shown to him were the same which had been taken in possession by the police from the house of appellant Gaurav Rana. During cross-examination by the learned defence counsel, he had stated that police had called him after taking into possession recovered clothes. He denied that he had put his signature on memo and other documents at the instance of the police and further denied that the seal had not been affixed in his presence.

26. PW16 Omkar Sharma is the Manager of Oasis Hotel and Restaurant, who has stated that he comes to the hotel at 8:00 a.m. and returns to his house around 10:30 p.m., however, during night one waiter Mukesh remain in the hotel and the details of the visitors who visit hotel after his duty, are entered in the register by the waiter. On 26.4.2011, he had left the hotel around 11:00 p.m. and in the morning the waiter had disclosed that two boys had stayed in the hotel during night and he charged Rs.1000/- from them, which the waiter handed over to him. As per waiter, these boys had left the hotel without getting their names entered in the register in the morning. The amount of Rs. 1000/- was handed over to the police vide Ex.PW16/A. During cross-examination, he stated that the appellants were not known to him, therefore, he cannot say that there were the appellants who had stayed in the hotel.

27. PW17 Mukesh Kumar is waiter in hotel Oasis and stated that on 26.4.2011 at around 12:00 midnight two boys came to the hotel and demanded room for stay. He opened the room and charged Rs.1000/-. He further deposed that these boys came on motorcycle and assured him to make entry in the register in the morning, however, in the morning both the boys had fled away without making entry in the register. He also stated that on the arrival of Manager, he handed over Rs.1000/- to him. On 23.5.2011, police came to the hotel and he had identified

the boys, who had been staying in the hotel in the night of 26/27.4.2011. He produced Rs.1000/- notes to the police, which were taken into possession vide Ex.PW16/A. He also identified the appellants before the Court. During cross-examination, he denied that without consent of the Manager he had no authority to allow anybody to stay in the hotel during night hours. He further denied that the appellants had not stayed in the hotel.

28. PW18 C. Jasbir Singh stated that on 30.4.2011, he had received five parcels, two samples of seals and one docket containing viscera, clothes, sealed with Una mortuary seal from MHC Vipan Kumar and other parcels sealed with seal 'P' alongwith sample seal, which were containing blood stained leaves, blood stained crushed stones, Rs.10 note and 50 paise coin and deposited the same at FSL, Junga. On 27.6.2011, he again carried three parcels sealed with seals T, J, DS, CHC, Haroli, 2 FTA cards, one parcel containing lower and T-shirt and one containing Kritch sealed with seal DS alongwith seal sample to FSL, Junga and deposited the same there on 28.6.2011.

29. PW19 C. Deepak Kumar had joined investigation on 27.4.2011 and as per his statement at about 1:25 a.m., I.O. Shakti Singh recorded statement of Chaman Lal which he had carried to P.S., Haroli on the basis of which FIR had been registered. On 5.7.2011 he had gone to Junga for collecting result and handed over the same to MHC on 7.7.2011.

30. PW20 HC Sanjay Kumar alongwith HC Naresh Kumar, HC Dharam Pal, C.Deepak Kumar and C. Ram Gopal remained associated in the investigation of the present case with SHO Shakti Singh of P.S., Haroli. The appellants during police custody had taken the police party to the spot at village, Bathri in Chaman Lal Sweet Shop and got identified the places from where they had snatched the money from the wife of Chaman Lal and stabbed her to death. They had also identified the place where they had parked the motorcycle. Regarding this memo Ex.PW4/B had been prepared which bore his signatures, as well as of Balbir Singh and the appellants. On the same day, the appellants took the police party to village Dhamai where PW Balbir Singh of village Dhamai was associated in the investigation and appellant Rajesh had led the police party to his house where his mother was present. The appellant from the room where iron petty (box) was lying over which, one brief case of black colour was kept and from the brief case, the appellant had taken out one lower suit (Pyjama) over which there were two cuts on right side of leg. He also got recovered T-shirt of black colour over which Amar Icon mark was written. Above said T-shirt and lower were packed in cloth parcel and parcel was sealed with seal T and seal after use was given to Balbir Singh and parcel had been taken in possession vide memo Ex.PW20/A. The sample of seal Ex.PW20/B had been retained. He has also identified T-shirt Ex.P35 and one lower Ex.P36 in the Court which had been recovered at the instance of appellant Rajesh from his house. During cross-examination, he has denied that they had called ward panch Balbir after recovery and nothing was recovered at the instance of appellant Rajesh.

31. PW21 Jagtar Singh has stated that he had purchased one old mobile Nokia 1202 from the shop of Amrit Pal Singh (PW10) for a consideration of Rs.400/- in the fifth or sixth month of 2011. After about 15-20 days of purchase of mobile, police had come to his shop where he was working and police had taken said mobile from him. He had inserted sim No. 94655-53283 in the mobile. During cross-examination, he has admitted that there is no specific identification on mobile Ex.P18.

32. PW22 ASI Prem Chand had produced Kritch in the Court which was deposited with him in Malkhana of P.S. Anandpur Sahib by SHO, P.S. Nurpur Bedi. He had already produced Kritch before learned SDJM, Anandpur Sahib as well as before learned JMIC (I), Una. During cross-examination, he has admitted that Kritch Ex.K1 had not been recovered in his presence by the I.O.

33. PW23 is HC Naresh Kumar. He has stated that he remained associated with the investigation of this case with SI Shakti Singh. As per his statement, on 21.5.2011 they had gone to village Samundra with both the appellants. The witness Vijay Kumar had also been associated and appellant Gaurav Rana took them to his house where his brother was present. Appellant

from his room got recovered T-shirt Ex.P23 and Capri Ex.P24 from small trunk which was lying on big iron box (petty). T-shirt, Capri which the appellant was wearing at the time of occurrence, had been taken in possession vide memo Ex.PW15/A. Clothes had been packed in a cloth parcel and parcel had been sealed with three seals of impression J and sample of seal Ex.PW15/B had been taken on a piece of cloth. On 12.5.2011 he alongwith HC Sanjay Kumar and other police officials as per orders of Superintendent of Police, Una had gone to village Samundra in connection with investigation of case FIR No. 91/2011. One Amrit Pal, son of Ajmer Singh who was running mobile shop was associated in the investigation. On the basis of call details as the mobile was under observation and mobile had been snatched from Jarnail Singh, the mobile had been sold to Amrit Pal by appellant Gaurav and after repair he further sold that mobile to Jagtar Singh. On the same day, Jagtar had produced mobile and sim which were put in cloth parcel and sealed with three seals of J and taken in possession vide memo Ex.PW23/B. During cross-examination, he has denied that they had purchased new mobile and other articles from the shop of Amrit Pal and no recovery of mobile had been made from Jagtar Singh. He has denied that parcel had been sealed in the police station. He has denied that no recovery had been effected at the instance of appellant Gaurav Rana.

34. PW24 SI Nishant Bhardwaj had also visited the spot alongwith SI Shakti Singh. In the shop of Chaman Lal dead body of Swarni was lying on the wooden cot and blood had been on the floor. The articles in the shop were scattered here and there. The I.O. got the spot videographed from HC Ashok Kumar and prepared site plan and took in possession articles for evidence. I.O. had filled in 25, 35(a)(b) forms and deputed ASI Ashok Kumar and L.C. Ramana for taking the dead body of Swarni for postmortem to D.H., Una. On 5.6.2011 he alongwith I.O. and other police officials had visited P.S., Nurpur Bedi (Punjab) where they had shown order dated 31.5.2011 of SDM, Anandpur Sahib, to MHC Balbir Singh, MHC had produced case property of case FIR No. 34/2011 dated 27.4.2011 which was required in the present case. The case property including one motorcycle pulsar of black colour and cloth parcel sealed with seal DS stated to be containing Kritch (sharp edged weapon) had been taken in possession. They had also procured copy of Malkhana register No. 19 of P.s. Nurpur Bedi bearing Mad No. 202 dated 17.5.2011. The motorcycle, parcel and abstract of Malkhana register had been taken in possession vide memo Ex.PW24/A by the I.O. Copy of order of learned SDJM, Anandpur Sahib had been given to MHC Balbir Singh of Nurpur Bedi. On the same day, he alongwith the I.O. and other police officials with the case property had gone to P.P. Kalma where ASI Darshan Singh had produced record of case FIR No. 34/2011 dated 27.4.2011 under Section 394 IPC registered at P.S. Nurpur Bedi including copy of disclosure statement of appellant Gaurav Rana, copy of memo regarding Kritch and cash Rs.20,600/-, copy of memo of motorcycle pulsar of black colour, copy of sketch of Kritch, zimini No. 16, dated 17.5.2011, two applications moved to Medical Officer, PHC Singhpur for medical examination of appellants, which were taken in possession by the I.O. vide memo Ex.PW24/B. copy of Malkhana register is Ex.PW24/C, copy of sketch of kritch is Ex.Pw24/D, copy of disclosure statement of appellant Gaurav Rana is Ex.PW24/E, copy of recovery memo of kritch and cash is Ex.PW24/F, copy of recovery memo of motorcycle is Ex.PW24/G, copies of applications moved to Medical Officer, PHC, Singhpur are Ex.PW24/I, copy of order issued by learned SDJM, Anandpur Sahib is Ex.PW24/J. During cross-examination, he had admitted that at the time of taking in possession copies of above documents, appellants were not present.

35. PW25 ASI Ashok Kumar had got conducted postmortem of the dead body of Swarna Devi and after postmortem, dead body had been handed over to Chaman Lal vide memo Ex.PW25/B in the presence of L.C. Ramna Devi and Balbir Singh. He had obtained postmortem report and handed over the same to I.O.

36. PW26 L.C. Ramna Devi had been deputed to village Bathri from where she and ASI Ashok Kumar had been deputed for D.H., Una for getting the postmortem of Swarni conducted through doctor. After postmortem, the doctor had handed over to her one parcel containing viscera, parcel containing clothes of deceased, one parcel of ornaments, one seal sample, one envelope sealed with Una mortuary seal and she had handed over all these articles to MHC.

37. PW27 HHC Dharam Pal on 4.6.2011 had been deputed to FSL, Junga. He accordingly collected envelop containing FSL report No. 670B-SFSL, PHY-88/2011 and had handed over envelope to MHC on 5.6.2011.

38. PW28 is HHC Jagtar Singh who on 5.8.2011 had been deputed to collect FSL report from Junga and he collected report No. 1025/A, SFSL, B10-149/2011 contained in a sealed envelope which he had deposited with MHC on 6.8.2011.

39. Postmortem of the deceased had been conducted by PW29 Dr. Sanjay Mankotia on 27.4.2011 on the application Ex.PW25/A moved by the police. At the time of postmortem, he had noticed;

(1) sharp edged wound on right breast 3cm x 2cm with deep tissues and fat visible 4cm below right nipple and 3cm deep.

(2) sharp edged wound below right breast 4cm deep in between 7th and 8th ribs.

(3) sharp edged wound on the joining right axilla and iliac crest 4cm x 2cm penetrating in abdominal cavity 4cm deep mid way between this line. Right plurae and lung punctured at leviel of 7th and 8th ribs.

As per his opinion, the deceased had died due to hemorrhagic shock subsequent to multiple wounds. The probable duration between death and postmortem was within 18 hours and duration between injury and death was few minutes to an hour. The doctor had preserved viscera in a jar, blood sample and clothes, brazier, dupatta, pranda for chemical examination in separate parcels sealed with Una mortuary seal and handed over the parcels to the police and issued report Ex.PW29/A. On 19.9.2011, SHO P.S., Haroli had moved application Ex.Pw29/D and produced one parcel sealed with FSL seals. There were two signatures on both sides of the parcel and parcel had been opened and Kritch Ex.K had been found in it. The injuries observed on the person of deceased Swarni Devi were possible with the kritch and injuries present on the dead body were sufficient to cause her death. Kritch Ex.K1 had been sealed with Una mortuary seal and returned to the police with sample seal Ex.PW29/E. During cross-examination, he has admitted that there was no blood on the kritch when it was shown to him by the police.

40. PW30 Dr. Shingara Singh is Medical Officer, posted at PHC, Basdehra and on 22.5.2011 the police had moved application Ex.PW30/A for medical examination and collection of blood samples on FTA cards for DNA profiling of appellants Gaurav and Rajesh. He has firstly conducted medical examination of appellant Gaurav Rana at about 12:40 p.m. and on examination there was healed scar mark curved over base of left hand forefinger. His blood sample in FTA cards was collected, sealed and sample was sealed for further investigation at FSL, Junga. The parcel was sealed with hospital seal. He had taken seal sample on FTA form Ex.PW30/B. On the same day, he had also conducted medical examination of appellant Rajesh and had noticed infected wound on his left thigh just above knee joint. The wound was already stitched and as stated by the appellant. He had got the wound stitched on 26.4.2011 from some private practitioner. He had issued MLCs of appellant Rajesh Ex.PW30/C and that of appellant Gaurav Ex.PW30/D. The blood sample of appellant Rajesh had been taken on FTA cards and sealed with hospital seal for further investigation at FSL, Junga. He had filled in FTA form Ex.PW30/E of appellant Rajesh and obtained his right and left thumb impressions and signatures.

41. PW31 Surinder Pal Singh is Patwari posted in Patwar circle, Bathri. On 16.8.2011 on application Ex.PW31/A, the Tehsildar had given orders of demarcation of T-shop of Chaman Lal and accordingly he had conducted demarcation of shop in the presence of police and shop had been identified by the police. He had prepared Tatima Ex.PW31/B and copy of Jamabandi Ex.PW31/C. On 17.8.2011 report had been produced before the police after counter signatures of Kanungo and report is Ex.PW31/D which is in his hand and bears his signatures. The shop of Chaman Lal had been found on Khasra No. 2397.

42. PW32 HC Vipan Kumar is MHC and he had received case property from LHC Ramana Devi on 27.4.2011 containing viscera, clothes, ornaments alongwith sample seals. On the same day, he had also received four parcels from SI/SHO Shakti Singh and he had entered all the articles at Sl. No. 576/2011 of Malkhana register. On 21.5.2011, SHO Shakti Singh had deposited one parcel sealed with three seals of impression J and he had entered the same at Sl. No. 574/2011 of Malkhana register. On 22.5.2011, he had received an envelope sealed with two seals of CHC, Haroli stated to be containing blood samples on FTA cards of appellant Gaurav Rana and another envelope sealed with two seals of CHC, Haroli containing blood sample on FTA cards of appellant Rajesh and he had entered the same at Sl. No. 598/2011 of Malkhana register. On 23.5.2011 he had received one unsealed envelope containing 10 notes of 100 denomination each and entry has been made by him at Sl. No. 600/2011. On 5.6.2011 he had also received one parcel from SHO Shakti Singh containing kritch sealed with seal DS and entered the same at Sl. No. 608/2011 of Malkhana register. On 30.4.2011, articles mentioned at Sl. Nos. 575/2011 and 576/2011 had been sent to FSL, Junga through C.Jasbir Singh. On 27.6.2011 articles mentioned at Sl. No. 594/2011, 598/2011 and 608/2011 had been sent to FSL, Junga through C.Jagtar Singh. On 5.6.2011 HHC Dharam Singh had brought one parcel sealed with two seals of FSL, Junga alongwith result which he had entered in Malkhana register and handed over the same to I.O.

43. PW33 Baldev Ram had got entered FIR Ex.PW33/A on the basis of statement of Chaman Lal Ex.PW1/A and made endorsement Ex.PW33/B on reverse of Ex.PW1/A and thereafter the file had been sent to the spot through C.Deepak Kumar. On receipt of file and expert opinion he had prepared supplementary challan. During cross-examination, he has denied that FIR was registered later on at the instance of I.O. and he has wrongly prepared supplementary challan.

44. PW34 is Dr. Vivek Sehajpal, Assistant Director (DNA), FSL, Junga. He has stated that in the present case, he had received nine parcels for DNA analysis in sealed condition vide R.C. No. 135/2011 dated 30.4.2011, R.C. No. 189/2011 dated 27.6.2011. He had carried DNA profiling of the exhibits and had given opinion as report No. 670/D/SFSL /DNA-52/2011 and 1025B/SFSL/DNA-89/11 Ex.PW34/A (nine sheets).

45. PW35 C/ Gurbax had only collected SFSL report in FIR No. 90/2011 on 28.6.2011. PW36 Naseeb Chand is Nambardar of village Ajampur. On 17.5.2011 in his presence and in the presence of Harket Singh appellant Gaurav Rana had made disclosure statement that on 26.4.2011 in the area of Himachal Pradesh in lower Bathri, he alongwith appellant Rajesh had inflicted injuries on pedestrian and snatched Rs.400/- and mobile and thereby, they had murdered one woman at village, Bathri and taken away Rs.2500/-. Copy of disclosure statement is Ex.PW24/E. Appellant Gaurav had also made disclosure statement that he had kept kritch and Rs. 2500/- in his house and accordingly, led the police party to his house and got recovered currency notes and kritch from the trunk which were taken in possession vide memo Ex.PW24/F. As per his version, copy of sketch of kritch is Ex.PW24/D. During cross-examination, he has stated that signatures of appellants were not taken in his presence. He has denied that no disclosure statement had been made by appellant Gaurav in his presence nor any recovery had been effected.

46. PW37 Balbir Singh has stated that on 21.5.2011 he remained associated with the police in this case and nothing was recovered in his presence at the instance of appellants. He was declared hostile and during cross-examination by learned P.P. he has admitted that on 21.5.2011 he and HC Sanjay had joined investigation but has denied that appellant Rajesh had taken the police party to his house and recovery of lower and T-shirt had been effected. He has admitted that seal sample Ex.PW20/B bore his signatures.

47. PW38 Navjeet is Nodal Officer, AIR Cell, Shimla. On 12.5.2011 on the request of Superintendent of Police, Una, he had provided call details of mobile No. 98035-91723 bearing IMEI No. 351529041336850 through e-mail to Superintendent of Police, Una copy of which is Ex.PW38/B and call details are Ex.PW38/B and IMEI No. is encircled red in Ex.PW38/B. During

cross-examination, he has stated that as per record, mobile No. 9803591723 belongs to Amrit Pal Singh son of Ram Lal.

48. PW40 HC Balbir Chand of P.S. Nurpur Bedi has stated that on 5.6.2011 on the directions of learned SDJM, Anandpur Sahib, he had produced one parcel containing kritch sealed with seal DS and motorcycle pulsar without number to SHO, Shakti Singh of P.S. Haroli which had been taken in possession vide memo Ex.PW24/A and memo bears his signatures as producer. He has brought original Malkhana register and Ex.PW24/C abstract of Malkhana register is correct as per original record. During cross-examination, he has denied that articles mentioned by him in examination-in-chief were not in his possession and he had not produced kritch and motorcycle to SHO, P.S. Haroli.

49. HC Balbir Singh (PW41) of P.P. Daulatpur has stated that on 23.5.2011 he had gone to Garhshankar alongwith SHO Mukesh Kumar had produced Rs. 1000/- who is working as waiter in hotel Oasis and currency notes had been put in an envelope and taken in possession vide memo Ex.PW16A. He had translated memos Ex.PW24/E, Ex.PW24/F, Ex.PW24/A which were in Punjabi and translation of the same is Ex.PW41/A to Ex.PW41/C which is true version of memos which are in Punjabi.

50. PW42 is C. Rajesh Kumar and he has proved rapats Ex.PW42/A to Ex.PW42/C from the original record and as per him, rapat Nos. PW42/A to Ex.PW42/C had been entered at the instance of SI Shakti Singh. During cross-examination, he has denied that rapats had been written later on.

51. PW43 is Megha Kanwar, Criminal Ahlmad of Court of learned JMIC-I, Una and she had produced challan pertaining to FIR No. 91/2011 of P.S. Haroli.

52. PW44 ASI Prem Lal is I.O. of P.S. Haroli and he had conducted investigation in case FIR No. 91/2011 dated 27.4.2011 registered under Section 392, 323, 326 read with 34 IPC. Information of murder at Bathri had been received and accordingly, rapat Ex.PW17/A had been entered which is lying in case file No. RBT-22-11-12/11 of the Court of learned JMIC-I, Una. He alongwith SI Shakti Singh, PSI Nishant, ASI Ashok Kumar and other police officials had visited the spot. He had received information that two boys were also assaulted by the appellants at Bathu village and he accordingly alongwith C. Ashok Kumar had been deputed to verify the facts at Bathu. He had recorded statement of Rajnish son of Prakaram Singh Ex.Pw1/A lying in the file of lower court and statement had been sent to P.S., Haroli through C. Ashok Kumar on the basis of which case had been registered against the appellants. He recorded statements of the witnesses and procured production warrants of the appellants on 23.5.2011 and they had produced the appellants before learned JMIC, Court No. 2, Una on 25.5.2011. During police custody, appellants had identified the place of occurrence and injured. During cross-examination, he has admitted that no investigation in case FIR No. 90/2011 had been conducted by him. He has denied that in case No. 91/2011 false investigation had been conducted by him.

53 PW45 HC Shakti Nandan on 14.9.2011 had received kritch sealed with seal of FSL, Junga from C. Yash Pal in P.S. Haroli and entered the same at Sl. No. 608/2011 of Malkhana register. Kritch had been given to SHO on 19.9.2011 for taking opinion of the doctor and on the same day, kritch bearing Una mortuary seal had been received by him alongwith sample seal from the SHO. On 22.9.2011 parcel of kritch had been sent through C.Jagtar to P.S. Nurpur Bedi and entry to this effect had been made at Sl. No. 608/2011.

54. PW46 C. Yash Pal on 12.9.2011 had gone to FSL, Junga for collecting result of case FIR No. 90/2011 and had brought kritch alongwith FSL report and deposited the same with MHC. The parcel was bearing FSL seals.

55. PW47 Devinder Verma is Nodal Officer of Bharti Airtel, Kasumpati, Shimla. He has stated that on the request of police he had emailed billing address of Mobile No. 98160-63345, copy of which is Ex.PW47/A. During cross-examination, he has stated that sim No. 98160-63345 had been issued in the name of Rekha Devi.

56. PW48 SI Shakti Singh Pathania is an Investigating Officer, who conducted investigation in this case. He stated that on 26.4.2011 at about 11:20 p.m. Pardhan, Gram Panchayat, Bathri telephonically informed at Police Station, Haroli that at Bathri bus stand in a tea stall two persons had stabbed woman in the shop and fled away towards Punjab on motorcycle. Regarding this rapat No. 37-A Ex.PW42/A had been entered. He thereafter alongwith PSI Nishant Sharma, ASI Ashok Kumar, ASI Prem Lal, C. Ashok Kumar, C. Deep Kumar and HHG Piare Lal proceeded to the spot in a government vehicle. On reaching spot, a dead body of woman, namely, Swarna Devi lying on wooden bench (takhtposh) and other local people were present there. The dead body was stained with blood and there were injuries on the stomach, arm and other parts of the body. During this period, he received one more information that at village Bathri two persons who were riding motorcycle had inflicted injuries to one person and snatched his money and mobile etc. and fled away. On this information, ASI Prem Lal alongwith C.Ashok Kumar were deputed to visit the spot to verify the facts. Thereafter, PW1 Chaman Lal got recorded his statement Ex.PW1/A under Section 154 Cr.P.C. On the basis of a statement, he prepared a Rukka and sent the same to the Police Station, Haroli through C. Deepak Kumar, on the basis of which FIR Ex.PW33/A under Sections 392, 302 read with Section 34 IPC had been registered. In the meanwhile, photographer HC Ashok Kumar and LHC Ramana reached on the spot and videography of this spot was conducted and CD Ex.P.22 was prepared, which was handed over to him after sealing the same with three seals of impression R. Specimen of impression was taken on separate piece of cloth Ex.PW48/A. The site plan Ex.PW48/B of the spot as per identification of complainant and witnesses was prepared. Dead body of the deceased was examined through LHC Ramana and local lady/witnesses and filled up form 25:35 A & B and form 25:39 (inquest report) Ex.PW4/A, which was signed by Chaman Lal and Balbir Singh. He then prepared application Ex.PW25/A for the postmortem of deceased Swarna Devi and sent the dead body alongwith inquest report and connected documents through ASI Ashok Kumar and LHC Ramana Devi to R.H., Una. After postmortem ASI Ashok Kumar handed over the report Ex.PW29/A to him. One ball pen, coin of 50 paise, currency note of Rs.10/- and blood stained leaves were found on the spot which were put in a plastic container and sealed with three seals of seal impression P and taken into possession vide memo Ex.PW2/A. The control sample of concrete was lifted from the spot and put in a plastic container and seal with three seals of seal impression P and was taken into possession vide memo Ex.PW2/B. Thereafter the blood was also lifted from inside the shop and verandah with the help of cotton bandage and put in a plastic container which was put in a cloth parcel and sealed with three seals of impression P and taken into possession vide memo Ex.PW2/C. Wooden box lying inside the shop, which was stated to be containing Rs. 2000/- to Rs.2500/- was checked and one currency note was found of Rs.20/-, one note of Rs.5/- and coins, total amount Rs. 123.50 and remaining amount had been allegedly taken away by the appellants. This amount was put in same wooden cash box and sealed with seal impression of P and taken into possession vide memo Ex.PW2/D. Specimen seal was taken on a piece of cloth Ex.PW2/F. Vide said memos, parcel and sample seals were signed by the witnesses, namely, Satish Kumar and Sansar Chand and the seal after use was handed over to PW Satish Kumar. The statements of PWs were also recorded and after conducting the investigation on the spot as well as in the area. He came back to the police station. Case property was handed over to MHC. The mobile phone, which was stated to be snatched by the appellants in case FIR No. 91/2011 was put on observation for tracking the location of mobile No. 98160-63345. On 12.5.2011, the mobile location was found in village Samundra, District Hoshiarpur in Aircel Sim No. 98035-91723, which was found to have been issued in the name of Amrit Pal, resident of Chack Guru, District Hoshiarpur. Regarding the investigation of this fact, a team comprising of police officials HC Naresh and HC Sanjay was sent to village Samundra and during investigation, it was revealed that the mobile phone being used for Sim No. 98035-91723 had been purchased by Amrit Pal from the repair shop. However, he again stated that he purchased the above said mobile from appellant Gaurav Rana, which has been taken into possession in case FIR No. 91/2011. During investigation, it was also found that appellants Gaurav and Rajesh were in judicial lock-up in Punjab. Production warrants of the accused were obtained from the Court and on 19.5.2011 both the appellants were arrested and produced before the Court on 20.5.2011 and their police

remand was obtained. On 20.5.2011, while in police custody, the appellant Rajesh made disclosure statement Ex.PW14/A, whereas appellant Gaurav made disclosure statement Ex.PW14/B in the present of witnesses Jaswant Singh and C. Ram Gopal and also on 21.5.2011 appellant Gaurav Rana got recovered Capri (short pant) and T-shirt from his house at Samundra, which were packed in a parcel of cloth and parcel was sealed with three seals of J and sample of specimen J Ex.PW15/B was retained on a piece of cloth and seal after use was handed over to witness Vijay Singh and these articles were taken into possession vide memo Ex.PW15/A. On the same day, at village Dhamai accused Rajesh got recovered from his house a lower (pajama) of blue colour and T-shirt and specimen of seal Ex.PW20/B was retained on a piece of cloth and taken into possession vide memo Ex.PW20/A. Seal after use was handed over to the witness Balbir Singh. The witnesses had also put their signatures on the memo. After investigation, the case property was handed over to MHC. On 22.5.2011, medical examination of both the appellants were conducted and the blood on FTA card was taken and two FTA cards, two envelopes were handed over to MHC. On 23.5.2011, at hotel Oasis in Punjab near Garhshankar, Rs.1000/-, which the appellants had given to waiter Mukesh were recovered and taken into possession vide memo Ex.PW16/A in the presence of witnesses. On 31.5.2011, application was moved to SDJM, Anandpur Sahib for taking case property in custody. On 5.6.2011, MHC Nurpur Bedi handed over motor cycle without number (Pulsar), one kritch sealed with seal impression DS, photocopy of register No. 19, which had been taken into possession vide memo Ex.PW24/A. On the same day, in P.P. Kalma, ASI Darshan Singh produced copy of Zimini order dated 17.5.2011, photocopy of sketch of kritch, photocopy of disclosure statement, photocopies of recovery memo of motorcycle, kritch, photocopies of MLC of both the accused which were taken into possession vide memo Ex. PW24/B in the presence of the witnesses. Earlier to this, on 21.5.2011, both the accused had led the police party to the places of occurrence and they identified the place where they had committed the crime and memo Ex.PW4/B as per disclosure statements had been prepared. Statements of the witnesses were recorded as per their version. Photocopy of FIR No. 91/2011 is Ex.PW48/C, application for medical is Ext. PW48/D, MLC of Jarnail Singh is Ext.PW48/D and call detail is Ex.PW48/F. Statements of witnesses Satish, Vijay and Balbir Ex.PW48/G to I, were recorded under Section 161 Cr.P.C., as per their version and nothing had been added or omitted from the statements. On receiving FSL report Ex. PW48/J to L, the challan was prepared by him and presented in the Court. Prior to this on 19.9.2011 weapon had been shown to M.O. concerned for taking his opinion and final opinion of doctor had been taken. The supplementary challan had been prepared by SI Baldev Ram. He had seen kritch Ex.K1 and case property Ex.P1 to P34, which were same. He further testified that both the appellants in the case were present in the Court on that date. In cross-examination, he had admitted that near the alleged place of occurrence, there is abadi and shops and towards the north west in front there is a Panchayat ghar and passage go in front of the panchayat ghar as well as in the back side of the Panchayat ghar. He also admitted that in the night, shops were closed, however, self stated that the alleged shop was open and one khokha was also open. He stated that the phone had been received at 11:20 p.m. was of Pardhan and he could not tell the name of the Pardhan. He voluntarily stated that rapat No. 37 has been entered on the basis of such information. Dead body of Swarna Devi was lying at taktposh in the verandah of the shop which had been placed by the husband and other relatives of the deceased. He had recorded the statements of persons about the identification of the assailants. He denied the suggestion that the currency note and other articles had not been sealed on the spot and such seal had not been handed over to anyone. He further denied that the statement of Chaman Lal, Rajinder Kaur, Jaswinder Singh were recorded lateron to give correct shape to the occurrence. He further denied that Mobile No. 98160-63345 is common and voluntarily stated that the phone was identified on the basis of IMEI number. He denied that the appellants had not made any disclosure statements or that the same had been recorded by using pressure on them. He stated that he had visited Samundra and Dhamai alongwith appellants and witnesses and had gone there in government vehicle as well as in private vehicle though he does not remember the number of such vehicle. He could not recollect the name of the witnesses who claimed that he had offered his personal search to the witnesses. He denied that Capri and T-shirt had not been recovered and also suggests that

the appellants Gaurav Rana had not got effected recovery of Capri and T-shirt. Similar, suggestions regarding Pajama and T-shirt by appellant Rajesh was denied and it is also denied that no parcel had been prepared at the spot and sealed. It is further denied that recovery memo Ex.PW16/A had been prepared falsely. It was also denied that no identification of the place of occurrence had been made by the appellant and that he had recorded the statement of the witnesses at his own. Lastly, it was denied that since the accused had been arrested in Punjab, therefore, they had been falsely implicated in the present case.

57. PW49 ASI Darshan Singh deposed that he had remained posted as at In-charge, P.P. Kalman, Police Station Nurpur Bedi from 2010-2011 and on 26.4.2011 had received file for investigation in case FIR No. 34/2011, registered under Section 394 IPC at Police Station Nurpur Bedi. Both the appellants were arrested by SHO on 26.5.2011 and on 17.5.2011 file had been handed over to him. That the accused had been interrogated on 18.5.2011 when appellant Gaurav Rana made disclosure statement Ex.PW24/E about the injuries inflicted to a person at Bathri with kritch and snatched a mobile and currency notes of Rs. 400/- on 26.4.2011 and murdered a lady at Bathri in shop with kritch and snatched Rs. 2500/- from the cash box in the same night. The statement had been given in the presence of witness Karam Chand, Lambardar and Harket Singh and HC Surjeet Singh. On 17.5.2011, the appellant Gaurav Rana had got recovered kritch and currency notes of Rs. 20,600/- from his house and on the basis of the statement appellant Rajesh, currency notes of Rs. 19,400/- alongwith mobile phone had been recovered from his house at village Dhamai, Police Station Nawansahar. The motorcycle used in the commission of the crime, which was without number had also been recovered from traffic staff Nawansahar. On 5.6.2011, he handed over the photocopies of memos Ex.PW24/e, PW24/F, PW24/G, PW24/H, PW24/I and sketch of kritch Ex.PW24/D to SHO, P.S. Haroli, which had been taken into possession vide memo Ex.PW24/B, which was duly signed by him. After seeing the kritch, Ex.K1, he claimed that he had deposited the same with MHC. In cross-examination, he denied the suggestions that the accused had not given any statement that he had procured their signatures on various memos by pressurizing them. He further denied that no witness was present on the spot or no recovery was effected at the instance of the appellants. He claimed to have gone to the village of the accused in government vehicle and its No. PB-12L-5231, the kritch was sealed with seal DS. He denied that the memo had been prepared in the police post and clarified that though he had called the local witnesses of the villages of appellants but nobody had turned up.

58. Learned Court thereafter recorded the statement of accused under Section 313 Cr.P.C. and thereafter examined one witness Varinder Singh DW1 who had stated that he was an agriculturist and for this purpose he kept tractor and threshing machine. In 2011, he had started threshing work of wheat from 15th April and work remained in progress for about one month. The appellants were known to him and had been engaged for threshing of wheat and this work remained in force continuously for 24 hours. The appellants had worked with him continuously for a period of one month for threshing of the wheat and they never remained absent during that period and they had also not availed any leave during that period. In cross-examination, he admitted that he did know the name of the father of accused Gaurav. He admitted that the labour take rest.. He further denied that threshing work start late in Himachal. He further denied that in the year, 2011, the threshing work had started late. He feigned ignorance that appellants had stabbed one boy on 26.4.2011. Similarly, he feigned ignorance about the accused having stabbed one lady in the same night at around 10:00 p.m. and snatching money from the owner of the shop at Bathri. He voluntarily stated that the appellants were with him on that day for threshing the wheat. He did not know that the appellants had been arrested by the Punjab Police on 27.4.2011 and recovery had been effected at their instance.

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

59. Having dealt with the evidence led on record by the parties, its now time to consider and evaluate the arguments of either side. As observed earlier learned counsel for the

appellants have vehemently argued that the instant case is a classical example, which is bereft of any evidence to connect the appellants with the alleged crime. PW1, PW3, PW5 and PW-39 are the close relatives of the deceased whereas no independent witness has been examined in this case.

60. Before proceeding to consider the submissions made by the appellants, it has to be remembered that the cardinal principal of criminal jurisprudence is that guilt of the accused must be proved beyond reasonable doubts. However, the burden on the prosecution is only to establish his case beyond reasonable doubt and not all doubts. In this context, it is apt to reproduce the following observations made by Hon'ble Supreme Court in State of ***U.P. vs. Krishna Gopal and Anr, 1988 4 SCC 302:***-

> "25. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.
>
> 26. The concept of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately on the trained intutions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."

61. It is clearly settled that the rule regarding the benefit of doubt does not warrant acquittal of accused by resorting to surmises, conjectures and fanciful considerations as held by Hon'ble Supreme Court in ***State of Punjab*** *Vs****. Jagir Singh, 1974 3 SCC 277***.

62. Earlier to that, Hon'ble Supreme Court in ***Shivaji Sahebrao Bobade & Anr.*** Vs. ***State of Maharashtra, 1973 2 SCC 793*** had observed that excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma and only reasonable doubts belong to the accused. It is apt to reproduce the following observations:-

> "The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community."

63. As regards the contentions of the appellants that the prosecution has only examined the interested witnesses, who were none other than the close relatives of the deceased, identical contentions have been considered by the Hon'ble Supreme Court in Criminal Case No. 1482 of 2013, ***Yogesh Singh*** Vs. ***Mahabeer Singh & Ors***., decided on 20.10.2016 wherein the Hon'ble Supreme Court observed as under:-

> "24. On the issue of appreciation of evidence of interested witnesses, Dalip Singh vs. State of Punjab, 1953 AIR (SC) 364, is one of the earliest cases on the point. In that case, it was held as follows:-
>
> "A Witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the

witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge alongwith the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

25. Similarly, in Piara Singh and Ors. Vs. State of Punjab, 1977 AIR (SC) 2274, this Court held:-

"It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is not bar in the Court relying on the said evidence."

26. In Hari Obula Reddy and Ors. Vs. The State of Andhra Pradesh, 1981 3 SCC 675, a three-judge Bench of this Court observed:

"..It is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subject to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, if may, by itself, be sufficient, in the circumstances of the further case, to base a conviction thereon."

27. Again, in Ramashish Rai Vs. Jagdish Singh, (2005) 10 SCC 498, the following observations were made by this Court:

"The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52).

64. In view of the ratio of judgments laid in Yogesh Sing's case (supra), this court is only required to carefully scrutinise and appreciate the evidence of closely related witnesses before arriving at any conclusion. However, evidence cannot be disbelieved on the ground that these witnesses are related to each other or to the deceased and evidence has a ring of truth to it is cogent, credible and trustworthy.

65. If the testimony of these witnesses i.e. PW1, PW3, PW5 and PW39, which has been reproduced in extenso above, is gone through, the presence of the appellants at the spot has clearly been established and they have been so identified by these witnesses. Moreover, the prosecution is not bound to produce all the witnesses said to have seen the occurrence. The material witnesses necessary by the prosecution unfolding the prosecution story alone need to be produced without any un-necessary and redundant multiplication of the witnesses and in this connection general reluctance of average villager to appear as witness and get himself involved has also to be considered. In this background, it shall be worthwhile to reproduce the following observations of the Hon'ble Supreme Court in ***Appabhai and Anr***. Vs. ***State of Gujarat***, 1988 Supp1 SCC 241:-

> "52. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. hey keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The Court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused."

66. The learned counsel for the appellants then contended that in absence of identification parade the appellants could not have been convicted and in support of such contentions, has placed reliance on following judgments:-

1. ***Lakhwinder Singh and Ors***. Vs. ***State of Punjab***, AIR 2003 Supreme Court 2577;
2. ***Ravi alias Ravichandran*** vs. ***State represented by Inspector of Police***, (2007) 15 Supreme Court Cases 372
3. ***OMA @ Omparkash & Anr***. Vs. ***State of Tamil Nadu***, 2013 (3) SCC 440
4. ***Motilal Yadav*** Vs. ***State of Bihar*** (2015) 2 SCC 647

67. In **Lakhwinder Singh and Ors.** *Vs.* **State of Punjab AIR 2003 Supreme Court 2577**, Hon'ble Supreme Court held that on the basis of the facts of that case observed that since the assailants were not known to the witness by name, therefore, there was no reason why the test of identification parade was not held and this was a serious lacuna in the case of the prosecution. It is apt to reproduced para 36, which reads thus:-

> "36. It is not in dispute that one the date of occurrence i.e. 24th December, 1996 the informant PW.14 did not know the names of any of the gunmen who had taken part in the assault. Similarly, PW.15 also did not know the names of the gunmen of Ranjit Singh and his father. Admittedly PW.14 came to know of their names 3-4 days later. We have earlier noticed that despite the fact that they did not know the names of any of the gunmen, the name of Paramjit Singh finds place in the first information report as well as in the marginal notes of the site plan, both prepared at the instance of PW.14. That apart, since the assailants were not known to this witness by name, there appears to be no reason why a test identification parade was not held. It is not in dispute that no test identification parade was held to identify the assailants and this also is a serious lacuna in the case of the prosecution. "

68. In ***Ravi alias Ravichandran*** vs. ***State represented by Inspector of Police***, (2007) 15 Supreme Court Cases 372, the Hon'ble Supreme Court held that the substantive evidence of identification parade is the one made in the Court and judgment of conviction can be

arrived at even if no test identification parade has been held. But when first information report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing veracity of the witness in regard to his capability of identifying the persons who were unknown to him. It is apt to reproduce the relevant observations, which read thus:-

> "18. It is no doubt true that the substantive evidence of identification of an accused is the one made in the court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a first information report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. The witnesses were not only sure as to whether they had seen the appellant before. Had the accused been known, their identity would have been disclosed in the first information report. PW1 for the first time before the Court stated that he had known the accused from long before, but did not know their names earlier, although he came to know of their names at a later point of time.
>
> 19. In case of this nature, it was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the witnesses concerned or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification."

69. In **OMA @ Omparkash & Anr.** Vs. **State of Tamil Nadu, 2013 (3) SCC 440,** it was observed by Hon'ble Supreme Court that where the witness did not know the accused earlier, the accused could be identified through test identification parade, which had not been done in case of one of the accused, it is apt to reproduce the following observations:-

> "30. We may indicate that in the instant case, FIR was registered against unknown persons. A2, as already stated, was arrested after ten years on 26.02.2005 in connection with some other crime. We fail to see how PW1 and PW2 could identify A2 in the court at this distance of time. They were guided by the photographs repeatedly shown by the police.
>
> 31. Evidently, the witnesses did not know the accused earlier, hence the accused could be identified only through a test identification parade which was not done in this case, so far as A-2 is concerned. In this connection we may refer to the judgment of this court in Mohd. Iqbal M. Shaikh vs. State of Maharashtra (1998 4 SCC 494 wherein this Court held that"
>
> > "If the witness did not know the accused person by name but could only identify from their appearance then a test identification parade was necessary, so that, the substantive evidence in court about the identification, which is held after fairly a long period could get corroboration from the identification parade. But unfortunately the prosecution did not take any steps in that regard."

70. In ***Motilal Yadav*** Vs. ***State of Bihar***, (2015) 2 SCC 647, which is heavily relied upon by the learned Counsel for the petitioner held otherwise as would be evident from paras 10 to 14 of the judgment, which reads thus:-

> "10.Another argument advanced before us is that no test identification parade in the present case was held, as such, the conviction and sentence, recorded by the trial court, has been wrongly upheld by the High Court. In this connection, our attention is drawn to the case of Kanan and others v. State of Kerala[5]. In said case, this Court has opined that failure to conduct test

identification parade raises serious doubt about the testimony of the witnesses. On going through said case, we find that this Court doubted evidence of a particular witness (PW-25 of said case) who told the Court that he could identify the accused persons (not known to him) who were running away from the scene of occurrence. Contrary to that, in the present case the testimony of PW-3 Sourav Kumar is natural as he explained in what manner he reached Haldwani, and he had enough time to identify the accused who accompanied him to the persons who took money from him whereafter the victim was released.

11.The evidence as to the identity of a person is admissible under Section 9 of the Indian Evidence Act, 1872. In the case of Ravi Kumar v. State of Rajasthan[6], this Court has opined in paragraph 35 as follows: -

"35.... The court identification itself is a good identification in the eye of the law. It is not always necessary that it must be preceded by the test identification parade. It will always depend upon the facts and circumstances of a given case. In one case, it may not even be necessary to hold the test identification parade while in the other, it may be essential to do so. Thus, no straitjacket formula can be stated in this regard."

12. In the case of R. Shaji v. State of Kerala[7], regarding the evidential value of the test identification parade, this Court has stated in paragraph 58 as under: -

".... The identification parade is conducted by the police. The actual evidence regarding identification is that which is given by the witness in court. A test identification parade cannot be claimed by an accused as a matter of right. Mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. "

13. In Ashok Debbarma alias Achak Debbarma v. State of Tripura[8], this Court has made following observations in para 20 which are reproduced below: -

"20..... The primary object of the test identification parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the test identification parade is really to find whether or not the suspect is the real offender. In Kanta Prasad v. Delhi Admn.[9], this Court stated that the failure to hold the test identification parade does not make the evidence of identification at the trial inadmissible. ...."

14. In view of the above principle of law laid down by this Court, we are unable to accept the submission of learned amicus curiae that not holding of test identification parade in the present case is fatal for the prosecution."

71. On the basis of aforesaid conspectuous of law, it can be conveniently held that the court identification is a good identification in the eyes of law and it is not always necessary that it must be proceeded by test identification parade. This would always depend upon the facts and circumstances of the given case. In one case, it may not necessary to hold the test identification parade while in the other it may be essential to do so. Thus, no strait jacket formula can be stated in this regard, after all the actual evidence regarding identification is that which is given by the witnesses in court and moreover a test identification parade cannot be claimed by an accused as a matter of right. Mere identification of accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. The primarily object of test identification parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the test identification parade is really to find whether or not the suspect(s) is / are the real offender(s). Moreover, the failure to hold the test identification parade per se does not make the evidence of identification at the trial inadmissible.

72. As observed earlier, PW1, PW3, PW5 and PW39 have identified the accused not only by their physical frame but also on the basis of clothes worn by them, which have been recovered on the basis of their disclosure statements and such recovery have been duly proved on record. Even if, the identification parade is not conducted, the same can only be a lapse in investigation. It is then required to be examined as to whether due to such lapse any benefit should be given to the accused. The law on the subject is well settled that the defective investigation itself cannot be a ground for acquittal. Here it shall be apt to reproduce the observations made by Hon'ble Supreme Court in ***C.Muniappan and Others Vs. State of Tamil Nadu, 2010 9 SCC 567***, which read thus:

> "30.There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

73. It is thereafter argued by the appellants that PW5 is a minor, who is an interested witness and has made marked improvements in his statement before the court. How the testimony of a child witness is to be appreciated has again been considered by the Hon'ble Supreme Court in ***Yogesh Singh's case (supra)***, wherein it was held as under:-

> "22. It is well-settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See Prakash Vs. State of M.P., (1992) 4 SCC 225; Baby Kandayanathi Vs. State of Kerala, 1993 Supp (3) SCC 667; Raja Ram Yadav Vs. State of Bihar, (1996) 9 SCC 287; Dattu Ramrao Sakhare Vs. State of Maharashtra, (1997) 5 SCC 341; State of U.P. Vs. Ashok Dixit & Anr., 2000) 3 SCC 70; Suryanarayana Vs. State Of Karnataka, (2001) 9 SCC 29).
>
> 23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is a found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. [Vide Panchhi Vs. State of U.P., (1998) 7 SCC 177]."

74. Adverting to the testimony of PW5, it would be noticed that he has not only established the presence of the appellants at the spot but has also narrated in detail the sequence of events how the taller appellant went inside the shop while other remained outside the shop and how thereafter the taller appellant stabbed Swarna Devi with some sharp edged object while she was giving the balance amount to the appellant who had purchased a Soda bottle from her. He also described in detail how both the appellants had fled away from the spot and how Smt. Swarna Devi ultimately succumbed to the injuries. He has identified the motor cycle, which was without number and being an eye-witness his testimony cannot be easily discarded as this witness has withstood the test of cross-examination.

75. The so-called improvement only relates to the purchase of Soda bottle which did not find mention in the statement given to the police and also with regard to beating being given to Swarna Devi prior to her being stabbed.

76. The learned counsel for the appellants then argued that there are number of contradictions, embezzlement and improvement and therefore the prosecution must fail.

77. As regards the so-called discrepancies in evidence, the legal position has been long settled that minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness and whether the same inspire confidence in the mind of the Court.

78. The legal position has been scantly summed up by the Hon'ble Supreme Court in Yogesh Singh's case (supra), wherein it was held as under:-

> "29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. (See Rammi @ Rameshwar Vs. State of M.P., (1999) 8 SCC 649; Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796)."

79. In the present case, we do not find any major contradiction in the evidence of the witnesses, which may tilt the balance in favour of the appellants. The minor improvement and embezzlement etc. apart from being far yielded of human faculties are insignificant and to be ignored since the evidence of the witnesses otherwise overwhelmly corroborate each other in material particulars.

80. It is established on record that prior to committing the murder of Swarna Devi, the appellants had given beating to PW6 Jarnail Singh at lower Bathri and had also snatched mobile having sim No. 98160-63345 and Rs.400/- from him and he duly identified the appellants in the court. This mobile phone was then sold by appellant Gaurav Rana to PW10 Amrit Pal at village Samundra, who had further sold the same to Jagtar Singh PW21 for Rs. 400/-. The appellants had been arrested by the Punjab Police on 16.5.2011 in case FIR No. 34/11, registered under Section 394, 34 IPC, P.S. Nurpur Bedi. The investigation had been conducted by ASI Darshan Singh PW49. Appellants had made disclosure statement Ex.PW24/E and had disclosed that they had committed the murder of lady at village Bathri and snatched currency notes. No doubt, much reliance cannot be placed on such statement as the same is hit by Section 26 of the Evidence Act, however, the recovery of the kirtch, currency notes of Rs. 20,600/- and Rs.19,400/- with mobile on the basis of the statement, cannot be discarded. More particularly, when there is no iota of evidence to suggest that the prosecution witness had any enmity with the appellants or for any other reason wanted to involve them in a false case.

81. Learned counsel for the appellants would then argue that once the prosecution has miserably failed to prove the motive behind the murder, the conviction of the appellants cannot be sustained.

82. It is a settled legal proposition that even any absence of motive, as alleged, is accepted, that is of no significance and pales into insignificance when direct evidence establishes the crime. Therefore, in case, there is direct trustworthy evidence of witnesses as to the commission of offence, motive losses it significance.

83. Here again it shall be apt to reproduce the following observation made by Hon'ble Supreme Court in Yogesh Singh's case (supra):-

> " 46. It has next been contended by the learned counsel for the respondents that there was no immediate motive with the respondents to commit the murder of the deceased. However, the Trial Court found that there was sufficient motive with the accused persons to commit the murder of the deceased since the deceased had defeated accused Harcharan in the Pradhan elections, thus putting an end to his position as Pradhan for the last 28-30 years. The long nursed feeling of hatred and the simmering enmity between the family of the deceased and the accused persons most likely manifested itself in the outburst of anger resulting in the murder of the deceased. We are not required to express any opinion on this point in the light of the evidence adduced by the direct witnesses to the incident. It is a settled legal proposition that even if the absence of motive, as alleged, is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of witnesses as to commission of an offence, motive loses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. [Hari Shankar Vs. State of U.P., (1996) 9 SCC 40; Bikau Pandey & Ors. Vs. State of Bihar, (2003) 12 SCC 616; State of U.P. Vs. Kishanpal & Ors., (2008) 16 SCC 73; Abu Thakir & Ors. Vs. State of Tamil Nadu, (2010) 5 SCC 91 and Bipin Kumar Mondal Vs. State of West Bengal; (2010) 12 SCC 91]."

84. Learned counsel for the appellant have thereafter vehemently contended that the entire evidence of the prosecution is full of contradictions and discrepancies which creates a serious doubt about the truthfulness and credit worthiness of the witnesses, and therefore, the appellants could not have been convicted on the basis of such evidence.

85. As regards discrepancies, this issue has again been considered by the Hon'ble Supreme Court in ***Yogesh Singh's*** case (supra), and the legal position was summed up as under:-

> "29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every

contradiction or omission. (See Rammi @ Rameshwar Vs. State of M.P., (1999) 8 SCC 649; Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796)."

86. The appellants have failed to point out any major contradictions though it is vehemently argued that PW1 in his examination-in-chief has stated that on checking of chest, he had found an amount of about Rs.2000/- -Rs.2500/- to be stolen, however, in his cross-examination, he had stated that he had kept his purse in the cash box. This fact had not been stated before the police in his statement Ex.PW1/A, and had only stated that he had not counted the remaining currency in cash box, which were found to be Rs.123/-.

87. We really do not find any discrepancies in the aforesaid statement as the statement regarding Rs.2000/- to Rs.2500/- is the one which pertains to the amount stolen by the appellants whereas the later part of the statement relates to the balance of Rs.123/-, and therefore, has no connection with the earlier part of the statement.

88. The appellants would then claim that there is major discrepancies with regard to the time of incident, as PW4 has stated that the incident took place at 10:30 p.m. whereas as per the police record, the incident took place at about 11:20 p.m. when the Pardhan, Gram Panchyat, Bathri informed the police.

89. We have considered this submission and find that the same is based upon complete mis-reading of the statements of PW4 and PW48. PW4 in his statement has categorically stated that on 26.4.2011 at about 10:30 p.m., he had heard noise of cries from the shop of Chaman Lal and thereafter reached the spot. As regards the testimony of PW48 Shakti Singh Pathania, who is an Investigating Officer. He has stated that on 26.4.2011 he had received a telephonic information about the incident at 11:20 p.m but nowhere has this witness stated that the incident itself took place at 11:20 p.m. It is obvious that when the incident took place people had assembled at the spot as otherwise stated by PW4 and it is after that, he informed the police and obviously the same would have taken some time.

90. That apart, the timing of the alleged occurrence is duly proved in the testimony of PW5 who categorically stated that the appellants came on a motorcycle at about 10:30 p.m. on 26.4.2011, when the committed the crime.

91. Learned counsel for the appellants would then contended that no reliance could be placed on the testimony of PW6, who in his cross-examination has categorically stated that the appellants were not got identified by the police and these were identified on the basis of photographs. We have gone through the statement of PW6 and find that the submissions made by the appellants is based upon mis-reading of the statement of PW6 who though has stated that the appellants were not got identified by the police but then he had identified them in the Court.

92. It is lastly contended that appellants' conviction cannot be sustained as it is based upon the testimony of PW14 who is a stalk witness whereas PW37, who is alleged to be an eye-witness to the recovery of the clothes worn by the appellant Rajesh, had turned hostile and had not supported the prosecution case.

93. Even this contention of the appellants cannot be accepted as there is nothing in the testimony of the statement of PW14 which may establish that he is stock witness rather this witness has clearly proved the disclosure statement of appellant Rajesh Singh PW14/A and of Gaurav Rana Ex/PW14/B. He has categorically denied that his village was 18 kilometers away from village Bathri. The mere fact that he has been frequently visiting the police station is of no consequence as he has explained the reason thereof. He being an ex Pardhan, obviously had good relations with the police, but that in any manner cannot be a reason to discard his testimony.

94. AS regards the statement of PW37 Balbir Singh, who is the ward panch of village Dhamai, Tehsil Garhshankar, no doubt he was declared hostile, however, in the cross-examination conducted by the Public Prosecutor, he clearly admitted that the sealed sample Ex. PW20/B bore his signature and also of HC Sanjay Kumar and accused. He further admitted that the parcel of clothes was taken into possession in his presence vide memo Ex.Pw20/A, which again bore his signature.

95. More importantly, he has categorically admitted that Banyan (T-shirt) Ex.P35 shown to him in the court was the same which had been sealed. That apart, the reason for this witness turning hostile was obvious because the appellant Rajesh Singh was his nephew.

96. In view of the aforesaid discussion, we find no reason to interfere with the judgment passed by the learned trial Court, which has correctly analyzed the material on record in the factual as well as legal perspective to arrive at its conclusion. Accordingly, there is no merit in this appeal, the same is accordingly dismissed and the judgment and order of conviction and sentence passed by the learned Sessions Judge is upheld.

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

FAO (MVA) No. 171 of 2012 and FAO No. 397 of 2012.
Judgment reserved on 28.10.2016.
Date of decision: 4th November, 2016.

1. FAO No. 171 of 2012.

ICICI Lombard General Insurance Co. Ltd. .....Appellant.

Versus

Smt. Satya Devi and others .....Respondents

2. **FAO No. 397 of 2012**.

Smt. Satya Devi and others .....Appellant.

Versus

Sh. Parkash Chand and another .....Respondents

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

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

T.T. Narayanan and another versus Mrs. P. Bridget and others II (1991) ACC 120 (DB)

For the appellant(s):	Mr.Jagdish Thakur, Advocate, for the appellant in FAO No. 171 of 2012 and Mr. Suneet Goel Advocate, for appellant in FAO No. 397 of 2012.
For the respondent(s):	Mr. Suneet Goel, Advocate, for respondents No. 1 to 3 in FAO No. 171 of 2012. Mr. Lovneesh Kanwar, Advocate, for respondent No. 4 in FAO No. 171 of 2012 and for respondent No.1 in FAO No. 397 of 2012. Mr. Jagdish Thakur, advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Both these appeals are outcome of judgment and award dated 15.2.2012, made by the Motor Accident Claims Tribunal Hamirpur, H.P., for short "the Tribunal", in MAC Petition No. 07 of 2010, titled *Satya Devi and others versus Shri Parkash Chand and another*, whereby compensation to the tune of Rs.19,90,000/- alongwith interest @ 7.5% came to be awarded in favour of the claimants and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Feeling aggrieved, the claimants have questioned the impugned award by the medium of FAO No. 397 of 2012, on the ground of adequacy of compensation and the insurer has questioned the same by the medium of FAO No. 171 of 2012, on the grounds that the Tribunal has fallen in an error in saddling it with the liability and the amount awarded is excessive.

3. The owner-cum-driver has not questioned the impugned award on any ground. Thus, the same has attained the finality so far as it relates to him.

4. Both these appeals arise out of a common award thus; I deem it proper to determine both these appeals by this common judgment.

5. The claimants being the victims of a vehicular accident, filed claim petition before the Tribunal, for the grant of compensation to the tune of Rs.25,00,000/- as per the break-ups given in the claim petition on account of death of Shri Piar Chand who died in a motor vehicle accident on 3.1.2010. He was teacher by profession. He had gone to Ramehra alongwith Azad Singh and others to purchase household articles. It is averred that when they reached at place Simal-ka-Rihra, a Santro car bearing Registration No. HP-22-B-6667, being driven by respondent No. 1 Parkash Chand, came from the side of Ramehra in a very high speed due to which the driver could not control it, hit the deceased, who was on extreme left side of the road, as a result of which he fell down on the road, sustained the injures and succumbed to the same. FIR under Sections 279, 337 and 304-A of IPC was registered against driver Parkash Chand in police Station Bhoranj, District Hamirpur, H.P.

6. The claim petition was resisted by the respondents by filing the replies and following issues came to be framed by the Tribunal.

1. *Whether the death of Piar Chand was caused due to use/rash and negligent driving of Santro Car No. HP-22B-6667 by respondent No.1 as alleged? OPP*
2. *If Issue No.1 is proved in affirmative, whether the petitioners/claimants are entitled to compensation, if so, to what amount and from which of the respondents? OPP*
3. *Whether the petition is not maintainable as alleged? OPRs.*
4. *Whether the respondent No.1 was not holding a valid and effective driving licence to drive the vehicle in question at the relevant time, if so, its effect? OPR-2.*

5. Relief.

7. Claimants examined five witnesses, namely Jaswant Singh as PW1, Arun Katna as PW2, Uttam Singh as PW3, Ramesh Kumar as PW4 and Satya Devi claimant No. 1 herself stepped into the witness-box as PW5.

8. Respondents have examined three witnesses, namely, Vijay Kumar as RW2, Criminal Ahlmad of the Court of Judicial Magistrate 1st Class Court No. II Hamirpur as RW3 and respondent No. 1 Parkash Chand stepped into the witness-box as RW1.

9. The Tribunal, after scanning the evidence held that the driver had driven the offending vehicle rashly and negligently and caused the accident, in which Piar Chand sustained the injuries and succumbed to the same. The driver and insurer have not questioned the said findings. Thus, the same have attained the finality so far as the same relate to them. However, I have gone through the record. Claimants have proved that the driver had driven the offending vehicle rashly and negligently and caused the accident in which Piar Chand lost his life. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

10. Before I determine issue No.2, I deem it proper to determine issues No. 3 and 4.

Issue No.3.

11. The Tribunal has rightly decided issue No. 3 and the findings returned on this issue are not questioned by the insurer, are accordingly upheld.

Issue No. 4.

12. It was for the insurer to prove that the driver was not having a valid and effective driving licence, has failed to prove the said fact. The Tribunal has rightly decided this issue in favour of owner-cum-driver and against the insurer. The insurer, in fact, has not questioned the said findings. However, I have gone through the driving licence which does disclose that the driver was having a valid licence. Accordingly, findings returned on this issue are also upheld.

13. During the course of hearing on 21.10.2016, learned counsel for the appellant in FAO No. 171 of 2012 was asked to seek instructions to settle the claim by paying Rs.15,52,000/- with 7.5% interest from the date of filing the claim petition till its realization. He sought instructions and stated at the Bar that award be made accordingly. His statement was taken on record. Learned counsel for respondents/claimants No. 1 to 3 sought time to seek instructions and case was posted for 28.10.2016. It is apt to reproduce order dated 21.10.2016 herein.

> ***"****Learned counsel for the appellant in FAO No. 171 of 2012 was asked to seek instructions to satisfy the award in a lump sum of Rs.15,52,000/- with 7.5% interest from the date of filing the claim petition till its realization. He stated that the award be made accordingly. Mr. Suneet Goel, learned counsel for respondents No. 1 to 3, sought time to seek instructions. Granted. List on 28th October, 2016.****"***

14. On 28th October, 2016 Mr. Suneet Goel, learned counsel for the appellant in FAO No. 397 of 2012, stated that he has sought instructions and his clients were not ready to settle the claim. It is also apt to reproduce order dated 28th October, 2016 herein.

> *"Learned counsel for the appellant in FAO No. 397 of 2012 stated that he has sought instructions but his client is not ready to settle the claim in a lump sum of Rs.15,52,000/- as recorded in order dated 21.10.2016, as agreed by the insurer in FAO No. 171 of 2012. His statement is taken on record."*

15. Thus, the only dispute involved in these appeals is-whether the amount awarded is adequate or otherwise.

16. The entire controversy revolves around Issue No. 2. The deceased was a government employee and was drawing gross salary to the tune of Rs.37,279/- per month as per the LPC Ext. PW3/A, was 57 years of age at the time of the accident and had to retire at the age of 58 years. Keeping in view of the 2nd Schedule attached to the Motor Vehicles Act, 1988 for short "the Act", read with ***Sarla Verma and others versus Delhi Transport Corporation and***

another reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.1/3rd was to be deducted towards his personal expenses. Thus, the source of pendency lost by the claimants comes to Rs.25,000/-, per month till the age of retirement, i.e., for one year only.

17. The compensation under the head 'loss of income' is to be assessed while keeping in view the fact that the deceased had to retire within one year and thereafter he would have been receiving pension and may be also doing some part time job.

18. In support of the aforesaid observations, reliance is placed on the judgment delivered by the Kerala High Court in case titled ***T.T. Narayanan and another versus Mrs. P. Bridget and others*** reported in ***II (1991) ACC 120 (DB).*** It is apt to reproduce para 3 of the said judgment herein.

> *"3. On the date of the occurrence and death deceased had 46 months more service left as headmaster. He was in a pensionable job and he would have drawn pension for fifteen years, namely, till he attains 70 years. The Tribunal computed pay and allowances due for 46 months and the pension due for 15 years and deducted 20% for personal expenses of the deceased and 10% for uncertainties of life and thus arrived at the compensation payable to the claimants. The only submission urged by learned Counsel for the appellants in this regard is that on account of premature death of U. Vincent, the amount of family pension for the period of 15 years has to be deducted from the amount awarded. This submission appears to be correct. Family would be entitled to maximum family pension of Rs. 150/- per month. Computing this for 15 years and deducting 30% the amount of family pension would be Rs. 18,900/-. This amount has to be deducted from Rs. 1,28,688/- awarded by the Tribunal. The correct quantum payable therefore would be Rs. 1,09,788/-."*

19. In view of the ***Sarla Verma's*** case supra, multiplier applicable is '7' and is applied accordingly.

20. It is worthwhile to record herein, at the cost of repetition that the deceased had to retire within one year and thereafter had to get pension. The Tribunal has fallen in an error in assessing the compensation. The assessment was to be made while keeping in view the gross salary of the deceased till the age of retirement, thereafter, pension payable and other income which he would have earned.

21. The multiplier '1' was applicable for assessing loss of dependency/income under the head 'gross salary' and multiplier '6' was applicable, i.e., (after deducting multiplier '1' out of multiplier '7') for assessing loss of dependency/income under the head 'pension and other income.'

22. The claimants have lost source of dependency and are entitled to compensation to the tune of Rs.25,000/-x12x1 =Rs.***3,00,000/-,*** under the head loss of income for one year as the deceased had to retire within one year from the date of accident.

23. The deceased would have been receiving pension to the tune of 50% of the basic pay plus dearness allowance which comes to Rs.18,500/- per month roughly. 1/3rd was to be deducted keeping in view the 2nd Schedule of the Act read with Sarla Verma's case supra, the source of dependency comes to Rs.12500/-. Thus, it can be safely held that the claimants have lost source of dependency to the tune of Rs.12500/-x12x6= ***Rs.9,00,000/-.***

24. The deceased would have worked for some period after retirement and would have been earning not less than Rs.6500/- per month by getting part time job and from other vocations. 1/3rd was to be deducted in view of the law referred to supra. Thus, it can be safely held that the claimants have also lost source of income roughly to the tune of Rs.4500x12x6= **Rs.3,24,000/-.**

25. In addition, the claimants are also held entitled to compensation under the four head as follows.

(i)	*Loss of love and affection:*		*Rs.10,000/-*
(ii)	*Loss of estate*	*:*	*Rs.10,000/-*
(iii)	*Funeral expenses*	*:*	*Rs.10,000/-*
(iv)	*Loss of consortium*	*:*	*Rs.10,000/-*
		Total	***Rs.40,000/-***

26. Thus, in all, the claimants are entitled to compensation to the tune of Rs.3,00,000/-+Rs.9,00,000+ Rs.3,24,000/- + Rs.40,000/-.= Rs.15,64,000/-, with interest at the rate of 7.5% as awarded by the Tribunal.

27. Accordingly, the appeal being FAO No. 171 of 2012, filed by the insurer is allowed, the impugned award is modified as indicated hereinabove and the appeal being FAO No. 397 of 2012 filed by the claimants for enhancement is dismissed.

28. Registry is directed to release the amount in favour of the claimants, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account or by depositing the same in their bank accounts and excess amount be released in favour of the insurer alongwith interest, through payees' cheque account, after proper verification.

29. Send down the record forthwith, after placing a copy of this judgment.

****

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

Kartara ....Appellant

Versus

Smt.Sinno Devi & Others ....Respondents

RSA No.75 of 2007
Judgment Reserved on: 09.09.2016
Date of decision: 04.11.2016

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

(Para-13 to 32)

Case referred:
Durga (deceased) and Others vs. Milkhi Ram and Others, 1969 P.L.J. (SC), 105

For the Appellant: Mr.Ajay Sharma, Advocate,
For the Respondents: Mr.N.K. Thakur, Senior Advocate with Ms.Jamuna, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Instant Regular Second Appeal filed under Section 100 of the Code of Civil procedure, is directed against the judgment and decree dated 29.11.2006, passed by learned Additional District Judge, Fast Track Court Una, District Una, H.P., reversing the judgment and decree dated 20.9.2000, passed by learned Sub Judge Court No.II, Una, in Civil Suit No.215/1990.

2. The brief facts of the case, as emerged from the plaint, are that the appellant-plaintiff filed suit for declaration to the effect that the land measuring 2 kanal 10 marlas bearing khewat No.929, 480 min, khatauni No.851, 789, bearing khasra Nos. 3198(7511/3208 old), 3203 (9206/3207 old), situated in village Haroli, Sub-Tehsil Haroli, District Una, HP., as per Missal Hakiat for the year, 1986-87 is in possession of the plaintiff as tenant under the owners on payment of rent since the time of his ancestors and the entry changed in favour of defendants showing them as tenants over the suit land are illegal, unauthorized, null and void and without any order of competent authority and have no binding effect on the rights of the plaintiff with a consequential relief of permanent injunction restraining the defendants from interfering in any manner in the peaceful possession of the plaintiff in the suit land. Plaintiff averred in the plaint that he is in possession of the suit land as tenant on payment of rent since the time of his ancestors and he never surrendered the possession of the suit land. The plaintiff averred in the plaint that he came in possession over khasra No. 3188, 3190 alongwith the suit land and he became owner of the land by operation of the H.P. Tenancy and Land Reforms Act and Khasra Nos., 3191, 3202 is also in his tenancy alongwith the suit land. Plaintiff further averred that he or his predecessor were never dispossessed or evicted by the competent Authority from the suit land and the defendants never came in possession over the suit land and the alleged entry changed during the consolidation in the year, 1986-87 is without any basis, null and void and have been procured behind the back of the plaintiff. Plaintiff further averred that the defendants were never inducted as tenants over the suit land either by the plaintiff or anybody else and the plaintiff never relinquished the tenancy rights over the suit land. Plaintiff also averred that the defendants are very headstrong persons and on the basis of wrong entry of their names in revenue record have now started illegal threats of interference and changing the nature of the suit land by raising construction over the same and also dispossess the plaintiff from the suit land for the last one week. The plaintiff requested the defendants many times to desist from their illegal acts and to admit the claim of the plaintiff, but they are evading from the same.

3. Defendants by way of filing written statement raised various preliminary objections qua locus-standi, cause of action, suit bad for mis-joinder and non-joinder of necessary party, civil court has no jurisdiction to try the present suit and maintainability. On merits, defendants averred that the plaintiff or his predecessor-in-interest was neither inducted as tenant nor he is in possession of the suit land in any capacity and has no concern with the same. Defendants averred that defendants No.1 and 2 are in physical possession over the suit land as tenant at will under the owners for the last more than 25 year and they are having their abadi over the suit land in the shape of shops and part of the suit land bearing khasra No. 3203 is under H.P.PWD Road. Defendants further averred that the plaintiff and his predecessor were never in possession of the suit land in any capacity, so question of dis-possessing or their eviction does not arise. However, the entries in the name of the plaintiff and his predecessor-in-interest as tenant-at-will were wrong, illegal, unauthorized and against the factual possession at the

spot, which were duly corrected by the Revenue agency after due verification of the suit land as per the spot situation. Defendants further averred that the plaintiff has no right, title or any interest, whatsoever, over the suit land. In the aforesaid background, the defendants prayed for the dismissal of the suit.

4. By way of replication, plaintiff while denying the allegations made in the written statement, re-affirmed and reasserted the stand taken in the plaint.

5. Learned trial Court on the basis of aforesaid pleadings, framed the following issues:-

"1. Whether the plaintiff has been coming in possession of the suit land as tenant-at-will as alleged? OPP.

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

3. Whether the suit is not maintainable on the grounds mentioned in para No.1 of the preliminary objection? OPD.

4. Whether plaintiff has got no cause of action to file this suit? OPD.

5. Whether civil court has no jurisdiction to try this suit? OPD

6. Whether suit is bad for non-joinder and mis-joinder of necessary parties? OPD.

7. Relief."

6. The learned trial Court on the basis of the evidence adduced on record by the respective parties, decided issues No.1 and 2 in favour of the plaintiff and issues No.3 to 6 were decided against the defendants.

7. Feeling aggrieved and dissatisfied with the impugned judgment and decree dated 20.9.2000, passed by learned trial Court, respondents/defendants filed an appeal in the Court of learned Additional District Judge, Fast Track Court, Una, H.P. i.e. Civil Appeal No.169/2000 RBT No.216/04/2000, however fact remains that learned Additional District Judge, Fast Track Court, Una vide judgment and decree dated 29.11.2006 accepted the appeal preferred by the respondents-defendants and quashed and set-aside the judgment and decree, dated 22.9.2000, passed by learned trial Court. In the aforesaid background, present appellant-plaintiff being aggrieved and dis-satisfied with the impugned judgment and decree, passed by learned lower Appellate Court, has approached this Court by way of instant Regular Second Appeal, praying therein for quashing and setting-aside the judgment and decree dated 29.11.2006, passed by learned lower Appellate Court.

8. This Regular Second Appeal was admitted on the following substantial questions of law No. 2 and 3:-

"(1) Whether the learned first appellate court below misread and misappreciated the documentary and oral evidence more specifically Ex.P-5 and D-5 thereby vitiating the impugned judgment and decree?

(2) Whether change of revenue entry being contrary to para 9.8 of H.P. Land Record Manual in law is void abinitio and could not have been looked into in favour of party, learned first appellate court below having heavily relied upon the same to non-suit the plaintiff in impugned judgment and decree thereby vitiating the same?"

9. Mr. Ajay Sharma, Advocate, representing the appellant–plaintiff vehemently argued that the judgment passed by the learned first appellate Court is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence adduced on record by the parties, rather, same is based upon the conjectures and surmises and as such, same deserves to be quashed ad set-aside. Mr. Sharma, further contended that learned first appellate Court has erred in not appreciating the well settled provisions of law

applicable, pleadings of the parties and evidence adduced by them in its right perspective, as a result of which, great prejudice has been caused to the present appellant-plaintiff. As per Mr. Sharma, close scrutiny of the revenue record made available on record by the parties, clearly suggests that predecessor-in-interest of the plaintiff i.e. Melu, was tenant at will over the suit land and after his death, plaintiff entered into his shoes and was reflected/shown as ***"Gair Maurusi"*** on payment of rent in revenue record. With a view to substantiate his aforesaid argument, Mr. Sharma also invited attention of this Court to the oral evidence adduced on record by the plaintiff to demonstrate that the plaintiff witnesses unequivocally stated before the learned trial Court that after the death of Sh. Melu i.e. father of the plaintiff, plaintiff is in possession of the suit land as ***"Gair Maurusi"*** on payment of rent, and as such, judgment passed by the first appellate Court deserves to be set-aside being contrary to facts as well as law on record. Mr. Sharma, forcefully contended that learned first appellate Court miserably failed to take note of the fact that change as ordered in Rabi 1979 in Ext.D5 was made at the back of the plaintiff and as such, same could not be relied upon by the court below, especially, in view of para 9.8 of HP Land Record Manual, wherein specific procedure has been provided for change of revenue entry. Mr. Sharma, strenuously argued that revenue record, as available on record, clearly suggests that the defendants stood entered vide Ext.D5 as ***"Gair Maurusi Doem"*** and ***"Gair Murusi Doem"*** either could have been inducted by the plaintiff or by original owner. Neither defendants themselves nor any witness adduced by them in their defence uttered a word that who inducted them as ***"Gair Maurusi tenant"***. He also stated that neither original owners were produced nor agreement etc., if any, was placed on record by the defendants to suggest that they were inducted as ***"Gair Maurusi Doem"*** as reflected in Ext.D5. Mr. Sharma, further contended that no receipt of payment of rent has been adduced on record by the defendants to prove that they were inducted as ***"Gair Maurusi tenant"***, rather close scrutiny of revenue record suggests that defendants procured entry qua the ***"Gair Maurusi Doem***" at the back of the plaintiff without there being any order of competent authority and as such, same were rightly held void-abinitio by the trial Court. Moreover, careful perusal of the evidence available on record suggests that the plaintiff by way of leading cogent and convincing evidence was able to prove that he is coming in possession as tenant and entry in the name of defendants is procured at the back of the plaintiff and as such, same deserves to be declared null and void. Mr.Ajay Sharma vehemently argued that the latest revenue entries showing the defendants in possession are wrong and illegal and any change made without resorting to the procedure as prescribed in clause 9.8 *supra*, is not binding upon the plaintiff and as such, same were rightly rejected by the trial Court below while decreeing the suit of the plaintiff.

10. In this regard, reliance is placed on judgments passed by this Court as well as other High Courts:-

1. Kanshi Ram v. Nikka Ram, 1988, SLJ, 264.
2. Tulsa Singh V. Agya Ram and others, 1994(2) Sim.L.C. 434 and 1995 (10) SLJ 428.
3. Lal Chand and Ors. v. Pala, 1998 (2) SLJ 1526.
4. Satya Devi v. Raghubir Singh and Others, 1998(1) SLJ, 263.
5. Chanda v. Ram Chander, Punjab & Haryana High Court, 1980, 561."

11. Per contra, Mr. N.K. Thakur, Senior Advocate, duly assisted by Ms. Jamuna, Advocate, supported the judgment passed by the learned first appellate Court. Mr. Thakur, contended that bare perusal of the impugned judgment passed by the appellate Court clearly suggests that the same is based upon the correct appreciation of evidence available on record by the respective parties and it calls for no interference, whatsoever, of this Court and as such, present appeal deserves to be dismissed. While referring to the judgment passed by the learned first appellate Court, Mr. Thakur, strenuously argued that learned first appellate Court has dealt with each and every aspect of the matter very meticulously and there is no scope of interference whatsoever, of this Court in the findings returned by the first appellate Court, which are based

upon the correct appreciation of facts as well as law. Mr. Thakur, also invited attention of this Court to the judgment passed by the learned trial Court to demonstrate that learned trial Court mis-directed itself while deciding the actual controversy at hand. As per Mr. Thakur, bare perusal of the plaint filed by the plaintiff itself suggests that plaintiff was not able to prove its case by way of leading cogent and convincing evidence. With a view to substantiate his aforesaid argument, he invited attention of this Court to the statements of witnesses adduced on record by the plaintiff to demonstrate that bare perusal of the depositions made by the plaintiff witnesses nowhere proves the case of the plaintiff, rather all the witnesses proved the case of defendants that he is in possession over the suit land and he has constructed 6-7 shops over the same. Mr. Thakur, made this Court to travel through the depositions made by the plaintiff witnesses to specifically point out that plaintiff witnesses admitted that there are shops constructed over the suit land, whereas plaintiff in his plaint never claimed that shops, if any, ever exist upon the suit land. Mr. Thakur, contended that bare perusal of the written statement filed by the defendants clearly suggests that stand of defendant from day one has been that he was inducted as tenant about 20-25 years back by the original owners and he has already constructed 6-7 shops over the suit land. Apart from this, defendant by way of leading cogent and convincing evidence successfully proved on record that abadi exists over the suit land because all the defendant witnesses as well as plaintiff witnesses specifically stated /admitted while making depositions before the Court below that shops as well as PWD road exist over the suit land. Mr. Thakur, strenuously argued that during consolidation proceedings, entries were got changed illegally by the defendants rather, plaintiff claimed himself to have acquired the status of owner with the conferment of proprietary rights of the H.P. Tenancy & Land Reforms Act. Mr. Thakur further added that if for the sake of argument, it is presumed that no procedure in terms of aforesaid para 9.8 was followed by authorities concerned, remedy, if any, for the plaintiff to get the revenue entries corrected was somewhere else not by way of civil suit.

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

13. Now this Court would be making an attempt to explore the answer to aforesaid substantial questions of law framed by this Court at the time of admission of appeal by looking into evidence adduced on record by the parties to the lis. Perusal of documents Ext.P1 to 10 though suggests that the predecessor-in-interest of the plaintiff was entered as ***"Gair Maurasi Deom"*** over the suit land but latest revenue entries prepared after year 1979 reflects defendants No.1 and 2 to 4 in possession of the suit land as ***"Gair Maurasi Doem"*** on payment of rent while late Sh. Melu i.e. predecessor-in-interest of the plaintiff, has been shown as ***"Gair Maurasi Abal".***

14. Careful perusal of the judgments, as have been referred herein above, clearly provides that presumption of truth is attached to the latest revenue entry but same is rebuttable in case there is evidence to suggest that latest entry was not recorded in accordance with the procedure prescribed under Clause 9.8 of the H.P. Land Records Manual. However, this Court after carefully going through the pleadings, especially plaint filed by the plaintiff, is of the view that learned trial Court, while allowing the suit of the plaintiff, mis-directed itself because close scrutiny of plaint, as perused by this Court, clearly suggests that plaintiff claimed himself to be in possession of the suit land as tenant- at-will and sought permanent injunction restraining the defendants from interfering in his peaceful possession but interestingly, while proving the contents of the plaint neither plaintiff himself nor any of witnesses produced by him stated qua the possession, if any, of the plaintiff over the suit land, rather all the PWs admitted the factum of the shops having been constructed on the suit land as claimed by the defendants in the written statement. Moreover, plaintiff himself admitted that entries are coming in favour of the defendants after year, 1979; meaning thereby that the plaintiff was fully aware of the fact that the entries, if any, were changed in the year, 1979, whereas present suit admittedly was filed in the year, 1990 i.e. after 11 years. Interestingly, there is no explanation either in the plaint or in the depositions having been made on behalf of the plaintiff before the trial Court that what prevented him from filing appropriate proceedings in accordance with law for correction of revenue entries,

which, as per him, were allegedly changed in favour of the defendants without following due procedure as has been referred herein above.

15. During the proceedings of the case, this Court had an occasion to peruse the entire evidence led on record by the parties. Revenue Record available on record itself suggests that suit land comprising of khasra No. 3198 is measuring 0-18 marlas, out of which 0.16 marlas is abadi and 0-2 marlas is vacant land. It clearly reflects from the revenue record that major portion of the suit land is in the shape of *abadi*, wherein defendants have been shown in the possession. Similarly, khasra No. 3202 is measuring one kanal 12 marlas, out of which one kanal is *Banjar Jadid* and 0-12 marlsa is ***"Gair Mumkin Sarak"*** i.e. road. Perusal of record, as discussed herein above, clearly corroborates the version put forth on behalf of the defendants in the written statement or witnesses adduced by them that they have constructed *abadi* over the suit land in the shape of shop and there exits one road of Himachal Pradesh Public Works Department *(for short 'HPPWD').*

16. Plaintiff, with a view to prove its case, examined himself as PW-1 and stated that suit land is measuring 2 kanals 12 marlas and the real owner of the suit land is Sheela etc. He further stated that after that Melu, his father became non-occupancy-tenant. He further stated that after the death of Melu, he has come into possession of the suit land. He specifically stated that he never surrendered the possession of the land and no one else cultivated the suit land. Though he stated that *batai* is being paid tothe owners, but he nowhere stated to whom he paid *batai*. He also stated that at no point of time Patwari informed him regarding entries made in favour of defendants showing them non-occupancy tenants over the suit land, rather, he came to know about the same in the year 1989. But in his cross-examination he admitted that suit land is in the shape of two Khasra Numbers, i.e. one, 1 kanal 12 marlas and another, 0-18 marlas and both the Khasra Numbers are abutting to each other. He further stated in his cross-examination that the land was taken on *batai* from Natha Mal prior to 1947. However, he admitted that no writing was executed to this effect and *batai* was paid till 1971. He also admitted that there is no receipt. However, he denied the suggestion put to him that they never remained in possession of the suit land and never cultivated the same. He also denied that suit land remained in possession of the defendants and shops, which are existing on Khasra No.398, belong to the defendants. However, he categorically admitted that shops are existing on the spot. He also admitted that shops have been rented out by Gurbachan Singh and Rattan Singh. He also admitted that there is road on Khasra No.3203, however, he denied that remaining part of Khasra No.3203 is in possession of the defendants. He also admitted that he never objected regarding Girdawari before the Consolidation Officer because he did not know about the wrong entries.

17. Similarly, PW-2 Mohinder Singh, Patwari, stated that Khasra Girdawari of Khasra No.9206/3207 was changed on 24.3.1979 in the names of Gurbachan Singh and Rattan Chand sons of Partapa and similarly Khasra Girdawari of Khasra No.7511/3208 was also changed in the name of Gurbachan Singh. However, he stated that he can not tell whether this change was being made by any order or not because there is no mentioning with regard to the same on the record. He also stated that there is no order of any Court regarding this change in Rapat Roznamcha and the presence of Kartara is not recorded in Rapat Roznamcha dated 24.3.1979. In his cross-examination, he admitted that Girdawari is first made by the Kanoongo after conducting inquiry, thereafter the same is confirmed by the Tehsildar.

18. PW-3 Sarwan Singh also deposed that the parties are known to him and he has seen the suit land and the plaintiffs are in possession of the suit land since long from the time of their father. But in his cross-examination he admitted that shops of Gurbachan Singh are in his own number and are not abutting the road. He denied that the defendants are in possession of the suit land and their shops are existing for the last 30 years.

19. PW-4 Kaka Ram also stated that parties are known to him and he has seen the suit land which is in possession of Kartara i.e. plaintiff from the time of ancestors. However, in

his cross-examination, he admitted that some of the suit land is vacant and on some part, 6-7 shops have been constructed abutting the road which is in occupation of the shop-keepers. He further stated that he does not know who has given the shops on rent. In his cross-examination, he expressed his inability to state that who is owner of the shops. Conjoint reading of the statements of aforesaid plaintiff witnesses clearly establishes on record that there is no cultivation on the suit land. Rather, there exist 5-6 shops and one road, which has been constructed by *'HPPWD'.*

20. On the other hand, if the written statement of defendants is perused in its entirety, it clearly emerge from the same that they claimed that there exists *abadi* and shops over the suit land and one road of PWD passes through the same. Defendants specifically denied the contention put forth on behalf of the plaintiff that suit land is cultivable land.

21. DW-1 Satnam Singh specifically stated before the Court that suit land is 2½ kanals, which is in possession of the defendants since 30-35 years. He also stated that their shops exist on the suit land and a part of it is vacant and on some part there is road constructed by HPPWD. He also stated that they are tenants over the suit land. DW-1 also denied that suit land ever remained in possession of the plaintiff and they have no concern with the same. He also stated that revenue entries in the name of plaintiff were wrong and they neither remained in possession nor used to pay *batai* to the owners. In cross-examination, he expressed his inability to tell the measurement of each Khasra number of the suit land. However, he stated that their *abadi* is about 50 meters away from the suit land. He was also unable to tell whether any notice was given to the plaintiff regarding change in the entries in their names. However, he further stated that shops were constructed 35-40 years ago. However, in cross-examination he denied that the shops belong to the plaintiff and had been constructed by him.

22. DW-2 Mulaba Singh also deposed that parties are known to him and he has seen the suit land measuring 2½ kanals. He specifically stated that suit land is coming in defendants' possession for the last 40 years and Gurbachan Singh and Rattan Chand have constructed shops on the suit land. He also stated that plaintiff never remained in possession of the suit land. However, in his cross-examination, he stated that there are shops towards the eastern side of the suit land which belong to Jullahas and Jats. He further stated that earlier, the suit land was owned by Shiva and after that Rattna. He denied that the shops belong to Kartara and he is coming in possession since the time of his ancestors. He also denied that defendants never remained in possession of the suit land and the plaintiff is coming in possession of the suit land as non-occupancy-tenant since the time of his ancestors.

23. DW-3 Kushal Singh also deposed that he is co-sharer of the suit land, which is 2½ kanals and is in possession of Gurbachan Singh and Rattan Chand. He also stated that Gurbachan Singh and Rattan Chand had expired and now their sons are in possession. He also stated that he is witnessing the possession of the defendants since 35 years and the defendants have constructed shops on the suit land. He also stated that defendants are in possession of the suit land as tenants and now they have become owners under the Act. He categorically stated that the shops are existing for the last 30 years. In cross-examination, he stated that the suit land was owned by him, Sheela Devi and Nathu Ram etc. It has also come in his statement that the consolidation was completed in their village in 1986-87 and settlement was conducted in 1997-98. He stated that correct record has been prepared by the consolidation staff as per the spot. Gurbachan, Rattan Chand and Partapa have taken this land for cultivation before he gained consciousness. He stated that the entries are coming in favour of the defendants for the last 30 years, prior to 1970 and the defendants used to pay 1/4th share to the owners.

24. DW-4 Surjit Singh prepared the site plan Ex.DW-4/A. In his cross-examination, he stated that while preparing site plan, he has not seen the revenue papers. He admitted that he prepared the site plan as per instructions of his client.

25. Careful perusal of aforesaid evidence led on record by the defendants clearly suggests that defendants were able to prove on record that suit land, description whereof has

been given hereinabove, is in their possession and they have constructed shops over the same. It also emerges from their depositions, referred hereinabove, that on a part of the suit land there exists a road constructed by PWD. All these defence witnesses have categorically denied the possession, if any, of the plaintiff. Rather they in unequivocally terms stated before the Court that they have seen defendants in possession of the land. More importantly, DW-3 Kushal Singh, who claimed himself to be co-sharer of the suit land, categorically stated that the suit land was owned by him, Sheela Devi and Nathu Ram, etc., which clearly corroborates the version put forth by the plaintiff. He himself stated before the Court that original owner of the land was Sheela Devi. DW-3, while claiming himself to be co-owner alongwith Sheela Devi and Nathu Ram, categorically stated that shops exist over the suit land for the last 30 years. He also stated that consolidation was completed in their village in 1986-87 and settlement was conducted in 1997-98, which admission on his part corroborates the revenue record placed on record by the defendants, which suggests that entries were changed during consolidation and correction, if any, was carried out by consolidation staff as per spot. He specifically stated that the defendants used to pay 1/4th share to the original owners. Conjoint reading of aforesaid witnesses of both the parties clearly suggests that land is not under cultivation, as claimed by the plaintiff, rather there exists shops as well as road on the suit land as have been admitted by the plaintiff himself and witnesses adduced by him on record also. It is not understood as to how, on the basis of evidence as has been discussed in detail, learned trial Court came to conclusion that plaintiff was able to prove that he has been coming in possession of the suit land as tenant-at-will. Similarly, it is not understood that how learned trial Court came to conclusion that plaintiff is entitled to relief of injunction when it stands duly proved on record that possession, if any, over the suit land is of defendants, who have constructed their shops over the suit land. Moreover, cross-examination conducted upon DW-1, nowhere suggests that plaintiff at any point of time ever put suggestion to him that he is not tenant-at-will over the land or he has never raised shops over the suit land. Though plaintiff stated that alongwith Sheela, Mansho Devi was also owner, but admittedly neither original writing nor receipt were placed on record by the plaintiff to prove on record that they were inducted as ***"Gair Maurusi Tenant"*** over the suit land by the original owner, as named above. Whereas, defendants, while citing DW-3 Kushal Singh, were able to prove on record that they were inducted as tenants. Kushal Singh, who claimed himself to be co-sharer, successfully proved on record that defendants were inducted as a tenants over the suit land by the original owner. Once Kushal Singh himself stated that defendants are in possession of the suit land as tenants and now they have become owners under the Act, findings returned by the learned trial Court that defendants were not able to produce on record by leading cogent evidence to demonstrate that they were inducted as tenants by the original owners does not appears to be correct on its face value.

26. In view of detailed discussion made hereinabove, this Court is unable to accept the findings recorded by the learned trial Court below that the plaintiff is in possession of the suit land and being so the change of entries in favour of defendants from Rabi, 1979, during consolidation, was wrongly made in favour of the defendants. Rather, this Court, after perusing the entire evidence led on record, is fully convinced and satisfied that learned first appellate Court rightly came to the conclusion that change of entries in favour of defendants from Rabi, 1979 during consolidation was rightly made by the revenue officials as per factual position at the spot because prior to change there were only paper entries in the revenue record in favour of plaintiff, which did not create any right in his favour. This Court, while exploring answer to substantial question of law, as referred above, also perused Ex.P-5 and Ex.D-5. Ex.P-5 is the copy of Misalhaquiat Istemal for the year 1986-87, wherein name of plaintiff has been entered as ***"Gair Maurusi Doem".*** But, in the column of area and category of land, it has been specifically recorded over Khasra Nos.3188, 3190, there is ***"Gair Mumkin Abadi"*** and ***"PWD Road",*** which itself belies the stand taken by the plaintiff that they are cultivating the suit land. Similarly, if this Ex.P-5 is perused juxtaposing Ex.P-1, i.e. Misalhaquiat Istemal for the year 1986-87, Mohal Haroli, the defendants have been recorded as ***"Gair Maurusi Soem"***. Similarly, if Ex.D-1, copy of Jamabandi placed on record by the defendants, is seen, that also pertains to the the year 1986-87 for Mauza Haroli, which also suggests that names of defendants stand recorded in the

column of cultivation and possession as ***"Gair Maurusi Deom".*** Similarly, perusal of Ex.D-5 also reflects the names of defendants in the column of cultivation and rent for the year 1978-79 and moreover in Ex.P-6 names of Smt.Sheela Devi, Manso Devi have been shown as owners. Whereas, name of plaintiff Kartara son of Melu has been shown as ***"Gair Maurusi"*** in Ex.P-7, Khasra Girdawari for the year 1978-79, qua Khasra No.3207, but name of the owner has been reflected as Smt.Thakri widow of Shri Sant Ram.

27. After perusing the aforesaid documents, as indicated in substantial question of law, this Court is unable to accept the contention put forth on behalf of plaintiff that learned first appellate Court below misread and mis-appreciated the documentary and oral evidence, more particularly Ex.P-5 and Ex.D-1, while coming to the conclusion that entries in favour of defendants from Rabi, 1979 was rightly made by revenue official as per factual position on spot. Hence, substantial question of law is answered accordingly.

28. It is well settled that presumption of correctness is attached to the latest revenue entries and whenever there is conflict, it is the latest entry which would prevail. Where the earlier revenue entries were changed in the later revenue entries and the change was effected without there being any order of the revenue authorities showing how the change was made, the presumption would be in favour of the later entries but that presumption was a rebuttable one and it would stand rebutted by the fact that the alteration in the later entries was made unauthorisedly or mistakenly, there being no material to justify the change of entries.

29. In this regard reliance is placed on ***Durga (deceased) and Otheers vs. Milkhi Ram and Others, 1969 P.L.J. (SC), 105,*** wherein the Hon'ble Apex Court has held as under:

> *"3. Relying on Shri Raja Durga Singh of Solan v. Tholu (1963) 2 S.C.R. 693, 700 = 1962 P.L.J. 88), it was urged before the High Court, as before us, that the lower appellate court had wrongly relied on the earlier revenue entries placing the burden on the defendants, whose names appeared in the later entries, to rebut the presumption. This Court observed in that case as follows:*
>
> > *"It was urged before us that there are prior entries which are in conflict with those on which the learned District Judge has relied. It is sufficient to say that where there is such a conflict, it is the later entry which must prevail. Indeed from the language of Section 44 itself it follows that where a new entry is substituted for an old one it is that new entry which will take the place of the old one and will be entitled to the presumption of correctness until and unless it is established to be wrong or substituted by another entry."*
>
> *Grover j.,observed as follows:*
>
> > *"It is clear from the pedigree-table set out in its judgment that Mathar Mal had three sons Jiwan, Amin Chand and Relu. Durga and Sidhu are the descendants of Jiwan whereas the plaintiff and defendant No. 3 are the descendants of Amin Chand and Relu. Now, in the entries prior to 1929-1930 each one of the descendants of the three sons of Mathar Mal had been shown to have 1/3rd share and without any mutation the entries were changed in 1929-30. Admittedly there is no order of the revenue authorities showing how the change was made. Thus although the presumption would be in favour of the latter entries but that presumption was a rebuttable one and it would stand rebutted by the fact that the alteration in the entries in 1929-30 was made unauthorisedly or mistakenly, there being no material to justify the change of entries."*
>
> *Grover, J. distinguished Shri Raja Durga Singh of Solan v. Tholu (1963) 2 S.C.R. 693, 700 = 1962 P.L.J.88) thus:*
>
> > *"There is nothing to indicate that in the case decided by their Lordships such was the position. More-over, the decision in that case proceeded largely on the finding of fact arrived at by the District Judge on a consideration of the*

evidence being not open to interference in second appeal. The finding in the present case of the lower appellate Court is also based on evidence from which it has been inferred that the later entries are not the correct ones."

30. In the instant case, admittedly, later entries are in favour of defendants and presumption of correctness is attached to the same because plaintiff nowhere succeeded to prove them to be wrong. Apart from above, plaintiff in the instant case woefully failed to prove his tenancy, consent of owners and payment of rent and as such it can be safely concluded that plaintiff was unable to prove that he was inducted as tenant over the suit land by the original owners. Since plaintiff failed to prove his tenancy over the suit land, there is no point in relying upon the entries made in his favour prior to 1979, which were admittedly paper entries and nothing more than that. Judgments, as have been relied upon by the learned counsel representing the plaintiff, as have been noted above, may not be of any help in the present case, especially in view of the failure on the part of the plaintiff to prove his tenancy over the suit land and as such same are not being referred herein.

31. At this stage, it may be observed that learned first appellate Court, while accepting the appeal of defendants, has not solely relied upon the entries made in the revenue record in favour of defendants, rather plaintiff was non-suited on account of his failure to prove his tenancy over the suit land and as such there is no force in the contention put forth on behalf of the counsel representing the plaintiff that change of revenue entries being contrary to para 9.8 of the H.P. Land Records Manual could not have been looked into in favour of the parties. Therefore, the question is answered accordingly.

32. Consequently, in view of the aforesaid detailed discussion, this Court sees no illegality and infirmity in the judgment passed by learned first appellate Court and as such same deserves to be upheld. Hence, present appeal fails and the same is, accordingly dismissed.

33. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Kashmiri Lal .....Appellant
Versus
Rajni Devi and others .....Respondents

FAO No.80 of 2012
Decided on : 04.11.2016

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

Cases referred:

S. Iyyapan versus United India Insurance Company Limited and another, (2013) 7 Supreme Court Cases 62

United India Insurance Co. Ltd. Versus K.M. Poonam and others, 2011 ACJ 917

Manager, National Insurance Co. Ltd. versus Saju P. Paul and another, 2013 ACJ 554

Dev Raj versus Shri Krishan Lal and others, I L R 2016 (III) HP 2288

For the appellant: Mr.R.R. Rahi, Advocate.

For the respondents: Mr.Vinay Thakur, Advocate, for respondents No.1 to 6.
Mr.Ratish Sharma, Advocate, for respondent No.8.
Nemo for respondents No.7 and 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 21st November, 2011, passed by Motor Accident Claims Tribunal-II, Mandi, District Mandi, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.7,40,000/, with interest at the rate of 7.5% per annum from the date of filing of the petition till deposit, came to be awarded in favour of the claimants, and the insured and the driver were saddled with the liability, (for short, the impugned award).

2. The claimants, the driver and the insurer have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insured has challenged the impugned award by way of instant appeal, on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant/insured argued that the Tribunal has fallen into an error in determining issues No.1A, 2A and 3A and has wrongly saddled the owner with the liability. Thus, the controversy in the instant appeal revolves around issues No.1A, 2A and 3A, framed by the Tribunal, which are reproduced below:

> *"1A. Whether the driver was not holding a valid driving license at the time of accident, if so its effect? OPR*
>
> *2A. Whether Devinder Kumar was sitting as a gratuitous passenger in the vehicle bearing registration No.PB-32-8826, if so its effect? OPR*
>
> *3A. Whether the driver was driving the vehicle in violation of terms and conditions of insurance policy and Motor Vehicle Act, if so its effect? OPR"*

5. Heard learned counsel for the parties and gone through the record. A perusal of the record shows that the driver of the offending vehicle was having a valid and effective driving licence to drive a light motor vehicle. The offending vehicle, in the instant case, was a tempo, which, admittedly, falls within the definition of Light Motor Vehicle. The Tribunal has fallen into an error in holding that the driver of the offending vehicle was not having a valid and effective driving licence. Accordingly, the findings returned by the Tribunal on issue No.1A are set aside and it is held that the driver of the offending vehicle was having a valid and effective driving licence at the time of accident.

6. Coming to issue No.2A, the claimants, in paragraph 24 of the Claim Petition, have specifically pleaded that the deceased was a photographer by profession and, on the fateful day, had gone to Dussehra festival, and while returning, came back in the offending vehicle, met with the accident and succumbed to the injuries. The offending vehicle was a goods vehicle. Thus, the Tribunal has rightly determined issue No.2A and held that the deceased was traveling in the offending vehicle as gratuitous passenger. Accordingly, findings on issue No.2A are upheld.

7. As far as issue No.3A is concerned, admittedly, the offending vehicle was a goods vehicle, was being driven in violation of the terms and conditions contained in the insurance policy, as discussed above. Thus, the findings on issue No.3A are also upheld.

8. However, the Tribunal has fallen into an error in not directing the insurer to satisfy the award at the first instance, with right of recovery. The mandate of Sections 146, 147 and 149 of the MV Act is to protect the rights of third parties and that is why, compulsory duty has been imposed on the owners to get the vehicles insured, so that, claim of third parties cannot be defeated.

9. The Apex Court has also discussed this aspect in a case titled as **S. Iyyapan versus United India Insurance Company Limited and another,** reported in **(2013) 7 Supreme Court Cases 62.** It is apt to reproduce para 16 of the judgment herein:

> *"16. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force."*

10. The same principle has been laid down by this Court in a series of cases.

11. In view of the above, the claimants, who are third party, cannot be left in lurch and cannot be dragged from pillar to post and post to pillar in order to get compensation. Thus, it is the duty of the Court to ensure that the compensation is paid to the claimants by directing the insurer to satisfy the award with right of recovery.

12. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **United India Insurance Co. Ltd. Versus K.M. Poonam and others,** reported in **2011 ACJ 917.** It is apt to reproduce paras 24 and 26 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle.*
>
> *25. .....*
>
> *26. Having arrived at the conclusion that the liability of the Insurance Company to pay compensation was limited to six persons travelling inside the vehicle only and that the liability to pay the others was that of the owner, we, in this case, are faced with the same problem as had surfaced in Anjana Shyam's case (supra). The number of persons to be compensated being in excess of the number of persons who could validly be carried in the vehicle, the question which arises is one of apportionment of the amounts to be paid. Since there can be no pick and choose method to identify the five passengers, excluding the driver, in respect of whom compensation would be payable by the Insurance Company, to meet the ends of justice we may apply the procedure adopted in Baljit Kaur's case (supra) and direct that the Insurance Company should deposit the total amount of compensation awarded to all the claimants and the amounts so deposited be disbursed to the claimants in respect to their claims, with liberty to the Insurance Company to recover the amounts paid by it over and above the compensation amounts payable in respect of the persons covered by the Insurance Policy from the owner of the vehicle, as was directed in Baljit Kaur's case."*

13. It would also be profitable to reproduce paras 19 to 21 and 25 of the judgment rendered by the Apex Court in the case titled as **Manager, National Insurance Co. Ltd. versus Saju P. Paul and another,** reported in **2013 ACJ 554,** herein:

> *"19. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the insurance company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (respondent no. 2 herein).*
>
> *20. In National Insurance Co. Ltd. v. Baljit Kaur and others, 2004 ACJ 428 (SC), this Court was confronted with a similar situation. A three-Judge Bench of this Court in paragraph 21 of the Report held as under :*
>
> *"(21) The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in Satpal Singh. The said decision has been overruled only in Asha Rani. We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding."*
>
> *21. The above position has been followed by this Court in National Insurance Co. Ltd. v. Challa Bharathamma, 2004 ACJ 2094 (SC), wherein this Court in para 13 observed as under:*
>
> *"(13) The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case, considering the quantum involved, we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."*

22 to 24. .....

25. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur, 2004 ACJ 428 (SC) and Challa Bharathamma, 2004 ACJ 2094 (SC) should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years' old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The insurance company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the insurance company before this Court along-with accrued interest. The insurance company (appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the insurance company from the owner shall be made by following the procedure as laid down by this Court in the case of Challa Bharathamma, 2004 ACJ 2094 (SC)."

14. The same principle has been laid down by this Court in a batch of FAOs, **FAO No. 353 of 2012,** titled as **Dev Raj versus Shri Krishan Lal and others,** being the lead case, decided on 24th June, 2016.

15. Having said so, the impugned award is modified to the extent that the insurer has to satisfy the impugned award at the first instance with right of recovery. The insurer is directed to deposit the amount, alongwith interest, as awarded by the Tribunal, within eight weeks from today, in the Registry of this Court, and the Registry is directed to release the same in favour of the claimants through their respective bank accounts, strictly in terms of the impugned award. The insurer is at liberty to lay motion for recovery before the Tribunal.

16. The appeal stands disposed of accordingly, alongwtih pending CMPs, if any.

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

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

Versus

Lakshmi Devi & Others ....Respondents.

FAO No. 552 of 2009
Decided on: 4.11.2016

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

For the appellant: Mr. B.M Chauhan, Advocate.

For the respondents: Mr. B.S Chauhan, Sr.Advocate with Mr. Munish, Advocate for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral)

The instant appeal came to be admitted on 28.12.2009 on the hereinafter extracted substantial question of law:-

"1. *Whether the workmen's compensation Commissioner was justified in hold that the deceased Rajinder Singh was working as an employee on the tractor in question?*

2. Whether the interest has been awarded by the workmen's Compensation Commissioner in accordance with the provisions of the workmen's Compensation Act, 1923?"

2. The learned counsel for the appellant has submitted with much vigor before this Court that the predecessor-in-interest of the claimants who uncontrovertedly is the son of the owner of the ill-fated vehicle and who met his end in an accident involving the ill-fated vehicle cannot per se hence render him to be construable qua his standing engaged as a driver in the ill-fated vehicle by his father nor he can be concluded to be drawing wages quantified in a sum of Rs.2600/- whereupon he contends of the impugned order recorded by the learned Commissioner warranting interference significantly when the trite factum of the deceased Rajinder Singh performing employment as a driver in the relevant vehicle under his father stands un-proven.

3. The aforesaid submission warrants its standing discountenanced as there is no inflexible proposition of law of a father not employing his son nor is it a rigid proposition of law qua the relevant employee/workman not drawing wages from his father, his employer.

4. Be that as it may the evidence on record was enjoined to pronounce qua the factum of the father of one Rajinder Singh who died in the ill-fated accident involving tractor Number HP21-0528 not receiving from his father wages per mensem constituted in a sum of Rs.2600/-. The relevant best evidence in portrayal thereof stood constituted in the appellant during the course of his holding the owner of the relevant vehicle to cross-examination endeavoring to make elicitations from his qua his maintaining receipts qua the amount of wages defrayed to his deceased son while his performing duties as a driver in the relevant vehicle.

5. However, the aforesaid evidence has remained unemerged as the owner of the vehicle died before the relevant trite issue standing put to trial, inevitable corollary whereof is qua this Court standing not seized with the relevant best evidence, for its hence accepting the contention addressed herebefore by the learned counsel for the appellant also hence for want thereof the impugned order recorded by the Commissioner while accepting the depositions of the claimants qua their predecessor-in-interest drawing from his employment under his father wages per mensem constituted in a sum of Rs.2600/-, holds field. Consequently, the finding qua the facet aforesaid warrants its acceptance by this Court. Substantial question of law answered accordingly.

6. In the impugned order the learned Commissioner on the compensation amount assessed qua the dependents/claimants of deceased Rajinder Singh had levied thereon interest @ 6%, liability whereof stood fastened upon the appellant herein also the aforesaid per centum of interest levied upon the compensation amount, stood mandated in the impugned order to accrue from 2.11.2003 whereas liability qua levy of 6% interest on the compensation amount was peremptorily enjoined to accrue thereon from one month elapsing since the date of accident. Consequently, the order impugned hereat is modified to the extent indicated above. In sequel the rate of interest levied on the compensation amount assessed qua the claimants of one Rajinder Singh would accrue thereon from one month elapsing since the date of accident. The impugned order is modified accordingly.

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

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

Oriental Insurance Company Ltd. ...Appellant.

Versus

Sh. Jai Kumar and others ...Respondents.

FAO No. 47 of 2012
Decided on: 04.11.2016

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

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, 2013 AIR SCW 6505

For the appellant:	Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeevan Kumar, Advocate.
For the respondents:	Mr. Rajiv Rai, Advocate, for respondent No. 1. Mr. Sanjeev Kuthiala, Advocate, for respondent No. 2. Mr. Umesh Kanwar, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

This appeal is directed against award, dated 1st October, 2011, made by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (for short "the Tribunal") in M.A.C. No. 44 of 2006, titled as Jai Kumar versus Smt. Sunita Devi and others, whereby compensation to the tune of ₹ 2,85,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimant-injured and the insurer was saddled with liability (for short "the impugned award").

2. The claimant-injured, owner-insured and driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has called in question the impugned award on the ground that the Tribunal has fallen in an error in saddling it with liability.

4. Learned Senior Counsel appearing on behalf of the appellant-insurer argued that the owner-insured of the offending vehicle has committed a willful breach as there was no fitness certificate of the offending vehicle at the time of the accident and that the driver was not having a valid and effective driving licence to drive the same at the relevant point of time.

5. The claimant-injured had claimed compensation to the tune of ₹ five lacs, as per the break-ups given in the claim petition, on the ground that he became the victim of the vehicular accident, which was caused by the driver, namely Shri Vijay Kumar, while driving tractor, bearing registration No. HP-69-0314, rashly and negligently, on 4th August, 2006, at about 11.00 A.M., at Village Padyalag, Tehsil Ghumarwin, in which he sustained multiple injuries.

6. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

7. On the pleadings of the parties, following issues came to be framed by the Tribunal on 28th May, 2009:

"1. Whether the petitioner suffered injuries due to rash and negligent driving on account of accident which took place on 4.8.2006 as alleged? OPP

2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled for compensation and if so from whom and to what extent? OPP

3. Whether the petition is bad for non-joinder of necessary parties? OPR

4. Whether the petition is not maintainable? OPR-3

5. Whether the petition is bad for mis-joinder of necessary parties? OPR-3

6. Whether the vehicle in question was being driven without R.C., insurance and valid route permit? OPR-3

7. Whether the vehicle was being driven without any effective driving licence? OPR-3

8. Whether the vehicle was being run in contravention of the terms of the Motor Vehicles Act? OPR-3

9. Whether there was contributory/ composite negligence of the driver of vehicle HP-23B-1052 and HP-69- 0314? OPR-3

10. Relief."

8. Parties have led evidence.

9. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in terms of the impugned award. Hence, the instant appeal.

Issue No. 1:

10. The Tribunal has held that the claimant-injured has proved that he sustained injuries due to the rash and negligent driving of the offending vehicle by its driver on 4th August, 2006 and decided issue No. 1 in favour of the claimant-injured. The said findings are not in dispute in this appeal. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before dealing with issues No. 2 and 6 to 8, I deem it proper to determine issues No. 3 to 5 and 9.

Issues No. 3 to 5 and 9:

12. It was for the insurer to prove issues No. 3 to 5 and 9, has not led any evidence to this effect, thus, has failed to discharge the onus. The Tribunal has made discussion that the insurer has not led any evidence and failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issues No. 3 to 5 and 9 are upheld.

Issues No. 6 to 8:

13. The insurer has not led any evidence to the effect that the driver of the offending vehicle was not having a valid and effective driving licence, the offending vehicle was being driven without valid documents and in contravention of the Motor Vehicles Act, 1988 (for short "MV Act"), and the owner-insured has committed a willful breach, thus, has failed to prove issues No. 6 to 8. The Tribunal has rightly decided the said issues while making discussion in paras 25 to 27 of the impugned award.

14. Even otherwise, it was for the insurer to plead and prove that the owner-insured of the offending vehicle has committed willful breach as per the mandate of Sections 147 and 149 of the MV Act read with the terms and conditions of the insurance policy.

15. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

16. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** has laid down the same principle. It is profitable to reproduce para 10 of the judgment herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."

17. Viewed thus, the findings returned by the Tribunal on issues No. 6 to 8 are upheld.

Issue No. 2:

18. The quantum of compensation is not in dispute. However, I have gone through the record and the impugned award, the awarded amount cannot be said to be excessive or meagre in any way. Thus, it is held that the Tribunal has rightly awarded ₹ 2,85,000/- to the claimant-injured and saddled the insurer with liability. Accordingly, the findings returned by the Tribunal on issue No. 2 are also upheld.

19. Viewed thus, the impugned award is well reasoned and legal one, needs no interference.

20. Having glance of the above discussions, the impugned award is upheld and the appeal is dismissed.

21. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

22. Send down the record after placing copy of the judgment on the Tribunal's file.

****

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

Sh. Rameshwar and another ...Appellants.

Versus

Smt. Reshmi Devi and another ...Respondents.

FAO No. 55 of 2012
Decided on: 04.11.2016

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

For the appellants: Mr. Deepak Kaushal, Advocate.

For the respondents: Mr. Amit Jamwal, Advocate, vice Mr. Ajay Sharma, Advocate, for respondent No. 1.
Mr. Virender Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 17th December, 2011, made by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 40-MAC/2 of 2009, titled as Rameshwar and another versus Reshmi Devi and another, whereby the claim petition filed by the appellants-claimants came to be dismissed (for short "the impugned award").

2. Appellants-claimants had invoked the jurisdiction of the Tribunal under Section 163-A of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation, as per the break-ups given in the claim petition, was resisted by the respondents and the following issues came to be framed by the Tribunal on 6th April, 2010:

"1. Whether Pawan Kumar had died on account of use of tractor No. HP-18-4506 on 10-5-2009 at about 7.20 AM near Tribhuwan, Shambhuwala, as alleged? OPP

2. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Whether the petition is not maintainable in the present form, as alleged? OPR-1&2

4. Whether the vehicle was being plied in violation of the terms and conditions of insurance policy? OPR-2

5. Relief."

3. The Tribunal has only determined issues No. 1 to 3 and dismissed the claim petition without returning findings viz-a-viz issue No. 4.

4. The claimants have specifically pleaded that the deceased was engaged/employed as a driver by the owner-insured of the offending vehicle. The owner-insured, while filing reply to the claim petition, has denied the said fact, but has stated in para 4 of the reply that the deceased was not a driver, but was a labourer.

5. Thus, the deceased was in the employment of the owner-insured of the offending vehicle whether as a labourer or a driver. So, the claimants have a legal right to claim compensation in terms of the Workmen's Compensation Act, 1923 (for short "WC Act") without getting involved in the niceties of rashness, negligence and other legal grounds.

6. Section 167 of the MV Act provides another option to the claimants, other than filing a claim before an authority under the WC Act, to file a claim petition before the Claims Tribunal enabling them to have the compensation more than what is provided in terms of WC Act.

7. The factum of deceased being a labourer and his death are admitted. It is also proved that the deceased had sustained injuries and succumbed to the said injuries because he was crushed under the offending vehicle. Having said so, the claimants have proved that the deceased had died on account of use of the motor vehicle, i.e. the offending vehicle. Accordingly, the findings returned by the Tribunal on issue No. 1 are set aside and it is decided in favour of the claimants and against the respondents.

8. Now, the question is – whether the claimants are entitled to compensation, if so, from whom and in which proportion?

9. The Tribunal had to determine issue No. 4 before dealing with issue No. 2. The Tribunal has held that the claim petition was not maintainable. The said findings are not legally correct for the simple reason that the claimants are the victims of a vehicular accident and, as discussed hereinabove, were entitled to compensation as per the mandate of WC Act or Section 167 of the MV Act. Thus, the claim petition was maintainable. Accordingly, the findings recorded by the Tribunal on issue No. 3 are set aside and it is held that the claim petition was maintainable.

10. The Tribunal has not returned any finding on issue No. 4, which requires determination. The driving licence of the deceased, as it has been averred that he was working as a driver, is not on the record. The final report under Section 173 of the Code of Criminal Procedure (for short "CrPC") is also not on record.

11. In the given circumstances, the impugned award is set aside and the case is remanded to the Tribunal for determining issues No. 2 and 4 with a direction to the Tribunal to provide four opportunities with effect from 1st December, 2016 to 31st December, 2016 to the claimants for leading evidence, two opportunities to the owner-insured of the offending vehicle with effect from 1st January, 2017 to 15th January, 2017, thereafter, two opportunities to the insurer with effect from 16th January, 2017 to 31st January, 2017 and to conclude the proceedings by or before 1st March, 2017, after hearing the parties.

12. Parties are directed to cause appearance before the Tribunal on 1st December, 2016.

13. Send down the record after placing copy of the judgment on the Tribunal's file.

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

Sateesh Chander Kuthiala .....Petitioner.
Versus
State of Himachal Pradesh and another. .....Respondents.

Cr. MMO No. 256 of 2015
Judgment reserved on: 27.10.2016
Date of decision : November 4th , 2016.

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

Cases referred:
Dhariwal Industries Ltd. vs. Kishore Wadhwani and others AIR 2016 SC 4369
M/s Tata Steel Ltd vs. M/s Atma Tube Products Ltd. and others, 2014 (173) Pun.LR 1

For the Petitioner	Mr. K.D.Sood, Senior Advocate, with Mr. Dushyant Dadwal and Mr. Rajnish K.Lal, Advocates.
For the Respondents	Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals, for respondent No.1. Mr. Gautam Sood and Mr. Dheeraj K.Vashisht, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The moot question that falls for consideration in this petition under Section 482 Cr.P.C. is as to whether the complainant can conduct the trial when admittedly he has only sought and granted permission by the learned trial Court to assist and not conduct the trial.

2. This petition arises out of the order passed by learned Chief Judicial Magistrate, Shimla, H.P. in Cr.M.A. No. 6-4 of 2015 on 21.7.2015 whereby the application filed by the complainant/respondent under Sections 294 and 311 of the Code of Criminal Procedure, 1973, through his counsel, seeking permission to tender in evidence certified copies of the judgment passed by learned Sub Judge (II), Shimla in *Case No. 62/I of 1985 titled Shri Radha Krishan Kuthiala versus Shri Gian Chand Kuthiala* and copy of judgments dated 31.3.1998 passed by

learned Additional District Judge, Shimla passed in *Civil Appeal No.105/S/13 of 88/86 in case titled Shri Hari Krishan and others versus Shri Radha Krishan and others*, came to be allowed.

3. Mr. K.D. Sood, Senior Advocate, assisted by Mr. Dushyant Dadwal, Advocate, would vehemently contend that even if permission had been granted by the learned trial Magistrate to the respondent to assist the Public Prosecutor in the trial, it did not in any manner authorise the complainant/respondent to directly file the application in question, through his counsel, that too, without even associating the Public Prosecutor as this would not be assisting but would amount to conducting the trial itself.

4. On the other hand, Mr. Gautam Sood, learned counsel for the complainant/respondent would strenuously argue that once the permission has been granted to the complainant under Sections 301 and 302 Cr.P.C., then the complainant was not only entitle to assist the Public Prosecutor, but he could even conduct the trial independently.

5. Both the parties have placed reliance on the latest judgment of the Hon'ble Supreme Court in ***Dhariwal Industries Ltd. vs. Kishore Wadhwani and others AIR 2016 SC 4369*** to contend that the point in issue is squarely answered in their favour.

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

6. It would be noticed that prior to 31.12.2009 the concept of "victim" was virtually alien to the Code of Criminal Procedure. However, the Code of Criminal Procedure (Amendment) Act, 2008, brought about widespread amendments not only by introducing the definition of victim as Section 2 (wa) w.e.f. 31.12.2009, but various other provisions were also included in the Code for benefit of the victim. Thereby recognizing the importance and relevance of a "victim" in not only the process of investigation, enquiry, trial, but even in matters relating to appeal, revision etc.

7. The statement of objects and reasons for introducing the amendment inter alia mentions that "*At present, the victims are the worst sufferers in a crime and they don't have much role in the Court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system.*"

8. The definition of "victim" as found in Section 2(wa) reads as under:

> *"Section 2 (wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."*

9. The new clause introduces a definition of "victim" to confer certain rights on the guardians and legal heirs of the victim like to engage an Advocate under Section 24 (8), right to file an appeal under proviso to Section 372, to claim compensation under new Section 357-A.

10. The Scheme behind the insertion of this new definition of "victim" is also apparent from the insertion of a proviso to Section 24 (8) of Cr.P.C., so as to enable a victim, or those who are covered by this definition, to engage an advocate of his/their choice to assist the prosecution. Since the entire criminal justice machinery is set into motion on the asking of or due to the sufferings of the victim, the law makers have deemed it fit to enable the victim to actively participate in the judicial process. There can be no manner of doubt that right from the occurrence of the incident till the ultimate decision by the highest Court of law, the "victim" is as much interested in the decision as is the accused or the State. In fact, the "victim" on account of his being the sufferer/injured, has to be recognized as the most aggrieved party in a crime.

11. The rights of a "victim", who can be said to be a "victim", whether the same would include the complainant, what are his rights etc. have been subject matter of a Full Bench of the Punjab and Haryana High Court in ***M/s Tata Steel Ltd vs. M/s Atma Tube Products Ltd. and others, 2014 (173) Pun.LR 1*** and it shall be worthwhile to extract some portions of the judgment, which reads thus:

"(7). The universalist views on criminal justice system emphasize on the norms collectively recognized and accepted by all of humanity. The internationally accepted norms whereunder an individual's criminal act(s) is accountable are universally binding and applicable across national borders on the premise that crimes committed are not just against individual victims but also against mankind as a whole. The crime against an individual thus transcends and is taken as an assault on humanity itself. It is the concept of the humanity at large as a victim which has essentially characterized 'crimes' on universally- accepted principles. The acceptability of this principle was the genesis of Criminal Justice System with State dominance and jurisdiction to investigate and adjudicate the 'crime'. For long, the criminal law had been viewed on a dimensional plane wherein the Courts were required to adjudicate between the accused and the State. The 'victim' - the de facto sufferer of a crime had no participation in the adjudicatory process and was made to sit outside the Court as a mute spectator. The ethos of criminal justice dispensation to prevent and punish 'crime' would surreptitiously turn its back on the 'victim' of such crime whose cries went unnoticed for centuries in the long corridors of the conventional apparatus. Various international Declarations, domestic legislations and Courts across the world recognized the 'victim' and they voiced together for his right of representation, compensation and assistance. The UN Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power, 1985, which was ratified by a substantial number of countries including India, was a landmark in boosting the pro-victim movement. The Declaration defined a 'victim' as someone who has suffered harm, physical or mental injury, emotional suffering, economic loss, impairment of fundamental rights through acts or omissions that are in violation of criminal laws operative within a State, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the 'victim'.

(8). European Union (EU) also took great strides in granting and protecting the rights of 'victims' through various Covenants including the following:-

i. The position of a victim in the framework of Criminal Law and Procedure, Council of Europe Committee of Ministers to Member States, 1985;

ii. Strengthening victim's right in the EU communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Reasons, European Union, 2011;

iii. Proposal for a Directive of the European Parliament and of the Council establishing "Minimum Standards on the Rights, Support and Protection of Victims of Crime, European Union, 2011".

(9). The United States of America (USA) had earlier made two enactments on the subject i.e. (i) The Victims of Crime Act, 1984 under which legal assistance is granted to the crime-victims; and (ii) The Victims' Rights and Restitution Act of 1990, followed by meaningful amendments, repeal and insertion of new provisions in both the Statutes through an Act passed by the House of Representatives as well as the Senate on April 22, 2004.

(10). In Australia, the Legislature has enacted South Australia Victims of Crime Act, 2001 while in Canada there are two legislations known as Victims of Crime Act, Prince Edward Island and Victims of Crime Act, British Columbia. Most of these legislations have defined the 'victim' of a crime liberally and have conferred varied rights on such victims.

***Indian Perspective**:*

(11). Much before the United Nations stepped into or the other developed nations legislated for the protection and promotion of victims' rights, the Supreme

Court in Rattan Singh vs. State of Punjab, (1979) 4 SCC 719, lamented against complete desertion of a victim in our criminal jurisprudence observing that "The victimization of the family of the convict may well be a reality and is regrettable. It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependants of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law. This is a deficiency in the system which must be rectified by the Legislature. We can only draw attention to this matter. Hopefully, the Welfare State will bestow better thought and action to traffic justice in the light of the observations we have made".

(12). The Legislature though did not come forward to address the issue but the Law Commission of India, nonetheless, in its 154th Report attributed Chapter-XV on "Victimology" made radical recommendations on the aspect of compensatory justice through a Victim Compensation Scheme. Thereafter came the report of a Committee on the Reforms of Criminal Justice System, commonly known as "Malimath Committee Report, 2003". The Committee was constituted by Government of India with an avowed object of suggesting ways and means for developing a cohesive system in which all the parts work in coordination to achieve the common goal as the people by and large have lost confidence in the criminal justice system and the bewildered victim is crying for attention and justice. The Committee recommended the right of the victim or his legal representative 'to be impleaded as a party in every criminal proceeding where the charge is punishable with seven years imprisonment or more'; the right of voluntary organizations for impleadment in court proceedings in select cases; the victim's right to be represented by an advocate of his choice and if he is not in a position to afford, to provide an advocate at the State's expenses; victim's right to participate in criminal trial; the right to know the status of investigation and take necessary steps in this regard and to be heard at crucial stages of the criminal trial including at the time of grant or cancellation of bail. The Committee further recommended that "the victim shall have a right to prefer an appeal against any adverse order...; he should be provided legal services and that 'victim compensation' is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted" and for this object a separate legislation be enacted.

(13). Soon after the Malimath Committee report came the verdict in Jahira Habibullah H. Sheikh & Anr. vs. State of Gujarat & Ors., (2004) 4 SCC 158, ripping apart the ailing criminal justice system in India and ordering re-trial of Best Bakery Case and desirability of further investigation in terms of Section 173(8) CrPC due to the factors like dishonest and faulty investigation, holding of trial in a perfunctory manner, non-production of vital witnesses, prosecuting agency acting unfairly and forcing eye-witnesses to turn hostile, resulting into the acquittal of several accused suspected to be involved in the gruesome murder of as many as 14 people as a result of communal frenzy.

(14). Before we proceed further, let there be a special reference to those decisions of the Hon'ble Supreme Court which built up the victim's right brick by brick, revolutionalised the conventional criminal justice system and sensitized its stakeholders, notwithstanding the fact that statutory initiatives through the desired amendments in the Code of Criminal Procedure, 1973 (in short, 'the Code') were still illusory.

(15). In PSR Sadhanantham vs. Arunachalam & Anr., (1980) 3 SCC 141, the Constitution Bench considered the question whether the brother of a victim who had been murdered, possessed the right to petition under Article 136 of the Constitution for special leave to appeal against the acquittal of the accused? After noticing that under the Code, the right of appeal vested in the State is subject to leave to be granted by the High Court and a complainant's right to appeal was also

subject to his obtaining 'special leave' to appeal from the High Court, it was held that a petition filed by the private party other than the complainant should be entertained "in those cases only where it is convinced that the public interest justifies an appeal against the acquittal and that the State has refrained from petitioning from special leave for reasons which do not bear on the public interest but are prompted by private influence, want of bona fide and other extraneous considerations".

(16). In Bhagwant Singh vs. Commissioner of Police, (1985) 2 SCC 537, the right of the complainant to be heard before the acceptance of a cancellation report submitted by the police after investigation of the FIR, was accepted laying down that the informant must be given an opportunity of hearing so that he could make his submissions to persuade the Magistrate to take cognizance of the offence and issue due process.

(17). In M/s JK International vs. State Government of NCT of Delhi, (2001) 3 SCC 462, the Supreme Court recognized the right of the complainant at whose instance the police-case was registered, to be heard by the High Court in the proceedings initiated by the accused for quashing those proceedings. It held thus:-

> *"9. The scheme envisaged in the Code of Criminal procedure (for short the Code) indicates that a person who is aggrieved by the offence committed, is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the police and the charge sheet was laid by them. Even the fact that the court had taken cognizance of the offence is not sufficient to debar him from reaching the court for ventilating his grievance. Even in the sessions court, where the Public Prosecutor is the only authority empowered to conduct the prosecution as per Section 225 of the Code, a private person who is aggrieved by the offence involved in the case is not altogether debarred from participating in the trial..."*

(18). In Puran Shekhar and Anr. vs. Rambilas & Anr., (2001) 6 SCC 338, the locus standi of father of the deceased in a dowry death case, to move the High Court and seek cancellation of bail granted by the Sessions Court was upheld as he was not a stranger.

(19). In Delhi Domestic Working Women's Forum vs. Union of India & Ors, (1995) 1 SCC 14, the Supreme Court in exercise of its PIL jurisdiction directed the National Commission for Women to evolve a Scheme to protect rape victims through various measures and cast obligation on the Union of India to implement the Scheme so evolved by the Commission.

(20). Rama Kant Rai vs. Madan Rai & Ors., (2003) 12 SCC 395 was a case where against an order of acquittal passed by the High Court in a murder case, the right of the private party to file an appeal under Article 136 of the Constitution was eloquently recognized especially to meet the pressing demands of justice.

(21). In Sakshi vs. Union of India & Ors, (2004) 5 SCC 518, mandatory guidelines for the recording of evidence of victim of offence under Sections 354, 375, 367 & 377 IPC were laid down.

(22). In Mosiruddin Munshi vs. Mohammad Siraj & Ors., (2008) 8 SCC 434, the right of the complainant to be heard before an order affecting the criminal proceedings initiated at his instance was recognized and it was held that the FIR could not be quashed by the High Court at the instance of the accused without notice to the original complainant.

(23). Some of the High Courts also dutifully espoused the cause of 'victims' and expanded the jurisprudence to create a space for them at one or the other stage of Court hearings. We may usefully quote the following observations made by a

Division Bench of Assam High Court in NC Bose vs. Prabodh Dutta Gupta, AIR 1955 (Assam) 116:-

> *"[I]t seems to me that the person vitally interested in the issue of the prosecution or the trial is the person aggrieved who 'initiates' the proceedings. He may be both civilly and criminally liable if, on account of any unfairness or partiality, the trial or the proceeding ends in wrongful acquittal or discharge of the accused. The Legislature therefore could not have intended to shut out such a person from coming to the High Court and claiming redress under Section 526 of the Code. The words should be construed to have the widest amplitude so long as the effect of the interpretation is not to open the door to frivolous applications at the instance of intermeddlers or officious persons having no direct interest in the prosecution or trial".*

Evolution of Right to Appeal:

(24). Since the issues to be determined by three-Judge Bench, as mentioned in para 6, are hedging around the 'right to appeal' given to a 'victim', we may briefly notice the evolution of that right under the Indian legal regime.

(25). The Code of Criminal Procedure when originally enacted in the year 1861 did not provide for any right to appeal against acquittal to anyone including the State. It was in the Code of Criminal Procedure of 1898 that Section 417 was inserted enabling the Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. The Law Commission of India in its 41st Report given in September, 1969 as also in 48th Report pertaining to the Criminal Procedure Bill, 1970, however, recommended to restrict the right of appeal given to the State Government against an order of acquittal by introducing the concept of 'leave to appeal' and that all appeals against acquittal should come to the High Court though it rejected the right to appeal to "the victim of a crime or his relatives".

(26). The Code of Criminal Procedure, 1973 came into being on January 25, 1974 repealing the Code of Criminal Procedure, 1898. The recommendations made by the Law Commission of India, referred to above, largely found favour with the Parliament when it inserted an embargo in sub-Section (3) to Section 378 against entertainment of an appeal against acquittal "except with the leave of the High Court". Sub- section (4) of Section 378 retained the condition of maintainability of an appeal at the instance of a complainant against an order of acquittal passed in a complaint-case only if special leave to appeal was granted by the High Court. Save in the manner as permitted by Section 378, no appeal could lie against an order of acquittal in view of the express embargo created by Section 372 according to which "no appeal shall lie from any judgement or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force". The Code of Criminal Procedure (Amendment) Act, 2005:

(27). Hon'ble Supreme Court in a string of decisions a few of which are already cited, has recognized time and again one or the other right of the 'victim' including locus standi of his/her family members to appeal against acquittal in the broadest sense. Notwithstanding these decisions or the chorus of such like rights being heard in all civic societies, the Legislature in its wisdom did not deem it necessary to permit a 'victim' to appeal against the acquittal of his wrong-doer even while carrying out sweeping amendments in the Code in the year 2005....."

12. Before adverting to the relative merits of the case, it would be necessary to first make note of the application filed by the complainant/respondent under Sections 301 and 302 Cr.P.C., which reads thus:

"Application under Section 301 and 302 of Cr.P.C., 1973 on behalf of Sh. Radha Krishan Kuthiala, with a prayer for assisting prosecution in the above titled case.

1. *That the above titled case is pending of adjudication before this Ld. Court for offences U/s 420, 468, 467 of IPC.*
2. *That the complainant Sh. Radha Krishan Kuthiala had filed a complaint in the said case with regard to said offences.*
3. *That the undersigned wants to assist the prosecution in the said case through the undersigned counsel.*

It is, therefore, prayed that the present application may very kindly be allowed and the undersigned counsel be permitted to assist the prosecution as per the provisions of Cr.P.C."

13. A perusal of the aforesaid application would reveal that not only in the prayer clause, but even in the heading of the application the only relief prayed for by the respondent was that he through his counsel, be permitted to assist the prosecution and had not sought any permission to conduct the trial of the case. It was perhaps for this reason that even the petitioner had not opposed the application as is evident from order dated 4.8.2012, the relevant portion thereof, reads as under:

"At this stage, Sh. Gautam Sood, Advocate, moved an application U/s 301 & 302 Cr.P.C, the same is considered and allowed as not opposed by Ld. APP."

14. Notably, there is an ocean of difference between assisting the Public Prosecutor under Section 301 and conducting the prosecution on the basis of a permission granted under Section 302. A Public Prosecutor is not actuated by any personal interest in the case. Whereas, the pleader engaged by a person, who is a de facto complainant has a personal interest in the case.

15. Now, adverting to the judgment rendered by the Hon'ble Supreme Court in ***Dhariwal Industries Ltd. vs. Kishore Wadhwani and others AIR 2016 SC 4369***, it would be noticed that the learned Single Judge of the Bombay High Court had modified the order passed by the Additional Chief Metropolitan Magistrate, whereby he had permitted the appellant before the Hon'ble Supreme Court (Dhariwal Industries) to be heard at the stage of framing of charge under Section 239 of the Code of Criminal Procedure by expressing the view that the role of the complainant was limited under Section 301 Cr.P.C. and that he could not be allowed to take control over the prosecution by directly addressing the Court, but can only act under the directions of the Assistant Public Prosecutor in charge of the case.

16. The Hon'ble Supreme Court not only upheld the order passed by the Bombay High Court, but it even explained the distinction between Sections 301 and 302 Cr.P.C. as would be evident from the following observations:

"**8.** *Section 301 CrPC reads as follows:-*

*"**Appearance by Public Prosecutors**.-(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal.*

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

9. *In Shiv Kumar (supra), the Court has clearly held that the said provision applies to the trials before the Magistrate as well as Court of Session.*

10. *Section 302 CrPC which is pertinent for the present case reads as follows:-*

> *"**Permission to conduct prosecution**-(1)Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:*
>
> *Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.*
>
> *(2) Any person conducting the prosecution may do so personally or by a pleader."*

11. *In Shiv Kumar (supra) interpreting the said provision, the Court has ruled:-*

> *" 8. It must be noted that the latter provision is intended only for magistrate courts. It enables the magistrate to permit any person to conduct the prosecution. The only rider is that magistrate cannot give such permission to a police officer below the rank of Inspector. Such person need not necessarily be a Public Prosecutor.*
>
> *9. In the Magistrate's Court anybody (except a police officer below the rank of Inspector) can conduct prosecution, if the Magistrate permits him to do so. Once the permission is granted the person concerned can appoint any counsel to conduct the prosecution on his behalf in the Magistrate's Court.*
>
> *Xxx xxx xxx*
>
> *11. The old Criminal Procedure Code (1898) contained an identical provision in Section 270 thereof. A Public Prosecutor means any person appointed under Section 24 and includes any person acting under the directions of the Public Prosecutor,(vide Section 2(u) of the Code).*
>
> *12. In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to magistrate courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words any court in Section 301. In view of the provision made in the succeeding section as for magistrate courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second sub-section, which is sought to be invoked by the appellant, imposes the curb on a counsel engaged by any private party. It limits his role to act in the court during such prosecution under the directions of the Public Prosecutor. The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the court permits him to do so."*

12. *It is apt to note here that in the said decision it hasalso been held that from the scheme of CrPC, the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the public prosecutor. It is because the legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. The Court has further observed that a public prosecutor is not expected to show the*

thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case.

13. *In J.K. International (AIR 2001 SC 1142) (supra), a three-Judge Bench was adverting in detail to Section 302 CrPC. In that context, it has been opined that the private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the court in his behalf. If a private person is aggrieved by the offence committed against him or against any one in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution by himself. This Court further proceeded to state that it is open to the court to consider his request and if the court thinks that the cause of justice would be served better by granting such permission the court would generally grant such permission. Clarifying further, it has been held that the said wider amplitude is limited to Magistrate's Court, as the right of such private individual to participate in the conduct of prosecution in the sessions court is very much restricted and is made subject to the control of the public prosecutor.*

14. *Having carefully perused both the decisions, we do not perceive any kind of anomaly either in the analysis or ultimate conclusion arrived by the Court. We may note with profit that in Shiv Kumar (supra), the Court was dealing with the ambit and sweep of Section 301 CrPC and in that context observed that Section 302 CrPC is intended only for the Magistrate's Court. In J.K. International (supra) from the passage we have quoted hereinbefore it is evident that the Court has expressed the view that a private person can be permitted to conduct the prosecution in the Magistrate's Court and can engage a counsel to do the needful on his behalf. The further observation therein is that when permission is sought to conduct the prosecution by a private person, it is open to the court to consider his request. The Court has proceeded to state that the Court has to form an opinion that cause of justice would be best subserved and it is better to grant such permission. And, it would generally grant such permission. Thus, there is no cleavage of opinion.*

15. *In Sundeep Kumar Bafna (AIR 2014 SC 1745) (supra), the Court was dealing with rejection of an order of bail under Section 439 CrPC and what is meant by "custody". Though the context was different, it is noticeable that the Court has adverted to the role of public prosecutor and private counsel in prosecution and in that regard, has held as follows:-*

> *"... in Shiv Kumar v. Hukam Chand (supra), the question that was posed before another three - Judge Bench was whether an aggrieved has a right to engage its own counsel to conduct the prosecution despite the presence of the Public Prosecutor. This Court duly noted that the role of the Public Prosecutor was upholding the law and putting together a sound prosecution; and that the presence of a private lawyer would inexorably undermine the fairness and impartiality which must be the hallmark, attribute and distinction of every proper prosecution. In that case the advocate appointed by the aggrieved party ventured to conduct the cross-examination of the witness which was allowed by the trial court but was reversed in revision by the High Court, and the High Court permitted only the submission of written argument after the closure of evidence. Upholding the view of the High Court, this Court went on to observe that before the Magistrate any person (except a police officer below the rank of Inspector) could conduct the prosecution, but that this laxity is impermissible in the Sessions by virtue of Section 225 CrPC, which pointedly states that the prosecution shall be conducted by a Public Prosecutor. ..."*

> ***16***. *Mr. Tulsi, learned senior counsel, has drawn inspiration from the aforesaid authority as Shiv Kumar (supra) has been referred to in the said judgment and the Court has made a distinction between the role of the public prosecutor and the role of a complainant before the two trials, namely, the sessions trial and the trial before a Magistrate's Court.*
>
> ***17***. *As the factual score of the case at hand is concerned, it is noticeable that the trial court, on the basis of an oral prayer, had permitted the appellant to be heard along with the public prosecutor. Mr. Tulsi, learned senior counsel submitted such a prayer was made before the trial Magistrate and he had no grievance at that stage but the grievance has arisen because of the interference of the High Court that he can only participate under the directions of the Assistant Public Prosecutor in charge of the case which is postulated under Section 301 CrPC.*
>
> ***18***. *We have already explained the distinction between Sections 301 and 302 CrPC. The role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as Section 302 CrPC is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently.*
>
> ***19.*** *.We would have proceeded to deal with the relief prayed for by Mr. Tulsi but, no application was filed under Section 302 CrPC and, therefore, the prayer was restricted to be heard which is postulated under Section 301 CrPC. Mr. Singh, learned senior counsel appearing for the respondents would contend that an application has to be filed while seeking permission. Bestowing our anxious consideration, we are obliged to think that when a complainant wants to take the benefit as provided under Section 302 CrPC, he has to file a written application making out a case in terms of J.K. International (supra) so that the Magistrate can exercise the jurisdiction as vested in him and form the requisite opinion."*

17. It would be clear from the aforesaid that the role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. However, as far as Section 302 Cr.P.C. is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently. However, such permission has to be expressly obtained by filing a written application.

18. At this stage, it also needs to be clarified that though the application was filed by the respondent invoking both the provisions as contained in Sections 301 and 302 Cr.P.C. and even the learned Magistrate considered and allowed the same vide his order dated 4.8.2012. However, the permission so granted by the learned Magistrate has essentially to be read and considered in light of the prayer contained in the application.

19. Once the respondent had specifically sought permission that his counsel be permitted to assist the prosecution, he cannot turn around to contend that such permission included a right to conduct the trial. Therefore, the petitioner at this stage has every right to object against the filing of the application directly by the counsel engaged by the respondent, instead of the same having been filed by the Public Prosecutor.

20. Adverting to the facts, it would be noticed that the application filed by the complainant/respondent under Sections 294 and 311 Cr.P.C. was opposed by the petitioner by filing reply wherein number of preliminary objections had been raised including the maintainability of the application on the ground that the complainant was granted permission to assist the Public Prosecutor but he was overstepping his limits by moving the application directly through his counsel.

21. Strangely enough, the learned trial Magistrate somehow assumed that the application had been filed by the complainant/State which finding is contrary to the record.

Before allowing the application, it was obligatory on the Magistrate to have first gone into the question of maintainability of the application and only thereafter could the same have been allowed, more particularly, when the petitioner had questioned the locus-standi of the complainant/respondent. Having failed to take into consideration all these facts and law on the subject, the order passed by the learned Magistrate cannot be sustained.

22. In view of the aforesaid discussion, there is merit in the petition and the same is accordingly allowed and the order dated 21.7.2015 passed by the learned Magistrate is quashed and set-aside. However, it shall not prevent the respondent, if so advised, from filing an application under Section 302 Cr.P.C. before the learned Magistrate and as and when the same is filed, the learned Magistrate shall consider the same in accordance with law.

23. With the aforesaid observations, the petition is disposed of in terms of the liberty aforesaid, so also the pending application(s) if any.

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

State of Himachal Pradesh .....Appellant.

Versus

Ashwani Kumar .....Respondent.

Cr. Appeal No. 345 of 2007
Decided on : 4.11.2016

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

For the Appellant: Mr. R.S.Thakur, Advocate.
For the Respondent: Mr. N.K.Sood, Sr. Advocate with Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge, Oral

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 1.5.2007 by the learned Additional Chief Judicial Magistrate, Dehra, District Kangra, Himachal Pradesh, in Criminal Case No. 49-II/2003, whereby the learned trial Court acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 31.12.2002 at around 10.50 a.m. on the public highway at Kiryada Chowk, the accused Ashwani Kumar was driving bus No. HP-36-0398 in a rash and negligent manner and caused the death of Ms. Pooja due to his negligent driving. The matter was reported to the police by the complainant Hardayal Singh vide his statement under Section 154 Cr.P.C. Ex. PA, in which it was mentioned by him that on 30.12.2002 he had gone to the house of his sister Babita Devi at Muhal and on 31.12.2002 at about 10.30 a.m. he alongwith his sister Pooja boarded the bus and at around 10.50 at Kiryada Chowk the bus was stopped and he came out from the bus and his sister Pooja tried to came out from the bus from front window and bus driver all of a sudden started the bus, as a result of which Pooja fell on the road and received multiple injuries. The bus driver did not stop the bus and he accordingly arranged van and took Pooja to hospital at Sub Divisional Hospital, Dehra but Pooja succumbed

to her injuries at around 11.30 a.m. It was also stated by the complainant in his statement that accident in question occurred due to rash and negligent driving of bus driver. On the statement of complainant, FIR Ex. PW-1/B was registered and investigation conducted by SI/SHO Daulat Ram. The photographs of deceased Ex. P-1 to Ex. P-6 alongwith negatives Ex. P-6 to Ex. P-12 were obtained and postmortem of deceased Pooja was conducted at Sub Divisional Hospital, Dehra and report of concerned Doctor Ex. PD was obtained. The investigating officer during the course of investigation, prepared site plan of spot of occurrence Ex. PW-7/A and also took into possession bus involved in the accident alongwith its documents vide memo Ex. PA in presence of witnesses Baldev Raj and Chandel Singh. Inquest report of Ms. Pooja was prepared. The mechanical examination of the bus was conducted and report of mechanic Ex. PE was produced. The statements of the witnesses under Section 161 Cr.P.C. were recorded by the investigating officer. After completion of investigation, the police found prima facie case against the accused for offences under Sections 279 and 304-A I.P.C. and Sections 184 and 187 of Motor Vehicles Act. After completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, a challan was prepared and filed before the learned trial Court.

3. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 304-A IPC and under Section 187 of the Motor Vehicles Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. Uncontrovertedly the deceased was a passenger on board of bus bearing No. HP-36-0398. At the relevant time, the aforesaid bus was driven by the accused/respondent herein. The accused is alleged to without facilitating a safe egress therefrom of the deceased abruptly galvanize the relevant bus into motion whereupon the deceased is alleged to fall onto the road, in sequel whereto, she sustained a fatal injury. The post mortem report comprised in Ext.PA unravels qua the demise of deceased being ascribable to 'hemorrhagic shock leading to cardiac respiratory arrest'. Apparently the demise of one Pooja an occupant of bus aforesaid occurred on hers suffering fracture of pelvis sequelled by hers purportedly falling onto the road from a moving bus.

10. The learned trial Court while recording an order of acquittal upon the accused/respondent herein had alluded to the testimonies of eye witnesses to the occurrence, all of whom except PW-8 reneged from their previous statements recorded in writing. Necessarily hence the learned trial Court concluded of with the testification of purported eye witnesses to the

occurrence not lending vigour to the prosecution case, the genesis of the prosecution story propagated in the F.I.R. comprised in Ext.PW-1/B not warranting any acceptance. As aforestated all eye witnesses to the illfated occurrence except PW-8 omitted to lend succor to the prosecution version. The efficacy of the testimony of PW-8 brother of deceased stood concluded by the learned trial Court to stand undermined by the factum of his being an interested witness. The aforesaid reason as stands assigned by the learned trial Court to dispel the vigour of the testification of PW-8 may not be sufficient to affirm the findings of acquittal recorded by it upon the accused/respondent herein preeminently when the learned defence counsel while subjecting him to cross-examination has not put any suggestion to him personifying the factum of his not being an eye witness to the occurrence. Absence of the aforesaid suggestions to PW-8 rather despite other eye witnesses to the occurrence not supporting the prosecution case was sufficient to record a conclusion qua the prosecution succeeding in proving the genesis of the occurrence comprised in the F.I.R. embodied in Ext.PW-1/B. Even if the defence has by not putting apposite suggestions to either PW-8 or to the Investigating Officer concerned hence efficaciously not propagated its defence qua the ill fated demise of an occupant of the bus driven at the relevant time by the accused/respondent herein arising not from hers suffering fatal injuries on hers falling onto the road from a moving bus given the accused respondent herein galvanizing it in motion without permitting hers safely egressing therefrom rather her demise occurring on hers colliding with a tractor which arrived at the relevant site of occurrence. Nonetheless omissions in support of the aforesaid defence does not empower the learned Additional Advocate General to contend of with hence the defence not concerting the aforesaid espousals its hence acquiescing to the factum of the ill fated demise of an occupant of bus aforesaid occurring during the course of hers alighting therefrom nor also he stands empowered to canvass qua the defence hence acquiescing to the factum of the accused respondent herein while not facilitating her safe egress therefrom his hence apparently negligently driving the bus nor thereupon it would be imperative for this Court to conclude of the penal liability constituted in the charge standing convincingly established against the accused respondent herein.

11. Otherwise too, though the aforesaid submission addressed before this Court by the learned Additional Advocate General is extremely impressive also may constrain this Court to thereupon record an inference of the accused respondent herein by proactively waiving in the manner aforesaid his defence, his hence acquiescing to the relevant propagations made by the prosecution. Nonetheless the stark imminent fact which emerges from a perusal of Ext.PW-7/A embodying therein the site plan whereat the relevant occurrence took place is qua PW-8 alighting from the relevant bus at point “G” whereas the deceased at a distance of 70 meters therefrom stands unravelled therein to suffer her demise. The aforesaid graphic depictions occurring in Ext.PW-7/A which stands relied upon by the prosecution visibly overcome the efficacy, if any, of the testimony of PW-8 also thereupon rather the testimonies of other eye witnesses to the occurrence wherein they reneged from their previous statements recorded in writing do assume vigour besides the espousal made herebefore by the learned Additional Advocate General of the sole testimony of a credible eye witness to the occurrence comprised in the deposition of PW-8 being sufficient to constrain this Court to reverse the findings of acquittal recorded by the learned trial Court is also concomitantly bereft of any legal sinew. The reason for benumbing the arguments addressed before this Court by the learned Additional Advocate General apparently stands foisted upon the trite factum of the aforesaid revelations occurring in Ext.PW-7/A wherein a graphic articulation stands pronounced qua PW-8 alighting from the relevant bus at a stage prior to the deceased alighting therefrom. The aforesaid factum leads to a further concomitant inference of both not simultaneously alighting therefrom besides thereupon also an inference is erectable qua at the stage where PW-8 alighted from the bus, its driver thereat stopping it, it being an ear marked place for its stoppage whereas the deceased at an unear-marked place for its stoppage voluntarily concerting to thereat disembark therefrom, wherefrom it is apt to conclude of the accused respondent herein neither by his not applying the brakes of the bus hence prohibiting her safe egress therefrom nor it can be concluded of the accused respondent being penally inculpable for the charges for which he stood tried. Contrarily reiteratedly it has to be concluded of the deceased at the relevant unearmarked place for the stoppage of the bus

voluntarily trying to egress therefrom. In aftermath, no imputation of penal negligence can be ascribed to the accused/respondent herein. Accentuated strength to the aforesaid inference stands marshaled from the factum of the testimony of PW-8 holding no veracity, inference whereof stands spurred by the factum of his evidently alighting from the bus not simultaneously alongwith his deceased sister rather his alighting therefrom earlier to the departure therefrom of his deceased sister whereupon he stood disabled to sight the factum of hers gaining fatal injuries in the manner he espouses in his testification besides thereupon his testification in disconcurrence to the testifications of other eye witnesses to the occurrence looses credibility.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

13. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

State of Himachal Pradesh .....Appellant
Versus
Paramjeet Singh @ Bangu .....Respondent

Cr. Appeal No. 272 of 2014
Decided on: 4th November, 2016

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

For the appellant: Mr. Virender Verma, Addl. A.G.
For the respondent: Mr. Gaurav Gautam and Ms. Megha Kapur Gautam, Advocates.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

State of Himachal Pradesh is in appeal before this Court. The complaint is that learned trial Court has acquitted the respondent (hereinafter referred to as the 'accused') of the charge under Sections 341, 323, 506 and 376 read with Section 511 of the Indian Penal Code vide judgment dated 11.03.2014 passed in RBT Sessions Case No. 3-J/VII/14/12 erroneously without appreciating the prosecution evidence in its right perspective. The evidence as has come on record by way of testimony of the prosecutrix who has stepped into the witness box as PW-5 and that of her mother PW-6 and her uncle PW-7. The evidence as has come on record by way of

testimony of PW-1, the Pradhan of Gram Panchayat is also stated to be erroneously ignored. The evidence qua age of the prosecutrix as has come on record by way of birth certificate Ext. PW-9/A and PW-11/K have also been erroneously brushed aside.

2. The charge against the accused in a nut shell is that on 1.9.2012 around 1.00 p.m. at village Papahan under Police Station, Jawali, District Kangra he wrongfully restrained the prosecutrix from proceeding ahead on her way to home from school after appearing in examination. He asked her to disclose the name of her parents and when she was about to disclose name their names to him, he put his hand on her shoulder. She objected to such unbecoming behaviour of the accused and asked him as to what he was doing. Instead of letting her free, he dragged her inside the maize field situated nearby and asked her to kiss him, failing which, threatened to torn out her clothes. She objected to such behaviour of the accused and on this he put his hand on the string of her salwar. On hearing that someone is going on motorcycle, she raised an alarm. The motorcyclist, none-else but her uncle Praveen Kumar (PW-7) on hearing her cries entered inside the maize field and noticed that the accused had caught hold the prosecutrix and was kissing her. On observing the presence of someone (PW-7) there, the accused set the prosecutrix free and fled away. PW-7 could not caught hold him. It is with these allegations, a case under Sections 341, 323, 354 and 506 IPC was registered against him in Police Station, Jawali, District Kangra vide FIR Ext. PW-11/A, on the basis of application Ext. PW-1/A made by PW-6 Sandla Devi, the mother of the prosecutrix to Smt. Santosh Kumari (PW-1) Pradhan Gram Panchayat, Papahan.

3. The investigation in the case was conducted by Sub Inspector Ashwani Kumar, PW-11. It is pertinent to note that the prosecutrix and her mother both have refused for getting the medical examination of the prosecutrix conducted. Any how, the prosecutrix was medically examined by PW-2 Dr. Sulekha Gupta vide MLC Ext. PW-2/A. No injury except for an abrasion was noticed on right wrist and on right knee joint. The Radiologist PW-4 Dr. Raman Sharma and Dr. Sulekha Gupta PW-2 both have disclosed the radiological age of the prosecutrix as 16 to 18 years. Such opinion Ext. PW-4/B was formed by them on the basis of X-ray films Ext. P-3 to Ext. P-8. The date of birth certificate Ext. PW-9/A was produced in evidence by PW-9 Rajinder Singh, Trained Graduate Teacher, Government Senior Secondary School, Guglara. Birth certificate Ext. PW-11/K was also obtained by the I.O from Secretary, Gram Panchayat, Papahan. The mother of the prosecutrix and her uncle Praveen Kumar were associated during the course of investigation and their statements under Section 161 of the Code of Criminal Procedure were recorded.

4. Learned trial Court after holding trial and on analyzing the evidence available on record has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The accused has, therefore, been acquitted of the charge as pointed out at the very out set.

5. On behalf of the appellant-State, Mr. Virender Verma, learned Additional Advocate General has forcefully contended that in view of own statement of the prosecutrix supported by that of her mother PW-6 and uncle PW-7 as well as corroborated by the link evidence available on record, the prosecution has been able to bring the guilt home to the accused. Therefore, according to Mr. Verma, the findings of acquittal recorded by learned trial Court being beyond pleadings of the parties and evidence available on record are legally unsustainable.

6 On the other hand, Mr. Gaurav Gautam, learned counsel representing the accused-respondent has urged that what to speak of cogent and reliable evidence produced by the prosecution, the present is a case of no evidence and as such, according to him the impugned judgment calls for no interference by this Court.

7. As pointed out hereinabove, the charge framed against the accused is under Sections 341, 323, 506 and 376 read with Section 511 of the Indian Penal Code. In order to infer the commission of an offence punishable under Section 341, the restraint should be wrongful and in a manner so as to prevent a person from proceeding beyond the circumscribing limits. For

example, if a person walking within a vacant space, which is blocked by another person and thereby prevented him from proceeding in any direction beyond the circumscribing line of wall such another person can be said to have committed an offence within the meaning of Section 341 of the Indian Penal Code and rendered himself liable to be punished under Section 341 of the Code. Similarly, in order to infer the commission of an offence punishable under Section 323 of the Indian Penal Code, there must be material available on record that the offender has voluntarily caused the hurt to the victim and as regards the offence punishable under Section 376 read with Section 511 of the Code, the essential ingredients are that the offender must found to have done any act towards the commission of substantive offence viz. in the case in hand an offence punishable under Section 376 of the Code. The first and foremost question which needs adjudication in the present case is that it is the accused alone who restrained the prosecutrix wrongfully and voluntarily caused hurt to her as well as did any act to be treated a step towards the commission of an offence punishable under Section 376 of the Indian Penal Code within the meaning of Section 511 of the Code.

8. The first version qua the manner in which the occurrence has taken place find mentioned in the application Ext. PW-1/A addressed to the Pradhan, Gram Panchayat, Papahan. In this application, the name of the accused has been disclosed as Baggu son of Shri Nana Ram. His name as per the prosecution case is Paramjeet Singh @ Bangu, whereas, name of his father is Harnam Singh. The prosecutrix while in the witness box as PW-5 tells us that it is the accused who met her and asked to disclose the name of her parents and that when she was about to disclose their names, he put his hand on her shoulder. When she objected to such conduct and behaviour of the accused, he dragged her to nearby maize fields. She was asked to give kiss to him and that in case he is not allowed to kiss her, he would tear her clothes. On this, he put his hand on the string of her salwar, however, her uncle PW-7 Praveen Kumar came there for her rescue. The accused ran away from the place. She revealed the occurrence to her uncle Praveen Kumar and also disclosed that the person who had been outraging her modesty was having beard. According to her, accused was seen by her outside the liquor vend and it is her uncle who disclosed that he was resident of nearby village. In order to connect the accused with the commission of offence, the prosecutrix has further stated that when she accompanied by other women folks visited the house of the accused on the same day, he was found to have ran away therefrom. Interestingly enough, in her cross-examination, she has stated that the name of the boy who had assaulted her was not known to her. Not only this but she has admitted the suggestion that the accused was arrested on the basis of suspicion. It is as such the identity of the accused was disclosed by them to the police. Her testimony also reveals that test identification parade was not got conducted by the police during the investigation of the case. In view of the statement made by the prosecutrix while in the witness box, the ingredients of an offence punishable under Section 341 of the Indian Penal Code nor that of Section 323 IPC are made out for the reason that the present is not a case where she was restrained wrongfully by the accused from moving in a particular direction or voluntarily caused hurt to her. At the most the accused/assailant has applied force and taken the prosecutrix inside the maize fields. The testimony of another material prosecution witness Sandla Devi to the extent that it is the accused who had taken the prosecutrix inside the maize field is hearsay. Though, in the application Ext. PW-1/A, it is she who had disclosed the name of accused as Baggu son of Nana Ram and while in the witness box she has stated that it is her daughter the prosecutrix who told her that accused Baggu had met her on the way from the school to the house. The prosecutrix was not knowing the name of accused as she has said while in the witness box, who told PW-6 that the name of the boy who dragged her daughter inside the maize fields is Baggu remained unexplained. Not only this but in her cross-examination, she has denied that it is her daughter who has disclosed the physical features of person who assaulted her. Though, it is stated by her voluntarily that her daughter has disclosed only that the boy was having beard, however, in the application Ext. PW-1/A this witness has not disclosed that boy was having beard. She admits that when the accused was apprehended by the police, he was clean shaved and also that he was arrested only on suspicion. Therefore, the testimony of the prosecutrix and that of her mother PW-6, if

scrutinized minutely, it is not at all established that it is the accused alone and none else who dragged the prosecutrix inside the maize fields and outraged her modesty.

9. Now if coming to the testimony of Praveen Kumar who allegedly came for the rescue of the prosecutrix is seen, he seems to have deposed falsely that the accused was seen by him while dragging the prosecutrix and pressing her mouth because the prosecutrix has also not said so while in the witness box as according to her on observing the presence of someone there, the accused set her free and ran away. She has not said that her uncle Praveen Kumar has tried to caught hold that boy, therefore, his testimony to this effect is also false. When as per his version in cross-examination he did not notice the colour of the clothes worn by the assailant, how he could have deposed that he noticed the boy while dragging the prosecutrix or that he tried to caught hold him. As per his version, he had disclosed the identifying features of the person to the police, however, PW-6 has denied the disclosure of such features to the police except for that the boy was having beard. As per further version of PW-7, he was not knowing the name and father's name of the boy who had assaulted the prosecutrix nor test identification parade was got conducted by the police. Therefore, his testimony is also not suggestive of that it is the accused who was the assailant. According to prosecutrix, it is PW-7 who had revealed to her that the boy who had assaulted her belongs to nearby village. However, the accused is not a resident of any other village and rather resident of village Papahan itself, to which the prosecutrix and PW-6 as well as PW-7 belong. Meaning thereby that the accused is the resident of the same village. As per version of the prosecutrix, he had noticed the accused sitting outside a liquor vend, however, no-one i.e. salesman etc., has neither been associated nor examined during the course of investigation. The present in the light of what has been said hereinabove is, therefore, a case where the identity of the accused is not at all proved. He, therefore, cannot be said to have assaulted the prosecutrix and outraged her modesty, in the manner as claimed by the prosecution.

10. Be it stated that the photographs Ext. P-8 to Ext. P-15 pertain to the fields. One hair clip is visible in the photograph Ext. P-14. The photographs Ext. P-9, P-10 and P-15 show the grass and maize field in badly crushed condition. The grass and crop in such a condition do not match with the prosecution case because had the prosecutrix been only taken inside the fields and within no time PW-7 appeared there for her rescue, this would have not been the condition of the grass and also the maize crop in the field. In this regard, without commenting any further qua this aspect of the matter, suffice would it to say that the factual position has been concealed by the I.O for the reasons best known to him. Any how, the prosecutrix seems to have been taken inside the maize crop and an attempt to assault her sexually also seems to have been made, however, it is not at all proved beyond all reasonable doubt that the assailant was the accused alone and none else. Therefore, the link evidence as has come on record from the photographs and also the recovery of broken pieces of bangles from the place of occurrence is hardly of any help to the prosecution case. The injuries on the neck and wrist of the prosecutrix were found simple in nature, as is evident from the perusal of MLC Ext. PW-2/A. Her age has been claimed below 16 years, however, the evidence i.e. the school certificate Ext. PW-11/K issued by the Secretary, Gram Panchayat, Chalwara cannot be treated as a validly proved proof qua the date of birth of the prosecutrix recorded therein has to be treated as correct for the reason that the birth and death register has not been produced nor the Secretary, Gram Panchayat, Chalwara examined during the course of trial. The certificate has simply been produced in evidence by the I.O. while in the witness box. Therefore, the same cannot be treated as a valid proof qua the date of birth of the prosecutrix. The extract of parivar register Ext. PW-11/H cannot also be treated as legal and valid proof qua the age of the prosecutrix. The another certificate Ext. PW-9/A proved by PW-9 TGT, Government Senior Secondary School, Guglara, District Kangra cannot also be said to be treated as valid proof so as to the date of birth of the prosecutrix is concerned for the reason that the same has not been proved to be issued on the basis of school record i.e. the admission and withdrawal register maintained in the primary school which could have only been treated as the primary evidence qua the date of birth of the prosecutrix and not the certificate issued from the record of Senior Secondary School, that too,

without producing the admission and withdrawal register. On the other hand, the radiological age of the prosecutrix in the opinion of Radiologist PW-2 at the relevant time was between 16 to 18 years. While determining the age of a person radiologically, margin of two years on either side is always there. Therefore, if such margin is taken into consideration, the prosecutrix may have been 18 years or 20 years of age also on the day of occurrence. The benefit of such error as per settled legal principles always available to the accused and not to the prosecution.

11. In view of the re-appraisal of the evidence hereinabove and examining the prosecution case from each and every angle, the only irresistible conclusion would be that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The accused has rightly been acquitted by learned trial Court. We, therefore, find no illegality, irregularity or infirmity in the impugned judgment. The same, as such, is hereby affirmed.

12. For all the reasons discussed hereinabove, this appeal fails and the same is accordingly dismissed. Personal bonds furnished by the accused shall stand cancelled and surety discharged.

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

The New India Assurance Co. Ltd. .....Appellant
Versus
Kamlesh Kumari and others ..... Respondents

FAO No.90 of 2012
Decided on : 04.11.2016

Motor Vehicles Act, 1988- Section 173- Insurer had limited grounds available to file an appeal – it can seek permission to contest the claim petition on all the grounds after seeking permission under Section 170 of the Act- no such permission was obtained by the Insurer and appeal cannot be filed on the ground of adequacy of compensation. (Para-3 to 10)

Cases referred:
United India Insurance co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

For the appellant: Mr.B.M. Chauhan, Advocate.
For the respondents: Mr.O.C. Sharma, Advocate, for respondents No.1 to 4.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 30th March, 2011, passed by Motor Accident Claims Tribunal-II, Solan, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.15,17,600/, with interest at the rate of 9% per annum from the date of filing of the petition till realization, came to be awarded in favour of the claimants, and the insurer was saddled with the liability, (for short, the impugned award).

2. The claimants, the owner and the driver have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. The insurer has filed the instant appeal on the ground of adequacy of compensation.

4. It is moot question whether the insurer can question the impugned award on the ground of adequacy of compensation?

5. The answer is in the negative for the following reasons. In terms of the mandate of Sections 147 and 149 of the MV Act read with the terms and conditions contained in the insurance policy, the insurer has limited grounds available, but, it can contest the claim petition on other grounds provided permission in terms of Section 170 of the MV Act has been obtained.

6. The insurer can seek permission to contest the claim petition on all grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on adequacy of compensation or any other ground, which is not otherwise available to it.

7. This question arose before the Apex Court in the case titled as **United India Insurance co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

8. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.*
>
> *9. to 16. .....*
>
> *17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.*
>
> *18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act.*

Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

9. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the MV Act.

10. In the present case, the application filed by the insurer under Section 170 of the MV Act was dismissed by the Tribunal vide order, dated 8th September, 2010. Thus, the insurer is precluded from questioning the adequacy of compensation.

11. It appears that the amount awarded is excessive and the rate of interest is also on the higher side.

12. At this stage, Mr.O.C. Sharma, learned counsel for the claimants/respondents No.1 to 4 herein, stated that he is under instructions to settle the dispute for a sum of Rs.14.00 lacs alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit. His statement is taken on record. The said offer is acceptable to Mr.B.M. Chauhan, learned counsel for the insurer.

13. Accordingly, with the consent of the learned counsel for the parties, the impugned award is modified by providing that the claimants are entitled to a sum of Rs.14.00 lacs, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit, as compensation. The Registry is directed to release the entire amount alongwith interest in favour of the claimants, through their respective bank accounts, and the excess amount alongwith interest be released in favour of the insurer through payees' account cheque.

14. The impugned award is modified and the appeal is disposed of as settled.

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

The New India Assurance Company .....Appellant

Versus

Smt. Urmila Devi and others ...Respondents.

FAO (MVA) No. 160 of 2011.
Date of decision: 4th November,2016.

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

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738

Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant: Mr. B.M. Chauhan, Advocate.

For the respondents: Mr. Vivek Chandel, Advocate, for respondents No. 1 and 2.
Mr. Baldev Singh Negi and Ashwani Negi, Advocates, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 7.2.2011, passed by the Motor Accident Claims Tribunal-II, Una, H.P. hereinafter referred to as "the Tribunal", for short, in MACP No.2 of 2009, titled *Smt.Urmila Devi and another versus Sh. Hem Raj and others*, whereby compensation to the tune of Rs.2,87,000/- alongwith interest @ 9% per annum with counsel fee assessed at Rs.1,000/- came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimants, owner and driver have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant argued that the driver was not having a valid and effective driving licence at the time of the accident. Thus, the only question to be determined in this appeal is-whether the driver was having a valid and effective driving licence and the owner has committed willful breach?

5. The insurer has examined only one witness, i.e., Kamlesh Kumar RW1, who is licence Clerk, from the office of S.D.M. Sarkaghat. The insurer has not led any evidence to the effect that the driver was not having a valid and effective driving licence and the owner has committed willful breach.

6. It was for the insurer to plead and prove that the owner has committed any willful breach in terms of Sections 147 and 149 of the Motor Vehicles Act read with the judgment rendered by the apex Court in case titled **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

7. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

8. RW-1 Kamlesh Kumar has deposed that the driver was having driving licence No. 151 /1999 dated 10.2.1999, issued by the R & LA, Bilaspur and it was renewed vide renewal No.

991/2010 dated 16.12.2010 by R& LA, Sarkaghat after getting confirmation from the R& LA Bilaspur that the driving licence was genuine and valid.

9. Having said so, the insurer has failed to prove that the driver was not having a valid and effective driving licence at the time of accident. The Tribunal has made discussion in para 23 of the impugned award, needs no interference.

10. The Tribunal has awarded interest @ 9% per annum. However, interest was to be awarded at the rate of 7.5% per annum, for the following reasons.

11. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

12. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

13. The insurer is directed to deposit the amount alongwith interest @ 7.5% per annum, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification and excess amount, if any, be refunded to the insurer/appellant through payees' cheque account.

14. Viewed thus, the impugned award is modified as indicated hereinabove and appeal is disposed of alongwith pending applications.

15. Send down the record forthwith, after placing a copy of this judgment.

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

Shri Babu Ram. .....Appellant/non-objector/non-applicant.

Versus

Shri Santokh Singh & another. .....Respondent/Objector/applicant(Santokh Singh).

CMP(M) No. 1118 of 2014 in Cross Objection No. 50 of 2014 in RSA No. 457 of 2002-F
Reserved on: 02.11.2016
Decided on: 07 .11.2016

Code of Civil Procedure, 1908- Order 41 Rule 22- Limitation Act, 1963- Section 5- The cross-objections are barred by eleven years eight months and 17 days – no actual date of hearing was issued – the Court has discretion to entertain the cross-objections, even after the expiry of 30 days – the objector was not asked to file the cross-objections within 30 days and he being illiterate, rustic and old person could not file them within the period of 30 days- there are sufficient grounds to condone the delay- held, that limitation will start running from the first date of hearing – the date of hearing will start from the day when the objector and his pleader appeared in the Courts- the appeal is yet to be decided and the interest of justice will be served, if

the objector is heard on merits- application allowed and the delay in filing the cross-objections condoned.(Para- 7 to 11)

Case referred:
Mahadev Govind Gharge and others vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 Supreme Court Cases 321

For the appellant/ non-objector:	Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Nishant Kumar, Advocate.
For respondent No. 1/ Objector:	Mr. G.C. Gupta, Sr. Advocate, with Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present application has been filed by the applicant/respondent/objector, Santokh Singh (now deceased, represented through legal representatives) (hereinafter referred to as 'the objector') under Order 41, Rule 22 CPC read with Section 5 of the Indian Limitation Act for condoning the delay in moving the cross-objections.

2. As per the objector, he has moved the cross-objections, which are barred by eleven years, eight months and seventeen days, but, in fact, the objections were filed within a year after fixing the date of hearing by this Hon'ble Court. It is further contended by the objector that he has preferred the cross-objections, in the present regular second appeal (RSA No. 457 of 2002), which is pending adjudication, against judgment dated 15.05.2002, passed by the learned District Judge, Hamirpur, in Civil Appeal No. 86 of 1994, whereby findings recorded by the learned Sub Judge, 1st Class(2), Hamirpur, in Civil suit No. 194/91, decided on 04.05.1994, were partly set-aside. As per the objector, the cross-objections have been filed within time, as no actual date notice of hearing was ever issued to him. As per Order 41, Rule 22 CPC, the Court has discretion to entertain the cross-objections, even after the expiry of thirty days. The objector was an old, illiterate and ailing person and he did not understand the intricacies of law. The objector further contends that he was never advised to file the cross-objections, till the last date of hearing, so the same could not be filed within thirty days from the date of admission. Even otherwise also, the period of thirty days, as per the provision of CPC would start from the date when actual date notice of hearing is issued by the Court. As per the objector, there are sufficient grounds for condoning the delay in filing the cross-objections and the same may kindly be condoned. The application is duly supported with an affidavit.

3. Reply to the application stands filed and it is averred therein that the regular second appeal was admitted on 08.10.2002. No objections were filed within the stipulated time of one month or extended period, therefore, the application deserves dismissal.

4. I have heard the learned Senior counsel for the parties and gone through the record in detail.

5. The learned Senior Counsel appearing on behalf of the objector/respondent/applicant has argued that the matter was listed for the first time for hearing on 14.12.2012 and the period of one month is to be taken from 14.12.2012. Taking this into consideration, the cross-objections cannot be said to be too much time barred. He has further argued that even Under Order 41, Rule 33 CPC, the objector (respondent) has a right to argue and assail the judgment, as against him. He has prayed that the delay, in moving the cross-objections, may be condoned. To fortify his arguments, he has relied upon a judgment rendered by the Hon'ble Apex court in case titled as ***Mahadev Govind Gharge and others vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 Supreme Court Cases 321.***

6. Conversely, the learned Senior Counsel appearing on behalf of the appellant/non-objector/non-applicant (hereinafter referred to as 'the non-objector') has also relied upon the judgment (supra) referred by the learned Senior Counsel appearing on behalf of the objector. He has argued that as the delay has not been sufficiently explained, the application for condonation of delay is required to be dismissed. He has further argued that the objector is taking contradictory pleas and first he should decide whether he want to pursue the present cross-objections under Order 41, Rule 22 CPC or want to argue the matter under Order 41, Rule 33 CPC. However, he has argued that the application deserves dismissal and may be dismissed.

7. Precisely, the grounds, which the objector has taken in the application, are that he is an old, illiterate and ailing person having no knowledge of the intricacies of law and more so he was never advised to file cross-objections till the last date of hearing.

8. The judgment of Hon'ble Apex Court in ***Mahadev Govind Gharge and others vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 Supreme Court Cases 321,*** has been relied upon by both the parties, wherein the Hon'ble Apex Court in para 60 has held as under:

> "60. Having analytically examined the provisions of Order 41 Rule 22, we may now state the principles for its applications as follows:
>
> (a) The respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order 41 Rule 22 of the Code.
>
> (b) The limitation of one month for filing the cross-objection as provided under Order 41 Rule 22 of the Code shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal.
>
> (c) Where a respondent in the appeal is a caveator or otherwise puts in appearance himself and argues the appeal on merits including for the purposes of interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/caveator, it shall be deemed to be service of notice within the meaning of Order 41 Rule 22. In other words the limitation of one month shall start from that date."

9. Further the Hon'ble apex Court in the judgment (supra) has also held as under:

> *" 24. Rule 22 is not only silent on the consequences flowing from such default from filing appeal within one month, from the period fixed hereunder, but it even clothes the court with power to take on record the cross-objections even after the expiry of the said period. Thus, the right of the cross-objector is not taken away in absolute terms in case of such default. The courts exercise this power vested in them by virtue of specific language of Rule 22 itself and thus, its provisions must receive a liberal construction.*
>
> *... ... ...*
>
> *28. In Kailash v. Nanhku ((2005) 4 SCC 480), a Bench of three Judges of this Court while —interpreting the provisions of Order 8 Rule 1 of the Code, which has more stringent language and provides no such discretion to extend the limitation as provided to the courts in Order 41 Rule 22, had observed that despite the use of such language in the provisions of Order 8 Rule 1 of the Code, the judicial discretion to extend the limitation contained therein has been a matter of legal scrutiny for quite some time but now the law is well settled that in special circumstances, the court can even extend the time beyond the 90 days as specified therein and held as under: (SCC pp. 494-95, paras 27-28)*

"27. ... The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried. ...

28. ... In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."

... ...

37. Procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to achieve the objects of justice and expeditious disposal of cases. The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction. The court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural checks must achieve their end object of just, fair and expeditious justice to the parties without seriously prejudicing the rights of any of them.

... ...

54. In Rashida Begum (AIR 2008 Rajasthan 131) the Delhi High Court had noticed that limitation for filing the cross-objection would start from the date of service of notice of hearing of the appeal. A notice containing only the date of hearing of the stay application but not the appeal would not be "notice" as contemplated under Order 41 Rule 22 of the Code.

55. The view taken by the Delhi High Court is more in line with the intent of the provisions of Order 41 Rule 22 while the decision of the Rajasthan High Court was on its own facts and cannot be treated to be stating a proposition of law. The application of law would always depend upon the facts and circumstances of a given case and what is the true and correct construction of Order 41 Rule 22 we shall shortly proceed to state."

10. From the above referred judgment it is amply clear that the limitation will start from the date the objector has given the first date of hearing. Taking this into consideration, it cannot be said that the cross-objections are hopelessly time barred, as as per the record, the date of one month will start from the date the objector or his pleader appears in the Court on the date fixed for hearing of the appeal, hearing in appeal was fixed on 14.12.2012, on which date the case was listed for hearing on 25.02.2013. It is clear from the record that earlier the case was not listed for hearing by this Hon'ble Court. Even if this Court takes that the cross-objections are barred by eleven years, eight months and seventeen days, then also the objector can request this Court to hear and give findings against the portion of the judgment which is against him. As the appeal is still to be heard and the Court under Order 41, Rule 33 CPC may render findings in favour of the objector, this Court finds that the interests of justice would be subserved if the objector (respondent) is heard on cross-objections. Moreover, the delay in moving the cross-objections has been sufficiently and satisfactorily explained, which, in the opinion of this Court, is the ill advice of the Advocate and when the objector was advised, he maintained the cross-objections.

11. Applying the law, this Court finds that the interest of justice would be met, in case the delay is condoned in moving application under Order 41, Rule 22 CPC. Accordingly, the

delay in moving the cross-objections is allowed and the cross-objections are taken on record. The application stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Khem Chand son of Shri Jagdish Chand ....Revisionist/Landlord

Versus

Kuldeep Chand son of Shri Khem Chand ....Non-Revisionist/Tenant

Civil Revision No. 188 of 2006
Order Reserved on 17th August 2016
Date of Order 7th November 2016

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

Case referred:
Hari Dass Sharma vs. Vikas Sood and others, 2013(5) SCC 243

For the Revisionist: Mr. K.D. Sood Sr. Advocate with Mr.Mukul Sood Advocate
For the Non-Revisionist: Mr. Bhupender Gupta Sr. Advocate with Mr.Janesh Gupta Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Order of Limited remand:- Present civil revision petition is filed under Section 24(5) of H.P. Urban Rent Control Act 1987 against order of learned Appellate Authority(III) Kangra dated 13.10.2006 whereby order of learned Rent Controller dated 30.3.2002 affirmed.

Brief facts of the case

2. Khem Chand landlord filed eviction petition under Section 14 of H.P. Urban Rent Control Act 1987 for eviction of tenant. It is pleaded that premises is commercial premises situated in Shop No. M/257 main market Palampur. It is pleaded that monthly rent is Rs.100/- (Rupees one hundred) per month and premises was let out in the year 1971. It is pleaded that electricity bill is paid by tenant. It is pleaded that tenant has not paid rent of premises w.e.f. 1.12.1993 and premises is in dangerous condition and would collapse at any time. It is pleaded that premises is required by landlord for rebuilding into three stories structure after demolition of existing structure. It is pleaded that tenant could not carry out rebuilding without vacation of premises by tenant. It is pleaded that landlord requires the premises for his own use as landlord did not own any building within urban area and landlord has not vacated any such building within five years of filing the eviction petition. It is pleaded that back portion of demised premises

has collapsed and partially demolished at the instance of Municipal Committee Palampur in consequence of notice. Prayer for acceptance of eviction petition sought.

3. Per contra response filed on behalf of tenant pleaded therein that eviction petition is not legally and factually maintainable. It is pleaded that act and conduct of landlord bars the landlord to file present petition. It is pleaded that landlord is estopped by his act, conduct and acquiescence to file the present eviction petition. It is pleaded that present petition has been filed just to harass the tenant. It is pleaded that present eviction petition is barred on concept of resjudicata. It is denied that premises has become unsafe and unfit for human habitation. It is pleaded that landlord can raise three stories structure/building without demolition of existing structure and without eviction of tenant. It is also denied that landlord requires the building for his own occupation. It is pleaded that earlier also eviction petition was filed on same ground and earlier eviction petition was dismissed upto the level of High Court. Prayer for dismissal of eviction petition sought.

4. Landlord also filed rejoinder and re-asserted the allegations mentioned in eviction petition. As per pleadings of parties following issues were framed by learned Rent Controller on 22.7.2001:-

1. Whether tenant has not paid rent of premises from December 1993 uptil now if so its effect? ....OPA

2. Whether premises in question/building is in a dangerous condition and unsafe which would collpase at any time and same cannot be re-build without the building being vacated, as alleged? ....OPA

3. Whether building in question is required by landlord for his own occupation as alleged? If so, its effect? .....OPA

4. Whether petition is not maintainable? .....OPR

5. Whether petitioner is estopped by his act and conduct to file the present petition? ...OPR

6. Whether petition is barred under the principle of resjudicata? .....OPR

7. Relief.

5. Learned Rent Controller decided issue No.1 in affirmative and decided issues Nos. 2, 4, 5 and 6 in negative. Learned Rent Controller held that issue No.3 was not pressed at the time of arguments. Learned Rent Controller decided issue No. 3 as not pressed. Learned Rent Controller allowed the petition of landlord partly on the ground of non-payment of arrears of rent w.e.f. 1.12.1993 at the rate of Rs.100/- per month. Learned Rent Controller dismissed the eviction petition on other grounds. Learned Rent Controller further directed that if tenant would pay the arrears of rent plus interest at the rate of 9% per annum within a period of thirty days w.e.f. 30.3.2002 plus costs assessed at Rs.200/- then tenant would not be evicted from demised premises.

6. Thereafter Khem Chand landlord filed appeal under Section 24 of H.P. Urban Rent Control Act 1987 against order of learned Rent Controller and learned Appellate Authority dismissed the appeal filed by landlord on dated 13.10.2006 and affirmed the order of learned Rent Controller.

7. Feeling aggrieved against order of learned Appellate Authority landlord filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and Court also perused entire record carefuly.

9. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 24(5) of Urban Rent Control Act 1987 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

10. *Findings upon point No.1 with reasons*

10.1. AW1 Khem Chand has stated that premises is situated in main market Palampur. He has stated that premises was rented out at the rate of Rs.100/- per month. He has stated that tenant did not pay the arrears of rent w.e.f. December 1993. He has stated that shop is 75-80 years old and some portion of shop was burnt in the year 1954-55. He has stated that application was filed before SDM with allegations that premises would fall at any time and would cause damage to human beings. He has stated that thereafter SDM issued notice to him and he also filed response. He has stated that thereafter back portion of shop was demolished. He has stated that he consulted the expert and expert had given the opinion that for re-construction eviction of tenant is essential. He has stated that he would spend Rs. 5 to 7 lacs for reconstruction purpose and he is drawing pension of Rs.6461/-(Rupees six thousand four hundred sixty one). He has stated that he is also owner of three hundred kanal of land in Una and he used to earn rupees three lacs annually from that land. He has stated that banks have also agreed to give loan to him. He has stated that copy of notice issued by SDM is Mark A-3 and further stated that he has also prepared site plan of proposed construction. He has denied suggestion that after December 1993 tenant offered rent but he declined to accept the rent. He has denied suggestion that wall of demised premises is constructed with cement. He has denied suggestion that demised premises did not require any major repair. He has denied suggestion that demised premises is safe for commercial purpose. He has admitted that he and Manohar Lal were joint owners of four shops. Self stated that family partition effected between him and Manohar. He has denied suggestion that three stories building could be constructed without eviction of tenant. He has denied suggestion that he is in possession of other shops also. He had admitted that his earlier eviction petition was dismissed upto High Court level. He has denied suggestion that no notice was given to him by SDM. He has denied suggestion that he did not obtain the opinion of any expert engineer. He has stated that he is not income tax assessee because his income is from agriculture product. He has denied suggestion that documents Mark 1 to 3 have been prepared in fraudulent manner. He has denied suggestion that eviction petition filed by him in order to harass the tenant in illegal manner.

10.2 AW2 Ajay Sharma has stated that he is civil engineer consultant at Palampur since 6-7 years and he has seen the demises premises. He has stated that basement of demised premises is damaged and premises is unsafe for commercial purpose. He has stated that no construction could be raised upon the old demised premises and demolition of demised premises is required for new reconstruction purpose. He has stated that he has filed report Ext.AW2/A placed on record. He has denied suggestion that he has not personally visited the demised premises. He has denied suggestion that report Ext.AW2/A is not written by him. He has denied suggestion that foundation and walls of demised premises are of permanent nature. He has denied suggestion that two stories structure could be raised upon the upper roof of demises premises. He has denied suggestion that he has prepared report Ext.AW2/A in his house.

10.3 AW3 Kishori Lal Ahlmad SDM Court Palampur has stated that he has brought the record. He has stated that copy of notice issued under Section 133 Cr.P.C. is Ext.AW3/A which is correct as per original record.

10.4 AW4 Rakesh Kumar Clerk Municipal Committee Palampur has stated that he is posted as Clerk in Municipal Committee and he did not bring the summoned record.

10.5 AW5 Mool Chand has stated that his shop is given upon tenancy to Shiv Kumar proprietor Janta Sweet shop. He has stated that Shiv Kumar informed him that shop of Khem Chand would demolish at any point of time and would damage his shop. He has stated that he told Shiv Kumar tenant to take necessary action. He has stated that thereafter Shiv Kumar filed

application before SDM and thereafter official of committee demolished the wall. He has stated that demised premises is not in proper condition. He has stated that his house is situated at a distance of 90 K.m. from Palampur. He has denied suggestion that he is not owner of any shop at Palampur. He has denied suggestion that demised premises is in proper condition. He has denied suggestion that walls of demised premises are in proper condition. He has denied suggestion that he came from 100 K.m. because he is friend of landlord.

10.6 AW6 Mahesh Dutt has stated that he is posted as executive officer at Municipal Committee Palampur. He has stated that municipal committee has written request letter to SDM with allegations that if back portion of house would fall then path would be blocked. He has stated that SDM was requested to take necessary action.

10.7 AW7 Mohinder Singh has stated that he is posted as Manager in KCC bank. He has stated that bank used to pay loan for construction of house. He has stated that landlord came to him for loan sanction. He has stated that he told the landlord that loan would be sanctioned after completion of loan formalities and he issued letter Ext.AW7/A. He has denied suggestion that landlord did not file any application for loan. He has denied suggestion that revenue papers were not perused. He has denied suggestion that he has issued wrong certificate Ext.AW7/A. He has denied suggestion that he has issued letter against the rules and regulations.

10.8 AW8 Vinay Sharma has stated that he is architect at Palampur. He has stated that he has prepared site plan Ext.AW8/A at the instance of landlord. He has stated that cost of structure would be 3-4 lacs. He has stated that he has prepared document Ext.AW8/A after perusal of tatima and after inspection of site. He has stated that he could not state that plinth of demised premises and shop of Manohar are same.

10.9 RW1 Khem Chand has stated that he is special attorney of tenant and same is Ext.R-1. He has stated that demised premises is constructed of permanent concrete bricks and further stated that walls are also concrete and lintel is raised upon roof. He has stated that floors are also cemented. He has stated that demised premises was taken in the year 1974 from Manohar Lal. He has stated that SDM did not pass any order relating to demised premises. He has stated that in family partition demised premises came to share of revisionist. He has stated that landlord did not receive the rent despite tendered by tenant. He has stated that expert also visited the demised premises and submitted reports Mark R-1 and Mark R-2. He has denied suggestion that back portion of demised premises fallen. He has stated that he did not see the basement of demised premises. He has stated that he did not visit the back portion of demised premises. He has admitted that tenant did not pay rent after 1993 and self stated that tenant is ready to pay rent after 1993.

10.10 RW2 Surender Kumar has stated that he is a member of Municipal Committee Palampur since 1974 and he also remained as President and as of today he is also member of Municipal Committee. He has stated that he has seen the demised premises and further stated that demised premises is constructed of concrete bricks. He has stated that floors are also concrete and lintel is raised upon the premises. He has stated that demised premises did not require any repair. He has stated that a room which was situated behind the shop was demolished and demised premises and rooms are two different portions. He has stated that house was 70-80 years old and demised premises was constructed in the year 1954-55. He has stated that shop of Manohar Lal is also situated adjoining to demised premises. He has stated that there is common wall of demised premises and shop of Manohar Lal. He has stated that demised premises was constructed in his presence. He has stated that two shops came in share of landlord and two shops came in share of Manohar Lal. He has stated that Manohar Lal has constructed two stories building upon his shop. He has stated that two stories building could also be constructed upon demised premises. He has stated that his shop is situated in front of demised premises. He has denied suggestion that cracks have developed in walls of demised premises. He has denied suggestion that 2-3 stories building could not be constructed upon the demised premises.

10.11 RW3 Raj Kumar has stated that he is posted in Agriculture University as Assistant Engineer and he has acquired diploma in civil engineering. He has stated that he was appointed as Junior Engineer and he worked as Junior Engineer for 17 years and now he is working as Assistant Engineer since 11 years. He has stated that he also used to do construction work and repair work of buildings and he has inspected the demised premises twice and submitted the report. He has stated that report is Ext.RW3/A. He has stated that entire demised premises is cemented. He has denied suggestion that walls of demised premises have tilted. He has denied suggestion that cracks have developed in demised premises.

11. Submission of learned Advocate appearing on behalf of revisionist that learned Appellate Authority did not decide ground No. 5 of appeal relating to issue No. 3 in accordance with law and caused grave miscarriage of justice to revisionist and on this ground case be remitted back to Appellate Authority is accepted for the reasons hereinafter mentioned. Learned Rent Controller has specifically mentioned in order that issue No. 3 was not pressed during the course of arguments by learned Advocate and learned Rent Controller decided issue No. 3 as not pressed. Thereafter landlord filed appeal before learned Appellate Authority and took specific ground in paragraph 5 of appeal that learned Rent Controller gravely erred in not deciding issue No. 3 on merits. Landlord pleaded in paragraph 5 of grounds of appeal that Advocate was not authorised to give any statement relating to issue No.3. Learned Rent Controller did not record statement of learned Advocate in writing to the effect that issue No. 3 was not pressed at the time of arguments. Learned Appellate Court decided ground No. 5 of appeal with observations that demised premises is commercial in nature and landlord cannot seek eviction of tenant in commercial premises on the ground of requirement for own occupation as per H.P. Urban Rent Control Act 1987. Section 14 of H.P. Urban Rent Control Act 1987 was amended vide H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) which received assent of President of India on 28.2.2012 and published in H.P. Gazetted on 16.3.2012. Vide amendment in Section 14 of H.P. Urban Rent Control Act 1987 landlord can seek eviction of tenant in residential and non-residential premises for his own occupation. It is well settled law that Court can take judicial notice of amendment in law at subsequent stage.

12. Submission of learned Advocate appearing on behalf of non-revisionist that amendment in Section 14 of H.P. Urban Rent Control Act 1987 is prospective in nature and not retrospective in nature and on this ground revision petition be dismissed is decided accordingly. It is well settled law that when legislature enacts a statute then whether its operation would be prospective or retrospective would depend upon the provision of statute. It is well settled law that amendment in statute is always prospective in nature unless it is expressly made retrospective in nature. There is no recital in H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) that its operation would be retrospective in nature.

13. It is well settled law that when Hon'ble Apex Court of India gives any decision declaring law then Hon'ble Apex Court of India declares pre-existence rights and obligations. It is well settled law that decision of Hon'ble Apex Court of India is always binding upon all Courts situated in India as per Article 141 of Constitution of India. It is well settled law that decision of Hon'ble Apex Court of India is binding upon pending cases of similar nature. Hon'ble Apex Court of India in case reported in ***2013(5) SCC 243 titled Hari Dass Sharma vs. Vikas Sood and others*** made operative amended provision of Section 14 of H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) upon pending cases also. In view of decision of Hon'ble Apex Court of India cited supra it is held that provision of H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) will also operative in present case.

14. Submission of learned Advocate appearing on behalf of revisionist that in view of disposal of civil revision No. 335 of 1997 by Hon'ble H.P. High Court on dated 6.3.1998 present revision petition be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that when civil revision No. 335 of 1997 was disposed of by Hon'ble H.P. High Court on dated 6.3.1998 at that time ground for eviction of tenant on the basis of requirement of premises for own occupation in commercial premises was not available to landlord

as per law. But now due to subsequent change in law vide H.P. Urban Rent Control Amendment Act 2009 (Act No. 8 of 2012) landlord can seek eviction of tenant from commercial premises on ground that landlord requires demised premises for his own occupation. Point No.1 is decided accordingly.

Point No. 2 (Relief)

15. In view of findings upon point No.1 order passed by learned Appellate Authority-III Kangra at Dharamshala dated 13.10.2006 is set aside and case is remanded back to learned Appellate Authority-III Kangra at Dharamshala for limited purpose only with direction to decide ground No. 5 of appeal upon merits afresh in accordance with law and thereafter dispose of entire appeal afresh in accordance with law. Parties are left to bear their own costs. Parties are directed to appear before learned Appellate Authority-III Kangra at Dharamshala on ***25.11.2016.*** Observations will not effect merits of case in any manner and will be strictly confined for disposal of present revision petition. Learned Appellate Authority-III Kangra at Dharamshala will dispose of appeal expeditiously within three months from today. Record of learned Rent Controller and learned Appellate Authority-III Kangra at Dharamshal be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Rajeev Kumar ....Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No.1293 of 2016
Decided on: 7th November, 2016

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

For the petitioner : Mr. N.S. Chandel, Advocate.

For the respondent : Mr. Virender Kumar Verma, Addl. AG, with Mr. Rajat Chauhan, Law Officer.
ASI Ravinder Singh, P.S. Jawalamukhi, District Kangra, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge ***(oral).***

The present bail application is maintained by the petitioner under Section 439 of the Code of Criminal Procedure for releasing him on bail in case FIR No.60/2016, dated 14.06.2016, under Section 302 of the Indian Penal Code, registered at Police Station Jawalamukhi, District Kangra, H.P.

2. As per the petitioner, he is innocent and has been falsely implicated in the present case. He is behind the bars and there is nothing against him, so he may be released on bail.

3. Police report filed. As per the prosecution case, on 13.06.2016 complainant, Shri Basant Kumar, was on his way to Village Muhal to labour work. At about 6 p.m. he was

telephonically informed by his mother, Smt. Sheela Devi, that his brother, Shri Nirmal Kumar, went with the present petitioner towards Beas river, but did not return. The complainant came back and reported the matter to Pradhan of the Gram Panchayat, who informed the police. Both, police and Pradhan visited the spot where the mother of the complainant gave application to the police. The complainant came to know that the deceased took drinks with the petitioner and was with him around 3-4 p.m. On the subsequent day, divers were called by the police and they started searching the deceased and the dead body of the deceased was taken out. There were bruises on nose and forehead of the deceased. Around 2-3 months ago the petitioner thrashed the deceased and few days prior to reporting the matter, the deceased was beaten by the accused. Thus, as per the prosecution story, there is strong suspicion that the petitioner might have taken the deceased by alluring him for drinks and thereafter pushed him in the river. On this, FIR No. 60 of 2016, dated 14.06.2016, was registered under Section 302 of the Indian Penal Code, at Police Station Jawalamukhi.

4. Heard. At this stage, this Court finds that it has come on record that the petitioner was last seen by the witnesses with the deceased. Keeping in view overall facts and circumstances into mind, the present is not a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised. Therefore, the petition, being devoid of merits, deserves dismissal and is accordingly dismissed.

5. In view of the above, the petition stands disposed of.

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

State of H.P. .....Appellant.
Versus
Sukh Dev .....Respondent.

Cr. Appeal No. 107 of 2012.
Decided on : 7/11/2016

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

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Vivek Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of Himachal Pradesh against the judgement recorded by the learned Sessions Judge, Kullu, Himachal Pradesh, whereby he reversed the verdict of conviction recorded by the learned Judicial Magistrate 1st Class, Manali, qua the commission by the respondent herein of offences constituted under Sections 498A and 506 IPC borne in F.I.R Ext.PW-5/A.

2. The brief facts of the case are that on the basis of application filed by the complainant Hira Devi FIR was registered at Police Station Manali. The complainant had alleged that her marriage was solemnized with the accused on 20.10.2008 by exchange of affidavits.

Thereafter they cohabitated together. Thereafter, the accused demanded dowry of Rs. four lacs and gave her beatings. The accused told her that marriage will not be registered until Rs. four lacs is paid to him. On 18.7.2009 she was given merciless beatings by the accused and demanded dowry of Rs. four lacs. She came in a Government bus alongwith accused and she was threatened that in case dowry amount was not paid to him the accused will throw her in the Pandoh Dam. It was further alleged that when she reached near a place known as 17 miles, she noticed Gokal Chand who is her cousin. She called him and at the relevant time the accused was also sitting with her. He inquired from the accused who told him that he wanted four lacs rupees dowry. Thereafter she fled away from the spot. The matter was investigated and after completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for his committing offences punishable under Sections 498A and 506 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 7 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused whereas the learned Sessions Judge returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Sessions Judge standing not based on a proper appreciation by him of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. Ext.PW-1/A embodies an affidavit holding therewithin recitals qua marriage standing solemnized inter se the complainant and the accused/respondent herein whereafter both stayed for two days at Manali thereafter both cohabitated at Jahu. The accused/respondent herein in his statement recorded under Section 313 Cr.PC. admitted the factum of the complainant being his wife. However, despite the accused, in his statement recorded under Section 313 Cr.P.C. admitting the factum of the informant being his legally wedded wife would not per se render open an inference qua the charge to which he stood tried standing efficaciously proven. The complainant in F.I.R. borne on Ext.PW-5/A has voiced therein qua the accused/respondent by belabouring her hence subjecting her to cruelty. She therein also ascribes to the accused an inculpatory role qua his demanding Rs. four lacs as dowry from her. Necessarily hence the factum of the accused/respondent belabouring her also his making a demand upon her for dowry stood enjoined to be proven by creditworthy evidence. Though in her testification the complainant has supported the recitals constituted in Ext.PW-5/A yet PW-2 wherefromwhom she concerts to lend corroborative vigour to her testimony has not rendered the required efficacious corroboration to her testification. Even though in his examination in chief he has testified qua on 18.7.2009 while he was standing at a place called 17 miles for alighting a bus therefrom his thereat noticing the complainant travelling in a bus alongwith the accused whereafter he testifies qua the complainant weeping in his presence and disclosing to him qua

the accused belabouring her also his demanding four lacs as dowry from her. He in his examination in chief has testified qua earlier to 18.07.2009 also the complainant twice or thrice disclosing to him of the respondent herein belabouring her besides making a demand of dowry. The aforesaid disclosures embedded in the examination of PW-2 for theirs being construable to lend corroborative vigour to the testification of PW-1 were enjoined to not suffer any erosion qua their probative sinew arising from contradictions thereto occurring in his cross-examination to which he subjected to by the learned defence counsel yet when therewithin he has been unable to disclose with precision the time(s) whereat revelations earlier to 18.07.2009 stood purportedly made to him by the complainant qua the latter standing belaboured by the accused, is an abundant portrayal of his relevant testifications in his examination in chief wherewithin he has made the aforesaid disclosures not warranting imputation of credence thereon also when he in his cross-examination concedes to the suggestion put to him by the learned defence counsel qua the accused not in his presence demanding dowry from the complainant besides his admitting qua the respondent herein not threatening the complainant in his presence also predominantly his admitting the suggestion put to him by the learned defence counsel qua his deposing in Court at the instance of PW-1, with aplomb fosters an inference of his not rendering a voluntary deposition in purported corroboration to the testification of PW-1 rather his rendering a version qua the relevant fact only at the behest besides at the instance of PW-1. In sequel thereto his testifying a tutored besides a concocted version qua the incident renders it to not stand imbued with any virtue of truth.

10. Be that as it may, the factum of the relevant disclosure standing made to him on 18.07.2009 at a place called 17 miles whereat he was standing for alighting a bus whereupon he noticed both the accused and the complainant to be travelling together is unbelievable given in his cross-examination his deposing qua the relevant revelations standing made to him at 15 miles. Since the anvil of the prosecution case is qua the relevant disclosure purportedly made by PW-1 to PW-2 occurring at 17 miles whereas PW-2 in his cross examination unraveling therein qua the relevant disclosures standing made to him by PW-1 at 15 miles distance inter se both location stands conceded by him to be two and half kilometers ipso facto renders the factum of the relevant disclosure occurring at 15 miles to be stained with a gross vice of inveracity also thereupon a conclusion is erected qua his contriving the factum of PW-1 making any disclosure to him on 18.7.2009. Consequently, the testification of PW-2 in purported corroboration of the testification of PW-1 is unworthy of reliance. In aftermath, the sole uncorroborated testimony of PW-1 cannot acquire any formidable vigour.

11. The complainant in her testification embodied in her examination in chief voices therein qua hers disclosing the factum probandum to her mother who despite her name occurring in the list of prosecution witnesses was given up by the learned APP concerned. Though her examination would have lent corroborative vigour to the testification of PW-1 yet the prosecution chose to not examine her as its witness rather it proceeded to examine PW-2 who however has for reasons aforesaid not lent any vigour to the prosecution version. Cumulatively hence the omission of the prosecution to examine the mother of the complainant as its witness whereas with the complainant making a communication qua hers unveiling the relevant disclosures to her mother constrains a conclusion of the prosecution failing to prove the charges to which the accused stood subjected to.

12. The accused respondent herein and the complainant both resided together at Jahu whereat she alleges qua hers standing belaboured by the former. However, she did not make any disclosure qua the purported belabourings perpetrated upon her person by the accused at Jahu to any of the inhabitants of the homesteads existing in the vicinity of her homestead rather she proceeded to make a disclosure to her mother and to PW-2 the latter of whom for reasons aforestated had not supported the prosecution case whereas the former stood unexamined by the prosecution. In sequel thereto the complainant is to be concluded to contrive the factum of the accused respondent herein belabouring her at Jahu.

13. The prosecution has not placed on record the apposite medical certificate prepared by the doctor concerned holding communications therein of the complainant standing subjected to physical beatings by the respondent herein. Omission of the aforesaid factum when construed in tandem with the factum qua the F.I.R qua the relevant occurrence standing belatedly lodged before the Police Station concerned significantly also when the relevant delay stands inexplicated, stirs an inference of the allegations constituted in the F.I.R. holding no truth rather theirs being a result of mere concoction on the part of the complainant.

14. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

15. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Asha Ram and another ...Petitioners.

Versus

State of Himachal Pradesh & others ...Respondents.

CMP No.7039 of 2016 in CWP No.1402 of 2016.
Reserved on: 25.10.2016.
Date of Decision: November 08, 2016.

Constitution of India, 1950- Article 226- Government issued a notification for opening Government Degree College, which is the subject matter of the writ petition- an application for interim direction was filed, which was allowed and the order was stayed – it was prayed that interim direction be vacated – held, that Government formulates the policy upon number of circumstances based on its resources – it would be dangerous, if the Court is asked to test the utility or beneficial effects of the policy based on the facts set out in affidavit – Court cannot strike down a policy or decision merely because it feels that another decision would have been fairer and more scientific, logical or wiser- the wisdom and advisability are not amenable to judicial review unless the policies are contrary to statutory or constitutional provision or arbitrary or irrational or an abuse of power – the Government has right to frame policy and there is no need to raise any grievance, if the policy is changed- the policy will not be vitiated merely because it has been changed- the Government has discretion to adopt a different policy to make it more effective – the decision to open a new college is not malicious, arbitrary or whimsical – the matter is also pending before Hon'ble Supreme Court of India- the decision to open the college cannot be stayed indefinitely- prayer allowed and the stay order vacated. (Para-12 to 28)

Cases referred:

State of Punjab and others versus Ram Lubhaya Bagga etc. etc. AIR 1998 SC 1703

Ram Singh Vijay Pal Singh and others versus State of U.P. and others (2007) 6 SCC 44

Villianur Iyarkkai Padukappu Maiyam versus Union of India and others (2009) 7 SCC 561

State of Kerala and another versus Peoples Union for Civil Liberties, Kerala State Unit and others (2009) 8 SCC 46.

State of Madhya Pradesh versus Narmada Bachao Andolan and another (2011) 7 SCC 639

Union of India & Anr. versus International Trading Co. and Another (2003) 5 SCC 437
Essar Steel Ltd. versus Union of India and others AIR 2016 SC 1980
State of Maharashtra and others versus Lok Shikshan Sanstha and others AIR 1973 SC 588
Raj Shikshan Prasarak Mandal versus State of Maharashtra and others (2001) 10 SCC 75

For the Petitioners : Mr. K.D.Sood, Senior Advocate with Mr.Dhananjay Sharma, Advocate.
For the Respondents: Mr.Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No.1 to 3.
Ms.Archana Dutt, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

CMP No.7039 of 2016.

The instant petition has been filed by the petitioners claiming therein the following reliefs:-

"a. Quash the notification dated 16th May, 2016, Annexure P-11 in so far it relates to the opening of the Government Degree College, Jandaur, District Kangra, H.P.

b. Prohibit the respondents from opening or starting Government Degree College Jandaur, District Kangra, H.P. from the Academic Sessions 2016-2017 and constructing building and creating infrastructure for the Degree College at Jandaur."

2. The respondents in the year 2012 decided to open eight colleges including the one at Kotla Behr. On 02.03.2013, the college at Kotla Behr was de-notified and the said decision was challenged by one Harbans Lal Kalia by medium of CWP No.1526 of 2013. This petition was decided alongwith bunch of petitions which pertained to the other colleges as de-notified vide notification dated 02.03.2013. This Court upheld the decision of the respondents, as would be clear from para-43 of the judgment which reads thus:-

"43. We may now turn to writ petition No.1526 of 2013 in respect of Government Degree College at Kotla Behar in Kangra District.The original record produced before us contains a communication, purported to be dated 15th June, 2012, sent from the office of the then Chief Minister addressed to the Principal Secretary (Education), mentioning that during the tour to Dehra, District Kangra, on 9th June, 2012, the (then) Chief Minister made announcement to start a Government Degree College at Kotla Behar, Tehsil Jaswan, District Kangra, from current academic session i.e. 2012-13. The communication calls upon the Principal Secretary (Education), Government of Himachal Pradesh, to take immediate action to comply with the said announcement made by the (then) Chief Minister and send compliance report within 15 days. It is in this backdrop, the Department moved into action and after completing the necessary paper work, issued notification on 23rd June, 2012 within the prescribed time. Notably, the decision to start new College is sought to be justified on some report prepared in the year 2003. However, no attempt was made by the dispensation to examine other relevant factors before taking the final decision. The Government Senior Secondary School was, obviously, compelled to set apart three rooms from its building to accommodate the College. That inevitably compromised the quality education imparted to its students. Besides, only 16 students were finally admitted in this College for the academic year 2012-13. In other words, the three reasons recorded for closing this College cannot be discarded nor can be said to be mala fide or unreasonable. The fact that the local Gram

Panchayats were supportive of setting up the said College cannot be the basis to ignore the opinion recorded in the impugned decision, which is taken in public interest. Accordingly, even this petition ought to fail for the same reasons."

3. It would be evident from the aforesaid decision that the considerations which primarily weighed with the Court to uphold the decision of the Government was that the opening of college at Kotla Behr would have inevitably compromised the quality education to be imparted to the students and, therefore, the reasons given by the respondents for closing the college could not be discarded nor said to be tainted with malafide or unreasonable. It was also observed that merely because the Gram Panchayats had been supporting the setting up of the colleges could not be the basis to ignore the opinion recorded in the decision of the Government which had been taken in public interest.

4. It was pursuant to the decision rendered in CWP No.1526 of 2013 alongwith other batch of petitions that the respondents formulated the guidelines for setting up the colleges vide notification dated 02.01.2014. Later, vide notifications dated 15.01.2014 and 24.02.2014, the Government took decision to open various new colleges, but college of Kotla Behr was not included in the aforesaid notifications. However, strangely enough, the petitioners filed a writ petition therein again assailing the notification dated 02.03.2013 whereby the respondents had already de-notified the college at Kotla Behr. This petition came to be allowed and the decision dated 02.03.2013 which as stated above had already been upheld in CWP No.1526 of 2013 came to be quashed and set aside vide judgment dated 20.07.2015.

5. The matter is now sub-judice before the Hon'ble Supreme Court in Special Leave Petition C.C. No.21698 of 2015 and the judgment and order passed by this Court on 20.07.2015 has been ordered to be stayed vide order dated 29.02.2016.

6. On 16.05.2016, the Government issued yet another notification for opening Government Degree College at Jandaur, District Kangra, which decision is the subject matter of the instant petition. The petitioners have assailed the notification on the ground that the same was arbitrary and irrational and taken with a view to frustrate the decision rendered by this Court on 20.07.2015 and that the respondents have not been guided by sound policies and doctrine of good governance in the State.

7. Alongwith the writ petition, the petitioners filed an application for interim directions and vide orders passed by this Court on 27.05.2016 the notification dated 16.05.2016 was ordered to be stayed.

8. The respondents have filed their reply wherein they have raised preliminary objections regarding the very maintainability of the petition on the ground that it is more than settled law that Court should be chary from interfering in policy matters and infusing or imposing its assessment of the policy, especially, when the same does not suffer from any malice or arbitrariness. On merits, it is averred that the decision of the Government to establish college at Jandaur was taken as the same would benefit the general public of the area as it would cater to the areas of Sanasrpur terrace Suelkhad, Nari Ghati, Ghati Bilwan, Jandaur, Katola, Bathu, Tippari, Ghamroor, Gangret, Dharmshala Mahantan, Gindpur Malon, Bari and such other backward adjoining areas. It is further averred that the area in question is semi-hill area and only one major district road passes through the same. Moreover, as the mode of transport is very limited and the students, particularly girl students cannot conveniently travel long distances and, therefore, after taking into consideration the judgment rendered by this Court on 18.06.2013 in CWP No.1468 of 2013 and after keeping in view the guidelines issued on 02.01.2014, the respondents have decided to open a college at Jandaur.

9. At this stage, the learned Advocate General has prayed for vacation of the interim orders dated 27.05.2016 on the ground that these orders virtually amount to sitting over the judgment rendered by this Court in CWP No.1468/2013 and that apart this Court ought not to interfere with the policy matters, particularly, when the decision of the respondents is not tainted with malafide and is not even otherwise arbitrary and illegal.

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

10. Shri K.D.Sood, learned Senior Counsel for the petitioner has vehemently argued that the decision taken by the respondents for not re-starting the Government Degree College at Kotla Behr and issuing notification to open the same at Jandaur which is 3 kilometres away from Kotla Behr is arbitrary, irrational and has been brought about with a view to frustrate the decision rendered by this Court on 20.07.2015. He further argued that the decision has been taken without taking into consideration the local conditions ignoring the comparative advantages of Kotla Behr vis-à-vis Jandaur like Kotla Behr was having no institution of higher studies, but was having sufficient feeder institution as there were 11 Government Senior Secondary Schools in the vicinity with a strength of more than 1000 students. The decision was taken by the respondents in haste and amounted to discrimination to the people of the area and the decision had been taken only when there was change of guard in the State.

11. On the other hand, Shri Shrawan Dogra, learned Advocate General, for respondents No.1 to 3, would vehemently argue that the decision by the respondents had been taken in the larger public interest that too strictly in accordance with the guidelines dated 02.01.2014. It is further argued that the policy cannot be vitiated only on the ground of change of Government as the Government has discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. The choice in the balancing of pros and cons relevant to the change in policy lies with the authority and until and unless proved to be in conflict with Wednesbury's reasonableness or arbitrary, irrational, bias or malafide should not normally be interfered with.

12. It cannot be disputed that when the Government forms a policy, it is based upon number of circumstances on facts, law including constraints based on its resources. It is also based upon expert opinion. It would be dangerous if Court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavit. The Court would dissuade itself from entering into this realm which belongs to the executive (Refer: ***State of Punjab and others*** *versus* ***Ram Lubhaya Bagga etc. etc. AIR 1998 SC 1703).***

13. It is well settled that the Court cannot strike down a policy on decision taken by the Government merely because it feels that another decision would have been fairer and more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provision or arbitrary or irrational or an abuse of power. (*See:* ***Ram Singh Vijay Pal Singh and others*** *versus* ***State of U.P. and others (2007) 6 SCC 44, Villianur Iyarkkai Padukappu Maiyam*** *versus* ***Union of India and others (2009) 7 SCC 561, State of Kerala and another*** *versus* ***Peoples Union for Civil Liberties, Kerala State Unit and others (2009) 8 SCC 46.***

14. Thus, what emerges to be a settled legal proposition is that the Government has the power and competence to change the policy on the basis of the ground realities. A public policy cannot be challenged through PIL when the State Government is competent to frame a policy and there is no need to anyone to raise any grievance if any policy is changed. The public policy can only be challenged where it offends some constitutional or statutory provisions (*Refer:* ***State of Madhya Pradesh*** *versus* ***Narmada Bachao Andolan and another (2011) 7 SCC 639).***

15. It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

16. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the

field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness. (See: ***Union of India & Anr.*** *versus* ***International Trading Co. and Another (2003) 5 SCC 437.***

17. It is equally settled that the Government policy can be changed with the changing circumstances and only on the ground of change, such policy will not be vitiated. The Government has discretion to adopt a different policy or alter or change its policy calculated to solve the public interest and make it more effective. The choice in the balancing of pros and cons relevant to the change in policy lies with the authority.

18. What would be the extent of the powers vested with the Court to review policy decision was the subject-matter of recent decision of the Hon'ble Supreme Court in ***Essar Steel Ltd.*** *versus* ***Union of India and others AIR 2016 SC 1980*** wherein the Hon'ble Supreme Court held as under:-

> *"30. Before we can examine the validity of the impugned policy decision dated 06.03.2007, it is crucial to understand the extent of the power vested with this Court to review policy decisions.*
>
> *In the case of Delhi Development Authority (AIR 2008 SC 1343) (supra) on issue of judicial review of policy decisions, the power of the court is examined and observed as under:*
>
> > *"An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the natty grittiest of the policy, or substitute one by the other but it will not be correct to contend that the court shall like its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review.*
> >
> > *Broadly, a policy decision is subject to judicial review on the following grounds:*
> >
> > *(a) if it is unconstitutional;*
> >
> > *(b) if it is de'hors the provisions of the Act and the Regulations;*
> >
> > *(c) if the delegatee has acted beyond its power of delegation;*
> >
> > *(d) if the executive policy is contrary to the statutory or a larger policy."*
>
> *31.Thus, we will test the impugned policy on the above grounds to determine whether it warrants our interference under Article 136 or not. Further, this Court neither has the jurisdiction nor the competence to judge the viability of such policy decisions of the Government in exercise of its appellate jurisdiction under Article 136 of the Constitution of India. In the case of Arun Kumar Agrawal v. Union of India (2013) 7 SCC 1, this Court has further held as under:*
>
> > *"This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and Assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve*

complex economical factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be a correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be a wrong, that itself is not a ground to hold that the decision was mala fide or done with ulterior motives."

(emphasis laid by this Court)

In the case of Villianur Iyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561, it was held as under:

> *"It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a Petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts."*
>
> *(emphasis laid by this Court)*

A Three Judge bench of this Court in the case of Narmada Bachao Andolan v. Union of India (2000) 10 SCC 664 cautioned against Courts sitting in appeal against policy decisions. It was held as under:

> *"234.In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such a policy decision." (emphasis laid by this Court)*

A similar sentiment was echoed by a Constitution Bench of this Court in the case of Peerless General Finance & Investment Co. Ltd. v. Reserve Bank of India (1992) 2 SCC 343, wherein it was observed as under:

> *"Courts are not to interfere with economic policy which is the function of experts. It is not the function of the Courts to sit in*

Judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."

A perusal of the above mentioned judgments of this Court would show that this Court should exercise great caution and restraint when confronted with matters related to the policy regarding commercial matters of the country. Executive policies are usually enacted after much deliberation by the Government. Therefore, it would not be appropriate for this Court to question the wisdom of the same, unless it is demonstrated by the aggrieved persons that the said policy has been enacted in an arbitrary, unreasonable or malafide manner, or that it offends the provisions of the Constitution of India."

19. It would, thus, be clear from the aforesaid exposition of law that broadly a policy decision is subject to judicial review on the following grounds:-

(i) if the policy fails to satisfy the test of reasonableness, it shall be unconstitutional;

(ii) the change in policy must be made fairly and should not give impression that it was so done arbitrarily of any ulterior intention;

(iii) the policy can be faulted on the ground of malafide unreasonableness, arbitrariness or unfairness etc.;

(iv) if the policy is found against any statue or Constitution or runs counter to the philosophy behind these provisions;

(v) it is dehors the provisions of the Act or Legislations;

(vi) if the delegatee has acted beyond its power of delegation.

20. It cannot be disputed that it is within the complete domain of the State to select a site for construction of college which decision obviously would be taken after taking into consideration various factors in mind. The Court has very limited jurisdiction to interfere with such policy matters.

21. Direct authority on the subject is judgment rendered by an Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***State of Maharashtra and others*** *versus* ***Lok Shikshan Sanstha and others AIR 1973 SC 588*** wherein while dealing with the State Policy in the matter of giving permission to start educational institutions, it was held that the High Court should not interfere so long as fundamental rights and principles of natural justice are not violated and it would be apt to reproduce para-9 of the judgment which reads thus:-

"9. Before we deal with the above contentions advanced before us on behalf of both sides, it is necessary to state that the High Court in the judgment under attack has made certain observations regarding what according to it should be the policy adopted by the educational authorities in the matter of permitting the starting of a new school or of an additional school in a particular locality or area. It is enough to state that the High Court has thoroughly misunderstood the nature of the jurisdiction that was exercised by it when dealing with the claims of the two writ petitioners that their applications had been wrongly rejected by the educational authorities. So long as there is no violation of any fundamental rights and if the principles of natural justice are not offended, it was not for the High Court to lay down the policy that should be adopted by the educational authorities in the matter of granting permission for starting schools. The question of policy is essentially for the State and such policy will depend upon an overall assessment and summary of the requirements of residents of a particular locality and other categories of persons for whom it is essential to provide facilities for education. If

the overall assessment is arrived at after a proper classification on a reasonable basis, it is not for the courts to interfere with the policy leading up to such assessment."

22. A similar issue with regard to shifting of school from one place to another came up for consideration before the Hon'ble Supreme Court in ***Raj Shikshan Prasarak Mandal*** *versus* ***State of Maharashtra and others (2001) 10 SCC 75*** and it was held that the High Court should not interfere with the Government order granting permission to shift the school in absence of it being malicious, arbitrary or whimsical and it is apt to reproduce para-3 of the judgment which reads thus:-

"3.....The shifting of the school from one place to the other or having an ashram school at one place is not governed by any statutory rules and it is in fact a policy decision of the Government. So long as the government decision is not actuated with any malice or is not the outcome of an arbitrary and whimsical act, the same should not be interfered with by a court of law under Article 226 of the Constitution of India....."

23. Similar reiterations of law can be found in **CWP No.621 of 2014 titled as Nand Lal and another versus State of H.P. & others, CWP No.7115 of 2013 titled as Sher Singh versus State of H.P. & others, CWP No.4625 of 2012 titled as Gurbachan versus State of H.P. & others, CWP No.3862 of 2014 titled as Surinder Kumar versus State of H.P. and others, CWP No.2927 of 2015 titled as Rikhi Ram and another versus State of H.P. and others, CWP No.359 of 2016 titled as Ranjan Singh and others versus State of H.P. and others, CWP No.1764 of 2012 titled as Meena Kumari versus Union of India and others and CWP No.1307 of 2016 titled as Mohan Dutt and another versus Union India and others.**

24. As we are only dealing with the prayer of vacation of stay, we need not to delve in detail in merits of the case. Suffice it to say that prima facie we do not find the action of the respondents in opening the college at Jandaur to be either malicious, arbitrary or whimsical. That apart, the decision taken by the respondents cannot be termed to be unconstitutional or dehors the provisions of any Act or Regulation or even notification dated 02.01.2014. The decision is not even contrary to the statutory provision and larger public policy, but appears to have been taken after due care and consideration.

25. In addition to the aforesaid, it appears that the petitioners at the time of passing of interim orders had not even brought to the notice of this Court the fact that the decisions qua de-notifying the Degree College at Kotla Behr dated 02.03.2013 had already been upheld by this Court in CWP No.1526 of 2013 titled Harbans Lal Kalia versus State of Himachal Pradesh and another.

26. Moreover, no reliance, at this stage, can be placed on the judgment rendered by this Court in CWP No.1526 of 2013 (supra) as the same has been stayed and the matter is now sub-judice before the Hon'ble Supreme Court.

27. That apart, the petitioners during the course of hearing of this petition had repeatedly sought adjournments, firstly, on the ground that they wanted to move a transfer petition before the Hon'ble Supreme Court in Special Leave Petition C.C.No.21698 of 2015 as mentioned in para-5 (supra) and thereafter after having preferred a Transfer Petition (Civil) No.1173 of 2016 sought adjournment on the ground that the application is likely to take up for consideration before the Hon'ble Supreme Court. However, the facts remains that the application though stands filed, yet no orders till date have been passed thereupon.

28. As observed earlier, the decision to open a college at Jandaur, prima facie, appears to have been taken in the larger public interest and, therefore, the said decision cannot be stayed indefinitely. We are, therefore, of the considered view that the interim order passed by this Court on 27.05.2016 whereby the notification dated 16.05.2016 (Annexure P-11) to the extent it pertains to the opening of Degree College at Janduar has been stayed deserves to be

vacated. Ordered accordingly. However, it is made clear that in case the respondents open the college at Jandaur, the same shall be subject to the final outcome of this petition. The application is accordingly disposed of in the aforesaid terms.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Sh. B.R.Sammi son of late Sh Sohan Lal. ....Revisionist..

Vs.

Sh. Narinder Singh son of Niranjan Singh and another. ....Non-revisionists.

Civil Revision No. 133 of 2014.
Order reserved on: 14.9.2016.
Date of Order: November 8, 2016**.**

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

Cases referred:

Kala and another Vs. Madho Parshad Vaidya, AIR 1998 SC 2773
Resham Singh Vs. Raghbir Singh and another, AIR 1999 SC 3087
Benjamin Premanand Rawade Vs. Anil Joseph Rawade, 1998 (9) SCC 688
Nedunuri Kameswaramma Vs. Sampati Subba Rao, AIR 1963 SC 884 (Full bench)
Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality Vs. K.N.Palsikar, AIR 1969 SC 580
P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao, AIR 1995 SC 1357
Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 SC 1004

For revisionist: Mr.R.K.Sharma Sr. Advocate with Ms.Anita Parmar, Advocate.
For Non-revisionists. Mr. Vikas Rathore, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed under Section 24 (5) of HP Urban Rent Control Act 1987 against order dated 31.3.2014 passed in rent appeal No. 13 of 2013 whereby learned Appellate Authority dismissed the appeal and affirmed order dated 31.7.2012 passed by learned Rent Controller Chamba in rent petition No. 1 of 2010 title Sh. B.R Sammi Vs. Sh. Narinder Singh and another.

BRIEF FACTS OF CASE:

2. Sh. B.R.Sammi landlord filed eviction petition against tenant under section 14 of HP Urban Rent Control Act 1987 pleaded therein that demised premises was rented out at the rate of Rs.300/- (Three hundred) per month on 1.4.1998. It is further pleaded that demised premises is commercial in nature situated in ward No.8 locality upper Julakari Chamba Town District Chamba H.P. It is further pleaded that non-revisionist No.1 has inducted non-revisionist No.2 as

sub tenant and non-revisionist No.2 is in exclusive possession of demised premises. It is further pleaded that tenant is also in arrear of rent w.e.f. 1.3.1999 to the tune of Rs.39600/- (Thirty nine thousand six hundred). Prayer for acceptance of eviction petition sought.

3. Per contra response filed on behalf of tenant pleaded therein that landlord has got no cause of action to file eviction petition. It is further pleaded that landlord is estopped by his own act and conduct to file eviction petition. It is further pleaded that eviction petition is barred by time. It is further pleaded that shop is used as workshop for the purpose of manufacturing small steel articles such as trunks and other steel articles. It is further pleaded that demised premises is in exclusive possession of tenant Narinder Singh. It is further pleaded that tenant did not induct any sub tenant in the demised premises. It is further pleaded that father of tenant namely Niranjan Singh was tenant at Dogra market Chamba HP and shop in the possession of father of tenant was destroyed in fire incident in the year 1988 at Dogra market Chamba. It is further pleaded that government of HP in order to rehabilitate fire victims of Dogra market Chamba provided a stall to the father of tenant at chowgan No.3 Chamba HP. It is further pleaded that steel products such as almirahs, chairs, tables, trunk used to be manufactured by tenant Narinder Singh and used to be sold by his father Niranjan Singh at chowgan No.3 Chamba. It is further pleaded that after death of the father of tenant non revisionist No.2 Sh Harinder Singh who is real younger brother of Sh Narinder Singh started sale of above mentioned steel articles at chowgan No.3 Chamba HP. It is further pleaded that non-revisionist No.2 namely Sh Harinder Singh has no right, title and interest in demised premises. It is further pleaded that no arrears of rent is due to landlord. Prayer for dismissal of eviction petition sought. Landlord filed rejoinder and reasserted the allegations mentioned in eviction petition.

4. As per pleadings of parties following issues framed by learned Rent Controller.

1.Whether demised premises is in possession of co-respondent No.2 or sublet without permission of landlord as alleged? …OPP.

2.Whether tenant is in arrears of rent w.e.f. 1.3.1999 onwards if so its effect? …OPR.

3.Whether landlord has no cause of action to file present petition?…OPR.

4. Whether landlord is estopped by his own act and conduct to file present petition? …OPR.

5.Whether eviction petition is time barred? …OPR

6. Relief.

5. Learned Rent Controller decided issue Nos.1,3,4 and 5 in negative and decided issue No.2 in affirmative. Learned Trial Court partly allowed eviction petition and ordered eviction of tenant Narinder Singh on account of arrears of rent w.e.f. 1.3.1999 at the rate of Rs.300/- per month. Learned Rent Controller directed tenant to pay Rs.48370/- (Forty eight thousand three hundred seventy) to landlord with interest @ 9% per annum till date. Learned Rent Controller further directed that tenant would not be evicted if arrears of rent is paid within 30 days from the date of eviction order. Learned Rent Controller dismissed eviction petition on the ground of subletting.

6. Feeling aggrieved against the order of learned Rent Controller landlord filed appeal before learned Appellate Authority. Learned Appellate Authority vide order dated 31.3.2014 dismissed appeal and affirmed order of learned Rent Controller.

7. Feeling aggrieved against the order of learned Appellate Authority revisionist landlord filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionists and also perused entire record carefully.

9. Following points arise for determination in present revision petition:

1. Whether revision petition filed under section 24(5) of HP Urban Rent Control Act 1987 is liable to be accepted as mentioned in memorandum of grounds of revision petition?.

2. Relief.

10. Findings upon point No.1 with reasons:

10.1. PW1 Sh Baldev Raj has tendered in evidence Ext PW1/A in examination-in-chief. There is recital in affidavit that demised premises was given upon rent to Narinder Singh son of Sh. Niranjan Singh in the year 1980 for eleven months. There is recital in affidavit that rent was Rs.300/- per month. There is recital in affidavit that after 28.2.1999 tenant Narinder singh did not pay rent. There is further recital in affidavit that Narinder Singh has sublet demised premises to his brother Harinder Singh. There is further recital in affidavit that demised premises is in possession of Harinder Singh as of today. There is further recital in affidavit that possession of demised premises be handed over to landlord. Landlord has tendered into evidence documents Ext P1 to Ext P15. In cross-examination PW1 has admitted that rent receipts Ext R1 to Ext R83 have been issued by him. PW1 has stated that he does not know that fire incident took place at Dogra market Chamba HP. PW1 has admitted that Niranjan Singh father of tenant used to work in stall No.3 at chowgan Chamba HP. PW1 has admitted that trunks and almirahs are manufactured in demised premises and sold in stall No.3 at Chowgan Chamba HP. PW1 has admitted that Niranjan Singh father of tenant has died. PW1 has admitted that after death of Niranjan Singh his son non-revisionist Harinder Singh started working in stall No.3 at Chowgan Chamba HP. He has denied suggestion that demised premises is in exclusive possession of Narinder Singh. He has denied suggestion that Narinder Singh is manufacturing steel articles in demised premises. He has denied suggestion that there is no subletting in demised premises.

10.2 PW2 Om Parkash Patwari has tendered in evidence field map Ext PW2/A. He has stated that field map is correct as per factual position and the same was prepared by him.

10.3 PW3 Umesh Kumar has stated that he is working in Trackon courier. He has stated that he went to deliver courier Ext P1 to Ext P4 but same could not be delivered and he submitted his report. In examination-in-chief PW3 has stated that he did not go to serve courier personally but his son Balbir Singh went to deliver courier. PW3 has stated that his son Balbir Singh is alive and working along with him. PW3 has stated that report is in his handwriting and further stated that report is not in the handwriting of his son.

10.4 RW1 Ram Kumar has tendered in evidence affidavit Ext RW1/A in examination-in-chief. There is recital in affidavit that RW1 is working in bank as dealing clerk since four years. RW1 has stated in cross examination that record relating to Niranjan Singh has been destroyed in accordance with rules. RW1 has admitted that cheque book and pass book issued by bank in favour of Niranjan Singh are correct.

10.5 RW2 Ramesh Chand has tendered in evidence affidavit Ext RW2/A in examination-in-chief. There is recital in affidavit that RW2 is posted in fire department since fourteen years. There is recital in affidavit that in the year 1988 fire took place at Dogra market Chamba HP and many shops and articles kept in shop were destroyed in fire at Dogra market Chamba.

10.6 RW3 Narinder Singh has tendered in evidence affidavit Ext RW3/A in examination-in-chief. There is recital in affidavit that father of Narinder Singh used to work at Dogra market Chamba HP. There is further recital in affidavit that in the year 1988 fire incident took place in Dogra market Chamba and many shops destroyed in fire. There is further recital in affidavit that thereafter Himachal government allotted a stall at Chowgan No.3 Chamba HP to the father of Narinder Singh. There is further recital in affidavit that steel furniture was manufactured in demised premises and same was sold in the stall. There is further recital in affidavit that after death of father of tenant younger brother of tenant namely Harinder Singh started selling manufactured articles from stall No.3 Chowgan Chamba. There is further recital in affidavit that demised premises is in exclusive possession of Narinder Singh tenant. There is

further recital in affidavit that manufactured articles are sold at Chowgan No.3 by Harinder Singh. In cross examination RW3 has denied suggestion that when he shifted to Sultanpur then demised premises came in exclusive possession of his brother Harinder Singh. RW3 has denied suggestion that he has sublet demised premises to his brother Harinder Singh. RW3 has denied suggestion that he did not pay rent w.e.f. 1.3.1999 to 31.3.2010.

10.7 RW4 Harinder Singh has filed affidavit Ext RW4/A in examination-in-chief. There is recital in affidavit that demised premises is situated in upper Julakhari. There is further recital in affidavit that Narinder Singh is tenant of demised premises since 1980. There is further recital in affidavit that tenant Narinder Singh is manufacturing steel furniture in demised premises. There is further recital in affidavit that father of RW4 used to work at Dogra market Chamba. There is further recital in affidavit that in the year 1988 due to fire Dogra market was destroyed and thereafter Himachal government allotted stall at Chowgan Chamba. There is further recital in affidavit that father of tenant used to sale steel furniture in the stall. There is further recital in affidavit that after the death of father of tenant Sh Harinder Singh is selling manufactured steel furnitures in stall No.3. There is further recital in affidavit that Harinder Singh has no interest in demised premises. There is further recital in affidavit that demised premises is in the possession of tenant Narinder Singh. RW4 has denied suggestion that Narinder Singh has shifted to Sultanpur. RW4 has denied suggestion that he is running demised premises. RW4 has denied suggestion that he is in exclusive possession of demised premises. RW4 has denied suggestion that Narinder Singh has sublet demised premises to him.

11. Following documentaries evidence adduced by parties.(1) Ext. P1 is the notice. (2) Ext P2 to Ext P4 are envelopes. (3) Ext. PW2/A is field book. (4) Ext.P5 is jamabandi pertaining to the year 2005-06. (5) Ext P6 is the letter issued to General Manager by landlord. (6) Ext.P7 & P8 are reply of the letter to landlord by General Manager. (7) Ext.P9 & Ext P10 are letter issued to Labour Inspector by landlord. (8) Ext P11 is reply of letter to landlord by Labour Inspector. (9) Ext.P16 is rent deed. (10) Ext.R1 to Ext R83 are receipts of rent. (11) Ext.R84 to Ext R86 are copies of passbooks. (12) Ext.R87 to Ext.R91 are copies of cheque books.

12. Submission of learned Advocate appearing on behalf of revisionist that it is proved on record as per testimony of RW3 Narinder Singh that demised premises was subletted to Harinder Singh and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that Sh Narinder Singh and Harinder Singh are real brothers. Court has carefully perused testimony of RW3 Narinder Singh recorded by learned Rent Controller. It is well settled law that testimony of witnesses recorded in judicial proceedings should be read as a whole and should not be read in isolation in order to determine the disputed facts. RW3 Narinder Singh has specifically stated in positive manner when he appeared in witness box that demised premises is in his possession and he is running demised premises. RW3 Narinder Singh has specifically stated in positive manner that he is proprietor of business running in demised premises. RW3 Narinder Singh has denied suggestion that he has sublet demised premises to his brother Sh Harinder Singh. It is well settled law that in order to prove subletting initial onus is upon landlord to prove subletting. It is well settled law that in order to prove subletting the relationship of lessor and lessee between tenant and sub tenant should be proved in accordance with law. It is well settled law that under section 105 of Transfer of Property Act 1882 the transferor is called the lessor, transferee is called lessee, price is called the premium and the money, share, service or other thing to be so rendered is called the rent. In the present case landlord did not prove relation of lessor and lessee between Narinder Singh and Harinder Singh. There is no evidence of payment of premium between Narinder Singh and Harinder Singh. In the present case there is no evidence of payment of any rent by Harinder Singh to Narinder Singh. Landlord did not adduce any eye witness of subletting from locality in present case. There is no document of subletting placed on record on behalf of landlord in the present case executed by Narinder Singh and Harinder Singh. Hence it is held that ingredients of subletting of demised premises are not proved on record in present case between Narinder Singh and Harinder Singh. It is proved on record that Harinder Singh is real brother of tenant Narinder Singh. It is well settled law that assisting brother in business did not fall within definition of

subletting. See AIR 1998 SC 2773 title Kala and another Vs. Madho Parshad Vaidya. See AIR 1999 SC 3087 title Resham Singh Vs. Raghbir Singh and another. See 1998 (9) SCC 688 title Benjamin Premanand Rawade Vs. Anil Joseph Rawade.

13. Submission of learned Advocate appearing on behalf of revisionist that revisionist filed application under order 41 rule 27 CPC for placing on record additional evidence and learned Appellate Authority did not allow application for additional evidence which cause miscarriage of justice to revisionist and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court has perused record of learned Appellate Authority carefully. Learned Appellate Authority has allowed application filed under order 41 rule 27 CPC by landlord vide order dated 21.3.2014 and letter No. 1070 and 1071 have been allowed to be exhibited and have been exhibited as Ext PX and PY subject to cost of Rs.200/-. Hence plea of learned Advocate appearing on behalf of revisionist that learned Appellate Authority did not allow application under order 41 rule 27 CPC is devoid of any force.

14. Submission of learned Advocate appearing on behalf of revisionist that learned Rent Controller did not frame proper issues as per pleadings of parties and on this ground revision petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Learned Rent Controller framed issues on 1.12.2010 in the presence of learned Advocates and there is recital in order sheet that issues were read over and explained to the parties. Landlord did not claim additional issue before learned Rent Controller. Even landlord did not file any application before learned Rent Controller for framing additional issues. In the present case parties went to trial fully knowing the rival case and led all evidence not only in support of their contentions but also in refutation of other parties. It is held that non framing of issue is not fatal to landlord in the present case. See AIR 1963 SC 884 (Full bench) title Nedunuri Kameswaramma Vs. Sampati Subba Rao.

15. Submission of learned Advocate appearing on behalf of revisionist that it is proved on record that Sh Narinder Singh is exclusive proprietor of M/s Madhur Steel Furniture Udyog in Sultanpur locality and Sh Harinder Singh is exclusive proprietor of M/s Niranjan Singh and Sons in demised premises as per documents furnished before Sale Tax office and Labour department and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Landlord did not examine any official from Sale Tax office and Labour department. In the present case landlord himself appeared as PW1 in witness box and examined PW2 Om Parkash patwari who proved only tatima (Field map) Ext PW2/A placed on record and examined PW3 Umesh who is posted in courier service. Landlord did not examine any official from Sale Tax office and Labour department in order to prove subletting of demised premises. Hence adverse inference under section 114(G) of Indian Evidence Act 1872 is drawn against landlord in present case.

16. Submission of learned Advocate appearing on behalf of revisionist that learned Rent Controller has ignored documents Ext P7 and Ext P8 placed on record and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court has perused document Ext P7 carefully. Document Ext P7 has signed by General Manager District Industries Centre Chamba HP. Landlord did not examine General Manager District Industries Centre Chamba in Court who has signed document Ext P7 placed on record. It is well settled law that contents of document can be proved by way of witness who is signatory to the document as per Indian Evidence Act 1872. It is held that document Ext P7 did not prove subletting of demised premises between Narinder Singh and Harinder Singh. Court has also perused document Ext P8 placed on record. Document Ext P8 is certificate issued by General Manager District Industries Centre relating to registration of M/s Madhur Steel Furniture Udyog Julakhari Chamba HP. Document Ext P8 did not prove subletting of demised premises in favour of Harinder Singh by Narinder Singh.

17. Submission of learned Advocate appearing on behalf of revisionist that learned Rent Controller and learned Appellate Authority has committed grave error by ignoring the fact that landlord had served number of notice upon tenant regarding subletting and tenant did not

rebut the allegation of subletting and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that non-filing of reply to notice issued by landlord prior to litigation in court did not mean that subletting of demised premises is admitted by tenant in judicial proceedings. There is no document on record in order to prove that tenant has admitted subletting in favour of Harinder Singh qua demised premises in judicial proceedings. It is well settled law that when response is not filed by adverse party to notice issued prior to litigation then aggrieved party can claim costs of entire litigations from adverse party.

18. It is well settled law that concurrent findings of fact of learned Rent Controller and learned Appellate Authority should not be disturbed by High Court unless findings of learned Rent Controller and learned Appellate Authority are perverse. In the present case it is held that findings of learned Rent Controller and learned Appellate Authority are not perverse but are based upon oral as well as documentary evidence placed on record. See AIR 1991 SC 455 title Masjid Kacha Tank Nahan Vs. Tuffail Mohammed. See AIR 1969 SC 580 title Indore Municipality Vs. K.N.Palsikar. See AIR 1995 SC 1357 title P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao. See AIR 2002 SC 1004 title Gurdial Singh Vs. Raj Kumar Aneja. In view above stated facts and case law supra point No.1 is answered in negative.

Point No.2 (Relief).

19. In view of findings on point No.1 revision petition is dismissed. Orders of learned Rent Controller and learned Appellate Authority affirmed. Parties are left to bear their own costs. File of learned Rent Controller and learned Appellate Authority along with certify copy of order be sent back forthwith. Revision petition is disposed of. Pending application(s) if any also disposed of.

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

Dinesh Kumar .....Petitioner

Versus

Jyoti Prakash and others .....Respondents.

CMPMO No. 308 of 2016.
Reserved on: 4.11.2016
Date of decision : November 8th, 2016

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

Cases referred:

Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370
Dalip Singh v. State of U.P., (2010) 2 SCC 114
Satyender Singh v. Gulab Singh, 2012 (129) DRJ, 128
Sky Land International Pvt. Ltd. v. Kavita P. Lalwani, (2012) 191 DLT 594
A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and ors. (2012) 6 SCC 430
Kishore Samrite Vs. State Of Uttar Pradesh and ors. (2013) 2 SCC 398

For the Petitioner : Mr. Hamender Singh Chandel, Advocate.
For the Respondents : Mr. Maan Singh, Advocate, for respondent No.1 and 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned trial Court on 15.3.2016 whereby the applications filed by the respondents No.1 and 4 under Order 9 Rule 4 CPC have been allowed and orders dated 19.3.2011 and 21.11.2012 whereby these respondents had been proceeded ex-parte has been ordered to be set aside.

The facts in brief may be noticed thus.

2. The petitioner has filed suit for recovery against the respondents which is pending before the Learned trial Court. The respondents No.1 and 4 were duly served and did not contest the suit for 4-5 years and it is only thereafter that they filed applications for setting aside exparte order, which applications as observed above has been ordered to be allowed by the Learned trial Court.

3. The grievance of the petitioner is that the application(s) filed by respondents No.1 and 4 could not have been allowed as the same was based on falsehood. He has invited my attention to the application firstly filed by respondent No.1 wherein it is averred that the respondent has been serving in the Indian Army for the last 3 years and remained posted in the most sensitive areas. In addition to that he also remained on deputation with VIPs and as such did not receive any notice from the Court and was proceeded exparte on 19.3.2011. He further invited my attention to the summons issued to respondent No.1 which were infact duly received by his wife and at the time the respondent No.1 himself was available at home.

4 As regards, the respondent No.4, the application filed for setting aside the ex parte order discloses that the only reason given for non-appearance is that she was residing at Ludhiana and came to know about the pendency of the case when she visited her native place. Where as, the notice issued to respondent No.4 which has been appended as Annexure P-1 with the petition discloses that the petitioner had personally received the summons on 16.2.2011 and therefore the explanation offered by her, like the one offered by the respondent no.1, is totally false.

5. Ordinarily, this Court would not interfere with matters which pertain to setting aside of exparte orders as it is more than settled that when technicalities are pitted against substantive justice, then obviously substantive justice has to prevail. However, the said principle would not apply to a case where a party does not approach the Court with clean hands, clean mind and a clean heart.

6. It is proved on record that the defence set up by the appellant was absolutely false. ***In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370,*** the Hon'ble Supreme Court held that false claims and defences are serious problems with the litigation. The Hon'ble Supreme Court held as under:-

> *84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent."*

7. In ***Dalip Singh v. State of U.P., (2010) 2 SCC 114***, the Hon'ble Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any

respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-

> *"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.*
>
> *2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."*

8. In ***Satyender Singh v. Gulab Singh, 2012 (129) DRJ, 128***, the Division Bench of Delhi High Court following Dalip Singh v. State of U.P. (supra) observed that the Courts are flooded with litigation with false and incoherent pleas and tainted evidence led by the parties due to which the judicial system in the country is choked and such litigants are consuming Courts" time for a wrong cause."

The observations of Court are as under:-

> *"2. As rightly observed by the Supreme Court, Satya is a basic value of life which was required to be followed by everybody and is recognized since many centuries. In spite of caution, courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court. Indeed, it is a nightmare faced by a Trier of Facts; required to stitch a garment, when confronted with a fabric where the weft, shuttling back and forth across the warp in weaving, is nothing but lies. As the threads of the weft fall, the yarn of the warp also collapses; and there is no fabric left."*

9. In **Sky Land International Pvt. Ltd. v. Kavita P. Lalwani,** (2012) 191 DLT 594, Delhi High Court held as under:-

> *"26.20 Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.*
>
> *xxx xxx xxx*
>
> *26.22 Unless the Courts ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the Courts" scarce and valuable time is consumed or more*

appropriately wasted in a large number of uncalled for cases. It becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that the dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

10. The judicial system has been abused and virtually brought to its knees by unscrupulous litigants like the respondents No.1 and 4.. It has to be remembered that Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants.

11. In **A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam and ors. (2012) 6 SCC 430**, the Hon'ble Supreme Court held as under:-

"27. The pleadings must set forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the court must carefully look into it while deciding a case and insist that those who approach the court must approach it with clean hands."

12. In **Kishore Samrite Vs. State Of Uttar Pradesh and ors. (2013) 2 SCC 398**, the Hon'ble Supreme Court observed as under:

"32.The cases of abuse of process of court and such allied matters have been arising before the courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

32.1. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

32.2. The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

32.3. The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

32.6. The Court must ensure that its process is not abused and in order to prevent abuse of process of court, it would be justified even in insisting on furnishing of

security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

32.7. Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

32.8. The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it. [Refer : Dalip Singh v. State of U.P. & Ors. (2010) 2 SCC 114; Amar Singh v. Union of India & Ors. (2011) 7 SCC 69 and State of Uttaranchal v Balwant Singh Chaufal & Ors. (2010) 3 SCC 402].

33. Access jurisprudence requires Courts to deal with the legitimate litigation whatever be its form but decline to exercise jurisdiction, if such litigation is an abuse of the process of the Court. In P.S.R. Sadhanantham v. Arunachalam & Anr. (1980) 3 SCC 141, the Court held:

> *"15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:*
>
> > *"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement the most basic 'human-right' of a system which purports to guarantee legal rights."*
>
> *16. We are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bona fide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action, pro bono proceedings, are. We cannot dwell in the home of processual obsolescence when our Constitution highlights social justice as a goal. We hold that there is no merit in the contentions of the writ petitioner and dismiss the petition."*

13. There is a legal duty cast upon a party to come to the Court with the true case or defence and prove it by true evidence. The Court of law is meant for imparting justice between the parties. One who comes to the Court, must come with clean hands and a person whose case is based on falsehood has no right to approach the Court and can be summarily thrown out at any stage of the litigation.

14. Adverting to the impugned order, it would be noticed that the learned Court has simply chosen to rely upon the contents of the application only because the same was supported by the affidavit of the respondents. Despite the factual aspects being disputed, it did not care to verify the factual position from the records and proceeded to allow the application by observing that expression sufficient cause should be construed to advance substantial justice and the Court should not take strict and pedantic approach and that the petitioner could conveniently be compensated by imposing cost and then proceeded to award Rs.1,500/- as cost.

15. Obviously, learned trial Court has fallen in error in relying upon the contents of the averment which were clearly belied by the documents placed on record more particularly the summons that have been received back after the service of respondents No.1 and 4. Therefore, the ultimate award of costs would be no panacea in such cases, since the mischief cannot be

repaired. The order passed by the learned Court below is clearly unsustainable and is therefore set aside.

16. Consequently, the petition is allowed in the aforesaid terms, leaving the parties to bear their cost. Pending application, if any, also stands disposed of.

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

Hari Singh ....Petitioner.

Versus

State of H.P. & others. ...Respondents.

CWP No.338 of 2015.
Reserved on : 25.10.2016.
Date of Judgment: 08.11.2016.

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

For the petitioner Mr. G.R. Palsra, Advocate.

For the respondents Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Pushpinder Singh Jaswal, Dy. Advocate General, for respondents No.1 and 2.
Mr. Lovneesh Kanwar, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner against the respondents praying therein for the following substantive relief :

> "That the orders dated 25.3.2000 (Annexure P-2), 23.2.2001 (Annexure P-4) and 20.12.2014 (Annexure P-9), may kindly be quashed and set aside by issuing a writ of certiorari."

2. As per the petitioner, the consolidation proceedings were initiated in Muhal Chail/51 by the consolidation staff in the year 1988 and the same was completed in the year, 1992. The petitioner and respondent No.3 are entitled to equal shares in the property of Shri Karam Singh. Prior to consolidation Khasra Nos.237 and 242 old, which were situated near the road side were given new Khasra No.237 are 190 and 191. Old Khasra No.242 is given new Khasra numbers i.e. 195 and 196. Khasra No.191 and 195 were allotted to the petitioner and Khasra No.190 and 196 were allotted to respondent No.3. The front side area of Khasra No.191 is 28 karam and front side area of Khasra No.195 is 11 karam, similarly the front side area of Khasra No.190 is 10 karam and Khasra No.196 is 30 karam. Total 40 karam front side area was allotted to respondent No.3 and total front side area of 39 karam was allotted to the petitioner. Respondent No.3 with malafide intention and ulterior motive without filing any objection and appeal directly filed revision under Section 54 of the Consolidation Act before the Director of Consolidation, Shimla, on 6.11.1999 after more than seven years. The Director of Consolidation, Mandi, remanded back the case to the Consolidation Officer, Mandi, to decide the case after verifying the spot and hearing the necessary parties, vide order dated 25.3.2000. It is further

averred that respondent No.3 has sold her front side area allotted to her in Khasra No.190 to Smt. Chamba Devi and others through sale deed No.29 dated 1.2.1993. Respondent No.3 has further sold Khasra No.196 to Mitar Dev and others through sale deeds No.158 dated 19.4.1995, 102 dated 3.3.1994, 134 dated 8.6.1993 and 54 dated 6.2.2001 and mutation No.273, 381, 290, 292 and 452 have been attested after the sale of Khasra No.190 and 196, as a whole to Smt. Champa Devi and others. The Consolidation Officer, Mandi, without verifying the spot and considering the directions issued by the Director Consolidation dated 25.3.2000, allowed the case of respondent No.3 on 23.2.2001 and cancelled the area of Khasra No.191 measuring 0-2-6 and 195 measuring 0-5-5 total area measuring 0-7-11 bigha, which was allotted to the petitioner and allotted the same to respondent No.3 in lieu of Khasra No.38/1 measuring 0-7-11 bigha. The petitioner and respondent No.3 are entitled to equal shares in Khasra No.242 old, new Khasra Nos.195 and 196. Thereafter, the petitioner filed an appeal under Section 30 (3) of Consolidation Act, before the Settlement Officer (Consolidation), Bilaspur, H.P, against the order of Consolidation Officer, Mandi, dated 23.2.2001, the same was allowed, vide order dated 28.11.2001, in which the order dated 23.2.2001, was set aside by holding that respondent No.3 has already allotted 40 Karam land on the front towards road side, as there is total area of front 79 karam of the petitioner and respondent No.3, which was jointly owned and possessed by them before the consolidation proceedings. Thereafter, respondent No.3 filed an appeal under Section 30 (4) of the Consolidation Act, against the order dated 28.11.2001, which was dismissed by Additional Deputy Commissioner, Mandi, on 19.7.2013 confirming the order dated 28.11.2001. Respondent No.3 challenged the order dated 19.7.2013 by filing revision petition before respondent No.2, the same was allowed, vide order dated 20.12.2014.

3. Respondents No.1 and 2 has not been filed reply to the petition.

4. In reply on behalf of respondent No.3, it is averred that the consolidation proceedings were carried out in the area, during the year 1992-93 and the Consolidation staff had prepared a scheme for carrying out the consolidation, wherein it has been provided that the land adjacent to the road would be allotted to the persons, who are in its possession. Replying respondent was in possession of the land adjacent to the road, as such the same was to be allotted to the replying respondent, but the same was wrongly allotted to the petitioner. Khasra No.196 is not a part of Khasra No.242 and in fact is an independent number, which was exclusively in possession of the replying respondent, as such the same was allotted to the replying respondent. Khasra No.237 (old) is measuring 0-4-17 bigha and khasra No.242 (old) is measuring 0-13-10 bigha. After completion of the consolidation proceedings Khasra No.237 was renumbered as Khasra No.190 and 191. After consolidation proceedings Khasra No.242 was renumbered as Khasra numbers 194 and 195. From the perusal of *Aks Musabi,* it revealed that the front of Khasra No.190 is 10 Kara and the front of Khasra No.191 is 28 Karam. Similarly front of Khasra No.195 is 11 Karam. Khasra No.196 was in exclusive possession of the replying respondent and the front of Khasra No.29 karam. Before consolidation proceedings replying respondent was in possession of 23 Karam of land in front of the road in Khasra No.237 (190 & 191 new) and 11 karam of land in front of the road in Khasra No.242 (194 & 195 new). During consolidation proceedings, replying respondent was only allotted 10 karam of land, on the road front in Khasra No.237, as such there was a deficiency of 13 karam in the share of replying respondent of the land on the front of the road in Khasra No.237. Similarly, no land on the road head was allotted to the replying respondent in Khasra No.242, despite the fact that the replying respondent was in possession of 11 karam of land in this khasra number on the front of the road prior to the consolidation. Replying respondent was in actual physical possession of the land and even after completion of the consolidation proceedings, the petitioner does not interfere in the possession. Replying respondent remained under bonafide belief that since the scheme provided for the allotment of land in front of the road of the persons, who are in its possession, as such the same would have been given to her. The petitioner for the first time interfered in the peaceful possession of the replying respondent in the year 1999, at that time the replying respondent inspected the revenue record and she was surprised to know that the wrong entries have been made in the revenue papers with regard to her possession in Khasra No.191 (new) and Khasra

No.195 (new). Respondent No.3 is an illiterate lady and was not aware about the entries changed during the consolidation proceedings and she came to know about the same only in the year 1999, when the petitioner interfered in her peaceful possession. Respondent No.3 was not aware about the illegality committed by the officials, as she remained under the bonafide belief that the possession on the road front would not be disturbed, as such the replying respondent was not filed objections under Section 30 (2) of the Consolidation Act. The possession of the land was with the replying respondent, but due to the fault of the officials of the consolidation department the entries in the revenue record were wrongly made, as such the replying respondent filed a revision petition before the Director, Consolidation of Holdings in the year 1999, the same was allowed, vide order dated 25.3.2000 and remanded the matter to the Consolidation Officer, Mandi. The petitioner never challenged the order dated 25.3.2000 before any Court and the same became final between the parties. The Learned Consolidation Officer, Mandi, visited the spot on 23.2.2001 in the presence of the parties and it was found that the replying respondent has been allotted 13 karam of less land in Khasra No.191 and 11 karam of less land in Khasra No.195 despite the fact that the replying respondent was in exclusive possession of the said land and she was entitled for the allotment of the same, as per the scheme. The present writ petition is not maintainable because the replying respondent has been allotted the share to which she was entitled, as per the scheme. The consolidation staff while carrying out the consolidation proceedings had made a mistake which had resulted in loss of share to the replying respondent on the road head and the mistake of the Consolidation staff has been corrected by the Consolidation Officer, Mandi, while passing the order dated 23.2.2001.

5. I have heard learned counsel for the parties and have also gone through the record of the case minutely.

6. At this stage, the only dispute is with respect to the land to be allotted to the parties only on the basis of the value of the land adjoining to the road and not on the basis of production out of the land. It cannot be disputed these days that the land adjoining to the road is commercial land and the categories of the land, as in the earlier times of consolidation/partition were '*आठआना*', '*बाराआना*', '*छेहआना*' and '*one rupee*', even when the land was adjoining to the road. In the present case, the petitioner is claiming the land adjoining the road near to the land allotted to respondent No.3.

7. After going through the order dated 20.12.2014 passed by the learned Revisional Court, this Court finds that the learned Revisional Court has not taken into consideration these facts. It is true that at the time of allotment of the land in the partition or consolidation, the possession of the parties is to be protected. At the same point of time, if the scheme doesn't provides for the protection of the possession, the petitioner is entitled to the equal shares alongwith the road side. So, I find that the learned Revisional Court while answering the findings has not taken into consideration the scheme, which was prepared prior to the consolidation, but the said scheme has neither referred nor discussed in the judgment. When the rights of the parties decided on the basis of some document, it was incumbent upon the learned Revisional Court, to have discussed the scheme in brief, which was prepared. At this stage, this Court finds that it is for the Revisional Court to come to the conclusion after reappreciating the scheme and the fact that in case, the scheme doesn't provide, the land of equal quantity i.e. the land near the road is required to be given to the parties equally, as has been done by the consolidation authorities at the additional stage and if there is scheme the learned Revisional Court is required to discuss the scheme in brief. At this stage, the matter requires appreciation of the document, as the parties looses his right to come to this Court by way of writ petition, this Court finds that the only order which can be passed at this stage is to direct the learned Divisional Commissioner, Mandi, to reconsider the case of petitioner and respondent No.3 afresh in view of the observation made hereinabove.

8. Resultantly, the impugned order dated 20.12.2014 passed by the learned Divisional Commissioner, Mandi, H.P, is ordered to be quashed and set aside with a direction to rehear the parties and to decide the revision petition afresh. Parties are directed to appear before

the learned Divisional Commissioner, Mandi, H.P, on ***5th December, 2016.*** Let a copy of this judgment be sent to the learned Divisional Commissioner, Mandi, for compliance.

9. In view of the above, the petition is disposed of, so also the pending application (s), if any. In the peculiar facts and circumstances of the case, parties are left to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Manav Kalyan Sanstha ....Petitioner.

Versus

State of Himachal Pradesh and others .....Respondents.

CMPs No.2040 & 8367 of 2016 in CWP No.529 of 2015.
Reserved on: 22.10.2016.
Date of decision: November 08, 2016.

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

For the Petitioner : Mr. Ravinder Singh Jaswal, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate, General with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No.1, 3 and 5 to 7.
Nemo for respondent No.2.
Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate, for respondent No.4.
Mr.K.D.Shreedhar, Senior Advocate with Mr. Yudhbir Singh Thakur, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

CMP No.2040 of 2016.

The petitioner/applicant has moved this application for producing on record additional documents which according to it are necessary for just and proper decision of the case.

2. Only respondent No.8 has contested the application and in turn placed on record plethora of documents.

3. The writ petition is only at the stage of completion of pleadings and, therefore, the application is allowed and documents accompanying the application as also the reply are taken on record and the parties shall be free to refer to them during the course of final hearing. Application stands disposed of.

CMP No.8367 of 2016.

4. This application has been filed by applicant/respondent No.8 for vacation of the interim orders dated 31.03.2016 (should be 30.03.2016) whereby this Court stopped the functioning of respondent No.8 Unit.

5. The instant writ petition has been filed in so-called public interest by 'Manav Kalyan Sanstha' which is a registered Society under the Societies Registration Act and appeared to be aggrieved by the setting up of a Bio Medical Waste Plant by respondent No.8 at Village and Post Office, Dugiari, Tehsil and District, Kangra, H.P. The establishment of the Unit, according to the petitioner, is proposed along the Manjhi Khad and, as a result thereof, the water sources in and around Manjhi Khad would be contaminated, the ambiance and quality of air as a result of discharge of toxic smoke would be affected from the discharge out of the 30 feet chimney erected in the plant. It is averred that the Bio Medical Waste Treatment Plant is being established without proper inspection of the site and the petitioner apprehends that the provisions of Act, Rules and Guidelines governing such Bio Medical Waste will be thrown to the winds and ultimately affect the health of residents of the area, who will have to bear the brunt only because of the inaction on the part of the official respondents.

6. The petitioner alongwith the main petition filed CMP No.908 of 2015 wherein directions were sought to the effect that respondent No.8 be directed to stop the operation of the Bio Medical Waste Treatment Plant (for short 'Plant') during the pendency of the petition.

7. The case appears to have been placed before the learned Vacation Judge and the following order came to be passed on 14.01.2015:-

> ***"CWP No.529 of 2015-C***
>
> Notice returnable within six weeks. List thereafter.
>
> ***CMP No.908 of 2015.***
>
> *Notice in the above terms. It is made clear that while constructing the Bio Medical Waste Treatment Plant, all the mandatory requirements shall be scrupulously followed. The persons responsible for construction work shall be personally liable for any breach of The Environment (Protection) Act, 1986 and the Rules framed thereunder. It is also made clear that water sources near the place of construction, shall not be polluted."*

8. Despite the aforesaid order, the petitioner during the vacations filed another miscellaneous application being CMP No.1500 of 2015 wherein the petitioner again made a similar request for directing respondent No.8 to stop the construction work of the plant. However, in view of the earlier order dated 14.01.2015, the subsequent application i.e. CMP No.1500 of 2015 was held to be not maintainable, as is evident from the order dated 16.02.2015 which reads thus:-

> ***"CMP No.1500/2015.***
>
> *In view of earlier order dated 14.1.2015, passed in CMP No.908/2015, the present application is not maintainable. The same is dismissed."*

9. The matter thereafter came up for consideration on 24.04.2015 and the Court directed that the pleadings be completed within four weeks. On 28.05.2015, the petition was admitted. However, despite the matter having already been admitted, it was again listed on 01.01.2016 under the head "*Admission Matters After Notice*". By this time, the only changed circumstance was that respondents No. 1, 3, 5, 6, 7 and 8 had already filed their replies wherein they had opposed the petition. However, despite this the petitioner obtained order of status quo which as observed earlier had already been denied to it at the initial stage. Eventually, the case was listed on 30.03.2016 on which date respondent No.8 was restrained from operating its Unit.

10. What is material at this point of time is the reply of respondent No.6, Executive Engineer, Irrigation and Public Health Department, Shahpur Division, wherein it has

categorically been averred that the 'No Objection Certificate' to set up a Servicing-Destroy of Bio Medical Waste had been issued by it subject to the condition that existing/proposed water supply schemes and irrigation schemes will not be disturbed. It is further averred that the existing Lift Irrigation Scheme, Dehrian and LWSS, Samirpur Tiara, Phase-I, are situated approximately 1 Km. and 1.5 Km. away from the plant. It is further submitted that while granting 'NOC' for setting up of the above Unit as many as 33 conditions have been imposed which are required to be strictly adhered to and complied with by respondent No.8 and in case of breach, respondent No.8 would be liable for civil and criminal action or both. It is also pointed out that the Pollution Control Board has also issued 'No Objection Certificate' which again is subject to certain mandatory conditions which have to be complied with by respondent No.8.

11. Respondent No.8, who is the Project proponent while filing reply to the writ petition has raised preliminary submissions specifically stating therein that the project being set up by it would in no manner affect the ecology and environment of the area as the project is using highly advanced technology whereby it will destroy the bio medical waste. It is also pointed out that a lot of investment has been put into the plant and the petition has been filed only on the basis of the apprehension which stands dispelled by the inquiry ordered by the Deputy Commissioner on the complaint filed by the petitioner, copy whereof has been annexed as Annexure R-8/2 with the reply. It is further averred that it was only after obtaining all the requisite permissions and 'No Objection Certificates' from all the concerned authorities that respondent No.8 established the Unit and thereafter invested huge money on this plant. Further, the work of the plant had been completed before filing of the writ petition and all the equipments, machinery and D.G. Set which are necessary for setting up the plant have already been installed in the plant and the same had been running smoothly.

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

12. Applicant/respondent No.8 has sought vacation of the interim orders on the ground that the petitioner has failed to point out any violation of any mandatory requirement of law. Whereas, on the other hand, applicant/respondent No.8 has obtained all the permissions, NOCs and other statutory and non-statutory clearances and after investing approximately one crore, out of which Rs. 70 lacs have been obtained by way of loan and had thereafter installed the plant. It has further been claimed that the life of the plant is hardly 5 years and had already started functioning on 26.12.2015, but had to stop its operation in view of the interim orders passed by this Court on 30.03.2016. Not only this, the monthly installment payable by applicant/respondent No.8 is Rs. 2,73,000/- per month.

13. We have gone through the contents of the writ petition and are prima facie of the view that the petitioner has not even remotely pleaded any violation of any statutory or non-statutory provisions and most of the pleas raised by it are far too general and more in the realm of speculation. Whereas, on the other hand, the specific case of the respondents, more particularly, respondent No.8 is that it had already obtained statutory and non-statutory clearances, NOCs and other requisite documents which are essential for making the Unit functional. That apart, we find that the 'NOC' granted by the Pollution Control Board is subject to as many as 33 conditions and we see no reason that in case respondent No.8 violates or chooses not to comply with any of these conditions, it would definitely invite action as permissible under the law. In addition to that, since we are keeping the petition pending, the petitioner would always be at liberty to approach this Court in case of violation of any condition (s) of the NOCs/clearances, or the provisions of the various legislations or rules framed thereunder. But, for the present, we are not inclined to restrain respondent No.8 from operating the Unit, particularly, when it has obtained statutory and non-statutory clearances, NOCs etc. and also invested an amount of nearly one crore rupees.

14. Accordingly, the application is allowed and the interim order dated 30.03.2016 is vacated. However, the petitioner/non-applicant is at liberty to approach this Court in case there is serious violation on the part of respondent No.8 of any of the conditions subject to which the

NOCs/clearances have been granted in its favour or in case there is violation of any statutory enactment or rules framed thereunder governing the field. Even otherwise, the permission to run the Unit shall be subject to the final outcome of this petition. The application is accordingly disposed of in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s United Electronics (India) Ltd. and another ...Appellants.
Versus
Ajay Kumar and others ...Respondents.

OSA No. 8 of 2015
Reserved on: 22.10.2016
Decided on: 08.11.2016

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

Cases referred:

Gopilal and another versus Sitaram and others, AIR 1968 Madhya Pradesh 196
Bakhsho versus Pakhar Singh and another, AIR 1985 Punjab and Haryana 322
L. Balu versus Periasami and others, AIR 1988 Madras 114
Shanti Devi versus H.P. Financial Corporation and others, 1997 (3) Sim. L.C. 256
Raja Shyam Sunder Singh and others versus Kaluram Agarala and others, AIR 1938 Privy Council 230
Vidya Bhan Prakash versus The Second Additional District Judge, Mathura and others, AIR 1988 Allahabad 204
Jaswantlal Natvarlal Thakkar versus Sushilaben Manilal Dangarwala and others, AIR 1991 Supreme Court 770
Janak Raj versus Gurdial Singh and another, AIR 1967 Supreme Court 608
Hukumchand versus Bansilal and others, AIR 1968 Supreme Court 86
M/s. Kayjay Industries (P) Ltd. versus M/s. Asnew Drums (P) Ltd. and others, (1974) 2 Supreme Court Cases 213

For the appellants: Mr. B.C. Negi, Senior Advocate, with Mr. Raj Negi, Advocate.
For the respondents: Mr. Ramakant Sharma, Senior Advocate, with Mr. Basant Thakur, Advocate, for respondent No. 1.
Mr. Ajay Kumar Dhiman, Advocate, vice Mr. Balwant Kukreja, Advocate, for respondent No. 2.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against orders, dated 27th March, 2015, 28th April, 2015, and 27th July, 2015, passed by the learned Single Judge in Execution Petition No. 1 of 2005, tilted as H.P. State Industrial Development Corporation versus M/s United Electronics (India) Ltd. and others (for short "the impugned orders").

2. At the very outset, we deem it proper to record herein that the appellants have filed this appeal while invoking the jurisdiction of this Court in terms of Order 43 Rule 1 (j) of the Code of Civil Procedure (for short "CPC") and is not an appeal as per the mandate of Section 96 of the CPC, as recorded in the cause title.

3. Learned counsel for the parties argued the case at length.

4. It is profitable to give a brief resume of the facts of the case, which have given birth to the instant appeal.

5. Decree Holder-Himachal Pradesh State Industrial Development Corporation (for short "HPSIDC") earned decree in Civil Suit No. 8 of 1999, titled as Himachal Pradesh State Industrial Development Corporation Limited versus M/s United Electronics (India) Ltd. and others, was constrained to file Execution Petition in the year 2004, i.e. on 31st December, 2004. Notice was issued on 4th January, 2005, remained on the dockets of the Court without service and ultimately OMP No. 138 of 2008 was filed by the Decree Holder-HPSIDC on 9th April, 2008 for attachment of the immovable property of Judgment Debtor No. 1, i.e. M/s United Electronics (India) Ltd. (for short "Company"), as described in para 3 of the said application. Thereafter, another application, being OMP No. 451 of 2008, was filed by the Decree Holder-HPSIDC under Order 21 Rule 54 read with Section 151 CPC. Warrant of attachment was ordered to be issued vide order dated 17th September, 2008.

6. OMP No. 315 of 2009 came to be filed by the Decree Holder-HPSIDC under Order 21 Rules 66 and 67 CPC read with Section 151 CPC on 9th July, 2009, for issuing advertisement qua sale of the attached property. The learned Single Judge directed to issue the proclamation vide order, dated 15th July, 2009.

7. The Judgment Debtor-Company moved OMP No. 413 of 2009 under Order 21 Rules 58 and 59 CPC read with Section 151 CPC on 18th August, 2009, for settling the process of auctioning the property afresh. It is apt to reproduce the relief sought for in the said application herein:

> *"That it would be in the interest of justice and fairness of law to allow the present application and settle the process of auctioning of the property afresh so that the Judgment Debtor is able to once and for all settle the alleged dues of the HPFC and PNB the other two secured creditors."*

8. The learned Single Judge, vide order, dated 25th August, 2009, passed in OMP No. 413 of 2009 (supra), ordered that sale of proclamation would disclose the value of the property as assessed by the Decree Holder and details of all encumbrances attached thereto. It was also provided that the sale would be subject to confirmation by the Court.

9. The Decree Holder-HPSIDC filed reply to the said application, i.e. OMP No. 413 of 2009, on 2nd September, 2009. Rejoinder thereto came to be field on 9th October, 2009. The application was disposed of vide order, dated 22nd October, 2009, by providing that no further orders were required to be passed in view of order, dated 25th August, 2009.

10. On 8th July, 2011, the Decree Holder-HPSIDC moved OMP No. 241 of 2011 seeking permission of the Court to carry out fresh evaluation of the assets, which was allowed by the learned Single Judge on 23rd August, 2011, and a direction was issued to the Decree Holder-HPSIDC to carry out fresh evaluation of the movable and immovable property. Fresh valuation

report was ordered to be taken on record vide order, dated 19th October, 2011 in OMP No. 373 of 2011, with a further direction to sell the attached property by way of public auction after drawing the proclamation of sale. The Collector, Solan, was directed to ensure that an officer not below the rank of Tehsildar would conduct the auction. It is profitable to reproduce relevant portion of order, dated 19th October, 2011, herein:

> *"Attachment of the property was ordered on 31.08.2007. The attached property, i.e. the immovable property comprised in Plots No. 12, 13, 20, 21, 22, 23 and 24, Industrial Area, Barotiwala, District Solan, Himachal Pradesh, alongwith building and machinery standing thereon be sold by way of public auction. Proclamation of sale be published in* ***the Tribune*** *(Chandigarh Edition),* ***Amar Ujala*** *(Chandigarh Edition) and* ***the Economic Times*** *(Delhi Edition). Proclamation of sale be drawn up by the Registry and proclamation be published on or before* ***19th December, 2011,*** *and sale shall take place on* ***7th January, 2012.*** *The Collector, Solan, shall ensure that an officer not below the rank of Tehsildar shall conduct the auction.*
>
> *As per the valuation report, the total value of the land is* ***₹*** *356.63 lacs and the value of the building is* ***₹*** *18.19 lacs, i.e. the total value of the property is* ***₹*** *374.92 lacs. It is, however, made clear that there is no upset price fixed in the auction, though, according to the Decree Holder, the distress value of the total property is* ***₹*** *208.02 lacs. The HPSIDC shall take necessary steps and furnish the proclamation charges within two weeks from today."*

11. The said order was not complied with and on 19th December, 2011, fresh direction was issued for proclamation of the sale and the sale of the property.

12. The Decree Holder-HPSIDC filed OMP No. 62 of 2012 on 21st March, 2012, for the survey, zoning and planning of the property on the ground that no bids were received in spite of wide publicity and to explore the possibility of selling the property in question at higher price. It is worthwhile to reproduce the relief sought in the said application herein:

> *"In view of submissions made above the application may kindly be allowed and permission may kindly be granted to Decree Holder Corporation to get the survey, zoning and planning of the property done and direction may also be issued to the Judgement Debtors to extend necessary cooperation in the matter."*

13. Vide order, dated 2nd April, 2012, OMP No. 62 of 2012 was granted with a direction to the Decree Holder-HPSIDC to go for the survey, zoning and planning of the property and the Judgment Debtors were also directed to extend necessary cooperation in view of the fact that nobody turned up for auction. Order, dated 2nd April, 2012, reads as under:

> *"Report of the Collector received. As per report nobody turned up for auction.*
>
> *The present application has been moved for seeking permission to allow the decree holder to get survey, zoning and planning of the property. Further for seeking direction to the JDs to extend necessary cooperation in the matter. In view of the fact that no one had turned up at the time of auction, decree holder is also interested to take part in the ensuing bid as such it intends to survey the property for the purpose of bid. As such, the application is allowed. Decree holder may get the survey, zoning and planning of the property done and JDs shall extend necessary cooperation in the matter. The application stands disposed of.* ***Dasti*** *copy. List on* ***24.5.2012.****"*

14. Thereafter, time was sought on various dates/ hearings to comply with order, dated 2nd April, 2012, quoted hereinabove.

15. On 1st May, 2013, an application, being OMP No. 190 of 2013, under Section 151 CPC came to be filed by the Decree Holder-HPSIDC for fixation of the date for auction of the attached property.

16. The Judgment Debtor-Company filed reply to the said application on 14th May, 2013. Rejoinder was filed on 13th June, 2013, and the application was disposed of vide order, dated 3rd July, 2013, the operative portion of which reads as under:

> *"In view of the above, the application is allowed and the attached property, as aforesaid, is ordered to be put to sale as per schedule of sale to be fixed by the Addl. Registrar (Judicial) and intimated to the contesting parties through their learned counsel, on taking requisite steps by the petitioner/DH within two weeks from today. It is further ordered that in order to identify the aforesaid Plot No. 42, with a view to segregate the same from the attached property, a panel of local commissioners comprising of Ms. Charu Gupta and Ms. Meena Thakur, Advocates, is appointed, who shall carry out the requisite demarcation before the attached property is put to sale, on a date to be fixed mutually in consultation with the learned counsel for the contesting parties. In this exercise, the panel of local commissioners would be assisted by the Tehsildar, Barotiwala alongwith the field revenue staff and the Executive Officer, Baddi Barotiwala Nalagarh Development Agency (BBNDA), Baddi at Jharmajri, or any other senior officer appointed by him for this purpose, so that there is no difficulty in identification and demarcation of the aforesaid Plot No. 42. Fee of the Members of the panel of local commissioners is fixed at ₹ 25,000/- (rupees twenty five thousand only) each, inclusive of conveyance charges etc., which shall be payable by the contesting respondents/JDs No. 1, 3 and 5. The panel of local commissioners shall submit their report to this court within 15 days from execution of the Commission, under intimation to the parties through their learned counsel. The parties through their learned counsel/authorized representatives shall be free to assist the panel of local commissioners in execution of the Commission. Let copies of this order be sent by the Registry to the Tehsildar, Barotiwala and Executive Officer, BBNDA for information and compliance.*
>
> *The application stands disposed of in the above terms."*

17. The warrant of sale after execution was received alongwith the report of the Local Commissioner and six bank drafts, the mention of which has been made in order, dated 3rd October, 2013. It is apt to reproduce the relevant portion of order, dated 3rd October, 2013, herein:

> *"As per report of the Registry, warrant of sale has been received back after execution along with the report of the Local Commissioner and six bank drafts, amounting to ₹ 1,13,65,000/- (one crore, thirteen lacs, sixty five thousand only), being the sale proceeds, which be invested by the Registry in a Fixed Deposit on usual terms....."*

18. On the request of the learned counsel for the parties, the matter was ordered to be listed on 7th November, 2013, with a direction to the parties to file objections against the sale, if any.

19. OMP No. 4266 of 2013, filed on 24th October, 2013, under Order 21 Rules 58 and 59 CPC read with Section 151 CPC, are, in fact, objections to the sale filed by the Judgment Debtors-Company. We deem it proper to reproduce para 8 of the application/objections herein:

> *"8. That it would be in the interest of justice and fairness of law to allow the present application and settle the process of auctioning of the property afresh so that the Judgment Debtor is able to once and for all settle the alleged dues of the HPFC and PNB the other two secured creditors."*

20. The Decree Holder-HPSIDC filed reply to the said application/objections on 26th November, 2013. It is apt to reproduce para 8 of the reply herein:

"8. In reply to para 8 is submitted that the JD's may be directed to produce better buyer as earlier the property was auctioned more than 9 times but no bids were received."

21. Thereafter, on 12th December, 2013, the auction purchaser filed OMP No. 4341 of 2013 under Order 21 Rules 94 and 95 CPC read with Section 151 CPC for issuance of sale certificate after confirmation of sale. Parties were directed to file reply vide order, dated 18th December, 2013. Both the applications, i.e. OMP No. 4266 of 2013 and 4341 of 2013, came up for consideration on 8th January, 2014, were ordered to be listed on 19th March, 2014.

22. The Execution Petition was ordered to be listed for settlement on 23rd April, 2014, in view of the agreement arrived at between the parties, as is recorded in order, dated 19th March, 2014. The case was adjourned on 23rd April, 2014, 20th May, 2014, 23rd June, 2014 and 14th July, 2014, for settlement. Thereafter, on 13th August, 2014, the Judgment Debtors-Company moved OMP No. 349 of 2014 under Section 151 CPC for settlement. It is apt to reproduce the relief sought in the said application herein:

"It is, therefore, respectfully prayed that the present application be allowed and the next documents be taken on record and appropriate orders may kindly be passed by this honourable High Court, keeping in view the facts and circumstances of the matter and direct the Judgement Holder/Corporation to settle the dispute under one time settlement, keeping in view the precedence on this issue.

b. It is humbly further prayed that any other direction or order may kindly be issued by this Hon'ble High Court keeping with the orders passed on 3rd of July 2013 on account of the legal implications of the same."

23. On 22nd October, 2014, a letter was produced before the learned Single Judge by the learned counsel for the Decree Holder-HPSIDC, in terms of which the Judgment Debtors were called upon for discussion qua one time settlement. The Judgment Debtors were directed to attend the office of the Decree Holder- HPSIDC during the course of that day with a further direction to the Decree Holder- HPSIDC to file objections in case the negotiation was not acceptable and the matter was ordered to be posted on 19th November, 2014.

24. The perusal of order, dated 19th November, 2014, does disclose that the Judgment Debtors failed to comply with the directions made by the learned Single Judge vide order, dated 22nd October, 2014, and the Judgment Debtors were directed to deposit the outstanding decretal amount within three weeks, failing which the Decree Holder- HPSIDC was directed to take appropriate steps including qua detention of the Judgment Debtors in civil imprisonment. It is profitable to reproduce order, dated 19th November, 2014, herein:

*"**OMP No. 349 of 2014***

*The affidavit filed on behalf of the petitioner-DH reveals that consequent upon the order passed on the previous date, the authorized representatives of JDs, present in the Court on the previous date, did not visit the office of the DH as directed by this Court. It being so, JDs to deposit the outstanding decretal amount within three weeks, failing which the petitioner-DH to take appropriate steps, in accordance with law, including qua detention of the JDs in civil imprisonment. List on **15th December, 2014.**"*

25. The Judgment Debtors failed to deposit the decretal amount, but, a statement was made by the learned counsel for the Judgment Debtors before the Court on 15th December, 2014, that they intend to settle the matter. The matter was referred for mediation, which failed, as has been recorded in order, dated 13th March, 2015. In the said order, it has also been recorded that the attached property stood already sold in an open auction for the consideration of ₹ 1,13,65,000/- and the parties were directed to produce a better buyer, who would be ready and willing to purchase the attached property in a sum over and above the one in which the same had been purchased by the auction purchaser.

26. In terms of order, dated 27th March, 2015 (impugned order-I), Decree Holder and Judgment Debtors had not filed the objections to the sale, but had sought one more opportunity to find out better buyer(s), if any, available, was granted with the command that in case the parties fail to do so, the sale of the property shall stand confirmed automatically in favour of the auction purchaser without reference to the Court and the matter was posted for 28th April, 2015. Order, dated 28th April, 2015, (impugned order-II) provides that the Decree Holder as well as the Judgment Debtors failed to produce the better buyer and the execution petition was ordered to be closed in terms of order, dated 27th March, 2015.

27. Thereafter, on 26th May, 2015, Judgment Debtors filed OMP No. 156 of 2015 under Section 151 CPC for recalling orders, dated 27th March, 2015 and 28th April, 2015, which came to be dismissed vide order, dated 27th July, 2015 (impugned order-III).

28. Being dissatisfied, the Judgment Debtors have filed the instant appeal thereby calling in question the impugned orders, on the grounds taken in the memo of the appeal.

29. Learned counsel for the Judgment Debtors-appellants was asked to justify the maintainability of the appeal. It was argued that the impugned orders have been passed by the learned Single Judge on the applications in terms of Order 21 Rule 92 CPC, thus, are appealable in terms of Order 43 Rule 1 (j) CPC.

30. Learned counsel for the respondents argued that the impugned orders do not fall within the scope and ambit of Order 43 Rule 1 (j) CPC. Further argued that the appeal is not maintainable, the Judgment Debtors are caught by law of waiver and have virtually objected to the sale proceedings.

31. It is profitable to reproduce Order 21 Rule 92 CPC herein:

> ***"ORDER XXI***
>
> ***EXECUTION OF DECREES AND ORDERS***
>
> .....
>
> ***92. Sale when to become absolute or be set aside.*** *- (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute:*
>
> *Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.*
>
> *(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within sixty days from the date of sale, or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale:*
>
> *Provided that no order shall be made unless notice of the application has been given to all persons affected thereby:*
>
> *Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.*
>
> *(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.*
>
> *(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.*

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered."

32. The said provision of law mandates that when the application is not made under Rules 89, 90 or 91 CPC or when such application is made and disallowed, the Court shall make an order confirming the sale and thereupon the sale becomes absolute.

33. The order must contain the following ingredients:

(i) that the sale can be made absolute when no application under Rules 89, 90 or 91 CPC has been filed; or

(ii) when such application is made and disallowed; and the sale has to be confirmed.

34. As discussed hereinabove, the Judgment Debtors, though, had moved an application, being OMP No. 413 of 2009, for settling the process of auction afresh, which was not granted, but the sale was ordered to be kept subject to the confirmation by the Court, vide order, dated 22nd October, 2009. The said order has not been questioned. Thus, the Judgment Debtors are estopped from questioning the process of attachment and auction of the property.

35. The Judgment Debtors have also not questioned the orders made by the learned Single Judge on the applications moved by the Decree Holder-HPSIDC, the details of which are given hereinabove, thus, cannot now question the process of attachment and auction of the property.

36. OMP No. 4266 of 2013 filed by the Judgment Debtors, are, in fact, objections to the sale, but the same have not been pressed by them by seeking adjournment for settlement and obtaining best buyer, i.e. a buyer, who would be ready to pay the price over and above the amount paid by the auction purchaser, is suggestive of the fact that the Judgment Debtors have not questioned the process of attachment or sale/auction on any grounds contained in Order 21 Rule 90 CPC or any other Rule. Thus, the Judgment Debtors are precluded from questioning the impugned orders.

37. Order, dated 27th March, 2015 (impugned order-I) is only an order of confirmation of sale. This order nowhere discloses that any application was made and it was disallowed, thus, the same does not fall within the scope and ambit of Order 21 Rule 92 CPC and is not appealable.

38. It is profitable to record herein that the Judgment Debtors did not question order, dated 27th March, 2015, though it

was a default order. They failed to take steps in terms of order, dated 27th March, 2015, and order, dated 28th April, 2015 (impugned order-II), came to be passed by the learned Single Judge in terms of which the Execution Petition was disposed of as party satisfied. In fact, the confirmation order has been made in terms of order, dated 27th March, 2015.

39. Order, dated 27th July, 2015 (impugned order-III), in terms of which OMP No. 156 of 2015 came to be dismissed, is not an order of review. No review petition was filed. The application was filed under Section 151 CPC for re-calling orders, dated 27th March, 2015 and 28th April, 2015.

40. We wonder when the remedy of review was available, why application for re-calling the orders was made. The dismissal of such application does not fall within the ambit and scope of Order 21 Rule 92 CPC.

41. Our this view is fortified by the judgment rendered by the High Court of Madhya Pradesh in the case titled as **Gopilal and another versus Sitaram and others,** reported in **AIR 1968 Madhya Pradesh 196.** It is apt to reproduce paras 6 and 7 of the judgment herein:

"6. No appeal lies under Order 43, Rule 1(j) from an order dismissing an application under Order 21, Rule 90 or an order dismissing an application for restoring the application under Order 21, Rule 90. Under Order 43, Rule 1(j) an appeal lies from an order under Rule 92 of Order 21 "setting aside or refusing to set aside a sale". Now, when no application is made under Order 21, Rule 90 or where such an application is made and disallowed, the Court is required to make an order confirming the sale. If the application made is allowed, then the Court has to make an order setting aside the sale. When no application is made under Order 21, Rule 90, there is no question of appeal against an order confirming the sale. Clause (j) of Order 43, Rule 1 does not provide for an appeal against an order confirming the sale. Under that clause, an appeal lies against an order under Order 21, Rule 92 setting aside or refusing to set aside a sale. When an application under Order 21, Rule 90 is made, and is dismissed for default or is not pressed by the applicant, it may be taken for the purpose of Rule 92 of Order 21 that it has been disallowed and the result of disallowing is that the sale is confirmed But it cannot be held that when the application is dismissed for default of appearance or when it is not pressed then there is a refusal on the part of the Court to set aside the sale The word "refusal" means "a denial or rejection of something demanded or offered" There can be no "refusal" unless there is a request or demand When, an application under Order 21. Rule 90 is dismissed for default or when it is not pressed, there is no demand on the part of the person applying for setting aside the sale and the Court is not required to consider whether the sale should be set aside or not. Thus, when an application under Order 21, Rule 90 is dismissed for default of appearance and the sale is confirmed, there is no refusal to set aside the sale and such an order is not appealable under Order 43, Rule 1(j). A fortiori, an order dismissing an application for restoring the application under Order 21, Rule 90 dismissed for default of appearance is also not appealable.

7. On the question whether an appeal lies from order dismissing an application under Order 21, Rule 90 for default or from an order dismissing an application for restoring the application under Order 21, Rule 90, the decisions are conflicting. In Kali Kanta Chuckerbutty v. Shyam Lal, AIR 1917 Cal 815(2) it has been held that the language of Order 43, Rule 1(j) is wide enough to cover a case of an application to have a sale set aside dismissed for default. The reasoning given in this case was that the effect of such an order is to confirm the sale under Rule 92. But, as pointed out earlier, under Clause (j) of Order 43, Rule 1, an appeal lies against an order refusing to set aside a sale and not against an order confirming the sale. This decision was followed in Narendra Nath v. Rakhal Das, AIR 1925 Cal 510 where also it was ruled that the effect of the dismissal of an application under Rule 90 is to confirm the sale under Rule 92 and hence an appeal lies against the order. But in a later case, namely, Basaratulla v. Reazuddin, AIR 1926 Cal 773, it was held that an order of dismissal for default is not a confirmation of the sale and does not preclude the party from making a fresh application and that such an order is not appealable under Order 43, Rule 1(j). In that case Page J. observed that :--

> *". . . . .in dismissing the application for default when neither party appears on the case being called for hearing, the Court does not refuse to set aside the sale, but in the absence of the parties refuses to consider whether the sale should be set aside or not."*

Page J. however, reached the conclusion in Basanta Kumar v. Khirode Chandra, AIR 1928 Cal 25 that where a person applies under Order 21. Rule 90 but the application is dismissed for his non-appearance and the opposite party is present and ready to contest, the order dismissing the application is an order under Order 43. Rule 1(j) and is, therefore appealable To us it seems that in principle there is no distinction between an order passed on an application under Order 21, Rule 90

dismissing it for default for non-appearance if one party and an order dismissing it for non-appearance of both the parties. The decision in AIR 1926 Cal 773 (supra) was not followed by the Calcutta High Court in Ansarali v. Bhim Sankar, AIR 1929 Cal 407(2). In that case it was held that when an application under Order 21. Rule 90 is dismissed for default, whether for non-appearance of one or for non-appearance of both the parties, it is disallowed under Rule 92 and that it is the disallowing of the application under Order 21, Rule 90 which corresponds to the order refusing to set aside a sale within the meaning of Order 43, Rule 1(j), and, therefore, such an order is appealable. In our judgment, the expression "where such an application is made and disallowed" occurring in Rule 92 means that where such an application is made and rejected. But it is not every order of rejection that has been made appealable under Order 43, Rule 1 (i) but only that Order of rejection by which the Court on a demand being made by a person to set aside a sale refuses to set aside the sale. This stands to reason as a party who has allowed his application to be rejected by default or for non-prosecution cannot really complain that the Court has refused to set aside the sale on a prayer being made by him. The Patna High Court has in Rampratap v. Triloknath, AIR 1957 Pat 465, following AIR 1928 Cal25 (supra) and AIR 1929 Cal 407(2) (supra), held that an order dismissing an application under Order 21, Rule 90 for non-prosecution is appealable under Order 43, Rule 1(j), the reason given being that if the application is disposed of on merits and is dismissed, the result is that the sale is confirmed; likewise if the application is dismissed for non-prosecution, the result is the same, namely, that the sale is confirmed. As we have stated earlier, the question of appealability under Order 43, Rule 1(j) does not depend upon whether the order under Order 21, Rule 92 results in the confirmation of the sale but on the fact whether the order is one refusing to set aside the sale or setting aside the sale. It is not necessary to note the decisions of other High Courts which are in similar vein. The reasonings given in these decisions, with all respect to the learned Judges deciding the cases, do not appear to us to be reconcilable with one another. We would respectfully say that Page J. rightly observed in AIR 1926 Cal 773 (supra) that when an application under Order 21, Rule 90 is dismissed for default, the Court does not refuse to set aside the sale. In our view, an order dismissing an application under Order 21, Rule 90 for default or an order dismissing an application for restoring the original application under Order 21. Rule 90 is not appealable under Order 43. Rule 1 (j).”

42. The High Court of Punjab and Haryana in the case titled as **Bakhsho versus Pakhar Singh and another,** reported in **AIR 1985 Punjab and Haryana 322,** held that the order passed by the executing Court confirming the sale is not appealable under Clause (j) of Order 43 Rule 1 CPC in absence of the objections under Order 21 Rule 90 CPC. It is profitable to reproduce para 6 of the judgment herein:

“6. The learned counsel for the petitioner has contended that the sale in favour of the auction-purchaser was confirmed by the executing Court on 22-12-1983. The petitioner did not file objection under S. 21, R. 90, as she did not come to know about the auction for want of proclamation of sale in terms of O. 21 R. 66 of the Code. The sale in favour of the auction-purchaser stood confirmed by the time the petitioner came to know of it. The petitioner did not approach the executing Court for relief, because the sale already stood confirmed. It is under these circumstances that the petitioner has filed the present revision wherein the prayer made is that the sale by auction in favour of Balbir Singh respondent be set aside for want of proclamation under O. 21, R. 66 of the Code. This contention is also without any merit. The petitioner has not sought the relief of getting the sale set aside from the executing Court so far. It is incorrect that the petitioner could not seek relief in this respect from the executing Court, because the sale in favour of the auction-

purchaser stood confirmed. If the petitioner had filed objections for getting the sale set aside, the order passed would have been appealable under Clause (j) of O. 43, R. 1 of the Code. The present revision against the order of the executing Court, confirming the sale in favour of the auction-purchaser in the absence of objection under O. 21, R. 90 of the Code is rather misconceived."

43. In the case titled as **L. Balu versus Periasami and others,** reported in **AIR 1988 Madras 114,** it has been held, in para 7, that an order, passed under Order 21 Rule 92 CPC, confirming the sale on the ground that no application to set aside the sale has been made, would not come within the purview of Order 43 Rule 1(j) CPC and would not be appealable.

44. The same principle has been laid down by this Court in the case titled as **Smt. Shanti Devi versus H.P. Financial Corporation and others,** reported in **1997 (3) Sim. L.C. 256.** It is profitable to reproduce para 3 of the judgment herein:

"3. The language in the Rule 1(j) of Order 43, is very significant. The rule talks only of an order setting aside the sale or refusing to set aside the sale. In this case, the order refusing to set aside the sale was separately passed on the application filed by the Appellant under Order 21, Rule 90, Code of Civil Procedure, The order has become final as there is no appeal against the said order by the Appellant. The present appeal, which is now filed, is against an order confirming the sale. That is not mentioned in Rule 1(j), as set out above. This order cannot be called an order setting aside or refusing to set aside the sale. Hence, the appeal is not maintainable."

45. The sale of property on low price in view of the fact that the Decree Holder and the Judgment Debtors failed to bring a best buyer, who would have paid the amount more than what the highest auction purchaser had paid, despite granting several opportunities, cannot be said to be a material irregularity and the objections raised by way of OMP No. 4266 of 2013, which too was virtually not pressed by seeking adjournment for settlement and obtaining best buyer, are of no consequence.

46. Keeping in view the facts of the case, the appellants-Judgment Debtors are caught by estoppel and waiver.

47. Our this view is fortified by the judgment rendered by the Privy Council in the case titled **Raja Shyam Sunder Singh and others versus Kaluram Agarala and others,** reported in **AIR 1938 Privy Council 230,** the relevant portion of which reads as under:

"As regards the appellants' objection to the sale proclamation, their Lordships consider that the waiver of the necessity for a fresh proclamation necessarily implied a waiver of objection to any defect appearing on the face of the sale proclamation, as appellant 1 must have been fully aware of its terms in view of his miscellaneous appeal to the High Court. The facts in this case are stronger against the said appellant than those in Girdhari Singh v. Hurdeo Narain Singh, 1876 3 IndApp 230 in which this Board held that the waiver covered any objection to an error in the statement of the Government revenue, as the judgment-debtor must have had the opportunity of seeing the copy affixed in the Court House. This objection of the appellants accordingly fails.

As regards the appellants' three objections to the attachment, their Lordships find it unnecessary to consider the correctness of the findings of the Subordinate Judge, and they have not heard the respondents on this question. Their Lordships do not consider that the waiver of any necessity for a fresh sale proclamation would imply a waiver of the right to object to any of the three irregularities in the attachment found by the Subordinate Judge."

48. In the case titled as **Vidya Bhan Prakash versus The Second Additional District Judge, Mathura and others,** reported in **AIR 1988 Allahabad 204,** it has been held

that unless there is nexus between the inadequacy of price fetched and the irregularity or fraud in conducting the sale, the sale cannot be set aside. Further held that where the inadequacy of price was the result of factors other than material irregularities or fraud, proviso to Order 21 CPC did not come into force. It is apt to reproduce paras 17 and 18 of the judgment herein:

> *"17. Sri S.R. Misra, Advocate appearing for the judgment-debtor, has during the course of his arguments relied upon a decision of the Andhra Praidesh High Court in the case of Satyanarayana Soni v. State of Andhra Pradesh (1987) 2 Cur CC 118. It has been held in this case that unless there is nexus between the inadequacy of price fetched and the, irregularity or fraud in conducting the sale, the sale cannot be set aside. It has further been held that,*
>
> *"Therefore, if a party, who has an interest in the property sold in execution of the decree is affected by such sale, he has to establish on facts proved to the satisfaction of the executing court that by reason of irregularity or fraud he sustained substantial injury and that injury has been resulted on grounds of material irregularity or fraud either in publishing the sale proclamation or conducting the sale."*
>
> *During the course of its judgment, the Andhra Pradesh High Court has relied upon the aforesaid earlier decision of its own Court in Ramdasjee's case AIR 1965 Andh Pra 334. It has held that any material irregularities per se will not invalidate a sale. Such irregularities will have the effect of a voiding the sale only if the connection is established between them and the inadequacy of price realised at the sale". It was further held that inadequacy of price proprio vigpre would not result in avoiding the sales. There must be correlation between the damage suffered by the judgment-debtor and the material irregularity complained of if the inadequacy of the price is the result of factors other than the material irregularities complained of the proviso to Order 21 Rule 90(1) cannot come into operation." As stated earlier the same is also the view taken by the Supreme Court in the case of Radhey Shyam (AIR 1971 SC 2337) (supra).*
>
> *18. On the findings recorded in the present case by the courts below, the decision cited on behalf of the respondents in the case of Satyanarayana Soni (1987-2 Cur CC 118) (Andh Pra) (supra), in my opinion does support the case of the petitioner. In our case, the execution court had dismissed the objections of the judgment-debtor and the lower appellate court had recorded a finding that no substantial injury had occurred to the judgment-debtor by reason of irregularity or fraud contemplated by the provisions of Sub-clause (2) of Order XXI Rule 90 of the Code of Civil Procedure."*

49. The same principle has been laid down by the Apex Court in the case titled as **Jaswantlal Natvarlal Thakkar versus Sushilaben Manilal Dangarwala and others,** reported in **AIR 1991 Supreme Court 770.**

50. Keeping in view the merits of the case and the orders passed from time to time, the mention of which has been made hereinabove, we are of the opinion that the impugned orders are the best orders, which could have been passed by the learned Single Judge.

51. Our this opinion is supported by the judgment rendered by the Apex Court in the case titled as **Janak Raj versus Gurdial Singh and another,** reported in **AIR 1967 Supreme Court 608.** It is apt to reproduce para 4, relevant portion of para 8 and para 24 of the judgment herein:

> *"4. Before referring to the various decisions cited at the Bar and noted in judgment appealed from, it may be useful to take into consideration n the relevant provisions of the Code of Civil Procedure. So far as sales of immovable property are concerned there are some specie provisions in O. XXI beginning with R. 82 and ending with R. 103. If a sale had been validly held, an application for setting the same aside can*

only be made under the provisions of Rr. 89 to 91 of O. XXI. As is well known, R. 89 gives a judgment-debtor the right to have the sale set aside on his depositing in Court a sum equal to five per cent of the purchase money fetched at the sale besides the amount specified in the proclamation of sale as that for the recovery which the sale was ordered, less any amount which may, since the date of sale, have been received by the decree-holder. Under sub-r . (2) of R.92 the Court is obliged to make an order setting aside the sale if a proper application under R. 89 is made accompanied by a deposit within 30 days from the date of sale. Apart from the provision of R. 89, the judgment-debtor has the right to apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it provided he can satisfy the Court that he has sustained substantial injury by reason of such irregularity or fraud. Under R. 91 it is open to the purchaser to apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Rule 92 provides that where no application is made under any of the rules just now mentioned or where such application is made and disallowed the Court shall make an order confirming the sale and thereupon the sale shall become absolute. Rule 94 provides that where the sale of immovable property has become absolute, the Court must grant a certificate specifying the property sold and the name of the person who at the time of sale was declared to be the purchaser. Such certificate is to bear date the day on which the sale becomes absolute. Section 65 of the Code of Civil Procedure lays down that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when it is sold and not from the time when the sale becomes absolute. The result is that the purchaser's title relates back to the date of sale and not the confirmation of sale. There is no provision in the Code of Civil Procedure of 1908 either under O. XXI or elsewhere which provides that the sale is not to be confirmed if it be found that the decree under which the sale as ordered has been reversed before the confirmation of sale. It does not seem ever to have been doubted that once the sale is confirmed the judgment-debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same result ought to follow when the reversal of the decree takes place before the confirmation of sale.

5. .....

6. .....

7. .....

8. ..... Nothing has been urged before us which would lead us to take a contrary view. Under the present Code of Civil Procedure, the Court is bound to confirm the sale and direct the grant of a certificate vesting the title in the purchaser as from the date of sale when no application as is referred to in R. 92 is made or when such application is made and disallowed.

xxx xxx xxx

24. For the reasons already given and the decisions noticed, it must be held that the appellant-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the Legislature seems to be that unless a stranger auction purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the credition alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Code of Civil Procedure of 1908 make ample provision for the protection of the interest of the judgment-debtor who feels that the decree ought not to have been

passed against him. On the facts of this case, it is difficult to see why the judgment debtor did not take resort to the provision of O. XXI, R. 89.The decree was for small amount and he could have easily deposited the decretal amount besides 5 per cent of the purchase money and thus have the sale set aside. For reasons which are not known to us he did not do so."

52. The same principle has been laid down by the Apex Court in the case titled as **Hukumchand versus Bansilal and others,** reported in **AIR 1968 Supreme Court 86.** It is worthwhile to reproduce paras 8 and 9 of the judgment herein:

"8. It is on these principles that we have to decide whether the trial court was correct. We have already indicated that the sale was held on April 7, 1958, and in the normal course it would have been confirmed after 30 days unless an application under R. 89, R. 90 or Rule 91 of Order XXI was made. Besides this case is, as we have already assumed, analogous to the case of a final mortgage decree. The judgment-debtor mortgagor had the right to deposit the amount at any time before confirmation of sale within 30 days after the sale or even more than 30 days after the sale under Order XXXIV, Rule 5 (1) so long as the sale was not confirmed. If the amount had been deposited before the confirmation of sale, the judgment-debtors had the right to ask for an order in terms of Order XXXIV, Rule 5 (1) in their favour. In this case an application under O.XXI R. 90 had been made and therefore the sale could not be confirmed immediately after 30 days which would be the normal course; the confirmation had to await the disposal of the application under Order XXI, Rule 90. That application was disposed of on October 7, 1958 and was dismissed. It is obvious from the order sheet of October 7, 1938 that an oral compromise was arrived at between the parties in court on that day. By that compromise time was granted to the respondents to deposit the entire amount due to the decree-holder and the auction-purchaser by November 21, 1958. Obviously, the basis of the compromise was that the respondents withdrew their application under O. XXI, Rule 90 while the decree-holder society and the auction-purchaser appellant agreed that time might be given to deposit the amount upto November 21, 1958. If this agreement had not been arrived at and if the application under Order XXI, Rule 90 had been dismissed (for example, on merits) on October 7, 1958, the court was bound under O. XXI, Rule 92 (1) to confirm the sale at once. But because of the compromise between the parties by which the respondents were given time upto November 21, 1958 the court rightly postponed the question of confirmation of sale till that date by consent of parties. But the fact remains that the application under Order XXI, Rule 90 had been dismissed on October 7, 1958 and thereafter, the court was bound to confirm the sale but for the compromise between the parties giving time upto November 21, 1958.

9. Now let us see what happened about November 21, 1958. On November 20, 1958, an application was made by the respondents praying that they might be given one day more as November 21, 1958 was holiday. No order was passed on that date, but it is remarkable that no money was deposited on November 20, 1958. When the matter came up before the court on November 22, 1958 no money was deposited even on that day. Now under Order XXXIV, Rule 5 it was open to the respondents to deposit the entire amount on November 22, 1958 before the sale was confirmed, but no such deposit was made on November 22, 1958. On the other hand, counsel for the respondents prayed to the executing court for extension of time by 14 days. The executing court refused that holding that time upto November 21, 1958 had been granted by consent and it was no longer open to it to extend that time. The executing court has not referred to Order XXI, Rule 92 in its order, but it is obvious that the executing court held that it could not grant time in the absence of an agreement between the parties, because Order XXI, Rule 92 required that as the application under Order XXI, R. 90 had been dismissed the sale must

be confirmed. We are of the view that in the circumstances it was not open to the executing court to extend time without consent of parties, for time between October 7, 1958 to November 21, 1958 was granted by consent of parties. Section 148 of the Code of Civil Procedure would not apply in these circumstances, and the executing court was right in holding that it could not extend time. Thereafter it rightly confirmed the sale as required under Order XXI, Rule 92 there being no question of the application of Order XXXIV, Rule 5 for the money had not been deposited on November 22, 1958 before the order of confirmation was passed. In this view of the matter, we are of opinion that the order of the executing court refusing grant of time and confirming the sale was correct."

53. In the case titled as **M/s. Kayjay Industries (P) Ltd. versus M/s. Asnew Drums (P) Ltd. and others,** reported in **(1974) 2 Supreme Court Cases 213,** the Apex Court has held that the Courts are not bound to adjourn the sale till a good price is got, it being a notorious fact that court sales and market prices are distant neighbours. Further held that mere inadequacy of price cannot demolish every court sale. It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

"7. Certain salient facts may be highlighted in this context. A Court sale is a forced sale and, notwithstanding the competitive element of a public auction, the best price is not often forthcoming. The judge must make a certain margin for this factor. A valuer's report, good as a basis, is not as good as an actual offer and variations within limits between such an estimate, however careful, and real bids by seasoned businessmen before the auctioneer are quite on cards. More so, when the subject-matter is a specialised industrial plant, which has been out of commission for a few years, as in this case, and buyers for cash are bound to be limited. The brooding fear of something out of the imported machinery going out of gear, the vague apprehensions of possible claims by the Dena Bank which had a huge claim and was not a party, and the litigious sequel at the judgment-debtor's instance, have 'scare' value in inhibiting intending buyers from coming forward with the best offers. Businessmen make uncanny calculations before striking a bargain and that circumstances must enter the judicial verdict before deciding whether a better price could be had by a postponement of the sale. Indeed, in the present case, the executing Court had admittedly declined to affirm the highest bids made on 16-5-1969, June 5, 1969 and August 28, 1969, its anxiety to secure a better price being the main reason. If Court sales are too frequently adjourned with a view to obtaining a still higher price it may prove a self-defeating exercise, for industrialists will lose faith in the actual sale taking place and may not care to travel up to the place of auction being uncertain that the sale would at all go through. The judgment-debtor's plea for postponement in the expectation of a higher price in the future may strain the credibility of the Court sale itself and may yield diminishing returns as was proved in this very case.

8. .....

9. The first respondent's counsel, Shri Parekh, drew our attention to condition No. 3 in the present proclamation of sale which is as follows :

> *The highest bidders for the two lots shall be declared to be the purchasers of the respective lots, provided always that he or they are legally qualified to bid, and provided that it shall be in the discretion of the undersigned Receiver holding the sale to decline acceptance of the highest bid for any lot when the price offered for any of the two lots appears so manifestly inadequate, as to make its acceptance inadvisable. The highest bid offered by any bidders for any of the two lots shall be subject to the sanction and approval of the District Judge, Thana.*

Form 29 prescribed in Appendix E to the Code contains condition No. 3 which is in like terms. The Court's activist obligation to exercise a discretion to make a fair sale out of a Court auction-and avert a distress sale - is underscored by this provision. In all public sales the authority must protect the interests of the parties and the rule is stated by this Court in Navalkha and Sons. v. Ramanya Das, (1970) 3 SCR 1 = (AIR 1970 SC 2037) thus :-

> *"The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the Commissioners is subject to confirmation of the Court the offerer does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is unreasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion."*

Be it by a receiver, commissioner, liquidator or Court this principle must govern. This proposition has been propounded in many rulings cited before us and summed up by the High Courts. The expressions 'material irregularity in the conduct of the sale' must be benignantly construed to cover the climax act of the Court accepting the highest bid. Indeed, under the Civil Procedure Code, it is the Court which conducts the sale its duty to apply its mind to the material actors bearing its mind to the material factors bearing on the reasonableness of the price offered is part of the process of obtaining a proper price in the course of the sale. Therefore, failure to apply its mind to this aspect of the conduct of the sale may amount to material irregularity Mere, substantial injury without material irregularity is not enough even as material irregularity not linked directly to inadequacy of the price is insufficient. And where a Court mechanically conducts the sale or routinely signs assent to the sale papers, not bothering to see if the offer is too low and a better price could have been obtained, and in fact the price is substantially inadequate, there is the presence of both the elements of irregularity and injury. But it is not as if the Court should go on adjourning the sale till a good price is got, it being a notorious fact that Court sales and market prices are distant neighbours. Otherwise, decree-holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. May be, subsequent events, not within the ken of the executing Court when holding the sale, may prove that had the sale been adjourned a better price could have been had. What is expected of the Judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors, and, if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale. The Court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of Court sales will be introduced.

10. So viewed we are satisfied that the district Court had exercised a conscientious and lively discretion in concluding the sale at Rs. 11.5 lakhs. If the market value

was over 17 lakhs, it is unfortunate that a lesser price was fetched. Mere inadequacy of price cannot demolish every Court sale. Here, the Court tried its best, time after time, to raise the price. Well-known industrialists in the public and private sectors knew about it and turned up. Offers reached a stationary off indefinitely in recovering its dues on baseless expectations and distant, prospects. The judgment-debtor himself, by his litigious exercises, would have contributed to the possible buyers being afraid of hurdles ahead. After all, producing around Rs. 11.4 lakhs openly to buy an industry is not easy even for apparently affluent businessmen. The sale proceedings had been pending too long and the first respondent could not, even when given the opportunity, produce buyers by private negotiation. Not even a valuer's report was produced by him. We are satisfied that the District Judge had committed no material irregularity in the conduct of the sale in accepting the highest offer of the appellant on September 3, 1969."

54. We have gone through the entire record and the proceedings drawn by the learned Single Judge/executing Court and are of the view that no irregularity has been committed in attaching the property, conducting the auction proceedings and confirming the sale.

55. Having said so, the appeal, on the face of it, is not maintainable. Even otherwise, on merits also, as discussed hereinabove, the appeal deserves to be dismissed and is dismissed accordingly alongwith all pending applications.

****

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Sh. Rajinder Kumar Verma. .....Plaintiff.

Versus

Smt. Anita Verma & ors. .....Defendants.

Civil Suit No. 13 of 1997
Date of order: November 8, 2016.

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

For the plaintiff Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashisth, Advocate.

For the defendants Mr. N.S. Chandel Advocate with Mr. Dinesh Thakur, Advocate, for defendants No. 1 to 3.
Mr. Anuj Gupta, Advocate, for defendant No. 4.
Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Kumari, Advocate, for defendant No. 6.
Defendant No. 5 in person.

The following order of the Court was delivered:

Dharam Chand Chaudhary, J.

The present suit after passing preliminary decree for partition of the suit land is presently at the stage of partition thereof by a Local Commissioner to be appointed by this Court before the final decree is passed.

2. It is seen that vide order passed on 2.3.2004 in an application registered as CMP No. 440 of 2003 filed in this suit Mr. Bhupender Guprta, Senior Advocate was appointed as Local Commissioner to partition the suit property in accordance with the preliminary decree and submit the report to this Court. Mr. Gupta, however, failed to do so because as per the record the parties i.e. all co-sharers have not cooperated with him in getting the suit property situate within the territory of the State of Himachal Pradesh partitioned. As regards the suit property A-1/12 Safdarjung Enclave, New Delhi Mr. Naresh Sharma, Senior Advocate came to be appointed as Local Commissioner to put the same to auction. The Local Commissioner has sold that property in auction and auction purchaser had deposited the earnest money also in the Registry of this Court. However, the application registered as OMP No. 4229 of 2013 filed by the auction purchaser with a prayer to confirm the sale was dismissed because the same being lease hold could have only been sold in auction subject to the payment of 50% of the sale consideration to Delhi Development Authority towards unearned increase. The parties to the suit were not ready and willing to part with 50% sale consideration, therefore, the permission to confirm the sale as sought was declined and as the proceedings qua conversion of the property aforesaid from lease hold to free hold were already initiated, therefore, the parties were directed to pursue the same and ascertain the status thereof as well as apprise this Court also qua the same.

3. On 23.6.2015, when the matter came to be listed before this court, time was sought on behalf of the plaintiff to ascertain the current status of the proceedings qua conversion of the property i.e. A-1/12, Safdarjung Enclave, New Delhi. At the same time, learned Counsel on both sides had come forward with the proposal that the property situated within the territorial jurisdiction of this court can be partitioned with mutual understanding. Consequently, the following order came be passed in this matter on that day:-

> "Learned counsel representing the plaintiff seeks time to pursue the matter with Delhi Development Authority qua conversion of the property i.e. A-1/12, Safdarjung Enclave, New Delhi from lease hold to free hold. Allowed. Let the Court be informed about the current status on the next date.
>
> 2. Learned counsel on both sides further submit that so far as the property situated within the territorial jurisdiction of the State of Himachal Pradesh is concerned, the same can be partitioned with mutual understanding. They further submit that at the first instance this matter can be fixed for presence of the parties and thereafter if necessary to refer the same for compromise through mediated settlement. List for presence of parties on ***18th August, 2015."***

4. Consequent upon the order *ibid* the parties did not appear on 18.8.2015 and even on the next date i.e. 22.9.2015 also it is only the plaintiff who was present in person. On the joint request made by learned Counsel on both sides the dispute was referred to learned Mediator appointed with mutual consent for negotiate settlement. The order passed on that day reads as follows:

> "Only plaintiff is present in person. Defendants, however, are not present.
>
> Learned Counsel on both sides are hopeful qua partition of the property situated within the State of Himachal Pradesh with mutual understanding. They pray for referring this matter to a Mediator for settlement. On their joint request, Mr. Naresh Sood, Senior Advocate is appointed as Mediator to conduct negotiations between the parties in this matter. The date for trying conciliation is left open to be fixed by learned Mediator under intimation to learned Counsel representing the parties on both sides. Administrative Coordinator, main Mediator Centre, HP High Court to render all required assistance to learned Mediator in conducting the negotiations.
>
> List on 16th December, 2015."

5. However, the efforts to settle the dispute amicably were failed as the parties did not agree for the same. An order to this effect came to be passed on 6.4.2016, which reads as under:

> "Mediation failed. On the joint request of learned counsel representing the parties on both sides, list on 26th May, 2016."

6. The matter when came to be listed before this Court again on 26.5.2016 a detailed order taking note of the delay occurred in expediting the proceedings in the suit on account of non-cooperative attitude of the parties on both sides came to be passed and prima facie opinion formed to adjourn the same as sine-a-die. The prayer made to appoint someone as Local Commissioner to partition at least the suit property situate in the state of H.P. though was not found to be in order in view of the non-cooperative attitude of the parties on both sides and also that in the opinion of this Court the appointment of the Local Commissioner was also not likely to serve any purpose, however, this Court agreed to appoint Local Commissioner subject to the parties to file their respective affidavits indicating therein a common name to be appointed as Local Commissioner and also undertaking to render all assistance to the Commissioner so appointed during the course of partition proceedings initiated by him. The matter as such was adjourned for the purpose with further observation that if the steps as directed are not taken the Court may proceed to pass appropriate orders in the matter including its adjournment as Sine-a-die. The order passed on 26.5.2016 also reads as follow:

> "Plaintiff Rajinder Kumar Verma is present in person and Dhananjay Verma son of Shri Ashok Kumar Verma (defendant No.5), is also present.
>
> 2. It is seen from the record that Mr. Bhupender Gupta was appointed as Local Commissioner vide order passed on 2nd March, 2004 in OMP No.440 of 2003 to effect partition of the suit property consequent upon the preliminary decree passed in the suit. Learned Local Commissioner has submitted the report on 2.11.2005. He could suggest the manner in which the property namely A-1/12 Safdarjung Enclave, New Delhi could have been partitioned. As regards the other suit properties situate in the State of Himachal Pradesh, no proposal could be made perhaps on account of the parties did not cooperate during the course of the proceedings having taken place before learned Local Commissioner. The property at Delhi could also not be partitioned in the manner as suggested by the Local Commissioner, of course, the same, pursuant to the order passed by this Court, was put to auction by Shri Naresh Sharma, Advocate, who was appointed as Local Commissioner. The sale could not be confirmed as the parties on both sides raised objections to the report of the Local Commissioner. Subsequently, an application registered as OMP No. 4229 of 2013 came to be filed by auction purchaser for confirmation of the sale was dismissed on merits whereas OMP No.4319 of 2013 filed by the plaintiff for cancellation of the sale was dismissed being premature vide judgment dated 2.4.2015. The plaintiffs were directed to apprise the status of the proceedings qua conversion of the property A-1/12 Safdarjung Enclave, New Delhi from lease hold to free hold. The instructions as sought, however, have not yet seen the light of the day. No doubt, learned counsel on both sides are hopeful that the suit property situated within the State of Himachal Pradesh can be partitioned with mutual consent and it is for this reason the matter was referred for mediation, however, the mediation is also failed.
>
> 3. This matter is pending in this Court right from the year 1997. Preliminary decree was passed long back on 3.7.2003. It is on account of non-cooperative attitude of the parties on both sides, the partition of the suit property could not be effected. Learned counsel on both sides though pray for appointment of Local Commissioner, afresh, however, taking into consideration the past conduct of the parties, it may not be possible to the Local

> Commissioner, if appointed, again to effect partition, unless and until, a joint prayer is made in this Court by the parties on their respective affidavits in support thereof and there being consensus between them qua the person to be appointed as Local Commissioner. As prayed, the matter is adjourned to ***14th June, 2016*** for taking appropriate steps in the light of this order. If no steps are taken appropriate orders including adjourning this matter *sine-a-die* will be passed".

7. The plaintiff and defendants No. 1 to 4 have filed the affidavits as directed and consented for appointment of Mr. Naresh Sood, learned Senior Advocate as Local Commissioner. Defendants No. 5 and 6 who were exparte also appeared and filed application for setting aside the exparte order. The application OMP No. 262 of 2016 filed by defendant No. 5 was allowed vide order dated 10.8.2016 and while setting aside the exparte order passed against him he was permitted to join the proceedings in the suit from the stage as on 10.8.2016 onwards. Similar order came to be passed on 14.9.2016 in the application, OMP No. 342 of 2016 filed on behalf of defendant No. 6. On 10.8.2016 when defendants No. 5 and 6 appeared before this Court they both came forward with the submissions that the parties i.e. all co-sharers are permitted to settle the dispute amicably in an outside court settlement. They were allowed to do so and also to discuss the matter with the remaining co-sharers i.e. plaintiff and defendants No. 1 to 4. The following order came to be passed on 10.8.2016:

> "Affidavits on behalf of defendants No.1 to 3 is also stated to be filed during the course of the day. Defendant No.6, who was proceeded against exparte on the last date, is present in person. If so advised, he may file appropriate application for getting the exparte order set aside. Defendants No.5 and 6 submits that the issue pertaining to the partition of the joint property can be decided by all the co-sharers (parties to the suit) themselves in an outside Court settlement. Learned counsel representing the plaintiffs and defendants No.1 to 4 have, however, certain reservations in this regard as according to them the suit property can only be partitioned by a Local Commissioner appointed by the Court. Anyhow, defendants No.5 and 6, if so advised, may discuss the matter with the plaintiffs and other defendants and if possible to settle the issue qua partition of the suit property by way of negotiation and inform the Court on the next date. In case their proposal is not acceptable to the plaintiffs and defendants No.1 to 4, they may also file their respective affidavits, in terms of the orders passed on 21.6.2016 so that Local Commissioner to effect the partition of the suit property amongst all co-sharers can be appointed. List on ***14th September, 2016***."

8. When the matter came to be listed on 14.9.2016 this court was informed that defendants No. 5 and 6 have not discussed the matter with the plaintiff and defendants No. 1 to 4 in terms of the order *ibid* while defendant No. 5 was granted one more opportunity as last and final in this regard, the submissions made on behalf of defendant No. 6 that he is also not averse to the appointment of local commissioner and also filing an affidavit to this effect, were taken on record. The order passed on 14.9.2016 is also reproduced here as under:

> "This Court has been informed that defendants No. 5 and 6 have not discussed the matter with the plaintiffs and defendants No.1 to 4 in terms of the order passed on the previous date. Defendant No. 5 who is present in person has sought some more time for the purpose, which though is allowed, however, as a last and final opportunity. On behalf of defendant No. 6 Mr. N.K. Thakur, learned Senior Advocate on instructions from Ms. Jamuna Kumari, Advocate submits that the said defendant is not averse to the appointment of the Local Commissioner and also for filing an affidavit to this effect. However, some more time has been sought for the purpose, which is granted. Let defendants No. 5 and 6 now to file their respective affidavits in the light of the order passed on 26.5.2016 within four weeks. List on ***25.10.2016."***

9. Now the affidavit filed by defendant N6. 6 is also on record and he has also no objection in case Mr. Naresh Sood, Senior Advocate is appointed as Local Commissioner, however, defendant No. 5 in the affidavit he filed submits that he has objection to the appointment of Mr. Naresh Sood, Senior Advocate as Local Commissioner, however without assigning any reasons therefor.

10. The position explained hereinabove make it crystal clear that plaintiff, defendants No. 1 to 4 and 6 are in favour of appointment of Mr. Naresh Sood, Senior Advocate as Local Commissioner to effect the partition of the joint property situate within the territorial jurisdiction of the State of Himachal Pradesh amongst the co-sharers. The objection to such appointment on behalf of defendant No. 5 being without any reason and justification is uncalled for. The record reveals that the conduct and approach of the said defendant had been non-cooperative throughout during the course of proceedings in the suit. He allowed himself to be proceeded against exparte during the course of proceedings in the suit. The date i.e. 26.5.2016 when the parties on both sides sought time to file their affidavits and agreeing therein for the appointment of some common person as Local Commissioner, defendant No. 5 was exparte. The exparte order was set aside vide order dated 10.8.2016 passed in OMP No. 262 of 2016 and he was permitted to join proceedings in this suit from that day onwards. Therefore, objection to the appointment of Local Commissioner he raised otherwise is also meaningless. One person cannot be allowed to hamper proceedings in the suit that too without any justifiable cause therefor. He even failed to make the other co-sharers agree for settlement of the dispute in an outside court settlement despite opportunities including last and final granted in this regard. The objection he raised as such is rejected. However, taking a lenient view this Court defers the penal action i.e. burdening him with exemplary costs at this stage.

11. In view of the above, I appoint Mr. Naresh Sood, learned Senior Advocate as Local Commissioner to effect the partition of the suit property situate in the State of Himachal Pradesh in terms of the preliminary decree passed in this suit. Mr. Sood while executing the partition shall be at liberty to seek expert assistance. The parties on both sides are directed to render all assistance to learned Local Commissioner as mutually agreed upon and undertaken by them in their respective affidavits. Liberty to defendant No. 5 also to join the proceedings before the Local Commissioner, if so advised. However, in view of the reasons hereinabove there shall be no impact of his absence during the course of partition proceedings because this Court has reasons to believe that learned Commissioner shall effect the partition of the suit property in accordance with law and in terms of the preliminary decree as well as in the better interest of all the co-sharers.

12. The tentative remuneration of learned Commissioner is fixed at Rs.2,00,000/- to be borne by the parties on both sides in equal shares. The amount in question be deposited in the Registry of this Court within four weeks. The incidental expenses, if any, incurred upon by the Commissioner shall also be borne by the parties in equal shares. The final remuneration of the Commissioner is left open to be considered and assessed after the receipt of the report.

13. Learned Commissioner shall inform the parties through learned Counsel representing them and also defendant No. 5 to remain present in person on the date, time and the venue for effecting partition which is left open to be fixed by him. Learned Commissioner to submit the report to this Court on or before *30th April, 2017*. There shall be a direction to the Registry to handover the record of the case as and when any request in this regard is made by learned Commissioner.

14. Learned Counsel representing the parties on both sides further submit that Mr. Naresh Sood, learned Senior Advocate can be appointed as Local Commissioner to effect partition of the property, A-1/12, Safdarjung Enclave, New Delhi also. Previously, it has been noticed that it was not possible to partition the suit property by metes and bounds and it is for this reason the same was ordered to be put to auction. The auction proceedings also did not mature for the reasons recorded in the order dated 2.4.2015 passed in OMP Nos. 4229 and 4319 of 2013 as neither the auction purchaser nor the parties were ready to part with 50% of the sale

consideration towards unearned increase in favour of Delhi Development Authority. Learned Counsel on both sides to ascertain there being any change in the rules and regulations if any to chalk out that the suit property situate at Delhi can now be partitioned or not. If it is possible to do so the authority of the Commissioner can be extended to partition the said property also in due course as and when the status of the rules and regulations governing lease hold property under the partition of Delhi Development Authority is placed on record.

15. The copy of this order and also that of the preliminary decree passed in this suit be supplied free of cost to learned Local Commissioner.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Shimla Educational Society Trust and Anr. ...Petitioners.

Versus

National Council for Teachers Education & Anr. ...Respondents.

CWP No. 1217 of 2016
Judgment reserved on: 25.10.2016
Date of decision: 8.11. 2016

Constitution of India, 1950- Article 226- Petitioner No. 1 is an educational trust having established a senior secondary public school and is also running B.Ed. college- it had applied to introduce diploma in elementary education- permission was rejected- writ petition was filed, in which a direction was issued – affiliation was not granted- it was contended that all the conditions were met and despite that the permission was not granted – respondents stated that the land is on private lease basis, which is in contravention of the regulation - a complaint was received against the petitioner – held, that the complaint could not have been made basis for rejecting the approval – no inquiry was conducted – copy of complaint was not supplied to the petitioners and opportunity of hearing was not given to them- other institutes were granted 6 months' time to get the land transferred in their names- it was a case of hostile discrimination – even Appellate Authority had granted time of six months to get the land transferred – it was not permissible for the respondents to sit over the orders passed by the Appellate Authority- the petitioners have been compelled to approach the Court repeatedly- petition allowed- permission granted subject to transfer of the land within a period of four weeks. (Para- 17 to 25)

For the petitioners: Mr. Suneet Goel, Advocate.
For the respondents: Mr. B. Nandan Vashisth, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Petitioner No. 1 is an educational trust, having established a Senior Secondary Public School and is also running B.Ed. College in the name and style of 'Shimla College of Education'. In order to introduce new professional course i.e. Diploma in Elementary Education (hereinafter referred to as the Course in question), it applied to respondent No. 2 i.e. Northern Regional Committee, National Council for Teachers Education (for short 'NRC'), initially in December, 2008, which application was rejected by respondent No. 2 vide letter dated 15.1.2009 constraining it to again apply, however, this application also came to be rejected on 16.5.2009 solely on the ground of delay. Thereafter, petitioners, time and again, applied to the respondents for grant of permission to run the course in question, but the said requests as also the appeal

were rejected by the respondents on different counts till 13.8.2010, the details of which have been given in the writ petition.

2. Left with no option, the petitioners preferred a writ petition being CWP No. 5944 of 2010 and during the pendency of this petition, respondent No. 2 carried out the inspection of the institution and in view of this development, the writ petition was disposed of vide judgment dated 23.4.2012 with a direction to respondent No. 2 to take appropriate action in light of the inspection report as also the action taken by the management of the institution.

3. The respondents again decided against the petitioners, constraining it to file an appeal before the Appellate Authority, which was accepted and the matter was again remanded to respondent No. 2 with a direction to conduct inspection of the institute afresh. The inspection was conducted in the first week of March, 2013, upon which respondent No. 2 issued show cause notice, dated 31.5.2013, calling upon the petitioners to submit a list of its teaching faculty members for the B.Ed. course, which the petitioners were already running. Petitioners filed reply to the show cause notice, which was considered by respondent No. 2 in its meeting held on 27th and 28th June, 2016, wherein it was observed as under:-

> *"…Therefore, the NRC came to the conclusion that the institution is running the B.Ed. Course without approved faculty since the grant of recognition by the NRC, NCTE. It is a violation of the provisions of the NCTE Regulations. "*

4. On the basis of the above observation, show cause notice was issued to the petitioners and the application for grant of permission to run the course was decided to be kept in abeyance. However, in the meeting held by respondent No. 2 on 28.1.2014, it was decided to withdraw the affiliation granted to the petitioners in respect of B.Ed. course. This constrained the petitioners to file an appeal, however, no decision was taken on the appeal, the petitioners again moved this Court by filing a writ petition being CWP No. 1062 of 2014, which was disposed of vide order dated 1.5.2014 with a direction to the Appellate Authority to decide the appeal within six weeks.

5. Subsequent thereto, the appeal of the petitioners was allowed and matter was remanded to respondent No. 2 whereafter, in the 235th meeting of respondent No. 2 held on 15.04.2015 to 18.04.2015, the recognition in respect of B.Ed. course was restored. As regards granting of recognition in favour of the petitioners for running the course in question, a letter of intent dated 24.4.2015, was issued in its favour. In compliance to the said letter, the petitioners requested the H.P. Board of School Education (for short 'Board') to constitute a selection committee in accordance with the letter of intent issued by respondent No. 2 for constitution of a selection committee for the selection of faculty/staff for running the course in question.

6. The Board, in turn, directed the Principal, district Institute of Education and Training, Shamlaghat to constitute a committee for the selection of faculty members. The said selection committee held meetings on 2.5.2015 and 6.5.2015 respectively and vide letter dated 14.5.2015 granted its approval of the teaching faculty and this committee recommended the names of ten (10) fresh teachers exclusively for D.EI.Ed. programme and also included list of six (6) teachers and Principal, already working in the B.Ed. college for D.EI.Ed. programme.

7. The case of the petitioners for recognition was thereafter taken in the 238th meeting held between 20th to 31st May, 2015, however, certain objections were raised which were responded to by the petitioners vide representation dated 4.6.2015. The case of the petitioners was thereafter taken up in the meeting of respondent No. 2 held on 30.6.2015 and 1.7.2015, wherein the recognition for running the course in question was again refused and against the said decision, petitioners filed the appeal before the Appellate Authority and also approached this Court by way of CWP No. 3279 of 2015. The said writ petition was disposed of vide order dated 6.8.2015 with a direction to respondent No. 2 to examine the case of the petitioners.

8. The case of the petitioners was again considered in the 242nd meeting of respondent No. 2 held between 1st to 3rd September, 2015, wherein also recognition was not

granted to the institution for running the course in question, against which, the petitioners preferred an appeal to the Appellate Authority. The petitioners also preferred writ petition, being CWP No. 3945 of 2015, before this Court, which was disposed of vide order dated 17th September, 2015, with a direction to the Appellate Authority to decide the appeal within a period of six weeks. When the appeal was not decided, a letter was written to the Member Secretary of respondent No. 1 for listing the appeal of the petitioners, but when no action was taken, the petitioner filed CWP No. 4283 of 2015, which was disposed of vide order dated 30.11.2015, with the following directions:-

> *"Learned counsel for the parties stated at the Bar that during the pendency of the writ petition, appeal was heard, the matter has been remanded and the lis is pending before respondent No. 2. Their statement is taken on record.*
>
> *2. In the given circumstances, we deem it proper to dispose of this writ petition with a direction to respondent No. 2 to decide the matter after hearing the parties within three weeks and report compliance before the Registrar (Judicial). The writ petitioners are at liberty to seek appropriate remedy at appropriate stage."*

9. In compliance to the aforesaid orders, the case was again taken up by respondent No.2 in its 246th meeting held on 9th to 12th December, 2015 and was rejected on the basis of the earlier grounds.

10. This constrained the petitioners to again approach this Court by way of CWP No. 4755 of 2015 and vide judgment dated 22.3.2016, the decision taken by the Appellate Authority in the proceedings of the 246th meeting, in so far as it pertained to the petitioners was quashed and respondents were directed to pass orders afresh within a period of three months.

11. The respondents were further directed to take into consideration the decision made by the Member Secretary, National Council for Teachers Education on 16.11.2015 whereby he had clearly observed that the petitioners have taken steps to remove all the deficiencies and the operative part of the decision reads thus:-

> "AND WHEREAS Appeal Committee noted that the Letter of Intent under Section 8(13) was issued to institution on 24.04.2015. The appellant institution furnished to N.R.C. on 30.5.2015, a revised list of faculty approved by the duly constituted selection Committee of the Himachal Pradesh Board of School Education, Dharamshala. There is valid evidence that the appellant institution had taken steps to remove deficiency in the earlier select list. Committee also noted that the appellant institution vide its letter dated 22.06.2015 addressed to R.D., N.R.C. had furnished a further revised list of faculty approved by the Himachal Pradesh Board of School Education on 17.05.2015 in which names of faculty which were erstwhile noticed to be working as B.Ed. faculty were replaced by new faculty exclusively selected for the D.EI.Ed. course. Appeal Committee noted that the appellant institution as well as N.R.C. got entangled in leveling unnecessary allegations and counter allegation. The crux of the case is that the appellant institution was found fit for conducting D.EI.Ed. course subject to fulfillment of certain conditions and the institution has finally completed the formalities under intimation to the N.R.C. The refusal order dated 09.07.2015 is not justified and hence the matter deserved to be remanded to N.R.C. for taking note of the revised list of faculty and, if need be, after getting the overwriting (erasing) verified through the issuing authority. The NR.C. may thereafter take further action as per the Regulations."

12. In compliance to the aforesaid directions, the respondent No. 2 vide its 252nd meeting held between 19.4.2016 to 2.5.2016, again rejected the case of the petitioners and same reads thus:-

> "The Prof. Y.K. Sharma was not present at the time of this decision.

The original file of the Institution alongwith other related documents, NCTE Act, 1993, Regulations were carefully considered by NRC and following observation was made:-

- In compliance with the order of Hon'ble High Court of Himachal Pradesh at Shimla, dt. 16.3.2016 in CWP No. 4755 of 2015, the applicant institution letter dt. 02.03.2016 was considered by the Committee and NRC decided the land for the proposed programme (D.EI.Ed. course) is on private lease basis which is contravenes the provisions of 8(4)(i) of the NCTE Regulations, 2014. Hence, grant of recognition is refused.
- Further, a complaint letter by Narendra Thakur, Counsellor, Kamla Nagar, Ward No. 6, Shimla was received in this office on 12.04.2016 against the institution may forward to Secretary, H.P. Board of School Education, Dharamshala, Kangra, for necessary action.

Hence, the Committee decided that the application is rejected and recognition/permission is refused u/s 14/15(3)(b) of the NCTE Act, 1993, FDRs, if any, be returned to the institution."

13. It is this order which has been assailed by the petitioners on the ground that the same is against the principal of natural justice and in complete violation of the order dated 30.11.2015 passed by this Court in CWP No. 4283 of 2015 whereby the respondent No. 2 was specifically directed to decide the matter after hearing the parties. It is further claimed that the decision is also vitiated on the grounds that the respondents have rejected the case of the petitioners under Rule 8(4)(i) of the NCTE Regulations, 2014, whereas, petitioners have met all the objections as has been raised by the respondents from time to time.

14. Lastly, it is averred that the respondents have adopted pick and choose policy in respect of the petitioners and they have been discriminated in as much as similarly situated institutions have been granted six months time to remove the deficiencies.

15. The respondents have filed their replies, wherein apart from setting out certain allegations against the faculty appointed by the respondents, it has been pointed out that the case of the petitioners has been rejected on two counts. Firstly that the land where the institute is situated is on a private lease basis, which is in contravention of the provisions of Clause 8(4)(i) of NCTE Regulations, 2014. Secondly, a complaint had been received from one Narender Thakur against the petitioners.

16. We have heard learned counsel for the parties and have gone through the material placed on record.

17. At the outset, we may observe that the petitioners appear to have been dragged into unnecessary and unwarranted litigation, which could have conveniently been avoided in case the respondents would have acted fairly and impartially. We observe so because the complaint filed by Sh. Narender Thakur, Councilor could not have formed one of the basis for rejecting their case for grant of approval, more particularly, when the contents of the complaint have not even been spelt out.

18. That apart, admittedly, no inquiry was conducted on such complaint and even copy thereof was not supplied to the petitioners so as to enable them to make representation. Therefore, the action of the respondents is clearly in violation of natural justice and fair play.

19. Adverting to the other ground for rejection, which is regarding the land for the proposed programme, being on a private land and not in the name of the institute, suffice it to say that as per the recognition order placed in case of other institute, the respondent No.2 itself has granted six months time to have the land transferred as would be evident from clause 7 of the recognition order dated 2.3.2015 (Annexure P-11) wherein it is clearly provided as under:

"7. In case if the land is in the name of the Society/trust, the land is to be transferred within six months in the name of the institution, failing which action shall be initiated to withdraw the recognition. It shall be essential on the part of the institution concerned to get the needful done in this regard and intimate about the same to the respective Regional Committee alongwith the new land documents within the stipulated time."

Therefore, this is clearly a case of invidious discrimination wherein the petitioners alone have been discriminated against, whereas other similarly situated societies/trusts have been granted six months time to have the land transferred in the name of institution.

20. Not only this, we in view of the earlier order passed by the appellate authority further find the action of the respondents to be unsustainable, whereby the respondents had already granted six months time to the petitioners to establish their ownership over the property through legally permissible documents and to show their ability to transfer the land and built up area thereupon in the name of the institution, as would be evident from the order dated 13.10.2015, relevant portion whereof reads thus:

"AND WHEREAS Committee noted that application for M.Ed. course was made by Shimla Educational Society Trust on 30.12.2012 and the name of appellant college is Shimla College of Education. The land documents enclosed with the application consist of a Lease Deed. The lease is granted by Shimla Education Society in favour of the Shimla College of Education. Committee further noted the relevant contents of clause 8(4) (i) & 8 (4) (iii) of the NCTE Regulations, 2014 which lay down as under: (i) No institution shall be granted recognition under these regulations unless the institution or society sponsoring the institution is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease from Government or Government institutions for a period of not less than thirty years. In cases where under relevant State or Union territory laws the maximum permissible lease period is less than thirty years, the State Government or Union territory administration law shall prevail and in any case no building shall be taken on lease for running any teacher training programme, (ii) The society sponsoring the institution shall be required to transfer and vest the title of the land and building in the name of the institution within a period of six months from the date of issue of formal recognition order under sub-regulation (16) of regulation 7. However, in case, the society fails to do so due to local laws or rules or bye-laws, it shall intimate in writing with documentary evidence of its inability to do so. The Regional Office shall keep this information or record and place it before the Regional Committee for its approval.

AND WHEREAS keeping in view the above provisions of NCTE Regulations, 2014, Appeal Committee is of the opinion that so long as appellant society is able to establish its ownership rights over the property through legally permissible documents and also able to transfer the land and built up area thereupon in the name of the appellant institution within 6 months after the grant of recognition, there is no objection to the appellant society's leasing out the land to the applicant college.

AND WHEREAS Appeal Committee, having considered the submissions made by appellant and the relevant clauses of the NCTE Regulations, 2014 decided to remand back the case to N.R.C. with a direction to process the application as per Regulations, 2014.

AND WHEREAS after perusal of the memorandum of appeal, affidavit, documents available on records and considering the oral arguments advanced during the hearing, the Committee concluded that the appeal deserves to be remanded to NRC with a direction to process the application as per Regulations, 2014.

NOW THEREFORE, the Council hereby remands back the case of Shimla College of Education, Sanjauli, Shimla, Himachal Pradesh to the NRC, NCTE, for necessary action as indicated above." (underlining supplied by us)

21. The respondents could not have sat over the order passed by the appellate authority and it is only when the petitioners would have shown their inability or failed to comply with the terms of the appellate authority, could they have rejected the case of the petitioners.

22. We are really at a complete loss to understand and as to how and why the respondents have once again rejected the case of the petitioners, that too, on the ground of violation of provisions of clause 8 (4) (i) of the Regulations. Undoubtedly, the respondents are vested with the authority to grant or refuse the recognition but the same has to be in accordance with law and the rejection cannot be left to the whims and caprices of the authorities (respondents), as is clearly reflected in the instant case.

23. It is unfortunate that the petitioners have repeatedly been compelled to approach this Court and within a span of five years have been constrained to file the seventh petition, earlier ones being:

1. CWP No. 5944/2010 decided on 23.4.2012
2. CWP No. 1062/2014 decided on 1.5.2014
3. CWP No. 3279/2015 decided on 6.8.2015
4. CWP No. 3945/2015 decided on 17.9.2015
5. CWP No. 4283/2015 decided on 30.11.2015
6. CWP No. 4755/2015 decided on 22.3.2016

24. That apart, the petitioners have time and again been compelled to approach the appellate authority against the action/inaction of the respondents.

25. In view of aforesaid discussion, we have no hesitation in allowing the petition and accordingly the same is allowed. The decision taken by respondent No.2 in its 252nd meeting held on 19.4.2016 to 2.5.2016 is quashed and set aside and the petitioners are permitted to start the course in question, i.e. D.El.Ed course for the session 2015-17. However, this would be subject to the petitioners transferring the land and built up area thereupon in the name of the institute within a period of four weeks.

The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Narain Dass Chauhan .....Petitioner

Versus

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

Cr.MP(M) No. 1244 of 2016
Decided on: 9th November, 2016

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

For the petitioner Mr. Bimal Gupta, Sr. Advocate with Ms. Kusum Chaudhary, Advocate.
For the respondent Mr. Neeraj K. Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

The petitioner who has been booked by the police of Police Station, Kotkhai in a case registered under Sections 447, 323, 341, 504, 506 of the Indian Penal Code and 3(1)(g),3(1)(r)3(1)(s) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 had surrendered before this Court on 18.10.2016 and filed this application with a prayer to enlarge him on bail. Though he is in custody, however, vide order dated 18.10.2016 was ordered to be not arrested subject to the outcome of this petition. The interim order so passed came to be extended from time to time with a direction to the accused-petitioner to continue to join the interrogation.

2. The record produced by the investigating agency reveals that besides the commission of an offence under the provisions of Indian Penal Code, the accused-petitioner has committed an offence punishable under the provisions of Atrocities Act also. The offence, therefore, he committed is not only against an individual i.e. the complainant but also the society as a whole, particularly weaker section of the society. Therefore, in all fairness though the prayer he made for being admitted on bail should have been declined, however, keeping in view his advanced age i.e. 79 years and also the submissions persuasive in nature made on his behalf by Mr. Gupta, learned arguing counsel and also that there being no complaint that he was not available to the investigating agency for the purpose of interrogation as and when called upon to do so, a lenient view of the matter has been taken, of course subject to the accused-petitioner not indulging in an illegal activity of this nature in future and maintain peace and good behavior in the area. As regards the apprehension of the investigating agency is that if admitted on bail, he may again torture and try to win over or influence the complainant who lives alone in the village, though, it is not expected from the accused-petitioner to do so, however, in case any such instance is brought to the notice of this Court either by the complainant or the investigating agency, he will be dealt with sternly in accordance with law including the cancellation of the liberty of bail against any such act and behaviour on his part.

3. In view of the above, I allow this application and order to release the accused-petitioner on bail subject to his furnishing personal bond in the sum of Rs.1,00,000/- with one surety in the like amount to the satisfaction of learned Judicial Magistrate, Rohroo/Jubbal. He shall further abide by the following conditions:-

(a) make himself available for interrogation as and when called upon to do so;

(b) not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever.

(c) not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer.

(d) not leave the territory of India without the prior permission of the Court.

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

5. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone. Petition stands disposed of accordingly.

Dasti ***copy***.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Roshan Lal son of Shri Nandu and others ....Revisionists/Judgment Debtors
Versus
Nika Ram son of Budhu & others ....Non-Revisionists/Decree Holders

Civil Revision No. 9 of 2012
Order Reserved on 2nd September 2016
Date of Order 9th November 2016

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

Cases referred:
Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
The Municipal Corporation Indore vs. K.N. Palsikar, AIR 1969 SC 580
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela, AIR 2002 SC 1004

For the Revisionists: Mr. Ashwani Sharma Advocate
For Non-Revisionists Nos. 1 and 2 : Mr. Y. Paul Advocate
For Non-revisionist No.6: Ms. Komal Chaudhary, Advocate.
For other Non-revisionists: None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 against order of learned Civil Judge (Senior Division) Court No.1 Sundernagar District Mandi passed in execution petition No. 8 of 1999 decided on 28.12.2011.

Brief facts of the case

2. Nika Ram Decree Holder filed execution petition No. 8 of 1999 pleaded therein that civil suit No. 1 of 1988 titled Nika Ram and others vs. Nandu was decided by learned Civil Judge on 11.2.1991 and Nandu son of Shri Chamaru was restrained from making any sale deed of suit land till partition of suit land. It is pleaded that thereafter civil appeal No. 77 of 1996 was filed by judgment debtors. It is pleaded that judgment debtor died and his LRs were impleaded in civil appeal No. 77 of 1996 which was disposed of on 1.8.1997 by learned District Judge Mandi (H.P.). Matter was compromised before learned Appellate Court inter se parties and appeal was not pressed and appeal was dismissed as withdrawn. It was ordered that statements of parties and their counsel recorded would form part of order. It is pleaded in execution petition that judgment debtors have intentionally and voluntarily violated decree of learned Trial Court by way of alienating suit land in favour of Hasan Ali on dated 20.10.1998 registered on 21.10.1998 in consideration amount of Rs.150000/- (Rupees one lac fifty thousand) before partition of suit land. It is prayed that judgment debtors be detained in civil prison and property of judgment debtors be also attached. It is further pleaded that sale deed dated 20.10.1998 registered on 21.10.1998 executed by judgment debtors in favour of Hasan Ali be cancelled.

3. Judgment Debtors Nos. 1 to 6 filed objections in execution petition. It is pleaded that sale deed has been executed by judgment debtor in favour of Hasan Ali in accordance with law. It is pleaded that undertaking before learned District Judge Mandi H.P. was subject to decision of civil suit No. 71 of 1992 titled Khalelu and others vs. Radha and others. It is pleaded that civil suit No. 71 of 1992 was decided on 31.8.1998. It is pleaded that after decision of civil suit No. 71 of 1992 judgment debtors were legally competent to execute sale deed qua land mentioned in decree sheet. It is pleaded that judgment debtors have alienated suit land in favour of Hasan Ali after receiving legal opinion from Advocate. It is pleaded that Hasan Ali is bonafide purchaser for consideration. Prayer for dismissal of execution petition sought.

4. Per contra separate objections filed by Hasan Ali purchaser of suit land pleaded therein that he is bonafide purchaser of land mentioned in decree sheet for valuable consideration of Rs.150000/- (Rupees one lac fifty thousand). Prayer for dismissal of execution petition sought.

5. Per contra separate objections filed on behalf of Kundan Lal Patwari pleaded therein that he was not aware of judgment and decree passed by learned Trial Court. Kundan Lal further pleaded that he simply supplied the copy of record of right on demand as per H.P. Land Revenue Act 1954 while discharging his official duty. Prayer for dismissal of execution petition against Kundan Lal Patwari sought.

6. Learned Executing Court framed following issues on dated 19.6.2002:-

1. Whether Judgment Debtors Nos. 1 to 6 have disobeyed the decree of Court by making alienation in favour of Hasan Ali as alleged? ....OPP
2. Whether execution application is not maintainable? .....OPRs
3. Relief.

7. Learned Executing Court decided issue No. 1 in affirmative and decided issue No. 2 in negative. Learned Executing Court partly allowed the execution petition against Judgment Debtors Nos. 1 to 3 namely Roshan Lal, Shyam Lal, Smt. Chetri Devi and ordered that Judgment Debtors Nos. 1 to 3 would be detained in civil imprisonment for a period of one month. Learned Executing Court issued arrest warrant against Roshan Lal, Shyam Lal and Khetri Devi returnable for 19.2.2012. Learned Executing Court further held that there is nothing on record to establish that Hasan Ali has constructive notice or knowledge regarding decree of civil suit No. 1 of 1988 titled Nika Ram and others vs. Nandu. Learned Executing Court further held that Hasan Ali is bonafide purchaser of suit land and his rights stand protected under Section 41 of Transfer of Property Act 1882. Learned Executing Court further held that sale deed in favour of Hasan Ali could not be declared as null and void.

8. Feeling aggrieved against order of learned Executing Court dated 28.12.2011 revisionists namely Roshan Lal, Shyam Lal, Smt. Chetri Devi filed present revision petition under Section 115 of Code of Civil Procedure 1908.

9. Court heard learned Advocate appearing on behalf of revisionists and learned Advocate appearing on behalf of non-revisionists and Court also perused entire record carefuly.

10. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115 of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

11. <u>Findings upon point No.1 with reasons</u>

11.1 PW1 Ram Singh has stated that he filed civil suit and same was decreed and it was directed by Civil Court that judgment debtor namely Nandu son of Chamaru would not alienate the suit land till partition. PW1 has stated that thereafter appeal was filed and LRs of Nandu were impleaded after death of Nandu and thereafter appeal was dismissed as withdrawn on 1.8.1997 and judgment and decree of learned Trial Court was affirmed. PW1 has stated that he has supplied the copy of decision to Halqua Patwari. PW1 has stated that despite prohibitory decree of Civil Court suit land was alienated by Chetri Devi, Roshan Lal and Shyam Lal to Hasan Ali in the year 1998. PW1 has tendered in evidence documents Ext.PA to Ext.PF. PW1 has admitted that Hasan Ali was not party in civil suit. PW1 has denied suggestion that decision of Civil Court was not in knowledge of Hasan Ali. PW1 has denied suggestion that civil suit title Khalelu vs. Radha was decided in favour of judgment debtors and thereafter suit land was alienated.

11.2 RW1 Shyam Lal has stated that two civil suits were filed qua land in dispute and title of other suit was Khalelu and others vs. Radha and others. RW1 has stated that dispute in civil suit i.e. Khalelu and others vs. Radha and others was relating to shares of parties. RW1 has stated that compromise was executed in appeal No. 77 of 1996 that till decision of civil suit titled Khalelu and others vs. Radha Devi and others suit land mentioned in decree would not be alienated. RW1 has stated that it was also decided in civil appeal No. 77 of 1996 that in case partition takes place prior to the decision of civil suit title Khalelu and others vs. Radha and others then judgment debtors would be competent to alienate the suit land mentioned in decree sheet. RW1 has stated that after decision of civil suit titled Khalelu and others vs. Radha and others share of judgment debtors increased. RW1 has stated that after decision of civil suit title Khalelu and others vs. Radha and others judgment debtors have alienated their share to Hasan Ali vide sale deed Ext.RW1/A qua land mentioned in decree sheet. RW1 has stated that field map is Ext.RW1/B and jamabandi is Ext.RW1/C. RW1 has stated that advice of Advocate was also sought. RW1 has stated that Advocate advised judgment debtors to alienate land mentioned in decree sheet. RW1 has stated that Hasan Ali was not party in both civil suits. RW1 has stated that Halqua Patwari also told that land mentioned in decree sheet could be alienated. RW1 has admitted that it was decided in decree of civil suit No. 1 of 1988 that till partition of land mentioned in decree sheet land would not be alienated. RW1 has admitted that appeal was also filed and in appeal undertaking was given by judgment debtors that judgment debtors would not alienate the land mentioned in decree sheet till partition. Self stated that undertaking was conditional to the effect that land mentioned in decree sheet would not be alienated till decision of civil suit title Khalelu and others vs. Radha and others. RW1 has denied suggestion that judgment debtors have wilfully failed to obey decree of Civil Court.

11.3 RW2 Tara Chand Patwari has tendered only jamabandi.

11.4 RW3 Kundan Lal Patwari has stated that he was posted as Patwari w.e.f. 1994 to 1998. RW3 has stated that field map Ext.RW1/B and Ext.RW1/C have been issued by him. RW3 has stated that both documents are correct as per original record. RW3 has stated that field map was prepared as per reqeust of legal representatives of Nandu. RW3 has stated that vendee was also alongwith vendors. RW3 has stated that as of today he is patient of paralysis.

11.5 RW4 Chander Mani Patwari has stated that he remained as Patwari w.e.f. 1998 to 2001. RW4 has stated that he has recorded note Ext.PG in red ink. RW4 has stated that rapat No. 484 was recorded on dated 26.6.2000. RW4 has stated that he did not peruse old record when he issued copy of jamabandi.

11.6 RW5 Hasan Ali has stated that he has purchased the land mentioned in decree sheet from Chetri Devi, Roshan Lal and Shyam Lal vide sale deed Ext.RW1/A relating to Khasra No. 1306/1 area measuring 0-4-13 bighas. RW5 has stated that he inquired from Halqua Patwari and Halqua Patwari informed him that there was no impediment for purchase of land mentioned in decree sheet. RW5 has stated that Halqua Patwari also issued field map. RW5 has denied

suggestion that decree of Civil Court was in his knowledge. RW5 has denied suggestion that he has intentionally purchased the land mentioned in decree sheet despite knowledge of decree passed by Civil Court.

12. Following documents filed by parties. (1) Ext.A-1 is certified copy of judgment dated 11.2.1991 passed in civil suit No. 1 of 1988. (2) Ext.A2 is certified copy of decree sheet passed in civil suit No. 1 of 1988. (3) Ext.A3 is certified copy of order dated 1.8.1997 passed by learned District Judge Mandi H.P. in civil appeal No. 77 of 1996. (4) Ext.A4 is certified copy of statements of Shyam Lal judgment debtor and Mr.D.N.Pathak Advocate given in civil appeal No. 77 of 1996 dated 1.8.1997. (5) Ext.A5 is certified copy of decree sheet in appeal. (6) Ext.A-6 is certified copy of judgment dated 31.8.1998 passed in civil suit No. 71 of 1992 title Khalelu and others vs. Radha Devi & others. (7) Ext.A7 is certified copy of decree passed in civil suit No. 71 of 1992 title Khalelu and others vs. Radha Devi and others. (8) Ext.RW1/A is copy of sale deed dated 20.10.1998 registered on 21.10.1998 qua land mentioned in decree sheet dated 11.2.1991 passed in civil suit No. 1 of 1988 whereby judgment debtors namely Roshan Lal, Shyam Lal, Chetri Devi alienated land in favour of Hasan Ali in consideration amount of Rs.150000/- (Rupees one lac fifty thousand). (9) Ext.RW1/B is copy of field map. (10) Ext.RW1/C is copy of jamabandi for the year 1992-93.

13. Submission of learned Advocate appearing on behalf of revisionists that order of learned Executing Court is contrary to law and contrary to proved facts is rejected being devoid of any force for the reasons hereinafter mentioned. In present case it is proved on record that civil suit No. 1 of 1988 titled Nika Ram vs. Nandu was decided by Civil Court and prohibitory decree was passed by Civil Court against Nandu judgment debtor to the effect that judgment debtors would not sell the land mentioned in decree sheet till its partition. It is also proved on record that thereafter appeal No. 77 of 1996 was filed before learned District Judge Mandi title Roshan Lal and others vs. Nika Ram and others and civil appeal No. 77 of 1996 dismissed on 1.8.1997 by learned District Judge Mandi as withdrawn. Statement of co-appellant Shyam Lal and learned Advocate D.N.Pathak were recorded by learned District Judge Mandi on 1.8.1997 and Shri Shyam Lal and learned Advocate D.N. Pathak appeared on behalf of appellants before learned District Judge Mandi have given statement on 1.8.1997 that appellants namely Shyam Lal and others would not alienate the suit land in any manner till partition of suit land take place in accordance with law and subject to decision of suit filed by respondents which was pending before learned Civil Judge Sundernagar titled Khalelu and others vs. Radha and others. It is also proved on record that learned District Judge Mandi H.P. has specifically mentioned in order dated 1.8.1997 passed in civil appeal No. 77 of 1996 that statements of parties and their Advocates shall form part of order. It is held that undertaking given by Shyam Lal and learned Advocate D.N.Pathak on behalf of other judgment debtors is binding upon Roshan Lal, Shyam Lal and Chetri Devi. It is held that Roshan Lal, Shyam Lal and Smt. Chetri Devi cannot be allowed to flout undertaking given in civil appeal No. 77 of 1996 titled Roshan Lal and others vs. Nika Ram and others decided on 1.8.1997.

14. Submission of learned Advocate appearing on behalf of revisionists that after decision of civil suit No. 71 of 1992 decided on 31.8.1998 titled Khalelu and others vs. Radha and others judgment debtors were legally competent to alienate land mentioned in decree sheet in civil suit No. 1 of 1988 in view of statements given on dated 1.8.1997 by Shri Shyam Lal and learned Advocate D.N. Pathak in civil appeal No. 77 of 1996 is rejected being devoid of any force for the reasons hereinafter mentioned. Undertaking given by co-appellant Shri Shyam Lal and Mr.D.N. Pathak before learned District Judge Mandi on dated 1.8.1997 is quoted in toto:-

> *"I have the instructions to state that the appellants undertake not to alienate the suit land in any manner till partition of suit land in accordance with law and subject to decision of suit filed by the respondents which is pending before learned Civil Judge Sundernagar titled as Khalelu versus Radha and others. The appeal may be dismissed as withdrawn."*

Court has carefully perused the contents of undertaking cited supra. Court is of the opinion that undertaking is not alternative in nature subject to decision of civil suit No. 71 of 1992 titled Khalelu and others vs. Radha & others but undertaking is additional undertaking subject to decision of civil suit No. 71 of 1992 titled Khalelu and others vs. Radha and others. It is held that word 'And' is always used for additional purpose and not used for alternative purpose. It is held that word 'Or' is always used for alternative purpose. In the present case word 'And' has been used in the undertaking given by Shri Shyam Lal and learned Advocate D.N. Pathak in civil appeal No. 77 of 1996 decided on 1.8.1997.

15. Submission of learned Advocate appearing on behalf of revisionists that judgment debtors have alienated the suit land in favour of Hasan Ali as per advise given by learned Advocate and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Judgment debtors did not examine learned Advocate in order to prove fact that judgment debtors were advised by learned Advocate to execute sale deed qua property mentioned in decree sheet passed in civil suit No. 1 of 1988 prior to partition. Plea of judgment debtors that they have alienated land mentioned in decree sheet as per advise of their Advocate is defeated on the concept of *ipse dixit* (An assertion made without proof).

16. Submission of learned Advocate appearing on behalf of revisionists that judgment debtors have not wilfully disobeyed the decree passed by Civil Court is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record beyond reasonable doubt that judgment debtors have failed to obey decree of civil Court having an opportunity of obeying decree by way of executing sale deed in favour of Hasan Ali on 20.10.1998 registered on 21.10.1998 in consideration amount of Rs.150000/- (Rupees one lac fifty thousand) before Sub Registrar Sundernagar Mandi (H.P.).

17. It is well settled law that High Court cannot reverse the findings of fact of learned Executing Court unless findings of facts are perverse. ***See AIR 1991 SC 455 Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 580 The Municipal Corporation Indore vs. K.N. Palsikar. See AIR 1995 SC 1357 P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See AIR 2002 SC 1004 Gurdial Singh vs. Raj Kumar Anjela.*** In view of above stated facts and case law cited supra it is held that order of learned Executing Court is not perverse. Point No.1 is answered in negative.

Point No. 2 (Relief)

18. In view of findings upon point No.1 revision petition is dismissed. Order passed by learned Executing Court dated 28.12.2011 in execution petition No. 8 of 1999 is affirmed. Parties are left to bear their own costs. Record of learned Executing Court be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Khem Chand .....Respondent.

Cr. Appeal No. 561 of 2008
Decided on : 09/11/2016

Indian Penal Code, 1860- Section 279 and 337- Accused was driving the car rashly and negligently, which hit the informant causing injuries to her – accused was tried and convicted by the trial Court- an appeal was preferred, which was allowed- held in appeal that the medical evidence does not establish the prosecution version – material witness was not examined – the

Appellate Court had rightly acquitted the accused, in these circumstances appeal dismissed.(Para-9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Dy. A. G.
For the Respondent: Mr. Neel Kamal Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed against the impugned judgement recorded by the learned Sessions Judge, Shimla, whereby he reversed the findings of conviction recorded upon the accused by the learned trial Court and acquitted the accused respondent herein for his allegedly committing offences punishable under Sections 279 and 337 IPC.

2. The brief facts of the case are that on 9th July, 2002 at 3.40 p.m. on duty pharmacist, DDU Hospital, Shimla, informed Police Station, Sadar, Shimla that a lady has been brought to the hospital in an injured condition. On this information H.C Lal Singh and constable Rai Singh were sent to DDU Hospital for investigation vide daily diary Ext.PW-9/A. The complainant made a statement Ext.PW-2/A that her daughter in law was admitted in Ripon Hospital, Shimla for the last 10-12 days and she came to Shimla to see her. When she wanted to cross the road near Ripon Hospital, a red coloured car came and hit her from right side. The car was being driven rashly and negligently. She has stated that she suffered injuries on the right side of the body. The number of the car was noted by her nephew Ramesh Kumar. In the meantime, a Traffic Police constable came there and stopped the car. She was taken to hospital by Ramesh Kumar and other people. Upon the aforesaid statement, formal F.I.R was registered. The Investigating Officer prepared the site plan on the spot and took into possession the offending vehicle. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279 and 337 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused whereas the learned Sessions Judge returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Sessions Judge standing not based on a proper appreciation by him of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by him of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. In sequel to the victim injured standing struck with the vehicle allegedly driven in a rash and negligent manner by the accused respondent herein, she begot injuries on her person, injuries whereof stand reflected in MLC Ext.PW-6/A. The injuries which stand pronounced therein stand testified by PW-6 to arise by user thereon of a blunt weapon. Also in Ext.PW-6/A there occurs a disclosure qua on the victim standing brought for examination before PW-6 hers divulging to the latter qua hers standing struck by a bus. The aforesaid revelation occurring in Ext.PW-6/A when holds an apparent contra-distinctivity vis.a.vis. the ascription made by her in the F.I.R qua hers begetting the injuries pronounced in Ext.PW-6/A on hers standing struck with the vehicle allegedly driven in a rash and negligent manner by the accused respondent herein does scuttle the vigour of the ascriptions made by her in the F.I.R. embodying therein qua the accused while negligently driving his vehicle, his striking her also denudes the vigour of her testimony holding therein communications in tandem therewith. Furthermore, with PW-6 in her testification proclaiming therein qua the injuries reflected in Ext.PW-6/A standing caused by user of blunt weapon also perse when holds no connectivity with the testification of the injured victim wherein she discloses qua hers standing entailed with injuries reflected in Ext.PW-6/A on hers standing struck with the car purportedly driven in a rash and negligent manner by the accused/respondent herein whereupon cumulatively hence with dichotomy also occurring intra se the testification of the victim vis.a.vis the testification of PW-6 qua the cause of injury delineated in Ext.PW-6/A, renders the genesis of the prosecution case embodied in the F.I.R. to stand not convincingly established.

10. Be that as it may, the prosecution had relied upon the testimony of PW-5 a purported eye witness to the occurrence who in his testification lends corroborative succor to the testification of the victim injured. However, his testimony wherewithin communications are held of his sighting the accused/respondent herein to strike the victim/injured at the place pronounced in site plan comprised in Ext.PW-8/A also wherewithin he pronounces qua the car driven by the accused purportedly in a rash and negligent manner arriving thereat from the lift side, does not command any probative vigour significantly when it is in rife contradiction with the relevant manifestations occurring in Ext.PW-8/A, contrarily wherein the car allegedly driven in a rash and negligent manner by the accused stands disclosed to arrive from a side other than the one divulged by PW-5 whereupon his testimony is to be concluded to stand ridden with a vice of invention besides concoction also thereupon when apparently he was not available at the site of occurrence his testification in purported corroboration to the testification of the victim injured who has deposed as PW-2, is legally unworthwhile.

11. Be that as it may, even though the sole testimony of the victim/injured was sufficient to constrain this Court to return findings of conviction upon the accused respondent nonetheless with the aforesaid reason assigned by this Court for dispelling the vigour of her testimony contrarily prods this Court to conclude qua her version loosing veracity. Also the vigour of her testimony stands denuded by the factum of hers deposing qua at the relevant time when she alighted from the bus, one Ramesh in simultaneity with her also alighting therefrom whereas with the aforesaid Ramesh standing neither cited as a prosecution witness nor obviously his statement coming to be recorded whereas his testimony constituted the best evidence to lend succor to the prosecution case. Consequently, when the adverse effect of his non examination stands construed in entwinement with the inference aforestated qua the testimony of the injured wanting in any tenacity also when is construed in coagulation with the legally frail testimony of a purported eye witness to the occurrence who deposed as PW-5 whereupon an inference qua its hence wanting in any legal vigour is erectable, constrains this Court to conclude qua the propagation made by the prosecution standing bereft of truth.

12. The learned Deputy Advocate General has contended of with PW-2 in her testification comprised in her examination in chief divulging therein qua hers while after alighting the bus hers taking to proceed to DDU hospital wherebefore she testifies qua hers looking around for ascertaining whether the vehicles from the apposite side had arrived thereat whereupon with hers despite hence adhering to the standards of due care and caution hers standing struck by the vehicle driven by the accused while its standing driven by him at a brazen pace, when has

remained unrebutted does hold visible echoings of the defence acquiescing to the inculpation of the accused respondent. However, the aforesaid submission stands negated preeminently when Ext.PW-8/A makes a disclosure of the purported incident occurring in close proximity to the road leading onwards to the DDU hospital whereat uncontrovertedly the victim/injured alighted from the bus whereon she was aboard as a passenger besides when the vehicle driven by the accused respondent stands not displayed by invincible evidence to stand driven on the inappropriate side of the road rather when it stands displayed by Ext.PW-8/A to occur at point 'E' thereof location whereof, is in close proximity to the road leading to DDU hospital, begets an inference of the victim injured abruptly arriving at the relevant site of occurrence unnoticing the car driven by the accused which came from the apposite direction wherefrom hence it is to be concluded qua her testimony qua hers adhering to the standards of due care and caution being incredible contrarily it is to be concluded of her abrupt appearance at the relevant site causing the mishap bereft of any element of penally inculpable negligence.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Parveen Kumar and another ....Respondents.

Cr. Appeal No. 529 of 2008.
Date of Decision: 9th November, 2016.

Indian Penal Code, 1860- Section 379 read with Section 34- **Indian Forest Act, 1927-** Section 41 and 42- A nakka was laid and a Tractor carrying 20 quintals fuel wood of different specis was recovered- no permit for transporting the same was produced – it was found on investigation that fuel wood was stolen from khasra No.326 – the accused were tried and acquitted by the Trial Court- held in appeal that PW-11 and PW-13 had made contradictory statements regarding place of recovery – no disclosure statement was made prior to the discovery of the place from where the recovery was effected – the prosecution case was not proved beyond reasonable doubt and the accused were rightly acquitted by the trial Court- appeal dismissed. (Para- 9 to 11)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For the Respondents: Mr. N.K. Thakur, Senior Advocate with Ms. Jamna Kumari, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Chief Judicial Magistrate, Una, District Una, H.P., rendered on 31.05.2008 in Case No. 156-III-2002, whereby, he acquitted the accused/respondents herein for theirs allegedly

committing offences punishable under Section 379 of the IPC and Sections 41/42 of the Indian Forest Act.

2. The facts relevant to decide the instant case are that on 29.4.2002 C. Yash Pal No. 364 was present at village Ghaluwal whereat he received a secret information that accused Parveen and Vijay Kumar are dealing in sale of stolen timber in Punjab and that on that day also they have gone to Dulehar Brahmna forest in the tractor to fetch timber and that if a naka is laid on the border of Punjab and Himachal Pradesh they can be apprehended red handed. This information was passed on by C. Yash Pal to ASI Baldev Ram,I/C P.P. Haroli who met him at Pubowal who recorded his statement under Section 154 Cr.P.C. on the basis of which FIR No. 228/2002 under Sections 379 IPC and 41 and 42 of Indian Forest Act was registered in P.S Una. Thereafter, SI Baldev Ram laid a naka on the border of Himachal and Punjab at Brahmnawala Forest and intercepted a Sonalika Tractor Trolley which was not bearing any registration number. On checking the accused persons were found sitting in the said tractor and fuel wood weighing about 20 quintals of different species was found loaded therein. On demand by SI Baldev Ram the accused persons could not produce any permit for transporting the fuel wood loaded in the tractor. Upon this SI Baldev Ram seized the tractor alongwith the fuel wood loaded therein in the presence of Sh. Krishan Gopal, Prem and H.C Jagtar Singh. During further investigation conducted by SI Baldev Ram it was found that the accused persons had stolen the fuel wood by cutting about 40 trees of different broad leave species from land bearing Khasra No. 326 situated at Mohal Bhariyara, Mauza Dulehar, Tehsil Haroli and converted the same into fuel wood and that they were transporting the same to Punjab without possessing any valid permit. Therefore, after completion of investigation the SHO P.S Una found the accused persons guilty under Section 379 IPC and Section 41/42 of Indian Forest Act, 1927.

3. On conclusion of the investigations, into the offence, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Section 379 of the IPC and under Sections 41 and 42 of the Indian Forest Act, 1927. In proof of the prosecution case, the prosecution examined 13 witnesses. On conclusion of recording of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the trial Court, in which they claimed innocence and pleaded false implication. However, they did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. Under recovery memo Ex.PW11/A fuel wood holding a weight of 20 quintals stood recovered from the relevant tractor which at the relevant time stood occupied by the accused/respondents. The accused/respondents stood detected by the Investigating Officer

concerned to not hold a valid permit under the Himachal Pradesh Forest Land Transit Rules for transporting it in the relevant vehicle also with the owner of the land wherefrom purportedly it stood stolen in his previous statement recorded before the Investigating Officer concerned making a disclosure therein qua trees standing felled from his land constrained the Investigating Officer to in his report prepared under Section 173 of the Cr.P.C., report whereof stood furnished before the learned trial Court, conclude qua offences constituted under Section 379 of the IPC and under Sections 41 and 42 of the Indian Forest Act standing committed by the accused/respondents. In sequel thereto the accused/respondents faced trial.

10. On conclusion of the trial qua the offences aforesaid, the learned Chief Judicial Magistrate on holding an incisive perusal of the evidence on record concluded qua the charge to which the accused/respondents stood subjected to not standing proven by adduction of emphatic evidence.

11. The reasoning as stands assigned by the learned trial Court for pronouncing an order of acquittal qua the accused/respondents stands founded upon the factum of with PW-11 and PW-13 contradictorily deposing qua the place whereat the relevant seizure occurred, significantly, with PW-11 deposing qua the relevant seizure occurring about 10-12 kilometers away from the territorial boundaries of the State of Punjab whereas PW-13 deposing of the relevant seizure occurring at a place wherefrom the territorial boundary of the State of Punjab stands located at a distance of ½ kilometers, it therefrom recorded a conclusion, conspicuously, when the relevant demarcation for ascertaining qua whether the naka whereat the relevant seizure occurred falling within the territorial jurisdiction of the State of Himachal Pradesh or within the territorial jurisdiction of the State of Punjab, qua hence the relevant seizure not occurring within the State of Himachal Pradesh rather it occurring within the territorial domain of the State of Punjab. However, the aforesaid reasoning as stands propounded by the learned Chief Judicial Magistrate to record an order of acquittal qua the accused/respondents herein may not hold any tenacity unless evidence stood adduced by the prosecution marking the factum of the tractor whereon fuel wood stood carried emanating from the territorial domain of the State of Himachal Pradesh. However, for the reasons ascribed hereinafter, the prosecution has miserably failed to adduce the aforesaid relevant best evidence whereupon this Court is interdicted to conclude of the tractor whereon the relevant illicit timber stood transported originating from within the territorial domain of the State of Himachal Pradesh. (a) Recovery memo Ex.PW11/A whereunder the accused/respondents recorded their statement whereby they identified the place held in the ownership of PW-9, whereat they axed trees for converting therefrom fuel wood allegedly carried in the relevant vehicle occupied at the relevant time by them not standing preceded by any disclosure statement. Consequently, with Ex.PW11/A remaining unpreceded by any disclosure statement constrains a conclusion of the recitals occurring therein standing prodded by duress besides compulsion exerted upon the accused by the Investigating Officer concerned during the period whereat he subjected them to custodial interrogation. Also it hence appears qua the Investigating Officer concerned inventing besides preceding the making of Ex.PW11/A his suo motto discovering the relevant place whereat the relevant purported fellings occurred whereafter he obviously proceeded to record an engineered recovery memo borne on Ex.PW11/A, memo whereof obviously holds no probative sinew. The effect of the aforesaid inference is hence the imperative ingredient for Ex.PW11/A to hold efficacy embodied in the factum of the relevant identified place reflected therein standing held within the exclusive knowledge of the accused/respondents remaining unsatiated. (b) PW-9 the owner of the land whereupon the relevant fellings occurred omitting to identify the accused to be the persons who had proceeded to fell trees growing upon his land. (c) The Investigating Officer concerned not placing on record the apposite scientific evidence obtained from the Forest Institute, Dehradun, comprised in a report prepared by its relevant officer in sequel to his visiting the relevant khasra number whereat the relevant felling of trees occurred, wherewithin unfoldments occur qua the fuel wood allegedly carried in the vehicle whereon the accused/respondents were aboard at the relevant time, standing felled therefrom. Omission of adduction by the prosecution of the aforesaid best evidence cannot constrain a conclusion qua the fuel wood as stood carried in the

relevant vehicle wherefrom its seizure occurred standing axed from trees growing upon khasra No.326 whereupon it is but natural to conclude of the fuel wood borne on the relevant vehicle not originating from khasra No.326 rather its occurrence thereon originating from a place other than khasra No.326. Consequently, when khasra No.326 stands concluded to be located within the territorial domain of the State of Himachal Pradesh wherefrom the relevant fellings did not occur, the imperative conclusion therefrom is of the fuel wood which stood carried in the relevant vehicle originating from outside the territorial domain of the State of Himachal Pradesh, whereupon, this Court is prodded to record a conclusion qua their being no necessity for the accused to hold the relevant permit for carrying the fuel wood in the relevant vehicle.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

13. Consequently, there is no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned trial Court in favour of the accused/respondents herein is affirmed and maintained. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Suman Kumari .....Petitioner

Versus

State of Himachal Pradesh & another .....Respondents

Execution Petition No. 136 of 2016
Date of Order : 09.11.2016

Code of Civil Procedure, 1908- Order 21 Rule 1- It was contended that respondents have not complied with the directions passed by the Court – a contempt petition was filed, in which time was granted to comply with the direction contained in the judgment – respondents directed to file a detailed status report indicating the compliance of direction. (Para-2 to 5)

Present: Mr. K.D. Shreedhar, Senior Advocate, with Mr. Sameer Thakur, Advocate, for the petitioner.
Mr. Anup Rattan, Mr. Romesh Verma, learned Additional Advocate Generals with Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals, for the respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

While hearing the case, Mr. K.D. Shreedhar, learned Senior Counsel caused appearance and stated that the respondents have not complied with the directions contained in the judgment passed by this Court in a batch of writ petitions, the lead case of which is CWP No. 3588 of 2012, which were supposed to be complied with within three months.

2. Further stated that the respondents have retired some of the writ petitioners and amended the rules, constraining one of the writ petitioners to file Contempt Petition No. 625 of 2015. The said contempt petition was disposed of vide judgment dated 22.09.2015, whereby four months' further time was granted to the respondents to comply with the directions contained in

the aforesaid judgment. He also stated that the Law Department has given opinion, which finds place from pages 30 to 32 of the paper book, has also been turned down.

3. Mr. J.K. Verma, learned Deputy Advocate General, was asked to seek instructions whether the respondents have complied with the directions passed in the judgment, *supra,* within the time frame. He stated that the respondents are concerned only with the petitioner in this execution petition.

4. We take suo motu cognizance and draw the proceedings against the respondents. Respondents are directed to file a detailed status report indicating therein whether the respondents have complied with the directions passed by this Court within aforesaid stipulated period, in letter and spirit.

5. List on **07.12.2016**.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Smt. Vijaya Devi and others .....Appellants.
Versus
Resident Engineer .....Respondent.

FAO No. 103 of 2007.
Decided on : 9th November, 2016.

Workmen Compensation Act, 1923- Section 4- Deceased was electrician and he died during the course of his duty- compensation of Rs.3,38,880/- was awarded by the commissioner with interest @ 12% per annum- held in appeal that interest is to be awarded from one month after the fatal accident- an amount of Rs.25,000/- was deposited which is not sufficient considering that ultimately an amount of Rs.3,38,880/- was awarded- therefore, employer is liable to pay the penalty on the awarded amount – the amount of Rs.40,000/- imposed as penalty. (Para-4 to 7)

For the Appellants: Mr. Ramesh Sharma, Advocate.
For the Respondent : Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned order rendered by the Commissioner under Workmen's Compensation Act, HPSEB, Shimla-3, (for short the "Commissioner"), whereby compensation quantified in a sum of Rs. 3,38,880/- stood assessed qua the claimants, successors-in-interest of one Jai Singh, who uncontrovertedly during the course of his performing employment as an electrician under the respondent suffered fatal injuries.

2. The appellants herein standing aggrieved by the rendition of the learned Commissioner hence concert to assail it by preferring an appeal therefrom before this Court.

3. The instant appeal stands admitted by this Court on 14.05.2007 on the hereinafter extracted substantial questions of law:

> 1. Whether provision of Section 4-A (3) (a) & (b) of the Workmen's Compensation Act is mandatory, when the due amount of compensation has not been paid within one month from the date of accident?

2. Whether the award passed by the ld. Commissioner deserved to be modified when there is no reasoning for ignoring the interest as well as penalty part to the claimants/appellants?

3. Whether the appellants are entitled to get the interest on the compensation amount as awarded by the learned Commissioner below?

Substantial questions of law Nos. 1 to 3.

4. The learned counsel appearing on either side do not contest the findings recorded by the learned Commissioner qua the predecessor-in-interest of the claimants/appellants herein suffering fatal injuries during the course of his performing employment as an electrician under his employer. However, the only address made herebefore by the counsel for the appellants for assailing the impugned order stands harboured upon the factum of it omitting to in detraction of the mandate enshrined in Section 4-1 (3) (a) of the Act, provisions whereof stand extracted hereinafter, wherewithin an obligation stands cast upon the Commissioner to on the compensation amount determined under Act, his levying interest thereon at the rate of 12% per annum, levy of interest in the aforesaid percentum on the compensation amount determined under the Act stands mandated in judicial verdicts to commence from one month elapsing since the fatal accident, whereas, in the impugned order the Commissioner omitting to levy on the compensation amount assessed qua the claimants interest thereon in the manner aforesaid, whereupon he contends qua the order impugned hereat standing modified.

5. The aforesaid submission addressed before this Court holds absolute concurrence with the relevant mandate encapsulated in the Act besides is in tandem with judicial verdicts. Consequently, it is accepted. Since apparently the impugned order has not begotten compliance therewith it stands modified to the extent that the amount of compensation assessed therein qua the apepllants/claimants shall beget interest @12% per annum from one month elapsing since the fatal accident. The provisions of Section 4A of the Act read as under:-

> "**4-A. Compensation to be paid when due and penalty for default.**-
>
> (1) Compensation under section 4 shall be paid as soon as it falls due.
>
> (2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.
>
> (3)Where any employer is in default in paying the compensation due under this Act within one month from the date of it fell due, the Commissioner shall-
>
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
>
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. of such amount by way of penalty;"

6. Furthermore the mandate of Section 4-A (3) (b) of the Act which stands extracted hereinabove, stands espoused by the counsel for the appellant to stand infracted. Since an obligation stands cast therein upon the employer to in immediate sequel to the ill-fated occurrence make provisional payment of compensation, inconsonance wherewith the counsel for the respondent contends of with a sum of Rs.25,000/- standing deposited before the learned Commissioner hence compliance with the relevant mandate of the Act standing begotten. However, the aforesaid submission is unacceptable as a meager amount of Rs.25,000/- cannot be construed to be proportionate to the liability of the respondent herein towards compensation qua the dependents of the workman, significantly, when during the course of his performing

employment under the respondent, he suffered his end. However, since ultimately an amount of Rs.3,38,880 stands assessed as compensation qua the appellant herein, the imposition of penalty upon the respondent herein for its omitting to beget compliance with the relevant mandate of the Act in a sum equivalent to the amount of compensation assessed under the impugned award would be improper. Consequently, statutory penalty in a sum of Rs. 40,000/- (Rs. Forty thousand only) stands imposed upon the respondent herein. Accordingly, all the substantial questions of law are answered in favour of the appellants and against the respondent.

7. For the reasons recorded hereinabove, the instant appeal is allowed and the award impugned before this Court is modified to the extent that the compensation amount Rs.3,38,880/- as assessed by the learned Commission qua the appellants/claimants shall carry interest at the rate of 12% per annum from one month elapsing since the fatal accident which occurred on 6.8.2005. The respondent herein is also directed to pay statutory penalty quantified in a sum of Rs.40,000/- (Rs. Forty thousand) to the claimants/appellant herein for its omitting to comply with the mandate of Section 4-A of the Act. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Shri Chander Sen Thakur son of Shri Tikkam Ram Thakur ....Revisionist/Applicant

Versus

Shri Jiwa Nand son of late Shri Ram Chand & others ...Non-Revisionists/Non-applicants

Civil Revision No. 149 of 2014
Order Reserved on 19th October 2016
Date of Order 10th November 2016

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that the applicant had entered into an agreement to purchase the suit land and is a necessary party – the application was dismissed by the trial Court- held in revision that plaintiff had not sought any relief against the applicant – applicant has already filed a civil suit, which is pending before High Court- an agreement to sell does not create any right in the property – the order of the trial Court is not perverse and cannot be interfered in exercise of the revisional jurisdiction. (Para-13 to 18)

Cases referred:

Mohd. Farooq vs. District Judge Allahabad and others, AIR 1993 Allahabad 8
Jiwan Dass Rawal vs. Narain Dass, AIR 1981 Delhi 291
Imtiaz Ali vs. Nasim Ahmed, AIR 1987 Delhi 36
Amulya Gopal Majumdar vs. United Industrial Bank Limited, AIR 1981 Calcutta 404
Indira Fruits and General Market vs. Bijendra Kumar Gupta, AIR 1995 Allahabad 316
Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality vs. K.N. Palsikar AIR 1969 SC 580
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another, AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela, AIR 2002 SC 1004

For the Revisionist:	Mr. Dibender Ghosh Advocate
For Non-Revisionist No. 1:	Mr. B.S. Attri Advocate
For Non-revisionists Nos. 2 to 7:	Mr. Ashish Verma, Advocate.
For other Non-revisionists:	None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 against order dated 27.8.2014 passed by learned Civil Judge (Junior Division) Manali whereby application filed under Order 1 Rule 10 CPC by revisionist was dismissed.

Brief facts of the case

2. Shri Jiwa Nand plaintiff filed civil suit old No. 183 of 2010 new No. 143 of 2013 title Jiwa Nand vs. Chande Ram and others before learned Civil Judge for declaration to the effect that plaintiff is in possession of suit land vide agreement of sale dated 7.11.2003 executed by co-defendants Nos. 1 to 8 in favour of plaintiff and co-defendant No. 9 for sale consideration of Rs. 678000/- (Rupees six lacs seventy eight thousand). Additional relief of declaration also sought to the effect that judgment and decree passed in civil suit No. 4 of 2004 by learned Civil Judge (Junior Division) Manali on 25.2.2004 is illegal, void, inoperative and same was procured by defendants Nos. 1 to 10 on false facts by way of playing fraud upon Court and plaintiff is not bound by same. Additional relief of declaration also sought to the effect that mutation No. 3303 dated 31.3.2004 is also illegal, void, inoperative. Additional relief of specific performane of contract dated 7.11.2003 in favour of plaintiff and co-defendant No. 9 also sought. Additional consequential relief of permanent prohibitory injunction also sought against defendants.

3. Per contra written statement filed on behalf of co-defendants Nos. 1 to 8 pleaded therein that suit in present form is not maintainable and plaintiff has no cause of action and locus standi to file the present suit. It is pleaded that suit of plaintiff is based upon false facts and plaintiff filed the suit just to harass co-defendants Nos. 1 to 8. It is further pleaded that present suit for declaration and specific performance of contract with consequential relief of injunction is also not legally maintainable. It is also pleaded that plaintiff is estopped from filing the present suit by his act and conduct and present suit is barred by law of limitation. It is also pleaded that suit of the plaintiff is not valued properly for the purpose of court fee and jurisdiction. Prayer for dismissal of suit sought.

4. Per contra separate written statement filed on behalf of co-defendant No. 9 Ved Ram pleaded therein that plaintiff has not come to Court with clean hands and has suppressed material facts from Court. It is pleaded that suit of plaintiff is liable to be dismissed with special costs under Section 35-A of CPC and further pleaded that plaintiff has no cause of action against defendants and plaintiff is estopped from filing present suit by his act and conduct. It is pleaded that suit is barred by law of limitation. It is pleaded that suit of plaintiff is not valued properly for the purpose of Court fee and jurisdiction.

5. Separate written statement filed on behalf of legal representatives of co-defendant No.10 namely Ram Chand pleaded therein that suit of the plaintiff is liable to the dismissed with special costs under Section 35-A of CPC and also pleaded that plaintiff has no cause of action against legal representatives of co-defendant No.10 Ram Chand and further pleaded that plaintiff did not come to Court with clean hands and plaintiff is estopped from filing the present suit by his act and conduct. It is pleaded that suit is not maintainable and also pleaded that suit is not valued properly for the purpose of Court fee and jurisdiction. It is also pleaded that suit is barred by law of limitation. It is also pleaded that suit is also bad for non-joinder of necessary parties. It is pleaded that Ram Chand vide agreement dated 20.7.2010 has sold the suit land to Chander Sen and Tikam Ram in sale consideration amount of Rs. fifty lacs. It is pleaded that Rs. eight lacs received on 20.7.2010 and later on Rs.104000/- (Rupees one lac four thousand) received. It is pleaded that remaining consideration amount was to be paid at the time of registration of sale deed before Sub Registrar. It is pleaded that Chander Sen and Tikam Ram are necessary parties. Prayer for dismissal of suit sought.

6. Plaintiff filed replication and re-asserted the allegations made in plaint.

7. Shri Chander Sen revisionist filed application under Order 1 Rule 10 CPC for impleading him as co-defendant in civil suit title Jiwa Nand vs. Chande Ram and others. It is pleaded that Chander Sen has filed civil suit title Chander Sen vs. Jiwa Nand & others before Hon'ble H.P. High Court for specific performance of contract dated 20.7.2010 with respect to suit land. It is pleaded that as per revenue record deceased Ram Chand was owner in possession of suit land and deceased Ram Chand contracted to sell the suit land to revisionist Chander Sen. It is pleaded that Chander Sen is necessary party in present suit to enable the Court to effectually and completely adjudicate upon and settle all questions involved in present suit. Prayer for acceptance of application filed under Order 1 Rule 10 CPC sought in civil suit title Jiwa Nand vs. Chande Ram & others.

8. Per contra response filed on behalf of plaintiff pleaded therein that civil suit filed by revisionist in the Hon'ble H.P. High Court on the basis of false facts. It is pleaded that deceased Ram Chand had no right title or interest in suit land. It is pleaded that agreement alleged by revisionist is also fictitious and forged. It is also pleaded that no agreement was executed by deceased Ram Chand. It is pleaded that plaintiff is dominus litis in civil suit and revisionist cannot be allowed to implead as co-party in present suit. It is pleaded that revisionist has already agitated the matter in Hon'ble High Court and it is not open for the revisionist to agitate the present matter before learned Trial Court. Prayer for dismissal of application sought.

9. Learned Trial Court dismissed the application under Order 1 Rule 10 CPC on dated 27.8.2014 filed by revisionist.

10. Feeling aggrieved against order of learned Trial Court revisionist filed present revision petition under Section 115 of Code of Civil Procedure 1908.

11. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionists and Court also perused entire record carefuly.

12. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115 of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

Findings upon point No.1 with reasons

13. Submission of learned Advocate appearing on behalf of revisionist that as per Order 1 Rules 3 and 5 of CPC revisionist should be impleaded as co-defendant in civil suit title Jiwa Nand vs. Chande Ram and others is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused relief clause of present civil suit title Jiwa Nand vs. Chande Ram and others. Jiwa Nand plaintiff did not seek any relief against revisionist in present civil suit. In present civil suit filed by Jiwa Nand sale agreement dated 20.7.2010 executed between revisionist and deceased Ram Chand is not under dispute. Revisionist Chander Sen has also already filed civil suit title Chander Sen vs. Jiwa Nand for specific performance of agreement dated 20.7.2010 executed between Chander Sen and deceased Ram Chand which is pending for disposal before Hon'ble H.P. High Court.

14. It is well settled law that plaintiff is dominus litis of his suit. It is well settled law that plaintiff has legal right to choose his own adversary against whom he seeks relief. It is well settled law that when there are no allegations against person who sought to be impleaded as co-party in civil suit or when there is no cause of action against the person who sought to be impleaded as co-defendant in the suit then application filed under Order 1 Rule 10 CPC should not be allowed. It is well settled law that any decree or order passed by Court did not affect any person who is not party in judicial proceedings except in cases of decree in rem. ***See AIR 1993 Allahabad 8 Mohd. Farooq vs. District Judge Allahabad and others.***

15. Submission of learned Advocate appearing on behalf of revisionist that deceased Ram Chand has executed sale of agreement dated 20.7.2010 with revisionist qua suit land and

on the basis of agreement of sale revisionist is necessary party in civil suit title Jiwa Nand vs. Chande Ram and others as per Order 1 Rule 10 (2) CPC is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that as per Section 54 of Transfer of Property Act 1882 a contract for sale of immovable land itself does not create any interest or charge upon immovable land. It is well settled law that contract for sale creates rights in personam and did not create rights in estate. ***See AIR 1981 Delhi 291 Jiwan Dass Rawal vs. Narain Dass. See AIR 1987 Delhi 36 Imtiaz Ali vs. Nasim Ahmed. See AIR 1981 Calcutta 404 Amulya Gopal Majumdar vs. United Industrial Bank Limited. See AIR 1995 Allahabad 316 Indira Fruits and General Market vs. Bijendra Kumar Gupta.***

16. Submission of learned Advocate appearing on behalf of revisionist that possession of suit property was given to revisionist by deceased Ram Chand father of Jiwa Nand plaintiff vide agreement for sale dated 20.7.2010 and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Civil suit title Chander Sen vs. Jiwa Nand and others is pending before Hon'ble High Court on the basis of agreement of sale dated 20.7.2010. In civil suit title Chander Sen vs. Jiwa Nand pending before Hon'ble H.P. High Court Shri Jiwa Nand plaintiff son of deceased Ram Chand is already impleaded as co-party. It is held that proper relief in accordance with law will be granted to revisionist Shri Chander Sen by Hon'ble H.P. High Court in civil suit title Shri Chander Sen vs. Jiwa Nand and others.

17. It is well settled law that while exercising revisional powers under Section 115 of Code of Civil Procedure 1908 High Court can interfere only when order of learned Trial Court is perverse. ***See AIR 1991 SC 455 Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 580 Indore Municipality vs. K.N. Palsikar. See AIR 1995 SC 1357 P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See AIR 2002 SC 1004 Gurdial Singh vs. Raj Kumar Anjela.*** In view of above stated facts and case law cited supra it is held that order of learned Trial Court is not perverse and it is also held that order of learned Trial Court is also not illegal. Point No.1 is answered in negative.

Point No. 2 (Relief)

18. In view of findings upon point No.1 revision petition is dismissed. Order passed by learned Trial Court dated 27.8.2014 passed upon application filed under Order 1 Rule 10 CPC is affirmed. Observations will not effect merits of case in any manner. Parties are directed to appear before learned Trial Court On ***30.11.2016.*** Parties are left to bear their own costs. Record of learned Trial Court be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Shri Chander Sen Thakur son of Shri Tikkam Ram Thakur .....Revisionist/Applicant
Versus
Jiwa Nand son of late Shri Ram Chand & others ....Non-Revisionists/Non-applicants

Civil Revision No. 150 of 2014
Order Reserved on 19th October 2016
Date of Order 10th November 2016

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that the applicant had entered into an agreement to purchase the suit land and is a necessary party – the application was dismissed by the trial Court- held in revision that plaintiff had not sought any relief against the applicant – applicant has already filed a civil suit, which is pending before High Court- an agreement to sell does not create any right in the property – the

order of the trial Court is not perverse and cannot be interfered in exercise of the revisional jurisdiction. (Para-13 to 18)

Cases referred:
Mohd. Farooq vs. District Judge Allahabad and others, AIR 1993 Allahabad 8
Jiwan Dass Rawal vs. Narain Dass, AIR 1981 Delhi 291
Imtiaz Ali vs. Nasim Ahmed, AIR 1987 Delhi 36
Amulya Gopal Majumdar vs. United Industrial Bank Limited, AIR 1981 Calcutta 404
Indira Fruits and General Market vs. Bijendra Kumar Gupta, AIR 1995 Allahabad 316
Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality vs. K.N. Palsikar AIR 1969 SC 580
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another, AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela, AIR 2002 SC 1004

For the Revisionist:	Mr. Dibender Ghosh Advocate
For Non-Revisionist No. 1:	Mr. B.S. Attri Advocate
For Non-revisionists Nos. 2 to 7:	Mr. Ashish Verma, Advocate.
For other Non-revisionists:	None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 against order dated 27.8.2014 passed by learned Civil Judge (Junior Division) Manali whereby application filed under Order 1 Rule 10 CPC by revisionist is dismissed.

Brief facts of the case

2. Shri Jiwa Nand plaintiff filed civil suit title Jiwa Nand vs. Dile Ram and others before learned Civil Judge for declaration to the effect that plaintiff is in possession of suit land under agreement of sale dated 7.11.2003 executed by defendant No. 1 in favour of plaintiff and defendant No. 2 for sale consideration amount of Rs. 471200/- (Rupees four lacs seventy one thousand two hundred). Additional relief of declaration also sought to the effect that judgment and decree passed in civil suit No. 3 of 2004 by learned Civil Judge Manali dated 25.2.2004 is illegal, void, inoperative and same was procured by defendants Nos. 1 to 3 on false facts by way of playing fraud upon Court and plaintiff is not bound by same. Additional declaration also sought to the effect that mutation No. 3304 dated 31.3.2004 is also illegal, void, inoperative. Additional relief of specific performane of contract dated 7.11.2003 in favour of plaintiff and co-defendant No. 9 also sought. Additional consequential relief of permanent prohibitory injunction also sought. Alternative relief of recovery of Rs.503504/- (Rupees five lac thirty thousand five hundred four) also sought against co-defendants Nos. 1 to 3. Prayer for decree of suit sought.

3. Per contra written statement filed on behalf of defendant No. 1 pleaded therein that suit in present form is not maintainable and plaintiff has no cause of action to file the present suit. It is pleaded that suit of plaintiff is based upon false facts and plaintiff filed the suit just to harass co-defendant No.1. It is also pleaded that plaintiff is estopped from filing the present suit by his act and conduct and present suit is barred by law of limitation. It is also pleaded that suit of the plaintiff is not properly valued for the purpose of court fee and jurisdiction. Prayer for dismissal of suit sought.

4. Per contra separate written statement filed on behalf of co-defendant No. 2 Ved Ram pleaded therein that plaintiff has not come to Court with clean hands and has suppressed material facts from Court. It is pleaded that suit of plaintiff is liable to be dismissed with special costs under Section 35-A of CPC and further pleaded that plaintiff has no cause of action against

co-defendant No.2 and plaintiff is estopped from filing present suit by his act and conduct. It is pleaded that suit is barred by law of limitation. It is pleaded that suit of plaintiff is not properly valued for the purpose of Court fee and jurisdiction. Prayer for dismissal of suit sought.

5. Separate written statement filed on behalf of legal representatives of co-defendant No.3 namely deceased Ram Chand pleaded therein that suit of the plaintiff is liable to the dismissed with special costs under Section 35-A of CPC and also pleaded that plaintiff has no cause of action against legal representatives of co-defendant No.3 deceased Ram Chand and further pleaded that plaintiff did not come to Court with clean hands and plaintiff is estopped from filing the present suit by his act and conduct. It is pleaded that suit is not maintainable and also pleaded that suit is not properly valued for the purpose of Court fee and jurisdiction. It is also pleaded that suit is barred by law of limitation. It is also pleaded that suit is also bad for non-joinder of necessary parties. It is pleaded that deceased Ram Chand vide agreement dated 20.7.2010 has sold the suit land to Chander Sen and Tikam Ram in consideration amount of Rs.fifty lacs. It is pleaded that Chander Sen son of Tikam Ram is necessary party. Prayer for dismissal of suit sought.

6. Plaintiff filed replication and re-asserted the allegations made in plaint.

7. Shri Chander Sen revisionist filed application under Order 1 Rule 10 CPC for impleading him as co-defendant in civil suit title Jiwa Nand vs. Dile Ram and others. It is pleaded that Chander Sen revisionist has filed civil suit title Chander Sen vs. Jiwa Nand & others for specific performance of contract dated 20.7.2012 in consideration amount of Rs. fifty lacs by deceased Ram Chand executed with respect to suit land before Hon'ble H.P.High Court. It is pleaded that as per revenue record deceased Ram Chand was owner in possession of suit land and he contracted to sell the suit land with Chander Sen revisionist. It is pleaded that Chander Sen is necessary party in present suit to enable the Court to effectually and completely adjudicate upon and settle all questions involved in present suit. Prayer for acceptance of application filed under Order 1 Rule 10 CPC sought in civil suit title Jiwa Nand vs. Dile Ram.

8. Per contra response filed on behalf of plaintiff Jiwa Nand pleaded therein that civil suit before Hon'ble H.P.High Court has been filed by revisionist on the basis of false facts. It is pleaded that deceased Ram Chand had no legal right title or interest in suit land. It is pleaded that agreement alleged by revisionist is also fictitious and forged. It is also pleaded that no agreement was executed by deceased Ram Chand in consideration amount of Rs. fifty lacs qua suit property. It is pleaded that plaintiff is dominus litis and revisionist cannot be allowed to implead as co-party in present suit. It is pleaded that revisionist has already agitated the matter in Hon'ble High Court and it is not open for the revisionist to agitate before learned Trial Court. Prayer for dismissal of application sought.

9. Learned Trial Court dismissed the application filed under Order 1 Rule 10 CPC on dated 27.8.2014.

10. Feeling aggrieved against order of learned Trial Court revisionist filed present revision petition under Section 115 of Code of Civil Procedure 1908.

11. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionists and Court also perused entire record carefuly.

12. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115 of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

Findings upon point No.1 with reasons

13. Submission of learned Advocate appearing on behalf of revisionist that as per Order 1 Rules 3 and 5 of CPC revisionist should be impleaded as co-defendant in present civil suit title Jiwa Nand vs. Dile Ram and others is rejected being devoid of any force for the reasons

hereinafter mentioned. Court has carefully perused relief clause of present civil suit title Jiwa Nand vs. Dile Ram and others. Jiwa Nand plaintiff did not seek any relief against revisionist in present civil suit. Sale agreement dated 20.7.2010 is not disputed in present civil suit. Revisionist has also already filed civil suit title Chander Sen vs. Jiwa Nand which is pending in Hon'ble High Court of H.P. for specific performance of contract dated 20.7.2010 executed by deceased Ram Chand in favour of Chander Sen.

14. It is well settled law that plaintiff is dominus litis of his suit. It is well settled law that plaintiff has legal right to choose his own adversary against whom he seeks relief. It is well settled law that when there are no allegations against person who sought to be impleaded as co-party in civil suit then application filed under Order 1 Rule 10 CPC should not be allowed. It is also well settled law that when there is no cause of action against person who sought to be impleaded as co-party in civil suit then application filed under Order 1 Rule 10 CPC should not be allowed. It is well settled law that any decree or order passed by Court did not affect person who is not a party in suit or civil proceedingts except in cases of decree in rem. ***See AIR 1993 Allahabad 8 title Mohd. Farooq v. Disrict Judge Allahabad and others.***

15. Submission of learned Advocate appearing on behalf of revisionist that deceased Ram Chand has executed sale of agreement dated 20.7.2010 with revisionist qua suit land and on the basis of agreement of sale revisionist is necessary party in civil suit title Jiwa Nand vs. Dile Ram and others under Order 1 Rule 10 CPC is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that as per Section 54 of Transfer of Property Act 1882 a contract for sale of immovable land does not create any interest or charge upon immovable property. It is well settled law that contract for sale creates rights in personam and did not create rights in estate. ***See AIR 1981 Delhi 291 Jiwan Dass Rawal vs. Narain Dass. See AIR 1987 Delhi 36 Imtiaz Ali vs. Nasim Ahmed. See AIR 1981 Calcutta 404 Amulya Gopal Majumdar vs. United Industrial Bank Limited. See AIR 1995 Allahabad 316 Indira Fruits and General Market vs. Bijendra Kumar Gupta.***

16. Submission of learned Advocate appearing on behalf of revisionist that possession of suit property was given to revisionist by deceased Ram Chand father of Jiwa Nand plaintiff vide agreement of sale dated 20.7.2010 and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Civil suit title Chander Sen vs. Jiwa Nand and others is pending before Hon'ble High Court on the basis of agreement of sale dated 20.7.2010. In civil suit title Chander Sen vs. Jiwa Nand pending before Hon'ble H.P. High Court Shri Jiwa Nand plaintiff son of deceased Ram Chand is also impleaded as co-party. It is held that proper relief in accordance with law will be granted to revisionist Shri Chander Sen by Hon'ble H.P. High Court in civil suit title Shri Chander Sen vs. Jiwa Nand and others.

17. It is well settled law that while exercising revisional powers under Section 115 of Code of Civil Procedure 1908 High Court can interfere only when order of learned Trial Court is perverse. ***See AIR 1991 SC 455 Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 580 Indore Municipality vs. K.N. Palsikar. See AIR 1995 SC 1357 P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See AIR 2002 SC 1004 Gurdial Singh vs. Raj Kumar Anjela.*** In view of above stated facts and case law cited supra it is held that order of learned Trial Court is not perverse and it is also held that order of learned Trial Court is also not illegal. Point No.1 is answered in negative.

Point No. 2 (Relief)

18. In view of findings upon point No.1 revision petition is dismissed. Order passed by learned Trial Court dated 27.8.2014 passed upon application filed under Order 1 Rule 10 CPC is affirmed. Observations will not effect merits of case in any manner. Parties are directed to appear before learned Trial Court On ***30.11.2016.*** Parties are left to bear their own costs. Record of learned Trial Court be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Court on its own motion .....Petitioner.
Versus
State of H.P. and others .....Respondents.

CWPIL No.13 of 2015
Date of order:10.11.2016.

Constitution of India, 1950- Article 226- DGP was directed to be present in the Court but he did not appear and instead sent ADGP- directions issued to Chief Secretary to ensure that Officers who are required to be present before the Court in terms of the Court's order should remain present. (Para-5 to 7)

For the Petitioner: Mr.C.N. Singh, Advocate, as Amicus Curiae.
For the Respondents: Mr.Romesh Verma & Anup Rattan, Addl.A.Gs. and J.K. Verma, Dy.A.G., for respondents No.1 to 13.
Mr.Tara Singh Chauhan, Advocate, for respondent No.14.
Superintending Engineer, Pollution Control Board, present in person.
Mr.Atul, ADGP, HP, present in person.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

CMP No.9088 of 2016

By the medium of this application, applicant/respondent No.14 has sought exemption from appearing personally before this Court, as directed vide order dated 19th October, 2016. However, the Superintending Engineer, Pollution Control, Board is present in person.

2. For the reasons mentioned in the application, the same is allowed, as prayed for.

CWPIL No.13 of 2015

3. It is stated that some of the respondents have filed the status reports and some are yet to file. The respondents who have not filed the status reports are directed to file the same within two weeks, with advance copy to the learned Amicus Curiae, enabling him to respond to all the status reports within two weeks thereafter

4. Response to the affidavit of the Drug Controller, Himachal Pradesh has been filed by the Amicus Curiae.

5. On the last date of hearing, we had directed the Director General of Police, Himachal Pradesh to remain present in person before this Court. Today, instead of remaining present in person, the Director General of Police had sent Additional Director General of Police Mr.Atul, who has stated that the Director General of Police has gone to Delhi in connection with some personal work.

6. We may remind that vide order dated 4th October, 2016, passed in COPC No.188 of 2016, titled Smt. Pratibha Kaushik vs. Shri R.D. Dhiman and another, this Court has directed the Chief Secretary to the Government of Himachal Pradesh to ensure that the officers, who are required to remain present before the Court in terms of the Court orders, seek exemption/permission from the Court before leaving the State. It is apt to reproduce paragraph 3 of the said order hereunder:

> "3. The Chief Secretary to the Government of Himachal Pradesh is directed to ensure that all those officers, who have been arrayed as party-respondents in the

contempt petitions or who have to remain present before the Court in the case(s) on the date(s) fixed, have to seek exemption/ permission from the Court before leaving for Delhi or outside the State. Any deviation shall be seriously viewed."

7. The said directions passed in COPC No.188 of 2016 are restated. Mr.Anup Rattan, learned Additional Advocate General, to convey this order to the Chief Secretary, to the Government of Himachal Pradesh, for strict compliance, otherwise this Court would be constrained to initiate contempt proceedings against the erring officers/officials.

8. List on 22nd December, 2016. The Director General of Police, H.P. to remain present in person before this Court on the next date of hearing.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Ashwani Kumar ....Respondent.

Cr. Appeal No. 685 of 2008.
Date of Decision: 10th November, 2016.

Indian Penal Code, 1860- Section 279 and 506 – **Motor Vehicles Act, 1988-** Section 181, 184 and 196- Accused was driving a scooter in a rash and negligent manner- he drove the scooter upon the informant by taking it to the wrong side - when the accused was called to stop the scooter, he abused the informant and B, an intervenor- the accused was tried and acquitted by the trial Court- held, that PW-1 and PW-4 had feigned ignorance regarding the identity of the accused and the registration number plate – police station was at a distance of 15 meters from the place of incident- however, investigating officer visited the site of the occurrence after one day - the site plan prepared by him cannot be relied upon - the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 11)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For the Respondents: Mr. Dhananjay Sharma, Advocate vice to Mr. Naveen Pathania, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Judicial Magistrate 1st Class, Court No.3, Hamirpur, District Hamirpur, H.P. rendered on 21.07.2008 in Police Challan No. 72-II-04, RBT No.437-II-4, whereby, he acquitted the accused/respondent herein for his allegedly committing offences punishable under Sections 279 and 506 of the IPC read with Sections 181, 184 and 196 of the Motor Vehicles Act.

2. The facts relevant to decide the instant case are that complainant Ram Narain, Sub Inspector, Enforcement, South Zone, Shimla, made a report at Police Station, Hamirpur, that he had accompanied Dy. S.P. Satish Kumar to Hamirpur. On 20.03.2004, at about 9.15 p.m., he alongwith Rafiq Mohammad and Harnam Singh were going towards rest house through the road that is lying in front of the rest house. A well built person came driving scoooter No. HP-22-2952 in a rash and negligent manner and drove it upon him from the wrong side. He at once took a jump and saved himself. When scooter driver was called to stop, he started abusing them and threatened them to his high contacts. One Banarsi Dass Malhotra, who tried to intervene, was also abused. He was threatened by the scooter driver. On the basis of the aforesaid facts, an FIR was registered in the police station concerned. The police started the investigations in the case and completed all the codel formalities.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 279 and 506 of the IPC read with Sections 181, 184 and 196 of the Motor Vehicles Act. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which he claimed innocence and pleaded false implication. However, he did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The victim/complainant is alleged to be struck by a scooter bearing No. HP-22-2952 on account of it at the relevant time standing driven in a rash and negligent manner by the accused herein. The prosecution would succeed in establishing the charge to which the accused/respondent herein stood subjected to trial only when the prosecution witnesses consistently depose qua the material factum of the accused/respondent herein at the relevant time negligently driving it also the prosecution by cogent evidence forthrightly unveiling the identity of the accused. The complainant in his testimony has communicated therein qua the scooter at the relevant time being driven on the inappropriate side of the road whereupon it almost struck him, whereas, his by jumping aside overting its striking him, whereas, PW-1, an independent witness to the occurrence has contradictorily deposed of the scooter at the relevant time occupying the appropriate side of the road. Be that as it may, even though occurrence of the aforesaid minimal contradiction intra se the testimony of the victim vis-a-vis the testimony of an independent witness to the occurrence, who testified as PW-1 would obviously not per se render rudderless the propagation of the prosecution. However, the crucial factum of PW-1 and PW-4 conjointly feigning ignorance qua the identity of the accused besides qua the apposite number borne on the number plate of the scooter whereas evidently with both at the relevant time walking along with the complainant hence held the capacity to disclose in their respective testifications the apposite number borne on the number plate of the scooter also to unanimously depose qua the identity of the accused, whereas, theirs omitting to do so cannot with aplomb lend any impetus to any formidable conclusion of the scooter bearing No. HP-22-2952 at the relevant time standing driven by the accused at the relevant site of occurrence nor it can be convincingly concluded qua the accused at the relevant time driving it wherefrom it is inapt to conclude qua the charge for which the accused/respondent stood tried warranting any inference qua it standing cogently proven.

10. Be that as it may, despite the occurrence taking place at a distance of 15 meters from the police station concerned, whereas, the Investigating Officer visiting the relevant site of occurrence a day subsequent to its taking place, in sequel, the omission of the Investigating

Officer to in prompt sequel to the occurrence visit the relevant spot constrains an inference of the spot map prepared by him being a sequel to a machination of engineering and invention deployed by the Investigating Officer whereupon no reliance is imputable.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

12. Consequently, there is no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned trial Court in favour of the accused/respondent herein is affirmed and maintained. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Kheera Mani ....Respondent.

Cr. Appeal No. 678 of 2008.
Date of Decision: 10th November, 2016.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving Swaraj Majda – he hit his vehicle against the bus due to which occupants of the bus sustained injuries- accused was tried and acquitted by the trial court- held in appeal that the prosecution witnesses deposed that the Swaraj Majda was heavily loaded and was being driven at a slow speed- it was moving upward- the Bus on the other hand was being driven with the high speed and on the inappropriate side of the road- the prosecution version was not proved, in these circumstances – appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For the Respondents: Mr. R.L. Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Judicial Magistrate, Court No.4, Mandi, District Mandi, H.P. rendered on 18.06.2008 in Police Challan No. 263/1/04/03 or 263/II/04/03, whereby, he acquitted the accused/respondent herein for his allegedly committing offences punishable under Sections 279, 337 and 338 of the IPC.

2. The facts relevant to decide the instant case are that on 13.02.2003 at about 11.45 a.m., at place Hanogi Bridge, accused was driving Swaraj Mazda bearing registration No. HP-33A-535 and was coming from the side of Pandoh and a bus bearing registration HP-37-2559 was going towards Kullu and since the accused was driving the Swaraz Mazda in a rash and negligent manner, so he dashed the vehicle against the bus due to which the occupants of the bus sustained injuries. On the aforesaid facts, FIR was registered in the police station concerned. The police started the investigations in the case and completed all the codel formalities.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the IPC. In proof of the prosecution case, the prosecution examined 19 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which he claimed innocence and pleaded false implication. However, he did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. A collision occurred inter se a swaraz mazda driven at the relevant time by the accused/respondent and a bus driven at the relevant time by PW-10. In sequel, to the collision which occurred inter se a swaraz mazda and a bus , the driver of the bus begot on his person injuries reflected in Ex.PW9/A whereas other occupants of the bus also sustained injuries on their respective persons. The prosecution version stood consistently testified by the prosecution witnesses. Unfoldments occur in the deposition of PW-13 qua at the relevant time a fully loaded swaraz mazda occupying the correct side of the road. Both PW-2 and PW-3 consistently depose qua at the relevant time the relevant vehicle driven by the accused moving upwards. Also they in their respective testifications make articulations therein qua its being heavily loaded besides it standing driven at a slow speed. Contrarily, they depose qua the bus driven at the relevant time by PW-10 whereon they were occupants standing driven at a high speed. The depositions of the aforesaid prosecution witnesses make vivid unfoldments qua (a) the swaraz mazda truck driven at the relevant time by the accused/respondent moving upward; (b) it being heavily loaded; (c) it standing driven at a slow speed and (d) its occupying the correct side of the road. Moreover, the depositions of the aforesaid witnesses underscore the factum of obviously the vehicle driven at the relevant time by PW-10 occupying the inappropriate side of the road also its at the relevant time standing driven at a brazen pace by PW-10. The effect of the aforesaid testifications of the prosecution witnesses qua the relevant bus driven at the relevant time by PW-10 occupying the inappropriate side of the road and its being driven at a brazen pace when read in coagulation with the evident testified fact qua the relevant vehicle driven by the accused occupying the correct side of the road also with its at the relevant time standing driven by the accused at a slow speed imperatively warrants an inference of PW-10 being negligent in driving his bus. Consequently, any imputation of penal negligence to the accused/respondent herein is unwarranted.

10. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

11. Consequently, there is no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned trial Court in favour of the accused/respondent herein is affirmed and maintained. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Ravinder Kumar ....Respondent.

Cr. Appeal No. 647 of 2008.
Date of Decision: 10th November, 2016.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a Trolla, which crushed the right foot of the informant – the accident had taken place due to the negligence of the accused- the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed – held, that as per the prosecution case the informant was hit from the rear – she should have sustained injuries on the back but no injury was found on her back – the defence version that the informant was in the process of alighting from the stair case is made probable by the testimony of PW-1 – the prosecution version was not proved, in these circumstances and Sessions Judge had rightly acquitted the accused- appeal dismissed. (Para- 9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For the Respondent: Mr. Sheetal Vayas, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The accused/respondent herein stood convicted by the learned trial for his committing offences punishable under Section 279, 337 and 338 of the IPC. On his standing aggrieved by the verdict by the learned trial Court, he carried an appeal therefrom before the learned Sessions Judge, Hamirpur, H.P. whereby the latter reversed the findings of conviction recorded upon the accused/respondent by the learned trial Court. The State of H.P. stands aggrieved by the verdict of the learned Sessions Judge, Hamirpur whereupon it by preferring an appeal herebefore concerts to beget its reversal.

2. The facts relevant to decide the instant case are that on 9.9.2004, the complainant had gone to Mehre Bazar. After purchasing some articles, she was proceeding towards the bus-stand at Mehre on her own side at about 4.40 p.m., and while, she was in front of Punam General Store, a jeep trolla came from behind in a rash and negligent manner and crushed her right foot. She made a cry and the trolla was stopped by the driver. Its number was HP-21-0545. The trolla driver disclosed his name as Ravinder Kumar. It is stated that the accident took place due to rash and negligent driving of Ravinder Kumar. On the aforesaid facts, FIR was registered in the police station concerned and thereafter the police completed all the formalities relating to the investigations.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the IPC. In proof of the prosecution case, the prosecution examined 12 witnesses. On conclusion of recording of prosecution evidence, the

statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which he claimed innocence and pleaded false implication. However, the accused examined two witnesses in his defence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/respondent herein. In an appeal preferred by the accused/respondent before the learned Sessions Judge, Hamirpur, the latter set aside the conviction and consequent sentences recorded by the learned trial Court against the accused/convict for his committing the offences punishable under Sections 279, 337 and 338 of the IPC.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned Sessions Judge, Hampur, H.P.. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Sessions Judge, Hamirpur, H.P., standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The victim/injured PW-7 sustained injuries as pronounced in Ex.PW10/A. The injuries borne thereon make a vivid portrayal qua hers suffering injuries on the right toe of her foot. However, the version propagated by the prosecution in the relevant FIR comprised in Ex.PW9/A is qua the accused/respondent while rashly and negligently driving his vehicle his striking the complainant from the rear. Though, the victim/injured has deposed in tandem with her previous statement comprised in Ex.PW7/A also though the site plan purveys succor to her testification, however, the factum of hers suffering an injury on the right toe of her foot on hers standing struck from the rear by the relevant vehicle allegedly rashly and negligently driven by the accused is per se, a sheered blatant concoction arising from the factum of thereupon the victim/injured would not stand entailed with injuries on the right toe of her foot, it facing a direction opposite to the one whereat she stood struck. Contrarily, she standing struck from the rear warranted infliction of injuries on her back besides in sequel thereto she imperatively was to suffer a fall with her face falling on the road, whereon also injuries were enjoined to occur. However, reflections occurring in the apposite MLC comprised in Ex.PW10/A do not bear out the propagation of the prosecution qua hers standing struck from the rear, conspicuously, when thereupon as aforestated she was to suffer injuries on her back besides on her face, whereas, with Ex.PW10/A omitting to pronounce the aforesaid factum, in sequel, the vigour of the prosecution case loses its creditworthiness besides its tenacity.

10. Be that as it may, one of the prosecution witnesses, namely, PW-1 Meenakashi Devi has conceded to the suggestion put to her by the learned defence counsel while holding her for cross-examination qua one foot of the victim occupying the road whereas the other foot occupying the stair case of a shoe shop whereupon credence is acquired by the espousal of the defence of the victim being in the process of alighting from the stair case of a shoe shop, whereas, hers omitting to take due care and caution qua arrival thereat of the relevant vehicle, she yet alighting from the stair case of a shoe shop whereupon her foot stood crushed under the tyres of the vehicle driven by the accused/respondent, also the efficacy of the aforesaid inference gets enhanced significantly when the aforesaid revelations stand unborne in the relevant testifications of the prosecution witnesses whereupon a sequel is derivable qua their testimonies not

warranting imputation of credence thereto also therefrom it is to be concluded qua the factum/injured abruptly arriving at the relevant site, whereupon, the accused/respondent hence stood precluded to sight her whereupon hence any purported negligence imputed to him cannot hold any element of penal inculpability.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

12. Consequently, there is no merit in the instant appeal which is accordingly dismissed and the judgment of acquittal recorded by the learned Sessions Judge, Hamirpur in favour of the accused/respondent herein is affirmed and maintained. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant

Versus

Vijay Kumar ...Respondent

Cr. Appeal No. 538 of 2012
Decided on: 10th November, 2016

Indian Penal Code, 1860- Section 363, 376, 342 and 506- Accused kidnapped the minor prosecutrix from the lawful guardianship of her parents and she was taken to a hotel, where she was subjected to sexual intercourse- she was threatened by the accused- the accused was tried and acquitted by the trial Court- held in appeal that the prosecutrix was 18 years and 8 months old at the time of making the application – the school certificate is not admissible because no evidence was led to prove the source on the basis of which the date of the birth of the prosecutrix was recorded – the entries in the parivar register are not primary evidence regarding the birth of the person- it was admitted that there were over writing and cutting in the birth register, which makes it difficult to rely upon the entries in the same – the person at whose instance the entries were recorded was not produced in evidence – the radiological age of the prosecutrix was 15½ to 17 years which could be 3-4 years more or less on either side – the prosecutrix admitted that she used to talk with the accused for 15 minutes to 1 hour, this shows that prosecutrix and accused were acquainted with the each other – she was taken from Solan to Deonghat in a broad day light – she had not raised any hue and cry, which shows that she was a consenting party – on other occasion also she had not raised hue and cry, although the incident had taken place in thickly populated area- prosecution case was not proved beyond reasonable doubt and the accused was rightly acquitted- appeal dismissed. (Para-6 to 23)

Cases referred:

State of Punjab Vs. Gurmeet Singh and others, AIR 1996 SC 1393,
Ranjit Hazarika Vs. State of Assam, (1998) 8 SCC 635
Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175

For the appellant: Mr. M.A. Khan and Mr. Virender Verma, Addl. A.Gs.
For the respondent: Mr. Dalip K. Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

State of Himachal Pradesh aggrieved by the judgment dated 17.07.2012, passed by learned Additional Sessions Judge, Fast Track Court, Solan in Session Trial No. 28FTC/7 of 2010, is in appeal before this Court. It is seen that learned trial Judge has acquitted the respondent (hereinafter referred to as the accused) of the charge under Sections 363, 376, 342 and 506 of the Indian Penal Code.

2. The allegations against the accused in a nut-shell are that on 2.6.2010 and 13.7.2010, in the morning hours, he kidnapped the prosecutrix, a minor from the lawful guardianship of her parents and she was taken to hotel 50 miles stone near Deonghat, where she was subjected to forcible sexual intercourse in Room No. 102 and thereby he has committed an offence punishable under Section 363 and 376 of the Indian Penal Code. As per further allegations against the accused, on 2.6.2010, the prosecutrix was wrongfully detained in Room No. 102 of hotel 50 miles stone after 12.00 noon for about 2-3 hours and also threatened to do away with her life by throwing '*Tezab*' if she disclosed the factum of her kidnapping by him and subjecting her to sexual intercourse in the room of hotel to anyone and thereby committed an offence punishable under Section 342 read with Section 506 of the Indian Penal Code.

3. The legality and validity of the impugned judgment has been questioned on the grounds *inter-alia* that despite of the direction evidence as has come on record by way of own testimony of the prosecutrix and her father PW-16 as well as by way of testimony of PW-6 Jagdeep Singh, the owner of hotel 50 miles stone near Panch Parmeshwar Temple, Solan, the same has not been appreciated in its right perspective and the trial Court has proceeded to record findings of acquittal mechanically and without application of mind. The testimony of PW-16 that while going to his residence in police line Solan from market, he got attracted to the place of occurrence on hearing cries of people gathered there and school girls present and noticed that the accused had caught hold hand of his daughter the prosecutrix and that on seeing him the accused had fled away from the spot is also not appreciated in its right perspective and to the contrary, the accused has been acquitted of the charge on presumptions and assumptions.

4. The grouse of the appellant-State, therefore, in a nut-shell is that learned trial Court has erroneously ignored and brushed aside the cogent and reliable evidence produced by the prosecution. In order to show the involvement of the accused in the commission of the offence and that he has been acquitted erroneously without application of mind, the findings recorded by learned trial Court are stated to be perverse and as such, the impugned judgment is not legally sustainable.

5. The nature of the offence, the accused allegedly committed is not only heinous but also grievous in nature because as per the allegations, he has not only removed the prosecutrix, a minor from her lawful guardianship, but also subjected her to sexual intercourse against her will and without her consent. It is, however, yet to be determined by us that occurrence has taken place in the manner as claimed by the prosecution or not and also that the prosecution has been able to establish its case that the prosecutrix at the relevant time was a minor and kidnapped as well as subjected to sexual intercourse forcibly.

6. Before coming to the factual matrix and also re-appraisal of the evidence available on record, it is desirable to take note as to under what circumstances it can be inferred that the prosecutrix, a minor has been kidnapped from the lawful guardianship of her parents and under what circumstances she can be said to have been subjected to forcible sexual intercourse. A bare perusal of Section 361 IPC reveals that if a female under 18 years of age is enticed away by a person from her lawful guardianship without the consent of her guardian, such person can be said to have committed the offence of kidnapping. The essential ingredients to constitute an offence of kidnapping, therefore, is enticing away a minor form her lawful guardianship without the consent of her guardian or any other person legally authorized to

consent on behalf of such guardian of minor. Such person can be said to have committed an offence of kidnapping punishable under Section 363 of the Indian Penal Code.

7. Now if coming to the commission of offence punishable under Section 376 of the Indian Penal Code in a case of minor, the commission of such an offence can be inferred once it is established that the prosecutrix has been subjected to sexual intercourse and it is not required to prove that she was not a consenting party to such an act on the part of the accused. However, in a case where the prosecutrix is not minor, the prosecution is required to plead and prove beyond all reasonable doubt that such cardinal intercourse with her was against her will and without her consent.

8. Now if coming to the legal principles attracted in a case of this nature, in ***State of Punjab*** Vs. ***Gurmeet Singh and others, AIR 1996 SC 1393***, the Apex Court has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person is not implicated in the commission of an offence of this nature, while taking note of the judgment in ***Gurmeet Singh's*** case supra has however diluted the ratio thereof in ***Ranjit Hazarika*** Vs. ***State of Assam, (1998) 8 SCC 635*** and held that the statement of prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, in such cases, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in V***imal Suresh Kamble*** Vs. ***Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175***. While placing reliance on this judgment and the law laid down by the Apex Court in the judgment supra, this Court in ***Criminal Appeal No. 481 of 2009*** titled ***State of Himachal Pradesh*** V. ***Negi Ram***, decided on 27th May, 2016 has held as under:

> "15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not got swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record."

9. It is also worth mentioning that in a case of this nature, it is the age aspect of the prosecutrix which assumes significance.

10. Now if coming to the factual matrix, the prosecutrix being born on 10.11.1992 was approximately 18 years and eight months old on 26.07.2010, when she made the application Ext. PW-5/A to the Station House Officer, Sadar, District Solan for registration of a case against the accused. Even if the date of occurrence is taken as 2.6.2010, in that event also, she was approximately 17 years seven months old at that time. In order to prove her age below 18 years school certificate Ext. PW-16/A, date of birth certificate Ext. PW-22/A and the extracts of parivar register Ext. PW-10/B has been produced in evidence. The school certificate Ext. PW-16/A has been produced in evidence by her father PW-16 Narender Pal Singh. The same in the present form is not legally admissible because no evidence has come on record as to what was the source on the basis of which the date of birth of the prosecutrix has been recorded as 10.11.1992 in this document. The entries in the parivar register being not primary evidence qua the birth of a person are also not legally admissible in evidence nor on the basis thereof, it can be said that such person was born on the date mentioned therein. Now if Ext. PW-16/A and Ext. PW-10/A are excluded from the evidence, there remains only Ext. PW-22/A, the date of birth certificate issued by the Registrar, Births and Deaths, Gram Panchayat, Maan, Tehsil Arki, District Solan, H.P. PW-22, who has proved this document is Ravinder Kumar, Registrar, Births and Deaths, Gram Panchayat, Maan, Tehsil Arki, District Solan. True it is that he had brought the birth register and while in the witness box has deposed that the birth certificate Ext. PW-22/A has been issued by him on the basis of entries in the said register, however, in his cross-examination he has admitted over writing and cutting in column No. 5 of the register and that the entries at

Serial No. 46 in the said register are in different ink. He has also admitted over writing and cutting in the entries made at Serial No. 47, 48 and 49 of the register. He has also admitted rubbing of entries at Serial No. 46 in the register. The abstract of register was obtained by the police during the course of investigation and as such this witness while in the witness box has proved the abstract of register, which is Ext. D-1. Overwriting and cutting in the entries against Serial No. 46 of the register qua the birth of prosecutrix renders the prosecution case that she has been born on 10.11.1992 as highly doubtful. The extract of register, Ext. D-1 makes it crystal clear that there is overwriting against entries at Serial No. 46. Otherwise also, it is Yasoda Devi, the grand mother of the prosecutrix at whose instance as per version of PW-22, the entries qua birth of the prosecutrix were entered in the birth register, was a material witness who could have told us that the prosecutrix was born on 10.11.1992 and that she had disclosed her correct date of birth to the Registrar, Births and Deaths, Gram Panchayat, Maan. As per version of PW-22, said Smt. Yasoda Devi is known to him and that she is alive. She, however, has neither been associated nor cited as a witness to the reasons best known to the prosecution. On the other hand, if coming to the opinion of Radiologist encircled red at point 'B' on the reverse of the MLC Ext. PW-24/A, the radiological age of the prosecutrix at the relevant time was 15½ to 17 years. The margin of two years, though as per the testimony of PW-24 Dr. Tanzin Chhokit the same may 3-4 years on either side, if taken into consideration, the age of the prosecutrix at that time was more than 18 years. Otherwise also, the age of the prosecutrix if taken above 17½ years, she had already attained the age of discretion. In the given facts and circumstances to be discussed hereinafter, therefore, it cannot be said that she was below 18 years of age and removed from her lawful guardianship by the accused without the consent of her parents. Being so, it cannot be said that the prosecutrix was minor below 18 years on the date of occurrence.

11. Before coming to the merits of the case, it is desirable to take note of the own admission of accused in his statement recorded under Section 313 of the Code of Criminal Procedure. His answers to question No. 2 to 8 reveal that he has admitted the prosecutrix a student of Government Girls Senior Secondary School, Solan and that he is owner of Balero bearing registration No. HP-11-3765 (used in the commission of offence). He has also admitted that the students of Badhalag were taken to Chandigarh, Kurukshetra and Renuka side for picnic and his vehicle was also hired for the purpose. It is he who had driven the vehicle during the period the students were taken for picnic. Though it is denied that he had obtained the cellphone number of the prosecutrix, however, according to him it is she who herself had asked for number of his cellphone. He also admits that he started calling the prosecutrix over her cellphone from his cellphone number 98054-38872. The prosecutrix also admitted in her cross-examination that she used to talk with accused continuously for 15 minutes to one hour at a time. She also used to call him from her cellphone. The explanation that she had been doing this due to fear is neither plausible nor reasonable. The accused also admits that he was subjected to medical examination vide MLC Ext. PW-1/B and that his vehicle HP-11-3765 was taken in possession vide seizure memo Ext. PW-7/A. It is thus seen that the accused and prosecutrix were well acquainted with each other. They used to talk with each other because as per prosecution case also, if believed to be true the accused had taken the number of cellphone of the prosecutrix. The controversy, therefore, lies in a narrow compass because it is to be seen from the evidence available on record that the prosecutrix a minor below 18 years was kidnapped by the accused from her lawful guardianship and subjected her to sexual intercourse.

12. On 2.6.2010, in the morning on her way to school from her quarter in Police Line, Solan at 11.30 a.m the accused was sitting in his Bolero and met her on bye pass near police line, Solan. He offered lift to her at the pretext that he will drop her near school, however, when they reached near Saproon bye pass, instead of taking turn towards Saproon chowk, he drove the vehicle towards Deonghat side. She tried to get the vehicle stopped but accused did not agree, therefore, she had altercation with him, but of no avail. She was taken to hotel at Deonghat and subsequently to a room in the said hotel. There he committed rape with her forcibly and also man handled her. He threatened her to throw acid on her body in case she

disclosed the incident to anyone else. He removed her clothes including salwar and subjected her to sexual intercourse forcibly.

13. It cannot be believed by any stretch of imagination that the prosecutrix had reasons to withheld the occurrence from her parents because the explanation that she was threatened not to disclose the incident to anyone, failing which, the accused will throw acid on her, is neither plausible nor reasonable. This Court has also failed to understand as to how the prosecutrix could have forcibly taken away by the accused, that too, from Solan town. As per her own admission in the cross-examination, the locality from police line Solan onward is thickly populated up to Deonghat. The hotel at Deonghat is touching the road. A 'Dhaba' also exist on roadside near the hotel. Room No. 102, where she was allegedly subjected to sexual intercourse situate below the restaurant/dhaba. She has not denied that in the restaurant no person was taking meal, however, expressed her ignorance as to how many persons were taking meal there. She was taken to the hotel in a broad day light i.e. 12.00 noon. As per her version, they both went walking through stairs up to the room. She also admitted that on the gate of police line at Solan, there are shops of a single owner. In view of such evidence as has come on record by way of her own testimony, even if it is believed that she was taken to hotel and subjected to sexual intercourse, it cannot be said that such an act on the part of the accused was forcible and contrary to her consent and against her will because had it been so, she could have raised hue and cry as it was not possible for the accused to have prevented her from doing so and also driving the vehicle simultaneously, that too, in Solan town and on Solan bye pass road, which as a matter of fact, is national highway and a very busy road. Being so, it would not be improper to conclude that she had voluntarily accompanied the accused and whatever happened on that day, she was a consenting party thereto. The prosecutrix for the purpose of commission of an offence under Section 376 of the Indian Penal Code was not minor below 16 years of age and rather more than 17½ years of age on that day. At the relevant time a female below 16 years of age used to be minor so far as the commission of an offence punishable under Section 376 of the Indian Penal Code is concerned.

14. Now if coming to the incident of 13.07.2010 that she was taken by the accused in the same vehicle to the same hotel. He allegedly tried to subject her to sexual intercourse forcibly inside the vehicle, however, he did not succeed in his attempt to do so and he administered beatings to her inside the vehicle. Her testimony in cross-examination that they could not reach in the hotel on that day as a result thereof, the accused parked the vehicle at an isolated place on the national highway where he tried to subject her to sexual intercourse cannot also be believed to be true for the reason that it was not possible for the accused to have assaulted her sexually on road side, had she been not a consenting party for the reason that on national highway there always remain flow of traffic and she being a young lady, the accused would have not made an attempt to assault her sexually on road side in the vehicle. How the accused could have driven the vehicle at a high speed and fighting with the prosecutrix also simultaneously. He could have also not prevented her from breaking glasses of the moving vehicle and driving the vehicle also simultaneously. This part of her statement in cross-examination also seems to be merely an afterthought. The incident of 13.7.2010 is also not disclosed by her to her parents as according to her she was threatened by the accused.

15. Now if coming to the incident of 26.7.2010, the accused caught hold her hand near ITI Solan at such a time when she was coming back from her school. On raising hue and cry other persons gathered there. As per prosecution case, even school girls were also present there. Had it been so, it is not known as to why no-one from the locality or other persons gathered there or the school girl(s) were not associated by the police during the course of investigation and cited as witnesses to prove this aspect of the matter beyond all reasonable doubt. In the given facts and circumstances and taking into consideration the own conduct of the prosecutrix, it is not safe to place reliance on her own testimony and that of her father PW-16. Had the occurrence of 26.07.2010 been taken place in the manner as claimed by the prosecution, the local people or anyone else gathered at the alleged place of occurrence would have voluntarily come forward to assist the police in the investigation of the case in order to bring guilt home to

the accused and to ensure that he is convicted. The possibility of the prosecutrix having voluntarily accompanying the accused on that day and when seen by her father PW-16, a false case was engineered and fabricated at the instance of her father to implicate the accused in this case, cannot be ruled-out.

16. It is significant to note that as per the complaint Ext. D-1, PW-16, the father of prosecutrix had mercilessly beaten up the accused. The allegations in the complaint also find support from the testimony of Dr. Lalit Mahajan who on being taken to the hospital by the police had examined the accused on the next day i.e. 27.7.2010 and issued MLC Ext. PW-1/B. PW-1 has noticed multiple reddish abrasion on upper half of back, swelling and bluish sicolouration below both eyes in infraorbital region and swelling on nasal bridge. PW-1 has also stated that injuries mentioned in the MLC can be caused by way of beatings. In his cross-examination conducted on behalf of learned defence counsel, he has stated that the injuries as disclosed in the MLC were recent. Therefore, the possibility of the accused having been beaten up by none-else but by the father of the prosecutrix, cannot be ruled-out. Nothing has come on record as to that any inquiry was made on the application, Ext. D-1 submitted by the mother of the accused to the police. We, therefore, find the present a case where the prosecutrix was in the company of the accused on 26.7.2010 and the case was registered at the instance of her father PW-16, who was working in Police Department as Head Constable at Solan at the relevant time. PW-16 even had administered beatings also to the accused may be on account of that they both were seen in the company of each other. The evidence as has come on record by way of the testimony of prosecutrix and that of her father is, therefore, not suggestive of that the prosecutrix was kidnapped from her lawful guardianship by the accused and that she was subjected to sexual intercourse without her consent and against her will in Room No. 102 of Hotel 50 Mile Stone.

17. The statement of PW-6, the owner of Hotel 50 Mile Stone has also been pressed in service. He while in the witness box has stated that the accused and prosecutrix were identified by him in the Court to be the same persons who had come to his hotel on 2.6.2010 in vehicle HP-11-3765 around 12.00 noon. The accused had introduced the prosecutrix as his wife. He further tells us that Room No. 102 was got booked by the accused and the entries Ext. PW-5/B were made by him in the register. He has identified the bed sheet, Ext. P-6, which according to him was lying spreaded on the double bed on 2.6.2010 and on 27.7.2010 also. Interestingly enough, his testimony in cross-examination reveals that the hotel situates on road side and there is 'Dhaba' of his brother where the services of Amar Deep have been engaged for prepration of meal. The accused and prosecutrix were not quarreling with each other, however, according to him gone to the room quietly. He did not over hear the cries or shouting from the room. He remained in the hotel during the night also. As per his version, the bed sheets and other clothes being used in the hotel are changed on each and every occasion after use of the room. The father of the prosecutrix was known to this witness. He tells us that those persons found to be quarreling with each other are not being allowed to stay in the hotel. The prosecutrix and the accused had gone for a walk in the evening, however, it is only the accused who had returned at 8.00 p.m. to the hotel and not the prosecutrix. Even if his testimony in his examination-in-chief is believed to be true and it is believed that the accused had taken the prosecutrix on 2.6.2010 to his hotel, it would not be improper to conclude that she had gone there voluntarily because as per version of this witness, the accused and prosecutrix were not quarreling with each other and rather went quietly to the room. Not only this but on the reception, the accused had introduced her being his wife to this witness. It is not known as to why the prosecutrix has not agitated against such conduct of the accused. Therefore, the evidence as has come on record by way of testimony of PW-6 Jagdeep Singh also does not support the prosecution case.

18. Now if coming the to the medical evidence as has come on record by way of testimony of PW-24 Dr. Tanzin Chhokit and the MLC Ext. PW-24/A, no doubt, at the time of medical examination of the prosecutrix, in her opinion, based upon local and physical examination of the prosecutrix, the possibility of sexual activity was not ruled-out, however, the duration of such activity could not be ascertained. The final opinion was left to be given after the receipt of the Chemical Examiner's report and the report of Radiologist. The report of chemical

examiner was received from the FSL, no blood and semen was detected on public hair, external genitalia, vaginal swab and salwar of the prosecutrix. Human blood was detected in the sample of blood of the prosecutrix, shirt and bed sheet but the result was not conclusive in respect of blood groups. No semen could be detected on other exhibits sent for analysis. The blood was detected in traces on underwear, however, the same was insufficient for further examination. Semen was not detected on the exhibits examined. The medical examination report Ext. PW-25/F was produced before the Medical Officer, PW-24. She, however, has noticed only gist and the results and failed to give her final opinion as to whether the prosecutrix was subjected to sexual intercourse or not, nor said that her opinion remained the same even on perusal of the report of chemical examiner also. On the other hand, result of the examination of the exhibits sent to the laboratory for analysis is not suggestive of that the prosecutrix was subjected to sexual intercourse.

19. In view of the discussion made hereinabove, the offence punishable under Section 341 and 506 of the Indian Penal Code has not been made out for the reason that the prosecution has failed to prove beyond all reasonable doubt that the prosecutrix was kidnapped by the accused form her lawful guardianship without the consent of her parents and that she has been subjected to sexual intercourse without her consent and against her will. Being so, there is no question of wrongful confinement of the prosecutrix in Room No. 102 of hotel 50 Miles Stone. It cannot also be believed that the prosecutrix was threatened with dire consequences including throwing of acid on her by the accused. Thyerefore, the charge under Section 341 and 506 of the Indian Penal Code as framed against the accused also fall to the ground.

20. There is no need to discuss the evidence as has come on record by way of the testimony of PW-7 Dharam Singh, PW-9 Naveen Kumar, Senior Assistant, office of Registering and Licensing Authority, Arki. The accused has not disputed the prosecution case qua his vehicle was taken into possession by the police along with its keys. PW-8 Vir Bhadra Tekta, Lecturer English, PW-18 Randhir Thakur, Lecturer Economics, PW-19 Narinder Pal Singh, Computer Teacher, PW-20 Tripta, Lecturer Sociology and PW-21 Veena Gupta, Lecturer Maths are formal in nature because they were working as Lecturers in Government Girls Senior Secondary School, Solan at the relevant time and as such had produced the record and deposed that the prosecutrix did not attend the classes on 2.6.2010. PW-10 Ravinder Kumar, Panchayat Sahayak, Gram Pachayat, Maan and Ravinder Kumar, Deputy Registrar, Births and Deaths, Gram Panchayat, Maan have produced the record pertaining to the date of birth of the prosecutrix, which has been duly considered hereinabove and the findings already recorded.

21. The official witnesses i.e. PW-4 LC Sandhya, PW-11 LC Neelam Kumari, PW-12 HHC Narender Prakash, PW-13 Constable Sanjay Kumar, PW-14 HC Pradeep Kumar, PW-17 HC Chander Mohan, PW-23 HC Rakesh Guleria and PW-25 ASI Dharam Sain, the Investigating Officer are formal as they remained associated during the investigation of the case in one way or the other, whereas, PW-25 has conducted the investigation of this case also. Their testimony could have been used as link evidence had the prosecution been otherwise able to establish beyond all reasonable doubt that the prosecutrix was kidnapped by the accused from her lawful guardianship and subjected to sexual intercourse without her consent and against her will.

22. In view of the re-appraisal of the given facts and circumstances of this case and also the evidence available on record, in our considered opinion, the prosecution has failed to prove its case against the accused beyond all reasonable doubt. The accused, as such, has rightly been acquitted of the charge framed against him. The judgment under challenge is neither perverse nor can be said to be legally and factually unsustainable. The same is accordingly affirmed.

23. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. Personal bonds furnished by the accused shall stand cancelled and surety bonds discharged.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Shri Avtar Singh ....Appellant
Versus
Sh. Tilak Raj & another ....Respondents

FAO No. 355 of 2012
Decided on : 11.11.2016

Motor Vehicles Act, 1988- Section 149- Tribunal held that driver was not having a valid and effective licence at the time of accident – licence was in the name of J and not in the name of S – there was no evidence that the owner had taken due care and caution while engaging the driver – held, that Tribunal had rightly recorded the findings- the driver was not having a valid and effective drivinglicence at the time of accident and the owner insured had committed willful breach- appeal dismissed.(Para-14 and 15)

Cases referred:
Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the Appellant : Mr. Ramakant Sharma, Advocate.
For the Respondents: Nemo for respondent No. 1.
Mr. P.S. Chandel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the judgment and award, dated 5th June, 2012, made by the Motor Accident Claims Tribunal, Hamirpur, H.P. (for short 'the Tribunal') in MAC Petition No. 42 of 2008, titled as Tilak Raj versus Shri Avtar Singh & others, whereby compensation to the tune of Rs. 3,64,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant and appellant-owner was saddled with liability (for short 'the impugned award').

2. The claimant, driver and insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The owner-insured has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellant-owner/insured argued that the Tribunal has fallen in an error in saddling him with the liability and the amount awarded is excessive.

5. Thus, the following questions are to be determined in this appeal:

1. *Whether the Tribunal has rightly saddled the owner-insured with liability and discharged the insurer?*
2. *Whether the amount awarded is adequate?*

6. In order to determine the aforesaid questions, it is necessary to examine the pleadings of the parties and record.

7. The claimant had invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs. 6,00,000/- as per the break-ups given in the claim petition.

8. The respondents resisted and contested the claim petition by filing replies.

9. Following issues came to be framed by the Tribunal:

"1. Whether the petitioner has suffered injuries due to rash and negligent driving of Qualis, bearing No. PB-18-J-0074 by its driver-respondent No. 2, as alleged? ..OPP

2. If Issue No. 1 is proved in affirmative, whether the petitioner/claimant is entitled to compensation, if so, to what amount and from which of the respondents? …OPP

3. Whether the petition is not maintainable in the present form?…OPRs

4. Whether the vehicle in question was being driven by respondent No. 2 at the time of accident in violation of the terms and conditions of the Insurance Policy? …OPR-3

5. Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the vehicle in question at the time of accident?…OPR-3

6. Relief."

10. The parties led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that the driver was not holding a valid and effective driving licence at the time of accident, the owner-insured has committed willful breach, saddled him with liability and discharged the insurer and granted compensation to the tune of 3,64,000/- with interest @ 7.5% per annum in favour of the claimant.

Issue No. 1

11. There is no dispute qua findings recorded on issue No. 1. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

Issue No. 3

13. The respondents have not led any evidence to prove that the claim petition was not maintainable, thus have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on Issue No. 3 are upheld.

Issues No. 4 & 5

14. The Tribunal has held that the driver was not having a valid and effective driving licence at the time of accident and the same was in the name of Jaswinder Singh, son of Shri Karam Singh and not in the name of Sarvjeet Singh, son of Shri Balbir Singh. Further, it has recorded that there was no evidence on the record to show that the owner-insured had engaged the driver after exercising due care and caution and has taken steps as required under law while engaging driver.

15. Having said so, I am of the considered view that the Tribunal has rightly recorded the findings that the driver was not having a valid and effective driving licence at the time of accident and the owner-insured has committed willful breach. Thus, the findings, recorded by the Tribunal on issues No. 4 & 5 are upheld.

Issue No. 2.

16. The Tribunal has assessed the monthly income of the claimant-injured at Rs. 5,000/- per month and held that the claimant has suffered 25% permanent disability and granted him compensation to the tune of Rs. 15,000/, under the head 'loss of dependency'. The claimant-injured has not questioned the same. Accordingly, the same is upheld.

17. The age of the claimant-injured was 35 years at the time of accident. The Tribunal has fallen in an error in applying the multiplier of '16'.

18. The multiplier of '14' is applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR**

2009 SC 3104, upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

19. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 1250 x 12 x 14 = Rs. 2,10,000/- under the head 'loss of dependency'.

20. The amount awarded under the other heads is maintained.

21. Accordingly, the claimant-injured is held entitled to total compensation under the following heads with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization,

(i) loss of dependency :	Rs. 2,10,000/-
(ii) Medical expenses :	Rs. 14,000/-
(iii) Attendant charges, special diet and transportation:	Rs. 15,000/-
(iv) Loss of income:	Rs. 15,000/-
(v) Pain and suffering:	Rs. 30,000/-
(vi) Loss of amenities of life:	Rs. 50,000/-
Total:	Rs. 3,34,000/-

22. Now, the question is- who is to be saddled with liability.

23. As discussed hereinabove, the owner-insured has committed willful breach. The claimant is the third party.

24. It is a beaten law of the land that right of third party cannot be defeated and even if the owner-insured has committed breach, the insurer has to satisfy the award, with right of recovery.

25. Viewed thus, the insurer is saddled with the liability, with right of recovery.

26. Learned Counsel for the appellant-insured stated at the Bar that an amount of Rs. 25,000/- stands already deposited before the Registry.

27. The insurer is at liberty to lay a motion before the Tribunal for recovery of the amount.

28. The insurer is directed to deposit the awarded amount minus the amount already deposited by the owner-insured before the Registry within a period of eight weeks from today.

29. The Registry is directed to release the awarded amount in favour of the claimant-injured, strictly as per the terms and conditions contained in the impugned award after proper identification, through payees' account cheque and by depositing the same in his account.

30. The impugned award is modified, as indicated hereinabove and the appeal is disposed of.

31. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Bimla and others ..Appellants/Defendants.

Versus

Saroj Rani ..Respondent/plaintiff.

RSA No. 235 of 2007
Reserved on : 1/11/2016
Date of decision: 11/11/2016

Specific Relief Act, 1963- Section 5 or 38- Plaintiff pleaded that he had given four rooms to the defendants as licencee- he demanded the possession but the defendants threatened to demolish the rooms – defendants pleaded adverse possession – the suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that the evidence in support of adverse possession was not satisfactory – the ingredients of adverse possession were not established – plaintiff is recorded to be the owner in the copy of jamabandi, which carries with it a presumption of correctness- the suit was maintainable without joining the co-owners – the evidence was properly appreciated by the Courts – appeal dismissed.(Para-7 to 12)

For the appellants: Ms. Seema Sood, Advocate.
For the respondents: Mr. H.C.Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

Both the learned Courts below concurrently rendered a decree vis.a.vis the plaintiff qua mandatory injunction whereupon the defendants were mandated to hand over possession of licensed premises borne on Khasra Nos. 264, 257 and 258 situated in Chak Khalinda, Pergana Matiana, Tehsil Theog, District Shimla, H.P. besides both the learned Courts below rendered qua the plaintiff a decree of permanent prohibitory injunction for restraining the defendants from raising any construction or carrying any construction on the existing construction. The defendants standing aggrieved by the concurrently recorded verdicts of both the Courts below preferred herebefore the instant appeal whereby they concert to seek their reversal.

2. The facts necessary for rendering a decision in the instant appeal are that the plaintiff is the owner in poosession of Khasra Nos. 264, 257 and 258 situated in Chak Kalinda to the extent of 3/4th share alongwith Kamlesh who is owner of 1/4th share. The defendants were co-villagers, who were in need of accommodation for their use. The plaintiff gave one room over Khasra No. 258 and three rooms over Khasra No. 257 to defendants as licensee. The defendants are in possession of four rooms as licensee. The plaintiff demanded the possession from the defendants but the defendants threatened to demolish the same and refused to handover the possession. The defendants have collected the construction material. Hence, it was prayed that defendants be restrained from raising the construction and be directed to handover the possession.

3. The suit is opposed by filing written statement, taking preliminary objections regarding the lack of maintainability, suit being barred for non joinder of necessary party and for misjoinder of cause of action. It was specifically denied that plaintiff is the owner in possession of the land bearing Khasra No. 257 and 258. It was asserted that the father of the defendant No.1 constructed one single storeyed house over the land bearing Khasra No. 257 showing his hostile animus over the same. The possession of defendants No. 1, 3 and 4 is open, visible and hostile to the true owner. The defendants No. 1, 3 and 4 have become the owners of the land bearing Khasra No. 257 by way of adverse possession and the revenue entries are wrong. The defendant Bimla constructed three rooms in the year 1980 over Khasra No. 258. The possession of the defendants No.2 is continuous since 1980 and she has become the owner by way of adverse possession. The possession of the defendants was also found by the settlement staff. The plaintiff came to know about the revenue entries and wants to take advantage of the same. Therefore, a false suit has been filed. Therefore, it was prayed that this suit be dismissed.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties at contest:-

1. Whether the possession of the defendants over the suit premises and land is that of licencee, as alleged? OPP.

2. If issue NO.1 is proved in affirmative, whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for? OPP.

3. Whether the plaintiff is also entitled to the relief of possession by way of mandatory injunction, as prayed for? OPP.

4. Whether the suit in the present form is not maintainable? OPD.

5. Whether the suit is bad for misjoinder of parties and cause of action? OPD.

6. Whether the defendants No. 1, 3 and 4 have perfected their title qua Khasra No. 257 by way of adverse possession, as alleged? OPD.

7. Whether the defendant No. 2 has also perfected her title in respect of Khasra NO. 258 by way of adverse possession, as alleged? OPD.

8. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

6. Now the defendants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 26/07/2007 this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "1. Whether the suit is groverned exclusively Article 64 (old article 142) of the Limitation Act?
>
> 2. Whether the purchase of shares of other coshares except that Smt. Kamlesh contrary to the restrictions imposed vis.a.vis transfer of the said shares by way of sale, mortgage, gift, etc. incorporated in Revenue Record (Jamabandi) vide report No. 115 dated 13.11.1969 to the knowledge of the plaintiff respondent or her predecessor in interest perfects her title and possession as alleged and makes her competent to file the suit?
>
> 3. Whether plaintiff respondent can be deemed to be legally competent to create interest in the suit land by alleged delivery of possession as licensees of four rooms located in Khasra No. 257 and 258 thereof in view of Report No. 115 dated 13.11.1969 and the restriction on transfer imposed thereby?

Substantial questions of law.

7. The premises existing upon the suit land contrarily stand contended by the litigating parties hereat qua the defendants' standing in the year 1992 inducted thereon as licensees whereas defendant No.1 espouses qua theirs acquiring/perfecting their title thereon by prescription arising from elapse hereat of the statutorily prescribed period of limitation commencing from the year 1950 whereat their predecessor in interest raised a construction thereon whereafter she contends qua hers continuously holding its possession of premises existing on Khasra No. 257. On the other hand the defendant No.2 has espoused qua construction standing raised by her upon Khasra No. 258 in the year 1980 whereafter she canvases of hers continuously since thereat upto date with a animus possidendi holding its possession whereupon with their statutorily prescribed period of time elapsing therefrom she espouses qua hers becoming its owner by adverse possession. Initially the veracity of DW-1 testify qua her predecessors in interest raising a construction in the year 1950 upon Khasra No. 257 is bereft of vigour especially when DW-3 testifies qua the father of defendant Surmi expiring about 45 to 46 years ago. Also with his testifying qua the predecessor in interest of defendant Surmi raising a construction upon Khasra No. 257 about 40 years back whereas with his rendering his testification in the year 2003 wherefrom on 40 years standing computed hitherto imperatively nails a conclusion of the father of defendant Surmi purportedly raising construction upon Khasra No. 257 not in the year 1950 as deposed by Surmi rather his purportedly raising construction thereon in the year 1963 whereupon reiteratedly he omits to lend succor to the

deposition of DW-1 qua her predecessor in interest raising construction upon Khasra No. 257 in the year 1950. In aftermath, the aforesaid plea raised by defendant No.1 warrants its standing discountanced it remaining in the realm of unsubstantiation. Also defendant No.2 espouses qua hers raising a construction on Khasra No. 258 in the year 1980 factum whereof is in rife contradiction to the testimony of DW-1 wherein she testifies qua her predecessor in interest raising construction upon Khasra No. 257 in the year 1950. Moreover, the factum aforesaid espoused in the testification of defendant Bimla is ridden with a vice of in veracity significantly when she has omitted to recite the name of the mason who had constructed the house in the year 1980 on Khasra No. 258.

8. Be that as it may with defendant Surmi besides defendant Bimla abysmally failing to establish the factum of construction standing raised respectively by them upon Khasra No. 257 besides upon Khasra No. 258 respectively in the year 1950 and in the year 1980, concomitantly the assertion respectively made by them qua theirs since thereat holding with an animus possidendi, possession of the suit property cannot stand ingrained with any virtue of truth. The effect of the aforesaid failure on the part of the defendant Surmi besides on the part of defendant Bimla to establish the relevant factum aforesaid constrains a derivative qua their assertion qua theirs respectively since 1950 besides since 1980 commencing with an animus possidendi possession of the suit land wherefrom with the statutorily prescribed period of limitation elapsing therefrom upto date theirs hence perfecting their title thereto, not warranting acceptance. Fortification to the inference aforesaid stands marshaled by the fact of DW Surmi omitting to specifically recite the name of the owner of Khasra No. 257 and 258. Though DW-2 has testified qua the plaintiff holding ownership of the suit land nonetheless her testification qua the aforesaid facet is bereft of credence significantly when she has feigned ignorance qua the owners of houses adjacent thereto. Moreover with hers not assigning any special reason qua hers holding knowledge qua the plaintiff holding ownership of Khasra No. 257 and 258 renders her testification qua the plaintiff holding ownership of the suit land whereon the disputed premises stand raised to be susceptible to skepticism. In aftermath it is to be concluded with aplomb qua with both not holding knowledge qua the plaintiff holding ownership of the suit property whereas for theirs obtaining success in their espousal qua theirs acquiring title thereto by adverse possession the identity of the real owner whereagainst the apposite plea is canvassed is enjoined to emerge by adduction of invincible evidence, contrarily with non emergence of the identity of the true owner of the disputed suit property constrains a deduction qua the plea of adverse possession asserted by the defendants qua the suit property holding no vigour, it being speciously raised for want of the indispensable besides imperative ingredients for it to hold success embodied in upsurgence of the identity of the person whereagainst it is asserted, hence remaining unsatiated.

9. Uncontrovertedly, reflections stand borne in Ext.P-1 comprising the Jamabandi qua the suit property wherewithin unveilings occur qua the plaintiff being the owner of the suit property besides the Jamabandi for the year 1982-83 shows the plaintiff to be the co-owner in possession of the suit property, likewise copy of Jamabandi qua the suit property comprised in Ext.P-4 pertaining to the year 1992-93 shows the plaintiff to be owner in possession of the suit property. Presumption of truth as carried by the aforesaid exhibits has remained uneroded also when for reasons aforesaid the plea of adverse possession reared by the defendants qua the suit property founders, the presumption of truth held by the reflections carried therewithin acquire conclusivity. Also the testification of the plaintiff qua the defendants standing inducted as licensees in the suit property in the year 1992 acquires corroborative vigour from the deposition of PW-2 besides when the testification of PW-2 on its wholesome appraisal holds credibility, it warrants its acceptance.

10. The learned trial Court on the issue of maintainability of the suit arising from lack of impleadment in the array of plaintiff other co-owners, had recorded thereon a finding adverse to the defendants, finding whereof stood anvilled upon pronouncements of this Court occurring in Ajmer Singh Vs. Shamsher Singh, AIR 1984, P&H 58 and Kanchna Vs. Bishan 2003(3), SLJ 700 wherein a mandate is encapsulated qua a co-sharer holding entitlement as a

plaintiff to institute a suit for injunction without his joining in the array of plaintiff the other co-owners of the joint suit property. The aforesaid mandate encapsulated in the aforesaid verdict warrants reverence. Consequently, the suit of the plaintiff for relief of injunction is maintainable even without hers joining in the array of the co-plaintiffs other purported co-owners of the jointly recorded suit property.

11. Be that as it may, since invincible evidence stands adduced qua under the purported report No. 115 of 13.11.1969 prepared by the Patwari concerned whereupon an interdiction stood cast upon the plaintiff to acquire the share of other co-owners in the suit property concomitantly when thereon she stood incapacitated to institute the suit against the defendants besides when it holds no tenacity its holding disconcurrence with the apposite rules, though imperatively warranted the learned trial Court to strike an apposite issue thereon whereas with the defendants at the time whereat the learned trial Court struck issues on the contentious pleadings of the litigating parties acquiescing qua the issues as stood struck for trial inter se the litigating parties rather is a vivid display of the defendants standing estopped to espouse herebefore qua on the aforesaid factum the concurrently recorded verdicts of both the Courts below warranting reversal also when any acceptance of the contention of the defendants anvilled thereupon would unnecessarily sequel a de novo trial of the suit despite the defendants at the apposite stage waiving the striking of the aforesaid issue(s) thereon by the learned trial Court. Contrarily thereupon on ground of estoppel arising from waiver forestalls on anvil thereof any argument in consonance therewith.

12. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather they have aptly appreciated the material available on record. I find no merit in this appeal, which is accordingly dismissed and the judgments and decrees of the both the Courts below are maintained and affirmed. Substantial questions of law stands answered against the defendants. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Chattar Singh .....Appellant-Plaintiff.

Versus

Gauri Singh and others ....Respondents/defendants.

RSA No. 630 of 2012.
Reserved on : 04.11.2016.
Decided on : 11th November, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that defendant is obstructing the passage to his house and is not allowing him to carry the construction material – defendant denied the existence of the passage- the suit was decreed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that plaintiff had proved the existence of the path by the spot map, oral testimony and the revenue record- however, no satisfactory evidence was led by the defendant- the Appellate Court had wrongly discarded the evidence on the ground that no demarcation was conducted- however, the demarcation was not required- appeal allowed- judgment of Appellate Court set aside and the suit of the plaintiff decreed.

(Para-8 to 11)

For the Appellant: Mr. Vijay Chaudhary, Advocate.
For the Respondents : Mr. Vikas Rathore, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The learned trial Court had decreed the suit of the plaintiff wherein he had claimed injunction against the defendants for restraining them from causing interference in his using path existing on abadideh land for facilitating his accessing his house. However, in an appeal carried therefrom by the aggrieved defendants before the First Appellate Court, the latter Court reversed the verdict of the learned trial Court. The plaintiff standing aggrieved by the pronouncement of the learned First Appellate Court has proceeded to through the instant appeal assail it herebefore.

2. The brief facts leading to the lis inter se the parties are that the plaintiff is permanent resident of Muhal Ahju/10, Tehsil Jogindernagar, District Mandi, H.P. and owns a considerable property there. House of the plaintiff is stated to be built over abadi deh land comprised in khasra No.487/1 and is in existence for last more than 90 years which requires immediate repairs. It is further averred that defendants without any right and authority are creating active interference on the path existing on the spot and leading to the house of the plaintiff and they are not allowing him to carry any building material for repair of the said house and are also not allowing him to repair the path by laying pucca cemented concrete. This path is alleged to be existing between khasra No.79 and 490 and passes through one side of the court yard of the house of the defendants and then it reaches to the house of the plaintiff. This path is in existence since the time of the forefathers and has always been peacefully used and enjoyed as a matter of right. Hence the suit.

3. The defendants contested the suit and filed the written statement wherein they have taken preliminary objection qua maintainability, cause of action etc. On merits, it is admitted that the house of the plaintiff exists over abadi deh land. It is denied that there is any passage over the abadi deh land ever enjoyed by the plaintiff and others. It is further stated that allegations are vague for want of any spot map and measurement of the passage. Other allegations are denied and it is stated that the suit is without any merits and it be dismissed.

4. The plaintiff/appellant herein filed replication to the written statement of the defendants/respondents, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether there exists any passage over the suit land, as claimed? OPP
2. Whether the plaintiff is entitled to the relief of injunction as prayed for? OPD
3. Whether the suit is not maintainable in the present form? OPD
4. Whether the plaintiff has no cause of action and locus standi to file the suit? OPD.
5. Whether the suit is bad for want of better particulars? OPD.
6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, it decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the defendants/respondents herein before the learned first Appellate Court, the latter Court while allowing the defendants' appeal, reversed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein has instituted herebefore the instant Regular Second Appeal assailing therein the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 10.09.2013, this

Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the findings of the First Appellate Court are result of complete mis-reading, mis-interpretation of the evidence and material placed on record and against the settled position of law?

Substantial question of Law No.1:

8. The propagation of the plaintiff qua his standing entitled to user of path, entitlement whereof stood espoused to arise from its prescriptive user commencing since times immemorial, stood countenanced by the learned trial Court. The learned trial Court while pronouncing qua the plaintiff holding an entitlement to use the suit land as a path for accessing his house existing ahead of the house of the defendants stood founded upon (a) the relevant path occurring in abadi deh land; (b) spot map Ex.PW3/A proven by PW-3 holding depictions of a path existing on the suit land besides it unraveling qua its standing blocked by the defendants. It therein also holding manifestations qua the width of the path upon the suit land holding dimensions of about 1 ½ feet; (c) PW-4 while proving spot map Ex.PW4/A also corroborating the testimony of PW-3; (d) jamabandi qua the suit land holding reflections of it being abadi deh land, a part whereof has remained unconstructed, whereon PW-3 and PW-4 unanimously depose qua existence of a path thereon and (e) DW-2 Jayawanti Devi in her testification acquiescing qua existence on the suit land a path holding a width of 1 ½ feet besides hers in her cross-examination acquiescing qua the plaintiff using it in good faith.

9. Even though the aforesaid manifestations unraveled in the testifications of the aforesaid witnesses make a vivid portrayal of the plaintiff thereupon emphatically sustaining his plea qua existence of a path measuring 1 ½ feet on the suit land also thereupon his obviously sustaining the factum of his holding a prescriptive right qua its user commencing since times immemorial besides when the defendants omitted to adduce the relevant germane evidence proclaiming the factum of the plaintiff holding a facility to access his house through an alternative path than the one whereon he asserted a prescriptive right of easement, when imperatively enjoined the learned First Appellate Court to concur with the verdict recorded by the learned trial Court, it on the score of (a) Ex.PW3/A not standing supported by any demarcation report and (b) no reflection in the relevant tatima in personification of the measurement of the path, interfered with the verdict pronounced by the learned trial Court. However, the aforesaid verdict recorded by the learned First Appellate Court on anvil of the hereinabove assigned reasons holds no weight, significantly, when there occurs no dispute inter se the litigating parties qua one encroaching upon the land of the other, whereupon there was hence no enjoined necessity for the learned First Appellate Court to insist qua preceding the preparation of Ex.PW3/A a demarcation standing conducted of the relevant spot, more so, when the width of the path delineated therein stood also acquiesced by the defendants' witnesses. Also with the suit land standing reflected in the apposite revenue record to be abadi deh land whereon save and except the constructed portion, clinching evidence stands embodied in Ex.PW3/A and Ex.PW4/A besides acquiesced by the defendants' witnesses qua a path holding a width of 1 ½ feet existing thereon whereupon the portrayals occurring therein warranted acceptance as tenably done by the learned trial Court rather than theirs standing discountenanced as untenably pronounced in the impugned verdict recorded by the learned First Appellate Court.

10. The above discussion unfolds the fact that the conclusions as stand arrived at by the learned first Appellate Court standing not based upon a proper and mature appreciation of evidence on record. While rendering the apposite findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the plaintiff/appellant and against the defendants/respondents.

11. In view of above discussion, the present Regular Second Appeal is allowed and the judgement and decree rendered by the learned Additional District Judge, Mandi on 22.8.2012 in Civil Appeal No.77 of 2012 is set aside. In sequel, the judgment and decree rendered by the

learned Civil Judge (Senior Devision), Jogindernagar, District Mandi, H.P. on 9.9.2011 in Civil Suit No. 77 of 2005 is affirmed and maintained. Consequently, the suit of the plaintiff is decreed and the defendants are restrained from causing any obstructions or hindrance through themselves or their family members, agents and servants qua the user of the path holding width of 1 ½ feet, shown in Ex.PW3/A and Ex.PW4/A, by the plaintiff which is situated over abadi deh land in Mohal Ahju/10, Tehsil Jogindernagar, District Mandi, H.P. Decree sheet be prepared accordingly. All pending application(s) also stand disposed of. Records be sent back forthwith.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Chaudhari Ram since died through LRs ..Appellant/plaintiff.
Versus
Nathu Ram and another. ..Respondents/defendants.

RSA No. 244 of 2006
Reserved on : 1/11/2016
Date of decision: 11/11/2016

Specific Relief Act, 1963- Section 38- Plaintiff was owner in possession of the suit land- land was given to defendant No.1 on payment of rent of Rs.1 per annum- the defendant No.1 constructed a house on the suit land – the lease was terminated and an agreement was executed- plaintiff paid Rs.300/- to defendant No.1, defendant No.1 removed the material of the house from the suit land and shifted to Village B- the defendant No.1 sold the suit land in favour of defendant No.2 and defendant No.2 is threatening to interfere in the possession of the plaintiff- the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff has admitted that construction raised by him was demolished – the document required registration and could not be looked into in absence of the registration – khasragirdawari was not produced – plea of adverse possession was also not established- the suit was rightly dismissed by the Trial Court- appeal dismissed. (Para-7 to 10)

For the appellant: Mr. Janesh Gupta, Advocate.
For the respondent: Mr. Anil Kumar God, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned Additional District Judge, Ghumarwin, District Bilaspur, H.P., whereby he affirmed the rendition of the learned Senior Sub Judge, Bilaspur, District Bilaspur, Himachal Pradesh, Camp at Ghumarwin. The plaintiffs standing aggrieved by the concurrently recorded renditions of both the learned Courts below, concert through the instant appeal constituted before this Court, to beget reversal of the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiff was the owner in possession of land measuring 0-2 biswas, bearing Khasra No. 95, situated in village Lethwin. In the year Sambat 2010 B.K the suit land was given on lease to defendant No.1 on payment of rent of Rs.1/- per annum. The defendant No.1 had constructed a house on the suit land. Lateron the lease was terminated in the year Sambat 2025 B.K. when the defendant No.1 executed an agreement and the plaintiff paid Rs.300/- to defendant No.1. The defendant No.1 had removed the material of house from the suit land and he permanently shifted to his native village Barota. Thus, the suit land had been coming in possession of the plaintiff since Sambat 2025 B.K. But the defendant No.1 had illegally sold the suit land vide sale deed

dated 18.08.1994 in favour of defendant No.2. The defendant No.2 had threatened to interfere with possession of plaintiff and to raise construction on the suit land. Hence, the suit.

3. The suit was contested by defendants. They filed written statement, wherein they raised preliminary objections about maintainability of the suit and cause of action. On merits of the case, the defendants refuted entire case of the plaintiff. They further alleged that possession was not handed over to plaintiff nor any agreement was executed by defendant No.1 in favour of defendant No.2. The defendants refuted entire case of the plaintiff and they prayed for dismissal of the suit.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled for relief of declaration and permanent prohibitory injunction, as prayed for? OPP.

2. Whether in the alternative the plaintiff is entitled for possession? OPP.

3. Whether the plaintiff is owner in possession of the suit land by virtue of adverse possession? OPP.

4. Whether the plaintiff has no cause of action? OPD.

5. Whether the suit is not maintainable in the present form? OPD.

6. Relief.

5. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff besides the learned Additional District Judge, affirmed the findings of the learned trial Court.

6. Now the plaintiffs/appellants herein has instituted before this Court the instant Regular Second Appeal wherein they assail the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 8.5.2007, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

"1. Whether both the Courts below have acted beyond their jurisdiction in applying the provisions of H.P. Tenancy and Land Reforms Act to the land which was Abadi and by no stretch of imagination was covered by provision of the said Act, to hold defendant No.1 to declare defendant No.1 to be non occupancy tenancy having acquired proprietary rights?

7. Whether both the Courts below have committed grave illegality and irregularity in misreading Ext.P1 the mutation which was not attested by a competent officer? Have not both the Courts below exceeded their jurisdiction in relying upon Ext.P1 which was illegal null and void and did not confor any provision of law and rule of procedure?

8. Whether both the Courts below have committed grave illegality in ignoring from consideration the material document Ext.PW-2/A by wrongly invoking the provisions of registration Act by holding that the document is inadmissible for want of registration, when no such objection regarding admissibility was raised during the course of the trial and when the said document was admitted in evidence?

9. Whether the lower Appellate Court has committed grave illegality and irregularity in rejecting the application filed by the plaintiff appellant for amendment of the plaint?

10. Whether both the Courts below have acted with material illegality and irregularity in presuming the title in favour of the defendant No.1 thereby holding defendant No.2 to be owner by misreading the pleadings and evidence?

11. Whether both the Courts below have acted in excess of their jurisdiction in dismissing the suit of the plaintiff to be non maintainable without properly

considering the alternative plea raised by the plaintiff for recovery of possession and mis-construing and misunderstanding the plea of perfection of the title raised by the plaintiff."

Substantial questions of law.

7. In the plaintiffs' concert to obtain qua the suit land a decree of permanent prohibitory injunction from the Civil Court for thereupon the defendants standing restrained from interfering with their possession qua it, it was imperatively incumbent upon them to by clinching evidence substantiate the trite factum qua theirs extantly holding possession of the suit land. The deceased sole plaintiff in the endeavour aforesaid had relied upon Ext.PW-2/A whereunder he espuoused qua his obtaining possession of the suit land whereon he raised a construction. However, in his plaint he acquiesces qua the construction raised by him on the suit land standing demolished whereafter his cultivating it. The impact if any of Ext.PW-2/A for clinching the factum of the plaintiffs in pursuance thereto holding possession of the suit land stands effaced by the factum of its holding a recital therein qua a sum of Rs.300/- passing as consideration from the plaintiff to defendant No.1 whereupon under the provisions of Section 17 of the Indian Registration Act its registration was compulsory whereas it remained unregistered, obviously thereupon no bestowment of title qua the suit land ensued vis.a.vis the deceased sole plaintiff. Apparently hence the gravamen of the deceased sole plaintiffs' concert to thereupon assert qua his holding possession of the suit land gets belittled besides scuttled.

8. Be that as it may, the counsel for the plaintiff relies upon Ext.P-1 wherewithin reflections are held qua the plaintiff holding possession of the suit land, described therein as 'Gair Mumkin Abadi', for making an espousal herebefore of his holding possession of the suit land. True it is of the apposite reflections aforesaid held in Ext.P-1 do carry a presumption of truth, presumption whereof carried by them unless belittled by cogent evidence would acquire conclusivity whereupon hence the plaintiff would succeed in establishing his holding possession of the suit land. However, even if no cogent evidence in rebutting the reflections held therewithin stands adduced by the defendants yet the efficacy of the reflections held therewithin stand denuded given the plaintiff acquiescing in his pleadings qua the aforesaid structure raised by him on the suit land standing demolished whereafter he espouses qua his cultivating the suit land. In sequel, it was imperative for the deceased sole plaintiff to adduce efficacious evidence in portrayal thereof. The deceased sole plaintiff has omitted to adduce the relevant best evidence comprised in the apposite reflections borne on Khasra Girdawaris whereas with defendant No.1 executing qua the suit land a registered deed of conveyance comprised in Ext.DW-1/A with defendant No.2, in sequel whereof mutation comprised in Ext.DA stood attested, pronounces upon the factum of the defendant No.2 holding possession of the suit land. The aforesaid pronouncements emerging from the exhibits aforesaid were enjoined to be subjected to an assault thereon standing constituted by the deceased sole plaintiff yet he omitted to mount an assault qua the efficacy borne by the relevant pronouncements occurring in Ext.DW-1/A and Ext.DA. The effect of his omitting to constitute an assault upon the efficacy of Ext.DW-1/A besides of Ext.DA unveils an inference of his acquiescing to the relevant manifestations which occur therewithin in display of defendant No.2 extantly holding possession of the suit land wherefrom it is apt to conclude of his pretextually canvassing qua his holding possession of the suit land.

9. The deceased sole plaintiff had canvassed qua his perfecting his title qua the suit land by way of adverse possession. However, the aforesaid plea stands propounded by a catena of judicial verdicts to be unavailable for its standing canvassed by the plaintiff also judicial verdicts expostulate qua the aforesaid plea being unavailable for its standing raised in the affirmative by the plaintiff contrarily it being available for its standing reared in-repudiation to the apposite assertions espoused by the deceased sole plaintiff. In aftermath, the ensuing apt conclusion is of the deceased sole plaintiff standing disabled to raise the aforesaid plea besides hence merit if any in the aforesaid plea gets benumbed by the factum, for reasons aforesaid his acquiescing to defendant No.2 extantly holding possession of the suit land.

10. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of both the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather they have aptly appreciated the material available on record. I find no merit in this appeal, which is accordingly dismissed and the concurrently recorded judgments and decrees of both the Courts below are maintained and affirmed. Substantial questions of law stand answered against the plaintiff. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Chhabi Ram since deceased through LRs ..Appellant/defendant-1

Versus

Smt. Narudhma Devi and others ..Respondents.

RSA No.598 of 2009
Reserved on : 28.10.2016
Date of decision: 11/11/2016

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit pleading that D had not executed any Will and the Will propounded by defendant No. 1 is a forged document – the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that execution of the Will was proved by marginal witnesses and the scribe – the Will was duly registered and was read over and explained to the deceased – testimonies of the witnesses were not shaken in the cross-examination – Sub Registrar proved the endorsement – Courts had wrongly discarded the Will – appeal allowed- judgments of Courts set aside.(Para-7 to 11)

For the appellant: Mr. Bhupender Gupta, Sr. Advocate with Mr. Janesh Gupta, Advocate.
For the respondents: Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree recorded by the learned District Judge, Mandi, H.P., whereby he affirmed the rendition of the learned Civil Judge, (Jr. Division), Court No.3, Mandi, District Mandi. The defendant Chabbi Ram standing aggrieved by the concurrently recorded renditions against him by both the learned Courts below concerts through the instant appeal constituted before this Court, to beget reversal of the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision in the instant appeal are that plaintiff filed a suit for declaration and permanent injunction against the defendants with the allegations that Shri Dile Ram, husband of the plaintiff and father of defendants was owner in possession of the land comprising Khata Khatauni No. 24/26, measuring 14-19-1 bighas situate at Mauja Dhar, Tehsil Sadar, District Mandi, H.P. Dile Ram was residing and being looked after by the plaintiff as well as the daughters. The defendant No.1 was not having good relations with the plaintiff and her husband and was residing separately for the last 30 years. The defendant No.1 never rendered any assistance to Shri Dile Ram. Dile Ram did not execute will in favour of defendant No.1. Dile Ram was suffering from senile dementia and was not in sound disposing state of mind. The will was fake document manufactured under suspicious circumstances without making provisions for the maintenance of the plaintiff. The defendant No.1 got the

mutation of the estate of Dile Ram attested in his favour on the basis of Will without notice to the plaintiff and proforma defendants and the same was illegal, null and void. The plaintiff and proforma defendants were in possession of the suit land and were entitled to inherit the property. The defendant was attempting to dispossess the plaintiff and proforma defendants from the suit land. So, the plaintiff has filed suit for declaration that the plaintiff and proforma defendants being widow and daughters had succeeded to the suit land and the Will and mutation in favour of defendant was wrong, illegal, null and void, alongwith a decree for permanent injunction restraining the defendant from causing interference in the possession of the plaintiff over the suit land.

3. The defendant contested the suit and rasied preliminary objections about maintainability, locus standi, cause of action and estoppel. On merits the defendant averred that the defendant was residing jointly with the plaintiff and his father and helping them. The defendant was unemployed Matriculate and the father of defendant to get government service deliberately got the family of the defendant recorded separately in the Parivar register. The defendant used to pay the electricity bills. Dile Ram had executed a valid will in sound disposing mind in favour of the defendant. The last rites of Sh. Dile Ram were also performed by the defendant. The defendant was in possession of the suit land. The mutation has also been attested in favour of defendant. The plaintiff has filed the suit on the provocation of proforma defendants No. 2 and 3. The proforma defendants admitted the case of the plaintiff.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties in contest:-

1. Whether the Will dated 26.5.2003 is the result of fraud and is a fake document as alleged? OPP.

2. Whether the plaintiff is in physical possession of the suit land? OPP.

3. Whether the deceased Dile Ram has executed a valid Will in favour of defendant No.1.

4. Whether the suit is not maintainable in the present form? OPD.

5. Whether the plaintiff has no locus standing to file the present suit? OPD.

6. Whether no enforceable cause of action has accrued to the plaintiff? OPD.

7. Whether the plaintiff is estopped by the own act and conduct to file the suit? OPD.

8. Relief.

5 On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

6. Now the defendant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 17.05.2010, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

"Whether the findings of the learned trial Court as well as first Appellate Court are result of complete misreading and misinterpretation of the evidence and material on record and against the settled position of law?

Substantial question of law.

7. Under Ext.DW-5/A embodying therein a registered testamentary disposition of deceased testator, the latter alienated the suit property qua the defendant Chhabi Ram. However, both the Courts below concurrently concluded of DW-5/A not standing proven to be validly and duly executed. The conclusion aforesaid concurrently recorded by both the Courts below stood anchored upon the factum of a marginal witness thereto while testifying as DW-6 not

therein making any communication in tandem with the apposite statutory parameters engrafted in Section 63 of the Indian Succession Act, tritely qua his seeing the deceased testator embossing his thumb impression thereon in his presence nor also his making any articulation therein qua his thereafter in the presence of deceased signaturing it.

8. True it is qua on a circumspect scanning of the testimony of DW-6, its omitting to unveil the aforesaid apposite communications. However, both the learned Courts below blunted the effect of Ext.DW-5/A after its execution occurring on 26.5.2003 at the Judicial Court Complex, Mandi, it on the same day standing carried to the office of the Sub Registrar concerned for its standing presented thereat for registration besides both the Courts below blunted the effect qua on its standing presented for registration before the Sub Registrar concerned the latter accepting it for registration pre-ponderantly also both the Courts below undermined the effect of a signatured endorsement occurring thereon holding unfoldments of the Sub Registrar concerned on reading over and explaining its contents to the deceased testator also on his thereupon drawing satisfaction qua the deceased testator comprehending them besides accepting the factum of occurrence of his thumb impressions thereon, his thereupon signaturing the apposite endorsement which occurs in Ext.DW-5/A. Both the Courts below also apparently had made short shrift of the factum of the deceased testator at the time contemporaneous to Ext.DW-5/A standing registered by the Sub Registrar concerned his embossing his thumb impression thereon. Moreover, the tenacity of the factum qua the marginal witnesses thereto also contemporaneous to Ext.DW-5/A standing registered signaturing it also visibly stands negated by both the Courts below.

9. Be that as it may, DW-6 has rendered a testimony qua the deceased testator at the time whereat Ext.DW-5/A stood registered his thereat in his presence embossing his thumb impressions thereon also in his testification he has voiced qua his thereat in the presence of the deceased testator thereat signaturing it. The veracity of the signatures of DW-2 occurring on the endorsements recorded by him in Ext.DW-5/A besides the authenticity of the portrayals held therein qua on the contents Ext.DW-5/A standing read over and explained by him to the deceased testator whereafter his comprehending them also his accepting his thumb impressions occurring thereon, all stand efficaciously testified by the Sub Registrar concerned. The aforesaid testification of DW-2 qua the factum aforesaid has remained unrebutted whereupon this Court is constrained to impute vigorous sanctity to his signatures occurring on the relevant endorsements manifested in DW-2/A besides obviously this Court stands prodded to likewise impute sanctity to the recitals of the relevant signatured endorsements. The testification of a marginal witness to Ext.DW-5/A also the testification of the Sub Registrar concerned acquire a paramount virtue of truth inference whereof stands fostered by their relevant testifications qua the factum probandum deposed by them remaining un-shattered during the course of a rigorous cross-examination to which they stood subjected to. Also the counsel for the plaintiff while holding the aforesaid to cross-examination omitted to unearth any elicitation therefrom manifestive of the thumb impression of the deceased testator occurring thereon being fictitious or their signatures occurring thereon likewise being fictitious. Want of cross-examination of the aforesaid witnesses by the learned counsel for the plaintiff qua the aforesaid relevant facet erects an inference of the plaintiff acquiescing to the factum of the thumb impressions of the deceased testator occurring on Ext.DW-5/A standing not stained with any vice of fictitiousness also his acquiescing to the factum of the signatures of the marginal witnesses thereto not suffering from an alike taint. Thereupon it was insagacious for the learned trial Court to merely on DW-6 a marginal witness to Ext.DW-5/A omitting to depose in tandem with the apposite statutory mandate vis.a.vis its execution at the initial stage whereafter it stood registered whereat the apposite statutory mandate stands concurrently testified by DW-5 and DW-6 to beget satiation to conclude qua its thereupon not standing proven to be validly and duly executed.

10. Be that as it may, as aforestated the import besides efficacy of the testimony of the Sub Registrar besides the testimony of the marginal witness to Ext.DW-5/A who deposed as DW-6 stood disimputed credence by the concurrently recorded renditions of the Courts below merely for want of DW-6 not deposing stricto sensu in tandem with the apposite statutory

parameters enshrined in Section 63 of the Indian Succession Act, tritely qua the deceased testator embossing in his presence his thumb impressions on Ext.DW-5/A also his not testifying qua his in the presence of the deceased testator signaturing it. Any emphasizes by the learned Courts below upon statutory satiation standing lent by the testification of a marginal witness thereto, who testified as DW-6 for thereupon Ext.DW-5/A standing concluded to be proven to be validly and duly executed is for reasons ascribed hereinafter unwarranted (a) the plaintiff for reasons aforestated acquiescing to the factum of the relevant signatures occurring thereon holding a virtue of truth. (b) With DW-6 testifying qua at the time contemporaneous to Ext.DW-5/A standing registered the deceased testator in his presence embossing thereon his thumb impressions whereafter he similarly in the presence of the deceased testator signatured it, testification whereof when remains uneroded subsumes the effect of the earlier part of his testification pertaining to an era whereat it remained unregistered wherein he has omitted to make a pronouncement in tandem with the apposite statutory parameters, omission whereof begot an inapt sequel from both the Courts below qua hence Ext.DW-5/A not standing proven to be validly and duly executed. In making an inapt inference both the learned Courts below remained grossly mindful only to the trite factum qua thereupon though it constituting a stage earlier to the acceptance of Ext.DW-5/A for registration by the Sub Registrar concerned qua hence the relevant testamentary disposition standing unproven by the relevant testification of a marginal witness thereto qua its standing validly and duly executed by the deceased testator nonetheless the factum of Ext.DW-5/A not thereat i.e. prior to its registration standing proven to validly and duly executed stood overridden by its subsequently standing presented for registration by deceased testator Dile Ram whereat the imperative statutory compliances qua the mandate of Section 63 of the Indian Succession Act stood begotten. Both the learned Courts below in relegating to the realm of oblivion the factum of accomplishment qua the apposite statutory parameters standing begotten at the stage contemporaneous to the registration of Ext.DW-5/A rather theirs contrarily emphasizing upon the testimony of DW-6 rendered qua the occurrence of execution of Ex. DW-5/A at a stage prior to its registration whereon the apposite statutory parameters stood not accomplished whereupon they concluded qua its not standing proven to be validly and duly executed, hence naturally besides visibly misdirected themselves in law. (c) It is a settled proposition of law mandated in Theresa vs. Francis, AIR 1921 Bombay 156 besides in Smt. Asharfi Devi vs. Tirlok Chand and others, AIR 1965 Punjab 140 qua the relevant signatured endorsement occurring in the relevant registered testamentary disposition unveiling therein qua on its contents standing read over and explained to the deceased testator by the Sub Registrar concerned whereafter he on comprehending its recitals besides accepting the occurrence thereon of his signatures mark/thumb impression besides with the Sub Registrar concerned emphatically deposing in tandem thereof, testification whereof remaining unshred also with a marginal witness thereto deposing qua at the stage contemporaneous to the registration of the relevant testamentary disposition of the deceased testator the latter embossing his thumb impressions thereon in his presence whereafter he thereat in the presence of the deceased testator signatured it hence lending corroborative succor to the testification of the Sub Registrar concerned whereupon the latter is construable to be an attesting witness to Ext.DW-5/A. The natural corollary thereof is of though the testimony of DW-6 apposite to the stage contemporaneous to the registration of Ext.DW-5/A is in absolute concurrence with mandate of Section 63 of the Indian Succession Act yet infirmity if any gripping it gets scuttled in the evident face of this Court concluding qua the testimony of the Sub Registrar concerned who testified as DW-6 holding a pedestal alike a marginal witness thereto besides his being construable to be an attesting witness qua Ext. DW-5/A. Herebefore significantly the testification also of a marginal witness to Ext.DW-5/A for the aforesaid reasons preeminently rests the factum of his proving Ext.DW-5/A to be validly and duly executed dehors assumingly the Sub Registrar concerned being not construable to be a marginal witness to Ext.DW-5/A. For all the reasons aforesaid a firm inference is galvanized qua Ext.DW-5/A standing proven to be validly and duly executed. The counsel for the plaintiff has contended of with an endorsement occurring in Ext.PW-2/A disclosing qua Ext.DW-5/A standing accepted as a sale deed renders vulnerable to suspicion the other embodiments recorded therein. However, the mere factum of a signatured recital occurring

in Ext.PW-2/B portraying qua its being a sale deed would not erode the efficacy of the testification of DW-6 besides of the Sub Registrar concerned qua it holding embodiments of a testamentary disposition of the deceased testator, also the aforesaid construction on anvil of Ext.PW-2/A would be untenable given the recitals in Ext.DW-5/A holding loud portrayals qua it being a testamentary disposition of the deceased testator.

11. The result of the above discussion is that the appeal preferred by the defendant/appellant herein is allowed and the substantial question of law is answered against the plaintiff. The judgements and decrees rendered by the both the Courts below are set aside. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Daulat Ram ..... Appellant
Versus
Krishan Lal and others ..... Respondents

FAO No.257 of 2012
Date of decision: 11.11.2016

Motor Vehicles Act, 1988- Section 166- MACT dismissed the petition on the ground that rashness and negligence were not proved – held, that the rashness and negligence were not specifically denied by the respondents – witnesses consistently stated that accident was the outcome of rash and negligent driving of the driver – rapat was proved on record – merely because FIR was not lodged cannot lead to the dismissal of the petition- MACT should not succumb to the niceties and hyper technicalities of law – the driver had a valid licence at the time of accident – the vehicle had all the documents and there was no breach of terms and conditions of the policy- claimant had sustained 15% disability – Rs.35,000/- awarded under the head pain and suffering – Rs.35,000/- awarded under the head loss of amenities of life – Rs.5,000/- awarded under the head attendant charges- Rs.10,000/- awarded under the head future medical treatment- Rs.30,000/- awarded under the head medical expenses – Rs.5,000/- awarded under the head special diet. (Para- 5 to 23)

Cases referred:
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646.
Savita vs. Bindar Singh & others, 2014 AIR SCW 2053
Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627

For the appellant: Mr.Tara Singh Chauhan, Advocate.
For the respondents: Mr.Malay Kaushal, Advocate, for respondents No.1 and 2.
Mr.O.P. Negi, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 20th May, 2011, passed by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P., (for short, "the Tribunal") in Claim Petition No.74 of 2006, titled Daulat Ram vs. Krishan Lal and others, whereby the claim petition came to be dismissed, (for short the "impugned award").

2. Facts of the case, in brief, are that on 11.6.2004, at about 9.30 a.m., the claimant was going to Dharamshala from Bilaspur in Maruti Car bearing No.HP-24A-1048. When

the said car reached near Damri in District Hamirpur, a truck bearing No.HP-23A-1470, being driven by driver Amar Singh rashly and negligently, hit the Maruti Car in which the claimant was traveling, resulting into injuries to the claimant in his right leg and multiple injuries on the whole body, was taken to Zonal Hospital, Hamirpur, fromwhere was referred to IGMC, Shimla where he remained admitted as indoor patient. Hence, the claim petition for compensation to the tune of Rs.8.00 lacs, as per the break-ups given therein.

3. The claim petition was resisted by the respondents and following issues were framed:

> *"1. Whether the injuries sustained by the petitioner on 11.6.2004 at about 1.30 P.M. near Vill. Damri, Distt. Hamirpur, H.P. were due to rash and negligent driving of Truck No.HP-23A-1470 by respondent No.2, as alleged, if so, its effect? OPP*
>
> *2. If issue N.1 supra is proved in affirmative, whether the petitioner is entitled to compensation, if so, to what extent and from whom? OPP*
>
> *3. Whether the present claim petition is bad for non-joinder and mis-joinder of necessary parties, as alleged? OPRs.*
>
> *4. Whether the offending vehicle was being driven by its driver without valid and effective driving licence as alleged? OPR-3*
>
> *5. Whether the offending vehicle was being driven without valid documents i.e. registration certificate, fitness certificate, route permit, as alleged? OPR-3.*
>
> *6. Whether accident took place as a result of contributory negligence of petitioner and respondent No.2 as alleged? OPR-3*
>
> *7. Relief."*

4. In order to prove his claim, the claimant stepped into the witness box as PW-1 and also examined three other witnesses, namely, Dr.M.I. Ahmad as PW-2, Hari Chand as PW-3, and Amar Nath as PW-4. On the other hand, driver of the offending truck appeared as RW-1. Respondents also examined RW-2 Naresh Kumar and RW-3 Usha.

5. The Tribunal, after scanning the evidence, held that the claimant has failed to prove that the accident was the outcome of rash and negligent driving of the driver Amar Singh, which findings, factually and legally, are incorrect and wrong for the following reasons.

6. The claimant has specifically pleaded in the claim petition that the driver of the offending truck, namely, Amar Singh, had driven the offending truck rashly and negligently on the fateful date, and had caused the accident in which the claimant sustained injuries. The respondents have not specifically denied the said averment made by the claimant. All the witnesses examined by the claimant have stated that the accident was the outcome of rash and negligent driving of the driver of the offending truck. Rapat dated 11th June, 2004, was entered in Police Station, Hamirpur and has been proved on record as Ext.RW-2/A by Head Constable Naresh Kumar, who appeared as RW-2. He has admitted that the rapat Ext.RW-2/A was recorded at the instance of the claimant and one other person.

7. In the given circumstances, the lodging of FIR is immaterial and cannot be a ground to dismiss a claim petition.

8. The findings recorded by the Tribunal are erroneous and against the concept of granting compensation. The Tribunal, while dismissing the claim petition, seems to have applied the standard of proof required in criminal proceedings, which is against the spirit of awarding compensation in accident cases. The Tribunal has to keep in mind that the victims of a vehicular accident have to establish prima facie that the injury or the death was due to the rash and negligent driving of a motor vehicle.

9. It is beaten law of the land that the Courts, while determining the cases of compensation in vehicular accidents, must not succumb to the niceties and hyper technicalities of law. It is also well established principle of law that negligence in vehicular accident cases has

to be decided on the hallmark of preponderance of probabilities and not on the basis of proof beyond reasonable doubt. Furthermore, the claimants claiming compensation in terms of Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), is not to be seen as an adversial litigation, but is to be determined while keeping in view the aim and object of granting compensation.

10. My this view is fortified by the judgment of the Apex Court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646***.

11. The Apex Court in **Savita vs. Bindar Singh & others, 2014 AIR SCW 2053,** has held that at the time of fixing compensation, courts should not succumb to niceties or technicalities of law. It is apt to reproduce paragraph 6 of the said decision hereunder:

> *"6. After considering the decisions of this Court in Santosh Devi (Supra) as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."*

12. A reference may also be made to the decision of the Apex Court in **Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627,** in which, in paragraph 12, it was observed that the courts, while deciding claim petitions, must keep in mind that the right of the claimants is not defeated on technical grounds. Relevant portion of paragraph 12 of the said decision is reproduced hereunder:

> *"12. ..... While interpreting the contract of insurance, the Tribunal and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."*

13. This Court also, in the recent past, in series of judgments, has followed the similar principle and held that granting of compensation is just to ameliorate the sufferings of the victims and compensation is to be granted without succumbing to the niceties of law, hyper-technicalities and procedural wrangles and tangles.

14. Having said so, I am of the considered view that the Tribunal has fallen in an error in holding that the claimant has failed to prove that the accident was the outcome of rash and negligent driving of the driver of the offending truck. Accordingly, the findings returned by

the Tribunal on issue No.1 are set aside, and it is held that the accident was the outcome of rash and negligent driving of the driver of the offending truck, namely, Amar Singh.

15. Before issue No.2 is determined, I deem it proper to decide issues No.3 to 6 at the first instance.

16. Onus to prove issue No.3 was on the respondents, have not led any evidence to prove the same. However, I have gone through the claim petition. The respondents have failed to show how the claim petition was not maintainable due to non-joinder and mis-joinder of necessary parties. The Tribunal has rightly decided the said issue against the respondents and the said findings are accordingly upheld.

17. In order to prove Issue No.4, the insurer was to plead and prove that the driver of the offending truck, namely, Amar Singh, was not having a valid and effective driving licence, has not led any evidence. However, I have gone through the pleadings and the record. Copy of the driving licence has been proved on record as Ext.RA, a perusal whereof does disclose that the driver of the offending truck had valid and effective driving licence at the time of accident. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

18. As far as issue No.5 is concerned, it is for the insurer to plead and prove, by leading evidence, that the owner of the offending vehicle had committed willful breach, has not led any evidence. In the absence of any evidence having been led by the insurer, the Tribunal has decided this issue against the insurer and the insurer has not challenged the said findings, either by way of appeal or cross objections. Thus, the said findings recorded by the Tribunal have attained finality. Notwithstanding that, I have gone through the record. Smt.Usha, Clerk from the office of RTO, Bilaspur has been examined as RW-3, who has stated that the offending truck was having all documents at the time of accident. Having said so, the findings returned by the Tribunal on issue No.5 are also upheld.

19. Issue No.6 pertains qua contributory negligence of the claimant and the driver of the offending truck, namely, Amar Singh. The insurer has pleaded in its reply that the accident was the outcome of contributory negligence. The Tribunal has recorded the findings that the accident was not the outcome of rash and negligent driving of the driver of the offending truck, which findings have been set aside by this Court while discussing issue No.1 supra and it has been held that the accident was the outcome of rash and negligent driving of the driver of the offending truck. Accordingly, this issue is governed by the findings returned on issue No.1 and is accordingly, decided against the insurer.

Issue No.2.

20. Now the question is, to what amount of compensation the claimant is entitled to. Due to the accident, the claimant sustained fracture on his leg and injuries on his body, was firstly taken to Zonal Hospital, Hamirpur wherefrom was referred to Indira Gandhi Medical College, Shimla remained admitted there till 23rd June, 2004. Discharge slips are placed on record as Exts.PW-1/A and PW-1/B. The claimant suffered 15% permanent disability, as per disability certificate Ext.PW-2/A. PW-2 Dr.M.I. Ahmad has stated that due to the injury sustained by the claimant, he would face difficulty in sitting on the ground and going upstairs/downstairs. In cross examination, this witness has admitted that the disability is in regard to the lower limb and not qua whole body.

21. The claimant has not placed on record anything about the amount he spent for the purchase of medicines etc. Thus, keeping in view the facts of the case, the injury sustained and the disability suffered, I deem it proper to award a sum of Rs.1,30,000/- in favour of the claimant, under the following heads:

Sl.No.	***Heads***	***Amount***
1.	*Pain and sufferings*	*Rs.35,000/-*

2.	*Loss of amenities of life*	*Rs.35,000/-*
3.	*Attendant charges*	*Rs.5,000/-*
4.	*Transportation charges*	*Rs.10,,000/-*
5.	*Future medical treatment*	*Rs.10,000/-*
6.	*Medical expenses incurred*	*Rs.30,000/-*
7.	*Special diet*	*Rs.5,000/-*
	Total	**Rs.1,30,000/-**

22. The amount of compensation shall carry interest at the rate of 7.5% per annum from the date of impugned award till deposit.

23. The factum of insurance is admitted. Therefore, the insurer is saddled with the liability. The insurer is directed to deposit the entire amount alongwith interest within eight weeks from today and on deposit, the same be released in favour of the claimant forthwith through bank account.

24. The appeal is allowed and stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Mukesh Kumar ....Petitioner.

Versus

State of Himachal Pradesh ... Respondent.

Cr.R. No. 142 of 2010.
Reserved on: 02.11.2016.
Decided on: 11.11.2016.

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a scooter in a rash and negligent manner- scooter hit L causing her death - accused was tried and acquitted by the trial Court- an appeal was preferred, which was allowed and accused was convicted – aggrieved from the order, the present revision has been filed-held in revision that Court can interfere in exercise of revisional power only if the findings are perverse, untenable in law, grossly erroneous, glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously – the deceased was aged 80 years and was hard of hearing – the statement of the informant was contradictory - the place of accident was almost mid-way between the side of the road and centre of the road, which shows that deceased was walking on the main road- the place of accident was a national highway, which was frequented by many vehicles – the conclusion of the trial Court that prosecution version was not proved beyond reasonable doubt was a reasonable conclusion and should not have been set aside merely because another view was possible- revision allowed and judgment of Appellate Court set aside. (Para- 9 to 13)

Cases referred:

Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123

Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94

For the petitioner. : Mr. Satyen Vaidya, Senior Advocate, wit Mr. Vivek Sharma, Advocate.

For the respondent : Ms. Parul Negi, Dy. A.G.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, petitioner has challenged the judgment passed by the Court of learned Presiding Officer, Fast Track Court, Mandi, District Mandi, in Criminal Appeal No. 56 of 2008, dated 14.06.2010, vide which learned Appellate Court, while accepting the appeal filed by the State, set aside the judgment of acquittal passed in favour of the petitioner by the Court of learned Additional Chief Judicial Magistrate, Court No. 1, Sundernagar, in Police Challan No. 379-I/2004, dated 18.06.2008 and convicted the petitioner for commission of offences punishable under Sections 279, 304-A of Indian Penal Code (hereinafter referred to as IPC) and Section 187 of the Motor Vehicle Act (hereinafter referred to as M.V.Act) and sentenced him to undergo simple imprisonment for a period of three months and to pay a fine of Rs. 1,000/- for commission of offence punishable under Section 279 of IPC, simple imprisonment for a period of eighteen months and to pay a fine of Rs. 5,000/- for commission of offence punishable under Section 304-A of IPC and simple imprisonment for a period of one month and to pay a fine of Rs. 500/- for commission of offence punishable under Section 187 of M.V.Act. All the sentences were ordered to run concurrently.

2. The case of the prosecution was that on 30.08.2003, at around 4:15 p.m., accused was driving Scooter bearing No. PB-10Z-3934 in a rash a negligent manner on National Highway-21 resulting in an accident and the death of Smt. Larju Devi at village Bhour after which the accused fled away from the spot. As per prosecution, on the fateful day, complainant Ram Pyari and her mother-in-law Smt. Larju Devi were on their way back home after attending the 'Kirtan' and while walking on the roadside, Smt. Larju Devi was hit by Scooter bearing No. PB-10Z-3934 being driven by accused in a rash and negligent manner which caused fatal injury to her. It was further the case of the prosecution that after causing the accident, accused fled away from the spot leaving Smt. Larju Devi bleeding to death. Information regarding accident was conveyed at police station Sundernagar through police station Balh, on which police party headed by HC Pushap Raj alongwith HC Karam Singh No. 5, Constable Baldev Lal No. 226 and Constable Ram Lal No. 142 reached the accident site at village Bhour where complainant Ram Pyari get recorded her statement under Section 154 of Code of Criminal Procedure (for short 'Cr.P.C.'), on the basis of said statement of complainant, FIR No. 217/03 dated 30.08.2003 was registered against the accused for the commission of offences punishable under Sections 279 and 304-A of IPC at police station Sundernagar. The body of the deceased was sent for postmortem by the police. During the course of investigation, the offending Scooter was seized alongwith documents of the same. The scooter was subjected to mechanical examination and report of the mechanic who examined the same mechanically was also obtained, as per which, there was no mechanical fault in the Scooter. Photographs of the accident site were taken, spot map was prepared and statements of witnesses under Section 161 of Cr.P.C were recorded by the Investigator. Investigation revealed that death of Smt. Larju Devi took place on account of rash and negligent driving of the accused, who was driving his aforementioned Scooter on aforesaid date, time and place on National Highway No. 21. After the completion of investigation, challan was filed in the court and notice of accusation was put to the accused for commission of offences punishable under Sections 279 and 304-A of IPC and Sections 187 and 196 of M.V. Act, to which he pleaded not guilty and claimed trial.

3. On the basis of evidence led by the prosecution both ocular as well as documentary, learned trial Court held that prosecution had failed to prove that the accused had committed offences punishable under Sections 279 and 304-A of IPC and Sections 187 and 196 of M.V. Act beyond reasonable doubt and on these bases, learned trial Court acquitted the accused by giving him benefit of doubt. While arriving at the said conclusion, it was held by the learned trial Court that the factum of death of the Smt. Larju Devi on 30.08.2013, at about 4:15 p.m. at village Bhour on National Highway No. 21 was not in dispute. It also took note of the fact that in his statement under Section 313 of Cr.P.C, accused had admitted that he was driving the

said Scooter. It was further held by the learned trial Court that the point for consideration which survived was as to whether the death of Larju Devi was the outcome of rash and negligent driving of the accused or not. Learned trial Court held that the FIR which was registered against the accused was on the basis of complaint of Smt. Ram Pyari recorded by the police under Section 154 of Cr.P.C. Ext. PW1/A. Learned trial Court further held that complainant Ram Pyari entered the witness box as PW1 and a perusal of her statement demonstrated that in fact she had not witnessed the accident since she was walking ahead of her mother-in-law when Smt. Larju Devi was hit by the Scooter. Learned trial Court further held that complainant as per her own admission did not saw the Scooter coming and hitting her mother-in-law. On these bases, it was held by the learned trial Court that as the accident took place behind the back of the complainant, her statement to the effect that the accident took place on account of rash and negligent driving of the accused becomes a highly improbable version. It further held that since complainant did not saw the accident taking place, therefore, under these circumstances, statement of the complainant to the effect that Scooter was being driven by the accused in a rash and negligent manner and in a high speed was unacceptable. Learned trial Court further held that PW2 Shri Thakru Ram who as per prosecution was an eyewitness also did not further the case of the prosecution since this witness had also admitted that he came to the spot after the Scooter had hit Smt. Larju Devi. It was further held by the learned trial Court that his statement did not clearly establish the manner in which the accident took place. On these bases, it was concluded by the learned trial Court that the statements of PW1 and PW2 did not prove that the accident in fact took place on account of rash and negligent driving on the part of the accused. Learned trial Court further held that besides this, there was no evidence whatsoever to clearly establish that the accused in fact had fled away from the spot after causing the accident. On these bases, learned trial Court acquitted the accused by holding that the prosecution has failed to prove its case against the accused beyond reasonable doubt.

4. In appeal, learned Appellate Court while setting aside the judgment of acquittal so passed by the learned trial Court held that it was not a fact in dispute that the accident took place and the deceased died on account of injuries which she suffered from the said accident. Learned Appellate Court further held that it was well settled law that test in accident cases was that whether accident could have been avoided by the respondent if he had exercised diligence which ordinarily a cautious person using the road in similar circumstances would have exercised. It further held that the question whether certain act is rash or negligent cannot be answered in the abstract and it must depend upon the time, place and nature of the road. Learned Appellate Court further held that spot map Ext. PW7/D demonstrated that the road where accident took place was 22 feet wide and the same was a straight road and there was enough space on the right side of the accused and accused could have easily seen the deceased, who was going ahead of him on the road as it was broad day light. Learned Appellate Court further held that in these circumstances, accused could have avoided the accident by sewering his scooter to the right or by stopping it as a prudent driver. It further held that he could have at least sounded the horn and warned the deceased. By relying on the report of the mechanic, learned Appellate Court held that there was no mechanical defect in the vehicle and it appeared that there was no effort on the part of accused/respondent to avoid the accident. Learned Appellate Court further went on to hold that the testimonies of PW1 and PW2 clearly established that the accident occurred due to rash and negligent driving of the accused who also fled away from the spot after causing the accident and it was clear from the statements of these two witnesses that the deceased and the complainant were walking on the left side of the road and the Scooter being driven by the accused came from the back side and dashed against the deceased and dragged her on the road up to 8 to 10 feet. Learned Appellate Court further held that act of the respondent of hitting the deceased from the back and dragging her was nothing but an act of rash and negligent driving. It further held that statements of PW1 and PW2 who were eyewitnesses to the accident demonstrated that no suggestion was put to them that deceased suddenly appeared in front of the Scooter ridden by the accused nor this was so stated by the accused in his statement under Section 313 of Cr.P.C. On these bases, learned Appellate Court held that it was of the firm view that no two views were possible as from the evidence of PW1, PW2 and PW7, the only conclusion which could be drawn

was that the accident took place due to rash and negligent driving of the Scooter being driven by the accused. On these bases, learned Appellate Court set aside the judgment of acquittal passed by the learned trial Court and convicted the accused for commission of offences punishable under Sections 279, 304-A of IPC and Section 187 of M.V. Act.

5. Feeling aggrieved by the judgment so passed by the learned Appellate Court, the petitioner preferred the present appeal.

6. Mr. Satyen Vaidya, learned Senior Counsel appearing for the petitioner has argued that the judgment of conviction passed against the present petitioner by the learned Appellate Court is perverse and the findings returned by the learned Appellate Court were not only erroneous but were also not borne out from the records of the case. Mr. Vaidya further argued that in fact a perusal of the impugned judgment clearly and categorically demonstrated that the findings returned by the learned Appellate Court were not based on material on record but were based on conjectures and surmises and assumptions drawn by the learned Appellate Court. It was argued by Mr. Vaidya that the perversity with the judgment passed by the learned Appellate Court was that the said Court lost sight of the fact that in criminal matters, adjudication cannot be made on the basis of conjectures, surmises and assumptions, but the findings must be returned on the basis of material which is produced before the court concerned. It was further submitted by Mr. Vaidya that the conclusion arrived at by the learned Appellate Court that PW1 and PW2 were eyewitnesses to the accident was a totally perverse conclusion and was a result of complete misreading ad misconstruction of statements of these two witnesses. He further argued that even the spot map was totally mis-appreciated by the learned Appellate Court as learned Appellate Court lost sight of the fact that it was not as if the deceased was hit on the side of the road but she was hit in the road where even otherwise a pedestrian was not to ordinarily walk. It was further argued by Mr. Vaidya that the judgment passed by the learned trial Court was a well reasoned judgment and keeping in view the fact that there was a judgment of acquittal in favour of the petitioner, the learned Appellate Court should not have had interfered with the same in the peculiar facts of the case especially in view of the material which was placed before the Court by the prosecution. On these bases, it was urged by Mr. Vaidya that the judgment passed by the learned Appellate Court was not sustainable in law and the same be set aside and the petitioner be acquitted.

7. Ms. Parul Negi, learned Deputy Advocate General, on the other hand, argued that the judgment passed by the learned Appellate Court was neither perverse nor it could be said that the finding of guilt returned by the learned Appellate Court was not substantiated from the records of the case. Ms. Negi submitted that learned trial Court had erred in acquitting the accused as it stood established beyond reasonable doubt from the material which was placed on record by the prosecution that the accused was in fact guilty of offences for which he was charged. She further argued that learned Appellate Court had rightly concluded that it stood established from the record especially from the statement of PW1 and PW2 who were the eyewitnesses to the incident that the accident had taken place on account of rash and negligent driving of the accused. She further argued that the findings returned by the learned Appellate Court to the effect that accident was avoidable if he had exercised diligence which ordinarily a cautious person using the road in similar circumstances would have done was based on correct appreciation of evidence placed on record and same called for no interference. On these bases, it was urged by Ms. Negi that as there was no merit in the revision petitioner, the same be dismissed.

8. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the Courts below.

9. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is

grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and undeserved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

10. Coming to the facts of this case, a perusal of the statement of PW1 (complainant) demonstrates that she cannot be termed as an eyewitness because she has not seen the occurrence of the accident. It has come in the cross examination of PW1 Ram Pyari that the age of the deceased was about 80 years and she was somewhat hard of hearing. She has also admitted that when the accident took place she was walking ahead of her mother-in-law and she came to know about the accident only when she heard the noise. She stated in her cross examination that she did not saw the Scooter coming and hitting her mother-in-law. It has also come in her statement that she became unconscious after the accident and gained consciousness after 1 ½ hour. Her testimony also does not seems to be trustworthy as besides being closely related to the deceased, on the one hand, she stated that after the accident she became unconscious and gained consciousness after 1 ½ hour and on the other hand, she stated that family members reached the spot in ten minutes.

11. A perusal of statement of PW2 Thakru Ram demonstrates that it has come in his cross examination that when he reached the spot, deceased was lying on the spot and that he had not witnessed the accident taking place.

12. The Investigating Officer had entered the witness box as PW7. He stated that he prepared the spot map on the spot which is Ext. PW7/B and also took photographs of the spot. In his cross examination, he stated that he reached the spot at around 4:30 p.m. Now, incidentally, a perusal of spot map which is on record as PW7/B demonstrates that road where the accident took place was 22 feet wide and towards the side on which the deceased was walking alongwith PW1 six feet road was available in addition to the mettle road. Mark B on the said spot is the position where the body of the deceased was lying after the accident and mark B is not on the side of the road but is almost midway between the side of the road and centre of the road. Therefore, it is evident from the spot map that the deceased was walking on the main road when the accident took place. Now, as I have already discussed above, there is no eyewitness to the occurrence of the accident as neither PW1 nor PW2 has seen the occurrence of the accident. Learned trial Court while appreciating this aspect of the matter and after taking into consideration the entire evidence placed on record by the prosecution came to the conclusion that the prosecution was not able to prove beyond reasonable doubt the guilt of the accused. Learned Appellate Court while setting aside the findings so returned by the learned trial Court has justified the conviction of the accused by raising doubt that as the road where the accident took place was 22 feet wide and it was a straight road and there was sufficient space on the right side, the accused could have easily seen the deceased and could have avoided the accident by sewering his Scooter to the right or by stopping it as a prudent driver or he could have at least sounded the horn to warn the deceased. These findings have been used by the learned Appellate Court to convict the accused. I am afraid that the conviction passed on the abovesaid findings returned by the learned Appellate Court cannot be said to be sustainable in law. It is settled law that in order to convict a person, his guilt has to be established by the prosecution beyond reasonable doubt. In other words, if there is some doubt in the case of prosecution, then he deserves the benefit of doubt. In the present case, the petitioner could not have been convicted for committing offences punishable under Sections 279 and 304-A of IPC on conjectures and surmises as has been done by the learned Appellate Court. It has not been appreciated by the learned Appellate Court that the accident had taken place on a National Highway where unfortunately the deceased, who was 80 years old and also hard of hearing, was not walking on the side of the road but was walking almost in the road, which road as per statement of daughter-in-law of deceased (PW1), was frequented by thousands of vehicles everyday (PW1 had stated in her statement that about 10

thousand vehicle ply on the said road everyday). Not only this, the findings returned by the learned trial Court that PW1 and PW2 are eyewitnesses to the occurrence of the accident are perverse findings because neither PW1 nor PW2 has seen the occurrence of the accident and this is prima facie evident from the perusal of their statements itself. In these circumstances, in my considered view, the judgment of conviction passed by the learned Appellate Court against the accused setting aside the judgment of acquittal in his favour passed by the learned trial Court is not sustainable as the findings returned by the learned Appellate Court are not borne out from the records of the case but are perverse findings based on conjectures and surmises and are contrary to the evidence on record. Learned Appellate Court has also not appreciated that there was no cogent evidence produced on record by the prosecution to conclude beyond reasonable doubt that petitioner had fled away from the accident site after causing the accident.

13. Learned Appellate Court also did not appreciate that it is settled law that Appellate Court shall not reverse the judgment of acquittal because another view is possible to be taken. It has not been appreciated that the Appellate can overrule or otherwise disturb the trial Court's acquittal if it has 'very substantial or compelling reasons' for doing so. Honble Supreme Court in ***Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94*** has held

> *"12. This Court has, time and again, dealt with the scope of exercise of power by the Appellate Court against judgment of acquittal under Sections 378 and 386, Cr.P.C. It has been repeatedly held that if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal. This Court has laid down that Appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State Of Uttar Pradesh1 shall suffice wherein this Court considered a long line of cases and held thus : (SCC p.477, paras 69 -70)*
>
> *"69. The following principles emerge from the cases above:*
>
> *1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.*
>
> *2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when (2008) 10 SCC 450 he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*
>
> *3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.*
>
> *70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:*
>
> *1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.*
>
> *A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:*
>
> *(i) The trial court's conclusion with regard to the facts is palpably wrong;*
>
> *(ii) The trial court's decision was based on an erroneous view of law;*
>
> *(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";*

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

Therefore, in view of the above discussion, the revision petition is allowed and the judgment of conviction passed by the Court of learned Presiding Officer, Fast Track Court, Mandi dated 14.06.2010 is set aside and the petitioner is acquitted of offences punishable under Sections 279 and 304-A of IPC and Section 187 of M.V. Act as the prosecution has not been able to prove beyond reasonable doubt that the petitioner had committed the said offences. Fine amount, if any deposited by the petitioner be returned to him in accordance with law. The criminal revision petition is disposed of accordingly. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Co. Ltd. ..... Appellants

Versus

Saroj Kumari and others ..... Respondents

FAO No.309 of 2012
Date of decision: 11.11.2016

Motor Vehicles Act, 1988- Section 166- Number of claimants are three, therefore, 1/3rd was to be deducted from the monthly income towards personal expenses – Tribunal had fallen in error in deducting 1/4th – monthly income of the deceased was Rs.4,000/- and after deducting 1/3rd loss of dependency comes to Rs.2700/- per month – total loss of source of dependency is Rs.2700 x 12 x 16= Rs.5,18,400/-. (Para- 4 to 6)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant: Mr.Ashwani K. Sharma, Senior Advocate, with Mr.Jeevan Kumar, Advocate.

For the respondents: Mr.H.S. Rana, Advocate, for respondents No.1 to 3.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 21st April, 2012, passed by the Motor Accident Claims Tribunal-I, Solan camp at Nalagarh, H.P., (for short, "the Tribunal") in Claim Petition No.40NL/2 of 2008, titled Saroj Kumari and others vs. Beer Chand and others,

whereby the claim petition was allowed and compensation to the tune of Rs.6,26,000/-, with interest at the rate of 7.5% per annum, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short the "impugned award").

2. Feeling aggrieved, the insurer has challenged the impugned award by the medium of instant appeal.

3. During the course of hearing, the learned Senior Advocate appearing for the appellant-insurer submitted that the impugned award is bad only to the extent that the Tribunal has wrongly deducted 1/4th amount towards the personal expenses of the deceased, whereas 1/3rd was to be deducted.

4. I have gone through the impugned award. The number of claimants, in the instant case, is three. Therefore, in view of the law laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** 1/3rd was to be deducted from the monthly income of the deceased, towards his personal expenses. The Tribunal has fallen into an error in deducing 1/4th and the impugned award needs to be set aside to that extent.

5. The Tribunal, after making discussion in paragraph 9, assessed the monthly income of the deceased at Rs.4,000/-. After deducting 1/3rd towards the personal expenses of the deceased, the loss of source of dependency comes to Rs.2,700/- per month.

6. The Tribunal has applied the multiplier of 16. Thus, the total loss of source of dependency comes to Rs.2,700/- x 12 x 16 = Rs.5,18,400/-. The amount awarded by the Tribunal under the other heads is maintained. The rate of interest is also maintained.

7. In view of the above discussion, the claimant is held entitled to compensation to the tune of Rs.5,68,000/- with interest at the rate of 7.5% per annum from the date of the claim petition till the same is deposited.

8. Having said so, the appeal is allowed and the impugned award is modified to the above extent. The Registry is directed to release the amount in favour of the claimants, through their bank accounts, strictly in terms of the impugned award and the excess amount, if any, alongwith interest, be released in favour of the insurer through payee's account cheque. The appeal is disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.1 of 2011 with FAO No.181 of 2011.
Reserved on : 4.11.2016.
Pronounced on : 11.11.2016

1. FAO No.1 of 2011

National Insurance Company Ltd. .....Appellant

Versus

Mukta Sharma and another .....Respondents

2. FAO No.181 of 2011

Mukta Sharma .....Appellant

Versus

National Insurance Company Ltd. and another .....Respondents

Motor Vehicles Act, 1988- Section 149- Insurance is not disputed- claimant is a third party – her claim cannot be rejected on flimsy ground – insurer has to prove the breach of the terms and conditions of the policy – Insurer was rightly saddled with liability. (Para-11 to 16)

Motor Vehicles Act, 1988- Section 166- Condition of the claimant was critical – injury has affected her brain- initially, her disability was quantified at 20% - subsequently, her condition deteriorated and the disability was found to be 50% - claimant remained admitted in the hospital for 25 days –the claimant was an advocate and would not be able to act as an advocate after the accident – claimant pleaded that she was earning Rs.20,000/-per month prior to accident and by guess work the income of the injured can be treated to be Rs.10,000/- per month – the claimant is entitled to Rs.10,000 x 7= Rs.70,000/- under the head loss of earning during treatment - claimant lost earning capacity to the extent of 50% and the loss of income will be Rs.5,000/- per month- claimant was aged 50 years at the time of accident and multiplier of 11 is applicable, thus, claimant is entitled to Rs.5,000 x 12 x 11= Rs.6,60,000/- under the head loss of income – the claimant is also entitled to Rs.1 lac under the head pain and suffering- Rs. 1 lac under the head loss of amenities of life – the claimant would have spent Rs.100/- per day or Rs.3,000/- per month during the period of treatment and is entitled to Rs.3,000 x 7= Rs.21,000/- under the head special diet- Rs.20,000/- awarded under the head future medical treatment – rate of interest reduced to 7.5% per annum. (Para- 17 to 47)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

FAO No.1 of 2011:

For the appellant: Mr.Jagdish Thakur, Advocate.

For the respondents: Ms.Nevadeta Sharma, Advocate, vice Mr.Abhinay Sharma, Advocate, for respondent No.1.
Mr.Vijender Katoch, Advocate, for respondent No.2.

FAO No.181 of 2011:

For the appellant: Ms.Nevadeta Sharma, Advocate.

For the respondents: Mr.Jagdish Thakur, Advocate, for respondent No.1.
Mr.Vijender Katoch, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Both these appeals are the outcome of common award, dated 7th October, 2010, passed by the Motor Accident Claims Tribunal(I), Kangra at Dharamshala, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.12,60,050/, alongwith interest at the rate of 9% per annum, came to be granted in favour of the claimant and the insurer was saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the claimant questioned the impugned award by the medium of FAO No.181 of 2011 on the ground of adequacy of compensation, while the insurer has assailed the impugned award in FAO No.1 of 2011 on the ground that the Tribunal has fallen into an error in saddling it with the liability.

3. Facts, as pleaded in the claim petition, are that the claimant, on 24th April, 2005, was traveling in Maruti Car No.HP-19-7000, being driven by respondent No.2, namely, L.R. Sharma. When the said car reached near Banikhet, it rolled down the road and fell into a rivulet, resulting into injuries to the claimant, was taken to Public Health Center Banikhet, Tehsil Dalhousie, fromwhere was taken to Dr.Anil Singh Nursing Home, Pathankot, whereafter to Dr. Kalra's Hospital at Pathankot, underwent medical tests, was referred to Dayanand Medical College and Hospital Ludhiana remained under treatment upto 12th May, 2005 and thereafter from 12th May, 2005 to 19th May, 2005 at IGMC, Shimla. It was also claimed that the claimant sustained permanent injury, was a practicing lawyer and was earning Rs.20,000/- per month. Thus, the claim petition was filed for compensation to the tune of Rs.32,50,000/-, as per the break-ups given in the claim petition.

4. Respondent No.1 resisted the claim petition by filing reply. Respondent No.2 (husband of the claimant) also filed reply wherein it has been admitted that the claimant sustained injuries in the accident in question and that he was holding a valid and effective driving licence at the time of accident.

5. On the pleadings of the parties, the following issues were framed:

"1. Whether the petitioner suffered injuries due to the rash and negligent driven of Maruti car No.HP-19-7000 by respondent No.2? OPP

2. If issue No.1 is proved in affirmative to what amount of compensation the petitioner is entitled to and from whom? OPP

3. Whether the petition is not maintainable? OPR-1

4. Relief."

6. The statement of the claimant as PW-1 was got recorded through Local Commissioner. In addition, the claimant examined Dr.Sandeep Puri as PW-2, HHC Prittam Chand as PW-3, Dr.J.S. Chandel as PW-4, Dr.Viyom Parkash Bhardwaj as PW-5. On the other hand, the insurer examined Ashok Kumar as RW-1.

7. The Tribunal after scanning the pleadings as well as the entire evidence held the claimant entitled to Rs.12,60,050/- as compensation alongwith interest at the rate of 9% per annum, and saddled the insurer with the liability.

8. Feeling aggrieved, the insurer has challenged the impugned award by the medium of FAO No.1 of 2011 on the ground that the compensation awarded by the Tribunal is excessive and that the Tribunal has wrongly fastened the liability on the insurer inasmuch as the insured has committed willful breach.

9. The claimant has challenged the impugned award by way of FAO No.181 of 2011 and prayed for enhancement of compensation.

10. Following questions arise for determination in the instant appeals:

i) Whether the Tribunal has rightly saddled the insurer with the liability?

ii) Whether the amount awarded by the Tribunal is adequate or otherwise?

11. The factum of insurance is not in dispute. The claimant-injured is a third party, therefore, her claim cannot be defeated on flimsy grounds.

12. It is beaten law of the land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms and conditions contained in the policy and mere plea here and there cannot be a ground for seeking exoneration.

13. The Apex Court in case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531,** has taken the similar view**.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

14. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or*

thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is 8 :fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

15. Thus, it was for the insurer to plead and prove that the offending vehicle was being driven in violation of the terms and conditions contained in the insurance policy, has not led any evidence to that effect, has failed to discharge the onus.

16. Having said so, question No.i is answered accordingly and it is held that the Tribunal has rightly saddled the insurer with the liability. Accordingly, the appeal filed by the insurer, being FAO No.1 of 2011, is dismissed.

17. PW-2 Dr.Sandeep Puri has stated that the condition of the claimant-injured was critical and she has to carry this injury throughout her life, and that the injury has affected her brain. It has also come on the record that at the first instance, the disability certificate was issued wherein it was mentioned that the claimant suffered 20% permanent disability. Thereafter, the condition of the claimant deteriorated and the claimant was again examined by the Medical Board, which issued the disability certificate whereby the disability was assessed at 51%. The said disability certificate has been proved on record as Ext.PW-1/A. Accordingly, it is held that the Tribunal has rightly relied upon the disability certificate Ext.PW-1/A and held that the claimant suffered 51% permanent disability.

18. Insurer had moved application under Section 170 of the Act before the Tribunal for contesting the claim petition on all grounds, which was granted. Thus, the insurer can question the impugned award on the ground of adequacy of compensation.

19. The learned counsel for the appellant/claimant argued that the compensation awarded by the Tribunal is meager and is required to be enhanced accordingly. It was submitted that the Tribunal has not properly assessed the income of the claimant-injured and also awarded paltry amount under the heads pain and suffering, medical expenses and transportation charges. It was further submitted that the Tribunal has also not taken into account the effect of the disability suffered by the claimant.

20. It appears that the Tribunal has not assessed the compensation properly and rightly. Thus, in the facts of the case, question arises as to what is adequate compensation. In order to determine the said issue, the evidence of the claimant is required to be appreciated.

21. PW-2 Dr.Sandeep Puri, DMC Hospital, Ludhiana, has stated that the claimant remained admitted in the hospital for 25 days, has to undergo medical treatment throughout her life and has to lead her life below normal.

22. PW-4 Dr.J.S. Chandel stated that the disability certificate dated 6th January, 2007 bears the signatures of Dr.Viyom Bhardwaj, examined as PW-5, who stated that Ext.PW-1/A (disability certificate) dated 6th January, 2007 bears his signatures.

23. The disability certificate, dated 6th January, 2007, Ext.PW-1/A, proved on record by the claimant shows that she suffered 51% permanent disability. The said fact has been proved by the claimant through her statement as well as from the statements of PW-4 and PW-5, though it has been pleaded in the claim petition that the claimant suffered 20% permanent disability. Another disability certificate, dated 31st December, 2005, has been proved on record as Ext.RX, which does disclose that the claimant suffered 20% permanent disability. The first disability certificate issued on 31st December, 2005 and the second disability was isused on 6th Janury, 2007. It appears that after the issuance of the first disability certificate, the percentage of the

disability has increased which has affected her physical frame, for which reason the Medical Board examined the claimant afresh and the second disability certificate dated 6th January, 2007 was issued, whereby the disability has been shown to be 51%, which stands proved by the claimant by leading evidence.

24. Having said so, the compensation is to be assessed keeping in view the disability suffered by the claimant i.e. 51%.

25. The Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how compensation has to be awarded in cases where the claimants have suffered permanent disability and how the assessment is to be made.

26. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his/her life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the whole life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> ....
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

27. The claimant-injured was an Advocate by profession. The disability suffered by the claimant has shattered her physical frame and, in all probabilities, she would not be in a position to do the job of an Advocate, as she would have been doing prior to the accident.

28. It has been pleaded by the claimant in the Claim Petition that she, at the time of accident, was earning Rs.20,000/- per month. No evidence has been led by the claimant in support of her assertion that she was earning Rs.20,000/- by practicing as an Advocate.

However, by guess work, it can be said that the claimant-injured was earning not less than Rs.10,000/- per month.

29. The accident had taken place on 24th April, 2005, whereafter, as pleaded in the claim petition, the petitioner remained admitted till 19th May, 2005 in different hospitals, which fact is borne out from the material available on the record. After discharge from the hospital, the claimant would have also remained out of profession for a considerable period, say, for, six months.

30. The discussion in the preceding paragraph shows that the claimant, after sustaining the injury, remained admitted in the hospital for about one month and also would have remained out of profession for about six months, for treatment. The income of the claimant, as has been held above, was Rs.10,000/- per month. The Tribunal has gone astray in not awarding anything for the period during which the claimant remained under treatment. The Tribunal must have appreciated the fact that the claimant was forced to remain out of practice because of the injuries sustained by her and not as per her own choice. Thus, the claimant was to be awarded compensation under the head 'loss of earning during treatment'. Accordingly, the claimant is held entitled to Rs.10,000/- x 7 = Rs.70,000/- under the head 'loss of earning during treatment'.

31. From the above discussion, it can safely be held that the claimant lost earning capacity to the extent of 50%. Thus, after making deduction, future loss of income, per month, to the claimant can be said to be Rs.5,000/-.

32. The claimant was 50 years of age at the time of accident. Having regard to the judgment of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120** read with the 2nd Schedule attached with the Act, it is held that multiplier of '11' is just and appropriate, and is applied accordingly.

33. Having said so, the claimant is held entitled to Rs.5,000 x 12 x 11 = Rs. 6,60,000/- under the head 'loss of future income'.

34. The Tribunal has also lost sight of the fact that the claimant suffered a lot, which fact is evident from the statement of Dr.Sandeep Puri (PW-2). Not only this, because of the disability suffered by the claimant, she has to struggle throughout her life. In the given circumstances, read with the law laid down by the Apex Court, the claimant is held entitled to Rs.1,00,000/- under the head 'pain and sufferings'.

35. The claimant is also deprived of all comforts and amenities of life. The Tribunal has not awarded anything under the head 'loss of amenities of life'. Keeping in view the facts and the law laid down by the Apex Court, the claimant is held entitled to Rs.1,00,000/- under the head 'loss of amenities of life'.

36. The claimant would have also spent at least 100/- per day i.e. Rs.3,000/- per month on account of special diet during the period of treatment. Accordingly, the claimant is held entitled to Rs.3,000/- x 7 = Rs.21,000/- under the head 'special diet'.

37. Keeping in view the expert evidence, the claimant has to undergo medical check-ups/treatment, at intervals, throughout her life and I deem it proper to award Rs.20,000/- under the head 'future medical treatment'.

38. Compensation awarded by the Tribunal under the heads 'medical expenses', 'transportation charges' and 'attendant charges' is maintained.

39. Having glance of the above discussion, the claimant is awarded Rs.11,40,150/-, under different heads as under:

Sl.No.	***Heads***	***Amount***
1	*Loss of earning during treatment*	*Rs.70,000/-*
2.	*Loss of future income*	*Rs.6,60,000/--*
3.	*Pain and sufferings*	*Rs.1,00,000/-*
4.	*Loss of amenities of life*	*Rs.1,00,000/-*
5.	*Attendant charges*	*Rs.25,000/-*
6.	*Special diet*	*Rs.21,000/-*
7.	*Future medical treatment*	*Rs.20,000/-*
8.	*Medical expenses incurred*	*Rs.1,34,150/-*
9.	*Transportation charges*	*Rs.10,000/-*
	Total	**Rs.11,40,150/-**

40. The Tribunal has also wrongly awarded interest at the rate of 9%, which is on the higher side. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in** ***(2002) 6 Supreme Court Cases 281****; **Santosh Devi versus National Insurance Company Ltd. and others,*** **reported in** ***2012 AIR SCW 2892****; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,*** **reported in** ***(2012) 11 Supreme Court Cases 738****; **Smt. Savita versus Binder Singh & others,*** **reported in** ***2014 AIR SCW 2053****; **Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,*** **reported in** ***2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,*** **reported in** ***(2015) 4 Supreme Court Cases 433,*** **and** ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another****, reported in* ***(2015) 4 Supreme Court Cases 434****, and discussed by this Court in a batch of FAOs,* ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others****, being the lead case, decided on* **19.06.2015**.

41. Accordingly, it is held that the amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization.

42. In view of the above discussion, the impugned award is modified. The Registry is directed to release the amount, alongwith interest, in favour of the claimant, forthwith, through her bank account, and the excess amount, if any, be released in favour of the insurer through payee's account cheque.

43. Both the appeals stand disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company ...Appellant

Versus

Smt. Santosh w/o Late Sh. Lekh Ram & Ors. ....Respondents.

FAO (MVA) No. 335 of 2012.
Date of decision: 11th November, 2016.

Motor Vehicles Act, 1988- Section 173- Insurer contended that the vehicle was being driven by S and not by M – held, that the insurer had not taken permission to contest the claim on all grounds and cannot question the adequacy of compensation – moreover, the MACT had rightly

made the discussion and no interference is required with the same- however, the rate of interest reduced to 7.5% per annum from 9%. (Para- 6 to 15)

Cases referred:

United India Insurance co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant:	Mr. Pritam Singh Chandel, Advocate.
For the respondents:	Mr. Anirudh Sharma, proxy counsel for respondents No. 1 to 3. Mr. P.S. Goverdhan, Advocate, for respondent No.4. Mr.Deepak Bhasin, proxy counsel for respondent No.5. Mr. Arti Sharma, proxy counsel for respondent No.6. Nemo for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 7.4.2012, passed by the Motor Accident Claims Tribunal-II, Solan, H.P. hereinafter referred to as "the Tribunal", for short, in MACT Petition No.1-S/2 of 2012/07, titled *Smt.Santosh and others versus Sh. Satpal and others,* whereby compensation to the tune of Rs.4,73,800/- alongwith interest @ 9% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimants, owners, drivers and insurer of Motor Cycle No. CH-03C-1451, have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The insurer of Bus No. HP-14-5098, has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant argued that the vehicle was being driven by driver Satpal rashly and negligently and not by Maha Singh.

5. Thus, the only question to be determined in this appeal is-whether the insurer can question the said findings? The answer is in negative for the following reasons.

6. Neither driver nor owner has questioned the same. However, I have gone through the record. Claimants have examined Dr. N.K. Gupta as PW1, Sh. Rishi Ram as PW3, Sunil Verma as PW4 and Smt. Santosh claimant No. 1 appeared in the witness-box as PW2.

7. Respondents examined HHC Krishan Dutt RW1 and drivers Maha Singh and Sat Pal stepped into the witness-box as RW2 and RW3 respectively.

8. Vijay Kumar PW5 is an independent witness. He has specifically deposed that he was present on the spot and witnessed the occurrence. Further stated that respondent No. 4 Maha Singh (respondent No.7 herein) has driven the vehicle rashly and negligently and hit the motor cycle which was being driven by Sat Pal, in which deceased sustained the injuries and succumbed to the same. His statement is of great importance and stands relied upon by the learned Tribunal while determining issue No.1. RW3 Sat Pal has deposed that the accident was outcome of rash and negligent driving of Maha Singh. The Tribunal has rightly made the discussion in paras 14 and 15, of the impugned award, needs no interference.

9. Having said so, the Tribunal has rightly held that the accident was outcome of rash and negligent driving of Maha Singh while driving Bus No. HP-14-5098. Accordingly, the findings recorded on issue No.1 by the Tribunal are upheld.

10. The insurer has not sought permission under Section 170 of the Motor Vehicles Act, for short "the Act" for contesting the claim on all grounds thus, is precluded to question the adequacy of compensation.

11. The question arose before the Apex Court in the case titled as **United India Insurance co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

12. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.*
>
> *9. to 16. .....*
>
> *17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is*

referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

13. I have gone through the impugned award. The Tribunal has rightly made discussion in paras 17 to 20 of the impugned award needs no interference. The amount awarded is adequate, cannot be said to be meager, is upheld

14. The Tribunal has awarded interest @ 9% per annum. However, interest was to be awarded at the rate of 7.5% per annum, for the following reasons.

15. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

16. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

17. The insurer-appellant is directed to deposit the amount alongwith interest @ 7.5% per annum, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification and excess amount, if any, be refunded to the insurer/appellant through payees' cheque account.

18. Viewed thus, the impugned award is modified as indicated hereinabove and appeal is disposed of alongwith pending applications.

CMP No.583/2012.

19. Learned counsel for the appellant has not pressed this application. Hence the application is dismissed as not pressed.

20. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Shankari Devi and another ..Appellants/Defendants.

Versus

Inder Jeet Singh and another ..Respondents/plaintiffs.

RSA No. 582 of 2006
Reserved on : 4/11/2016
Date of decision: 11/11/2016

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for fixation of boundary and for relief of possession and injunction – it was pleaded that plaintiffs are owners in possession of the suit land- defendants are strangers who threatened to interfere with the suit land – they were found to be encroachers on the portion of the suit land – they were requested to deliver possession but in vain- the suit was decreed by the trial Court- an appeal was filed, which was dismissed- held in second appeal that parties are adjacent owners - the demarcation report shows that defendants have encroached upon a portion of the suit land - however, the demarcation was not conducted in accordance with the binding instructions – the plea of adverse possession was not established satisfactorily – matter remanded to the Appellate Court to appoint a Local Commissioner and thereafter to decide the matter afresh. (Para-7 to 11)

For the appellants: Mr. Bhuvnesh Sharma, Advocate.
For the respondents: Mr. R.K.Gautam, Sr. Advocate with Ms. Megha Gautam, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

Both the learned Courts below recorded concurrent verdicts vis.a.vis. the plaintiffs qua theirs standing entitled to a decree for fixing of boundaries by way of demarcation also both the learned Courts below concurrently rendered a decree for possession by way of demolition of the construction raised on the suit land by the defendants. In sequel thereto with the defendants/appellants herein standing aggrieved by the concurrently recorded verdicts of both the Courts below, they through the instant appeal preferred therefrom before this Court concert to seek reversal of the pronouncements recorded by the learned Courts below.

2. The facts necessary for rendering a decision in the instant appeal are that the plaintiffs had claimed for fixation of boundaries by way of demarcation with consequential relief of permanent prohibitory injunction restraining the defendants from making any type of interference, changing the nature, raising construction cutting and removing the trees from the land comprised in Khata No. 41, Khatoni No. 53 min, Khasra No. 72 as described in the copy of Misal Hakiat for the year 1997-98, situated in Village Thain, Mouza Nauhangi and in case the defendants succeed in raising construction over the suit land or any part of it or taking possession of any portion of it, in that event a decree for possession by way of demolition or otherwise was claimed and further the plaintiffs by way of amendment claimed a decree for possession of land shown in Tatima as Khasra No. 72/2 out of the suit land. The said reliefs had been claimed by the plaintiffs on the grounds that the plaintiffs are the owners in possession of the suit land, whereas the defendants are quite stranger to the same but the defendants started

interference over the suit land by way of digging for the purpose of raising construction, threatened dispossession of the plaintiffs, created boundary dispute and refused to desist from such wrongful acts inspite of repeated requests made by the plaintiffs and during the pendency of the suit on the strength of demarcation of Local Commissioner the defendants were found to have encroached upon Khasra No. 72/2 out of the suit land shown in the Tatima, but refused to deliver the possession of the same to the plaintiffs, hence they were compelled to file the suit and claimed the said reliefs.

3. The defendants resisted and contested the suit by taking preliminary objection qua estoppel and claimed ownership by virtue of adverse possession. On merits, the defendants pleaded that they are owners in possession of the adjoining land. It was pleaded that they are in open, peaceful and hostile possession of the suit land under their Abadi or its portion for the last 100 years, hence they have become its owner by virtue of adverse possession and prayed for dismissal of the suit.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties at contest:-

1. Whether the plaintiffs are entitled for fixation of boundaries by way of demarcation and also prayed for permanent prohibitory injunction against the defendants, as prayed for? OPP.
2. Whether the plaintiffs are entitled for the relief of mandatory injunction and for possession if the defendants succeed in raising construction during the pendency of the suit as alleged? OPP.
3. Whether the plaintiffs are estopped from filing the suit by their act and conduct? OPD.
4. Whether the defendants are entitled for special costs under Section 35-A CPC? OPD.
5. Whether the defendants have become owners of the suit land by virtue of adverse possession as prayed for? OPD.
6. Whether the suit is not properly valued for the purposes of court fees and jurisdiction? OPD.
7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

6. Now the defendants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 17/04/2007 this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "1. Whether the findings given by the learned Courts below are perverse, their being either based on no evidence or contrary to the material on record and the same has thus resulted into erroneous decision?
>
> 2. Whether the demarcation report Ext.PW-2/A is contrary to the instructions of the Financial Commissioner and the High Court Rules and orders pertaining to the demarcation of the land and the same has wrongly been relied upon by both the learned Courts below while passing the impugned judgements and decrees?
>
> 3. Whether the adjoining land of the appellants comprising Khasra Nos.73 and 77 to the suit land Khasra No. 72 could be ignored to be measured by the Local Commissioner while demarcating the suit land, if no, whether the report of the Local Commissioner is unsustainable and could not be relied

upon while passing the impugned judgements and decrees by both the Courts below?

Substantial questions of law.

7. Khasra No. 72 stands owned and possessed by the plaintiffs whereas Khasra numbers adjoining thereto bearing field Nos. 73 and 77 stand owned by the defendants appellants. The decree concurrently pronounced by the learned Courts below stand anvilled upon demarcation report proven by PW-2. Demarcation report stands comprised in Ext.PW-2/A, the tatima prepared in consonance therewith stands comprised in Ext.PW-2/B wherewithin reflections occur of the defendants unauthorisedly holding possession of 132 sq.meters held in the suit land. Both the learned Courts below imputed sanctity to the demarcation report comprised in Ext.PW-2/A wherefrom they recorded a conclusion of the plaintiffs standing entitled to the decree as stood rendered qua them. Consequently, the factum of the tenacity of pronouncements occurring in Ext.PW-2/A besides the vigour of reflections communicated in Ext.PW-2/B is enjoined to be determined. Both would enjoy formidable probative sinew despite an abortive concert standing made by the demarcating officer concerned qua theirs preceeding his holding the apposite demarcation proceedings theirs recording before him a consensus qua the fixed points wherefrom he held authorization to conduct the relevant demarcation predominantly when his apposite report besides his testification hold a visible display of his while holding the relevant demarcation his thereat possessing the field Map/Musabee of the village concerned holding therewithin reflections of the relevant fields alongwith their dimensions (Karu kans) besides his unanimously voicing in his report also in his testification qua his therefrom in consonance with the relevant instructions measuring their dimensions, lastly his articulating in his report besides in his testification qua his therefrom thereafter proceeding to relay the relevant measured dimensions held in the relevant field Map/Musabee onto the contiguous khasra numbers of the litigating parties qua which he held demarcation. However, the aforesaid invincible display stands omitted to be bespoken by PW-2 in his demarcation report comprised in Ext.PW-2/A also stands unechoed by him in his testification. Besides the preemptory mandate of the relevant instructions which stand encapsulated in Chapter 10 paragraph IX of the H.P.Land Records Manual, which stands extracted hereinafter, :-

> "IX. In the report to be prepared/submitted by the Revenue Officer/Field Kanungo, it must be explained in detail how he made his measurement. He should submit a copy of the relevant portion of the last settlement field map (musavi) of the village showing the fields with their dimensions(Karu Kan) of which he took measurement as mentioned in instructions supra and the boundary in dispute. There should also be a mention in this report as to what method was adopted and the way he fixed the starting points and the fields he measured and the result of such measurement. All the fields and points measured should be shown in the site plans, within the frame of copy of musavi."

enjoining the demarcating officer to at the relevant time hold the relevant portion of the field map of the village concerned holding reflections of the relevant fields besides their dimensions wherefrom he stands enjoined to in consonance with the relevant instructions hold the relevant measurement of their dimensions whereafter he stands mandatorily injucted to thereafter relay them onto the relevant fields, for reasons aforestated is visibly infracted. Since the mandate held in the relevant portion of the H.P. Land Records Manual, relevant portion whereof stands extracted herebefore, is preemptory also when the relevant mandate enjoins strict compliance therewith by the demarcating officer, in sequel any departure therefrom renders the relevant demarcation held by PW-2 to be legally frail also any reliance thereupon by both the learned Courts below especially when its preparation is evidently in digression of the relevant mandate of the relevant instructions which stands extracted hereinabove, is grossly unwarranted.

8. However, the learned counsel appearing for the plaintiffs has contended of with the defendants voicing in their respective testifications qua theirs perfecting their title to the suit land by adverse possession, plea whereof for concurrently recorded tenable reasons stood

dispelled by both the Courts below, significantly for theirs (a) omitting to spell with certainty the date of its commencement, besides the territorial extent whereon they adversely held the suit land contrarily rather with DW-1 and DW-2 contradictorily testifying qua the territorial extent of the suit land whereon they propagate qua theirs adversely holding it rendered their espousal on facet aforesaid to remain unsatiated reiteratedly when (b) the commencement of the period with an apposite communication with precision qua the time since whereon they asserted qua theirs holding possession of the suit land with an animus possidendi remaining unpleaded besides untestified whereupon they stood disabled to espouse qua theirs hereat completing the mandatorily enjoined period of limitation prescribed in the relevant statute for theirs standing construed to perfect their title qua the suit land (c) DW-1 and DW-2 evidently contradictorily deposing qua the territorial extent of the suit land whereon they espoused qua theirs becoming owners by adverse possession, wherefrom an inference is erectable qua theirs acquiescing qua the defendants holding possession of the suit land rendering hence the vice if any gripping the report of the Local Commissioner comprised in Ext.PW2/A being overlookable. However, the aforesaid submission addressed herebefore by the counsel for the plaintiffs is unamenable for acceptance by this Court conspicuously when both aforesaid DW-1 and DW-2 contradictorily depose qua the territorial extent of the suit land whereupon they stake a claim qua theirs perfecting their title by statutory prescription whereas occurrence with precision in their respective testifications qua the apposite territorial extent of the suit land whereon they asserted qua theirs perfecting their title thereon by adverse possession was imperative for hence affirmatively facilitating their apposite espousal. In aftermath with lack of concurrence inter se DW-1 and DW-2 qua the territorial extent whereupon they purportedly hold adverse possession of the suit land would naturally interdict a Civil Court to with aplomb pronounce an apposite decree holding revelations with precision besides exactitude vis.a.vis the area whereon the suit land stands unauthorisedly held by the defendants also lack of specificity with unanimity in the respective depositions of DW-1 and DW-2 qua the relevant facet aforesaid would prohibit a Civil Court to render an apposite decree qua thereupon the defendants standing encumbered with an apposite decree. However, both the learned Courts below despite conflicts occurring in the testifications of DW-1 and DW-2 qua the territorial extent of theirs adversely holding possession of the suit land also with demarcation report comprised in Ext.PW-2/A though apparently infracting the mandate of the relevant extracted portion of the apposite instructions, they yet proceed to inaptly pronounce the impugned decree hereat which obviously is ridden with a gross inherent fallacy.

9. Be that as it may, an apposite decree holding embodiments therein with precision qua the area whereon the defendants unauthorizedly hold possession of the suit land was renderable only when a valid demarcation was held of the suit property by the demarcating officer besides of the khasra numbers in contiguity thereof owned by the defendants. However, when for reasons aforestated PW-2 did not hold any valid demarcation of the suit property besides of the Khasra Numbers located in contiguity thereof, there was no worthwhile material available before both the Courts below to emphatically pronounce qua the area/dimensions reflected therein constituting the area of the suit land whereon the defendants unauthorisedly hold possession. The corollary thereof is of the concurrently recorded apposite decrees by both the Courts below suffering from an inherent fallibility.

10. Be that as it may for facilitating the rendition of an efficacious decree holding delineations therein with specificity qua the area whereon the suit land stands subjected to encroachment by the defendants also for conclusively clinching/resting the controversy engaging the parties at lis, it is deemed fit and appropriate to remand the matter to the learned First Appellate Court for facilitating it to appoint the Tehsildar concerned of the area wherewithin suit land is located for holding demarcation of the suit property. However the learned first Appellate Court after receiving the demarcation report besides after considering the objections filed thereto by the contesting parties shall pronounce a fresh decision only qua the area of the suit land encroached upon by the defendants within six months hereafter.

11. For the foregoing reasons, the substantial questions of law are answered in favour of the defendants. The judgements and decrees rendered by both the Courts below are quashed and set-aside. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of. Records be sent back forthwith. However, as aforestated, in the interest of justice and also for perennially setting at rest the controversy engaging the parties at lis, it is deemed fit and appropriate to remand the matter to the learned First Appellate Court for facilitating it to appoint the Tehsildar concerned of the area wherewithin suit land is located for holding demarcation of the suit property. However the learned first Appellate Court after receiving the demarcation report besides after considering the objections filed thereto by the contesting parties shall pronounce a fresh decision only qua the area of the suit land encroached upon by the defendants within six months hereafter.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Suresh Kumar .....Petitioner.
Versus
Mamta Rani ....Respondents.

Cr.MMO No.224 of 2014
Reserved on: 03.11.2016.
Date of Decision: 11th November, 2016.

Code of Criminal Procedure, 1973- Section 125- The marriage between the parties was solemnized – the husband started beating the wife – a petition for maintenance was filed and maintenance of Rs.5,000/- per month was awarded by Additional Sessions Judge while reversing the order of Judicial Magistrate- held in revision that the wife had left her matrimonial home and was residing with her parents- the husband had instituted a petition for restitution of conjugal rights but mere institution of the petition for restitution of conjugal rights will not have any effect on the proceedings under Section 125 of Cr.P.C – the wife had left the home due to beatings given to her and she had a reasonable cause to reside separately – the income of the wife was not proved – the maintenance was rightly granted. (Para-2 to 9)

For the Petitioner: Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. Anoop Rattan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition stands directed against the impugned order recorded on 13.08.2014 by the learned Additional Sessions Judge (II), Una, Camp at Amb, District Una, H.P., in Crl. Revision RBT No. 6/2013/2011 whereby he reversed the verdict pronounced by the learned Judicial Magistrate 1st Class, Court No.1, Amb, District Una, H.P. on an application preferred therebefore by the respondent herein under Section 125 of the Code of Criminal Procedure. Under the impugned rendition, the learned Additional Sessions Judge assessed qua the respondent herein maintenance quantified in a sum of Rs.5000/- per month. He pronounced therein qua the aforesaid per mensem amount of maintenance being payable w.e.f. 21.04.2010. Standing aggrieved, the petitioner herein has assailed herebefore the impugned rendition.

2. Uncontrovertedly, the litigating parties herebefore are married partners. An obligation under law is cast upon the husband to maintain his lawfully married wife. On emphatic proof standing adduced qua his neglecting to maintain his wife or refusing to maintain her, would entail upon the trial Magistrate concerned to assess maintenance qua the married

spouse unless evidence of immense vigour stands adduced therebfore by the husband qua his married spouse possessing sufficient means to maintain herself. An inference of the husband refusing besides neglecting to maintain his lawfully wedded wife would stand spurred even when his lawfully married spouse stands precluded by strong exceptional compelling reasons to alienate herself from the matrimonial company of her husband. However, the learned trial Magistrate on incisively traversing through the evidence as stood adduced before him, has concluded of the purported incident(s) of physical cruelty perpetrated upon the respondent herein by her husband during the former's stay at her matrimonial home remaining unproven whereupon he concluded of the departure of the respondent herein to her parental home not standing emphatically established to stand founded upon any reasonable ground rather her stay thereat being pretextual whereupon he refused to assess maintenance per mensem qua the respondent herein.

3. Dehors the tenacity or otherwise of the evidence adduced before the learned trial Magistrate displaying the factum of the respondent herein during her stay at her matrimonial home standing subjected to belabourings by her husband, the imperative fact which was enjoined to be pronounced upon was qua the petitioner herein, since his married spouse leaving for her parental home on 17.01.2009 whereat she since thereat has been continuously staying, making sincere genuine efforts to retrieve her to her matrimonial home, efforts whereof standing spurned by the respondent herein, would foster an inference of the respondent herein without any reasonable cause staying at her parental home whereupon she would be dis-entitled to claim maintenance from her husband. Contrarily, on emergence of evidence in display of her husband not making any genuine sincere efforts to retrieve her to her matrimonial home would entail upon him an obligation to maintain her thereat also necessarily with his omitting to retrieve her to her matrimonial home would galvanize an inference of his abandoning her company, concomitantly, thereupon he cannot refuse or neglect to maintain his married spouse despite the latter staying with her parents.

4. For determining the aforesaid factum probandum, an allusion to the evidence germane to it warrants advertence. Though the husband in portrayals of his making sincere efforts to retrieve his married spouse to her matrimonial home has testified qua the factum of the respondent staying at her parental home against his wish standing brought to the notice of Nagar Panchayat and Community Health Sabha. However, the aforesaid testification in display of the husband concerting to retrieve the respondent herein to her matrimonial home lacks vigour for want of it acquiring corroboration from the official concerned of the Nagar Panchayat or Community Health Sabha. The apt sequel arising from the aforesaid omission of the husband to lend corroborative succor to his testification qua his soliciting the support of the functionaries of the Nagar Panchayat and the Community Health Sabha, for retrieving the respondent herein to her matrimonial home warranting a deduction qua his contriving the factum of his making genuine sincere efforts to retrieve his married spouse to his matrimonial company.

5. Furthermore in display of the husband making an arduous, genuine attempt to retrieve his married spouse to her matrimonial home he propagates in his testification qua his standing accompanied by the members of Sawarankar Sudhar Sabha to the parental home of the respondent, visit whereof to the parental home of the respondent not acquiring any success arising from the factum of PW-2 not permitting the visitors to his house to egress his homestead. However, the aforesaid propagation loses its vigour for the reason that an apposite suggestion qua the aforesaid factum stood not put to PW-2 besides with none of the members of Swarankar Sudhar Sabha, who purportedly accompanied the petitioner herein to the parental house of the respondent herein, who however were purportedly not allowed by PW-2 to enter his house not standing examined for thereupon lending succor to the aforesaid propagation. An inevitable sequel of the aforesaid want of adduction of the relevant germane best evidence by the husband in portrayal of his making sincere, genuine efforts to retrieve his married spouse to his matrimonial company, foments an inference of the petitioner herein abandoning the company of the respondent herein whereupon it is to be concluded of his being the errant spouse whereas the respondent herein not being amenable to any imputation of any fault for hers living at her

parental home nor also her stay thereat being without any reasonable cause whereupon it is apt to conclude of the husband being enjoined to maintain her even when she is staying at her parental home whereas his neglecting or refusing to maintain her, entails a command upon him from this Court qua his being amenable to pay maintenance to her in the manner as pronounced by the learned Additional Sessions Judge.

6. It is relevant to advert to the submission made herebefore by the counsel for the respondent qua the petitioner herein instituting before the learned Addl. Sessions Judge a petition for restitution of conjugal rights wherefrom he contends of it personifying the factum of the petitioner herein endeavouring to retrieve the respondent herein to his matrimonial company whereupon he contends of the impugned order warranting interference. However, the mere institution of a petition for restitution of conjugal rights by the petitioner before the learned District Judge would not per se tantamount to his proving the factum of his thereupon making sincere endeavours to retrieve the respondent herein to his matrimonial company unless a verdict thereupon stood pronounced by the learned District Judge. However, the apposite verdict pronounced by the learned District Judge on a petition preferred before him under Section 9 of the Hindu Marriage Act by the petitioner herein remains unadduced in evidence. For lack of adduction into evidence of the apposite verdict pronounced by the learned District Judge on the apposite petition preferred therebefore by the petitioner, cannot constrain a conclusion of its mandate standing infracted by the respondent herein whereas only on hers provenly infracting besides disobeying the verdict pronounced by the learned District Judge on an apposite petition constituted before him under Section 9 of the Hindu Marriage Act would stir an inference qua thereupon the respondent herein standing dis-entitled to claim maintenance from her husband in a petition under Section 125 of the Cr.P.C. Contrarily, for reiteration, for lack of its standing adduced into evidence warrants an inference of its mere institution not galvanizing any thrust to the espousal of the petitioner herein qua his making sincere efforts to retrieve the respondent herein to his matrimonial company nor also it can be concluded qua on its mere institution the respondent herein standing enjoined to return to the matrimonial company of her husband. On the other hand, it appears of the aforesaid apposite petition standing speciously preferred by the petitioner herein before the learned District Judge as a mere contrivance to defeat the claim of the respondent herein for maintenance, conspicuously, when it stood instituted subsequent to the institution of the instant petition by the respondent herein before the learned trial Magistrate concerned.

7. Be that as it may, the factum of the petitioner herein possessing sufficient financial means to defray to his married spouse the quantum of per mensem maintenance as assessed in the impugned order is garnerable from the factum of the father of the petitioner herein disclosing in his testification qua his rearing from his business of a goldsmith an income ranging from 2700 to 2800 whereas with the petitioner herein deposing his earning a salary of Rs.2500/- per month while his standing employed as a helper in the jewelery shop of his father at Naudan, makes a palpable upsurgence of the factum of both the petitioner herein besides his father contriving the factum of the former standing employed as a helper in the goldsmith shop, established by his father at Naudan wherefrom the petitioner is purportedly drawing monthly wages quantified at Rs.2500/-. Also it appears hence of the petitioner in collusion with his father by falsely displaying qua the petitioner herein not possessing sufficient financial means his hence concerting to thwart the claim for maintenance of the respondent herein from him. Furthermore, the factum of the petitioner rearing a false plea of his standing employed as a helper in the goldsmith shop of his father located at Naudan wherefrom he purportedly draws a salary of Rs.2500/- per month stands generated by the factum of (a) bag Ex. P1 holding therein the mobile number of the petitioner herein; (b) with a display occurring in ex.P1 qua the business of a goldsmith shop located at Naudan running in the name and style of Suresh Jewellers, name whereof occurring in Ex.P-1 holds synonymity with the name of the petitioner herein, dispels the factum of the petitioner herein standing employed as a helper in the jewelery business of his father. Contrarily, it portrays of the relevant business of goldsmith standing operated by the

petitioner herein wherefrom the ensuing sequel is qua his rearing an income sufficient to maintain his married spouse, the respondent herein.

8. Though, the respondent herein had for discountenancing the claim reared by the respondent herein in a petition under Section 125 of the Cr.P.C., espoused qua the latter drawing and earning Rs.4000/- per month by working in Swami Viveka Nand Public School besides hers earning another sum of Rs.5000/- per month by doing tuition work yet the aforesaid espousal does not hold any probative worth for want of adduction of relevant best evidence in support thereof comprised in his examining the official concerned of Swami Viveka Nand Public School also for want of his examining the parents of the wards tuitioned by the respondent herein. In sequel, thereto it is apt to conclude qua the respondent herein not possessing sufficient financial means to support herself.

9. For the foregoing reasons, there is no merit in the instant petition and it is accordingly dismissed. In sequel, the order rendered on 13.08.2014 in Crl. Revision RBT No. 6/2013/2011 by the learned Additional Sessions Judge (II) Una, H.P. is maintained and affirmed. The learned trial Magistrate is directed to, given the evident recalcitrance of the petitioner herein to beget compliance with the orders of this Court ensure by all lawful means forthwith expeditious execution of the orders of this Court. All pending applications also stand disposed of. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Surinder Singh .....Petitioner

Versus

State of Himachal Pradesh and others .....Respondents

CWP No. 1006/2008
Reserved on : September 27, 2016
Decided on : November 11, 2016

H.P. Town and Country Planning Act, 1977- Section 31(5)- The mother of the petitioner applied seeking planning permission for the construction of commercial building – no intimation was received and the sanction is deemed to have been granted – however, a notice was issued to which a reply was sent – a writ petition was filed, which was disposed of with a direction to pass a speaking order- a detailed order was passed and the appeal was rejected against which a present writ petition has been filed- held, that if no decision is conveyed on the application for reconstruction, sanction is deemed to have been given – documents show that the plan submitted by the mother of the petitioner was not complete and sanction could not have been granted- the case for construction of three storeyed commercial building over existing single storey plus parking was rejected on the ground that proposal falls in the banned area of Shimla and proposed construction would obstruct vision and cause congestion - petitioner failed to reply to the observations made by the respondent and no decision could be taken on the plan- the period of 6 months cannot be counted from the date of submission of original application- the dispute regarding the receipt of the documents cannot be looked in exercise of the writ jurisdiction- petition dismissed. (Para-16 to 48)

Cases referred:

Live Oak Resort (P) Ltd. v. Panchgani Hill Station Municipal Council, (2001) 8 SCC 329
Municipal Corpn. Shimla v. Prem Lata Sood, (2007) 11 SCC 40
M/s. Verma Traders and others v. The State of Himachal Pradesh and another, AIR 1983 HP 81

For the petitioner : Mr. G.C. Gupta, Senior Advocate with Mr. Surender Thakur, Advocate.

For the respondents : Mr. Rajat Chauhan, Law Officer, for respondents No.1 to 3.
Mr. Hamender Singh Chandel, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant petition has been filed against order dated 18th March, 2008 passed by the Additional Chief Secretary (TCP) on an appeal under Section-32 of the HP Town and Country Planning Act, 1977 preferred by the petitioner against order dated 29.12.1997 of the Director, Town and Country Planning, Himachal Pradesh, whereby proposal of the petitioner for construction of three storeyed commercial building over existing single storey + parking and addition in ground floor on Khasra Nos. 281, 284, 288 to 310, 312 to 318, at Bright Land, Shimla-3, was rejected being in banned/core area of Shimla Planning Area and on the ground that said proposed construction will obstruct the vision and create more congestion in the already developed area.

2. However, this is second round of litigation between the parties as the petitioner has already approached this Court by filing CWP No. 398 of 1997, which was disposed of on 24.12.2007. The petitioner had filed aforesaid CWP against decision dated 1.3.2000, whereby appeal filed by the petitioner against order dated 29.12.1997 passed by Director, Town and Country Planning was rejected by respondent No.1. While disposing of CWP No. 398 of 1997, this Court quashed and set aside order dated 1.3.2000 and observed that order dated 1.3.2000 was not a speaking order, as such respondent No.1 was directed to pass a speaking order on the appeal of the petitioner within three months of the passing judgment dated 24.12.2007.

3. In pursuance to above, Additional Chief Secretary (TCP) passed a detailed order dated 18.3.2008, thereby rejecting the appeal of the petitioner, against which now the instant petition has been filed.

4. Matrix of the case, as emerge from the petition, is that the mother of petitioner namely Shanti Devi applied on 26.12.1994 seeking planning permission for the construction of the commercial building, as noticed above. As per the petitioner, he/his mother did not receive any communication till 22.4.1996, when letter was written to the Executive Engineer, Town and Country Planning. Another letter was written on 25.9.1996, which was received on 26.9.1996 in the office of Town and Country Planning. In between another letter dated 23.6.1995 was sent to the respondents, which too was not replied by them. On 20.11.1996, another letter was sent by Shanti Devi for invoking deemed sanction in her favour, on account of having received no response by her after 26.12.1994. Thereafter, on 5.5.1997a notice was sent to the Director, Town and Country Planning and Executive Engineer, Development Control Division No.4 through advocate, in reply to letter dated 11.3.1997, advising the respondents to withdraw letter dated 11.3.1997 and to accord sanction under deeming provision in her favour. This notice was also not replied to by the respondent. In the meantime, Shanti Devi expired, and, accordingly, the present petitioner filed CWP No. 398/1997 before this Court.

5. In reply to the averments contained in the writ petition, respondent-State put up a different case altogether. As per the reply, petitioner was intimated about the shortcomings in the proposal dated 26.12.1994 on the same date, to which the petitioner replied on 23.6.1995 that too without attending the shortcomings. Petitioner was again advised to attend to the shortcomings, on 22.6.1996. Petitioner replied on 31.7.1996 and again failed to submit the complete documents. On 17.9.1996, again petitioner was asked to meet the observations, which was replied by the petitioner on 26.9.1996, again leaving some of the formalities unattended. Respondents conveyed their observations on 17.10.1996 and 11.3.1997 to the petitioner. Provisions of deemed sanction having come into play, has been denied by the State. It is also averred that in response to the letter dated 23.11.1996 of petitioner, respondents asked petitioner to furnish original copy of revenue record on 11.3.1997. Factum of notice dated 5.5.1997 is not

denied, however, it is averred that the same was withdrawn on 26.8.1997. Stand as taken by the respondent-State is that the plan/proposal of petitioner was rejected in view of para 10.4.1.2 of the Interim Development Plan Shimla, to avoid congestion in the area. Further objection was taken that as per proposal, the set back left in the previous plan was also proposed to be used for construction, which would lead to congestion in the area. It was also averred that the site in question fell in the banned/core area of Shimla. They have vehemently denied the stand of the petitioner that the provisions of Interim Development Plan are applicable to vacant plots only. They also stressed that the Interim Development Plan was applicable to vacant as well as existing constructions. The main contention of the respondent-State is that provisions of deemed sanction would not be applicable since there is continuous correspondence between the petitioner and the respondents, besides the fact that the petitioner never submitted a complete proposal.

6. Petitioner filed rejoinder to the reply filed by respondents No.1 to 3 and refuted the averments made by the respondents. It is reiterated that the proposal submitted by the petitioner/ his predecessor-in-interest, was complete in all respects and further the petitioner attended to all the observations made by the respondents in subsequent communications. It is averred that during 23.6.1995 to 22.6.1996, for one year, there was no response/communication from the respondents rejecting/accepting the proposal of the petitioner and as such there is deemed sanction in favour of the petitioner as per para 31 of the Town and Country Planning Act. Factum of withdrawing notice dated 5.5.1997 is denied. It is reiterated that provisions of para 10.4.1.2 of the Plan are not applicable to the existing construction. It is also stated that no obstruction of vision would take place as the area behind the proposed construction site belongs to the petitioner only.

7. During the pendency of the petition, State also placed on record additional documents i.e. copies of letters/communications during the period 26.12.1994 to 29.12.1997 in order to show that correspondence has taken place between the petitioner and the office of Town and Country Planning during this period and there was no period, when there was no response given by the department to the communications received from the petitioner.

8. During the pendency of petition, Municipal Corporation, Shimla was arrayed as respondent No.4. The Corporation also filed is reply to the petition stating therein that the petitioner had submitted a proposal thereby exceeding the maximum floor area i.e. 1982.18 sq metres as against the maximum admissible area of 1074.48 sq metres. It was also averred that these facts had been concealed in the petition and as such same could not be dealt in the order passed by respondent No. 3 and respondent No.1. Deemed sanction in favour of petitioner was denied.

9. Petitioner filed rejoinder to the affidavit/ reply filed by Municipal Corporation, Shimla reiterating the stand taken in the petition and denying the averments made in the reply affidavit by the Municipal Corporation, Shimla. Factum regarding exceeding floor area was denied.

10. Interestingly, respondent State filed an application being CMP No. 8517/2014 thereby seeking amendment of reply on the ground that some relevant documents could not be filed during earlier reply. Paras No. 3 to 6 of reply were amended. Reply to the same was also filed. Yet another application was filed by the State for placing on record certain other documents.

11. Mr. G.C. Gupta, learned Senior Advocate duly assisted by Mr. Surender Thakur, Advocate, vehemently argued that the impugned order dated 18.3.2008, passed by the Additional Chief Secretary (TCP), while disposing of the appeal under Section 32 of the Town and Country Planning Act, 1977, is not sustainable in the eyes of law, as the same is not based on correct appreciation of facts as well as provisions of law and same deserves to be quashed and set aside. He further stated that the order passed by respondent No. 3, which was further upheld by respondent No.2, is against the provisions of Town and Country Planning Act, 1977 because neither the provisions of Para 10.4.1.2 of Interim Development Plan under the Act ibid are applicable in the present case nor the ground, on which plan has been rejected by respondent

No.3 falls in the ambit of the Act ibid. With a view to substantiate his aforesaid argument, he forcefully contended that since there was already a construction, qua which planning permission was sought, it was only a addition to existing construction. There is no force in the findings returned by the authority below that there would be congestion in the area in case permission is granted to the petitioner. As per Mr. Gupta, provisions of Interim Development Plan are applicable only in case planning permission is sought for construction on vacant plot and in this case, even no permission was required from State Government. Final authority for grant of permission vested with respondent No.2. Mr. Gupta, further contended that respondent No.2 while passing impugned order failed to take note of the deeming provisions as contained in Section 31(5) of the Act and wrongly arrived at conclusion that provisions of deemed sanction are not applicable in the present case. As per Mr. Gupta, besides the provisions contained in Section 31 of the Town and Country Planning Act, there is no other provision for grant/refusal of permission with respect to applications received under Section 30 of the Act, irrespective of the fact that recommendation is to be sent to respondent No.1. With a view to substantiate his aforesaid argument, Mr. Gupta invited attention of this Court to letter dated 26.12.1994, whereby predecessor-in-interest of the petitioner applied to respondent No.3 and submitted plan seeking planning permission for the construction of three stories over existing structure (single storey) plus parking, to demonstrate that plan, complete in all respects, was submitted with the authorities for according approval but the authorities failed to acknowledge aforesaid letter till 22.4.1996, when she sent another letter to the Executive Engineer, TCP to know about the fate of the plan submitted by her. Since the authorities failed to take action on her plan, same would be deemed to have been sanctioned as per provisions of Section 31 (5) of the Act immediately following the expiry of six months. Mr. Gupta, with a view to substantiate his argument that no communication after submission of plan vide letter dated 26.12.1994 was ever sent to the petitioner, made this Court to travel through various letters placed on record by way of annexures P-2 dated 22.4.1996, P-3 dated 26.9.1996, P-4 dated 20.11.1996 and P-5 notice dated 5.5.1997, to demonstrate that since there was no response by the authorities pursuant to submission of plan vide letter dated 26.12.1994, plan submitted by the predecessor-in-interest of the petitioner was bound to be sanctioned in terms of provisions of Section 31 (5) of the Act. While concluding his arguments, Mr. Gupta made this Court to peruse various letters purportedly sent by the petitioner to the respondents requesting therein to accord sanction to the plan as submitted by her vide letter dated 26.12.1994. Mr. Gupta, strenuously argued that since there was no communication from the side of respondents from 23.6.1995 to 22.6.1996, for more than the stipulated period of six months, plan submitted by the predecessor-in-interest of the petitioner is deemed to have been sanctioned as per Section 31 (5) of the Act. He placed reliance on judgment passed by Hon'ble Apex Court reported in (2001) 8 SCC 329 and judgment of this Court reported in AIR 1983 Himachal Pradesh 81. Mr. Gupta, further stated that bare perusal of impugned order passed in appeal by the appellate authority nowhere suggests that documents placed on record by the petitioner were ever taken into consideration by the appellate authority while disposing of the appeal, which clearly suggests that impugned order is not based upon correct appreciation of material documents made available on record by the petitioner, as such, same deserves to be quashed and set aside.

12. Mr. Rupinder Singh Thakur, Additional Advocate General duly assisted by Mr. Rajat Chauhan, Law Officer, supported the order passed by the appellate authority. While referring to the impugned order dated 18.3.2008, passed by Additional Chief Secretary (TCP), Mr. Thakur stated that same is based on correct appreciation of documents adduced on record as well as law and as such there is no illegality or infirmity in the same. Mr. Thakur, with a view to refute the contentions put forth by the petitioner that no communication after submission of plan by Shanti Devi, predecessor-in-interest of the petitioner, was sent to the petitioner by the respondents for more than six months, as a result of which plan submitted was deemed to have been sanctioned, invited attention of this Court to various documents placed on record by the respondent-State to demonstrate that letter dated 26.12.1994 was suitably replied and petitioner was advised to attend all the observations in a time bound manner to enable authorities to proceed ahead to sanction plan in accordance with law. Mr. Thakur, with a view to substantiate

his aforesaid contention also invited attention of this Court to various documents placed on record suggestive of the fact that after submission of plan vide letter dated 26.12.1994, respondents repeatedly requested the petitioner to attend to other observations made in various letters. Mr. Thakur, specifically invited attention of this Court to communications dated 17.10.1996 (annexure R-1/H and annexure R-1/J, addressed to the petitioner, wherein she was advised to make available structural design, to demonstrate that there is no force in the submissions having been made by the petitioner that after submission of plan dated 26.12.1994, no communication was ever addressed to the petitioner. Mr. Thakur, on the basis of aforesaid documents vehemently argued that since at no point of time, petitioner submitted plan complete in all respect, there was no occasion, whatsoever, for the authorities to take action in the matter. Mr. Thakur, while inviting attention of this Court to impugned order dated 18.3.2008, contended that bare perusal of same suggests that order is reasoned one and same has been passed after due appreciation of the facts. He specially stated that provisions of para 10.4.1.2 of Interim Development Plan under Town and Country Planning Act, 1977 were rightly applied in the case of petitioner because if plan submitted by petitioner is seen vis-à-vis spot, there would be congestion as has been defined in the provisions of para 10.4.1.2 of Interim Development Plan. He also refuted the claim of the petitioner that no permission is required from State Government and provisions of Interim Development Plan are applicable to vacant plots and not to existing construction. In this case, he stated that provisions are applicable to the construction whether on vacant plots or on existing constructions. In the aforesaid background, Mr. Thakur, while supporting the impugned order, prayed for dismissal of the petition.

13. Mr. Hamender Chandel, Advocate, appearing for Municipal Corporation, Shimla also supported the impugned order passed by the appellate authority and stated that the petitioner had submitted proposal thereby exceeding the maximum floor area i.e. 1982.18 sq metres as against admissible area of 1074.48 sq metres and as such same was rightly not accepted by the authorities. He also stated that at the time of furnishing plan with the Department, petitioner concealed material facts and proposal was not furnished as per position existing on the spot. Mr. Chandel, further argued that since there are ample documents on record suggestive of the fact that letter dated 26.12.1994 vide which plan was submitted, was suitably replied by the Town and Country Planning, there is no question of application of Section 31 (5) of the Act.

14. I have heard the learned counsel for the parties and gone through the record.

15. After carefully perusing the pleadings of the parties as well as submissions having been made by respective counsel, following questions arise for determination by this Court:

1. Whether plan submitted by the predecessor-in-interest of the petitioner on 26.12.1994 seeking planning permission for construction of three storied building over the existing construction (single storey) plus parking in the ground floor of Khasra Nos. 281, 284 and 288 to 310 and 312 to 318 at Bright Land Hotel, Shimla, is deemed to have been sanctioned in terms of Section 31 (5) of the Town and Country Planning Act, 1977?
2. Whether impugned order dated 18.3.2008 passed by Additional Chief Secretary (TCP) is based on correct appreciation of documents as well as law on the point?

16. Before adverting to merits of the case, it would be appropriate to reproduce Para 31(5) of the Himachal Pradesh Town and Country Planning Act, 1977, as under:

> Grants or refusal of permission. 31(5) If the Director does not communicate his decision whether to grant or refuse permission to the applicant within two months from the date of receipt of his application, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of two months:

Provided that in computing the period of two months the period in between the date of requisitioning any further information or documents from the applicant and date of receipt of such information or documents from the applicant shall be excluded.

17. Para 10.4.1.2(iii) of the Interim Development Plan, Shimla reads as under:

No building or other structure thereafter be erected or re-erected or materially altered: -

1. to exceed the height;
2. to accommodate or house a greater number of families;
3. to occupy a greater percentage of plot area;
4. to have narrower or smaller rear years, front yards, side yards, or other open spaces

Other than required or any other manner contrary to provisions of these regulations.

18. Perusal of Section 31 (5) suggests that on receipt of application under Section 30, Director, TCP may either grant permission unconditionally or grant permission subject to such condition as deemed necessary in the circumstances or refuse permission. Section 31(5) further suggests that further order granting permission subject to condition or refusing permission shall state grounds for imposing such condition or such refusal. But most importantly, Section 31 (5) provides that if the Director does not communicate his decision whether to grant or refuse permission to the applicant within two months (amended) from the date of receipt of application, permission shall be deemed to have been granted to the applicant on the date immediately falling on the expiry i.e. two months, provided that in computing period of two months, period between the date of requisitioning of any further information or documents from the applicant and date of receipt of same from applicant, would be excluded.

19. In the instant case, in nutshell, the case of the petitioner is that his predecessor-in-interest namely Smt. Shanti Devi submitted plan to respondent No.3 vide communication dated 26.12.1994 seeking planning permission for construction of three storied building over the existing structure (single storey + parking in ground floor) of the property known as Cosy Nook Estate, Shimla-3, which was diarized as No. HIM-TP-case-471. Petitioner has placed on record drawings submitted by Smt. Shanti Devi on 26.12.1994. As per the petitioner, his predecessor-in-interest did not receive any communication till 22.4.1996 and as such she was compelled to send another communication to the Executive Engineer, TCP on 22.4.1996 i.e. annexure P-2. Perusal of aforesaid communication suggests that the petitioner had submitted case for planning permission for addition to existing building on 26.12.1994 and certain points were raised but the fact remains that the same were attended by Smt. Shanti Devi and submitted in the office of TCP on 23.6.1995. Since one year had passed after re-submission of plan on 23.6.1995, Smt. Shanti Devi vide letter dated 22.4.1996, claimed that permission shall be deemed to have been granted to the petitioner immediately on expiry of six months in terms of Section 31 (5). But perusal of annexure P-3 suggests that communication dated 25.9.1996 placed on record by the petitioner itself suggests that the respondent-department had called for structural designs from Smt. Shanti Devi because, admittedly, all these letters suggest that petitioner vide communication dated 23.6.1995 had informed the respondents that structural designs would be submitted in the department after approval of the Government is conveyed. Further, this letter suggests that structural designs were submitted vide communication dated 25.9.1996. It would be relevant to reproduce letter dated 25.9.1996 as under:

"To
The Executive Engineer,
Dev. Control Division No. IV,
Town and Country Planning Department,

Shimla-1(H.P.)

Sub: Planning permission/addition and alteration to the exiting structure in Cosynook Estaet vide your First observation letter No. HIM/TP-Case Diary No. 471/94 dated 26.12.94 and your third observation letter No. HIM/TCP-D-IV/Case No. Dy. 471/98-572 dated 17.9.96.

Dear Sir,

As I have already pointed out in my letter dated 23.6.95 that structural designs will be submitted in your Department after approval from the government is coveyed to us. Anyhow, I am submitting the structural designs which are enclosed herewith.

All the Tatima, jamabandhi and demarcation certificate are all submitted in your office on 26.12.94 and in my site plan 600/B is already deleted which I had submitted in your office on 31.7.96 showing all setbacks. As far as the setbacks are concerned, the building will be constructed on the existing structure where ground floor having parking lot is not to be demolished in any case.

Kindly refer to my letter dated 23.6.95. Your office neither raised any objection nor any rejection, infact no reply at all was received from your end. Further I also wrote a letter dated 22.4.95 sent under postal certificate requesting that my plan be sanctioned immediately, to which also no reply was received.

Kindly send me the approval letter of my plans as early as possible.

Thanking you.

Yours faithfully,

Sd/-

Shanti Devi

Encl: Structural designs.

(Total pages Twenty-six).

Recd.

Dtd. 26.9.96"

20. This Court, after perusing aforesaid communication is convinced that till 25.9.1996, plan submitted by predecessor-in-interest of the petitioner vide letter dated 26.12.1994 was not complete in all respects and as such there was no occasion for the respondent authorities to grant sanction, if any. Perusal of annexure P-5 placed on record by petitioner suggests that legal notice was got served upon Director, TCP, through advocate calling upon authorities to withdraw leter dated 11.3.1997, whereby Smt. Shanti Devi, predecessor-in-interest of the petitioner, was asked to furnish copies of revenue records. Since petitioner has not placed on record communication dated 11.3.1997, it would be apt to reproduced paras 3 to 5 of the legal notice dated 5.5.1997 as under:

"3. That no sanction or refusal was communicated to Smt. Shanti Devi with respect to the building plan submitted by her on 26-12-1994 within a period of 6 months from the date of receipt of application seeking permission, therefore, the building plan was "deemed to have been sanctioned" within the meaning of Section 31(5) of H.P. Town & Country Planning Act, 1977. This fact was brought to your notice by Smt. Shanty Devi mother of my client vide her notice dated 21-11-1996 and was diarised on 23-11-1996 in your office vide diary No. 7596.

4. That since the building plan submitted by Smt. Shanti Devi for carrying out additions/alterations in the building was "deemed to have been sanctioned", therefore, she was within her right to carry out construction.

5. That my client has received letter No.HIM/TCP/D-iv/Case No.471/96-97-1202-03 dated 11-3-1997 whereby my client has been asked to furnish copies of revenue records. It is brought to your notice that since no objection was raised by your department within the stipulated period of 6 months from the date of submissions of the plan, therefore, the letter dated 11-3-1997 issued by you, referred to above, is totally uncalled for and it has been issued just to harass my client. You have no right at this stage to call upon my client to submit any documents as the plan stands already deemed sanctioned as per law."

21. Perusal of aforesaid averments contained in the legal notice suggests that vide communication dated 11.3.1997, predecessor-in-interest of the petitioner was asked to furnish revenue records but she instead of supplying the same, stated that since no objection was raised by the department within stipulated period of six months from the date of submission of plan, letter dated 11.3.1997 needs to be withdrawn.

22. Finally, respondents vide letter dated 29.12.1997, rejected the case of the petitioner for construction of three storied commercial building over existing single storey + parking, submitted by the predecessor-in-interest of the petitioner, on the ground that the proposals falls in the banned area of Shimla and proposed construction would obstruct vision and cause congestion.

23. Petitioner being aggrieved with the issuance of aforesaid rejection letter issued by the respondents filed an appeal under Section 32 of the Town and Country Planning Act, 1977, which was also rejected. Being further aggrieved, petitioner filed CWP No. 398/1997 before this Court, which was decided on 24.12.2007, when this Court quashed order passed by appellate authority on 1.3.2000 and directed it to decide the appeal afresh and to dispose of the same by passing speaking/reasoned order reflecting due application of mind. In the aforesaid background, appellate authority again decided the appeal under Section 32 of the Town and Country Planning Act, 1977 and passed order dated 18.3.2008, which is impugned before this Court, in the present petition.

24. This Court, with a view to ascertain correctness and genuineness of the order passed by appellate authority, examined the same, perusal whereof suggests that the respondents while refuting claim of the petitioner stated before the appellate authority that pursuant to submission of the plan vide letter dated 26.12.1994, Executive Engineer, advised the predecessor-in-interest of the petitioner to attend to the observations which were with respect to challan fee, planning permission of the Municipal Corporation, Shimla qua existing construction and to submit structure stability certificate. Aforesaid submissions/ contentions having been made by the respondents before appellate authority are strengthened by communication dated 23.6.1995 placed on record by petitioner, whereby observations made by Executive Engineer were addressed by the petitioner but the fact remains that the petitioner neither furnished structural design details nor submitted copies of sanction as was asked by the Executive Engineer. Respondents vide letter dated 22.6.1996 again advised the petitioner to submit site/location plan and structural designs, meaning thereby, after furnishing of plan, on 26.12.1994, predecessor-in-interest of the petitioner failed to attend the observations made by the authorities, as a result of which, plan submitted by Smt. Shanti Devi remained pending with the authorities.

25. Close perusal of communication dated 1.8.1996 placed on record by the petitioner itself suggests that no structural designs as were called for by Executive Engineer, were submitted because perusal of communication dated 1.8.1996 clearly suggests that at that time, petitioner submitted that structural designs would be submitted as and when necessary approval is granted by the Government. Hence, after careful perusal of aforesaid communications, which have been discussed hereinabove, this Court is compelled to conclude that the case of the petitioner remained incomplete and same could not be considered by the authorities for want of necessary documents. Respondents vide letter dated 17.91996, again advised the petitioner to submit structural designs and copies of revenue papers. It was specifically stated in the aforesaid letter that site plan was not proper as set backs were not shown therein but there is no document

available on record suggestive of the fact that pursuant to aforesaid communication dated 17.9.1996, petitioner submitted structural designs as well as copies of revenue papers. Similarly, there is letter dated 17.10.1996, placed on record by respondents, perusal whereof suggests that petitioner was again requested to submit revenue papers/requisite designs. Again vide communication dated 11.3.1997, reminder was sent regarding communication dated 17.10.1996 but no response was sent by the petitioner. Finally, on 5.5.1997, petitioner issued notice to the respondents calling upon them to withdraw letter dated 11.3.1997 and to accord sanction in terms of Section 31 (5) of the Act to the plan submitted on 26.12.1994. But interestingly, aforesaid legal notice dated 5.5.1997 was withdrawn vide communication dated 26.8.1997, which, reads as under:

> "To
>
> The Executive Engineer,
> Development Control Visn. No.4
> Shimla.
>
> Sub: Planning permission case No. Him/TCP/D-IV/case No.471/96-97
>
> Dear Sir,
>
> I hereby withdraw the notice given by my advocate dated 5-5-1997, which were given under my instruction, for the case mentioned above.
> Thanking you,
> Yours faithfully
> Sd/-
> (Surinder Singh)
> 26/8/97"

26. Since the petitioner failed to responded to the various communications sent by the respondents, his case was rejected on 29.12.1997, as has been stated herein above.

27. During arguments having been made by the parties, Mr. G.C. Gupta, learned Senior Advocate disputed the correctness and genuineness of the letters placed on record by the respondents and as such this Court summoned the original record pertaining to the case.

28. At this stage, before proceeding ahead to decide the matter on merits, it would be apt to reproduce paras 3 to 6 of the reply filed by respondents No.1 to 3:

> "3. That the contents of this para are wrong hence denied. It is submitted that Smt. Shanti Devi, the predecessor in interest of the petitioner had applied for construction of three and half storey commercial building over existing structure on old kh. No. 602, 602/1 & 602/2 (New Khasra nos. 281, 284, 288 to 310 & 312 to 318 at bright Land Hotel on dated 26.12.1994. The applicant Smt. Shanti Devi was informed about the short comings in the plan on 26.12.1994 and the applicant submitted his reply on 23.6.1995 without attending all the observations and the applicant was again advised to attend all the observations vide letter on 22.6.1996 vide which the applicant was asked to submit the site plan, location plan and structural design. The applicant attended the aforesaid observations partly vide letter 31.7.1996 (Diarised in the office dated 1.8.1996) and submitted only site and location plan. The applicant was again asked to attend the complete observations vide letter dated 17.9.1996 which was replied by the applicant on dated 25.9.1996, (diarised in the office vide diary No. 557 dated 26-9-1996), but this time also the applicant did not attended all the observations and submitted only structural design and accordingly observation

conveyed to applicant./ petitioner on dated 17.10.1996 and 11.3.1997. It is further submitted that provision of deemed sanction would have come into play only if the department would not have responded and the applicant would have fulfilled all requisite necessary codal requirements.

4. That the contents of this para are wrong hence denied and it is submitted that during the period 26.12.1994 to 17.10.1996 lot of correspondence was done with the petitioner. After receiving a letter dated 23.11.1996 (regarding Deemed Sanction) from the petitioner the replying respondent had asked the petitioner to furnish the original copy of revenue record vide letter dated 11.3.1997. (Copy of letter attached as annexure A-1) The contents of para are admitted to the extent that petitioner through his counsel issued a notice on dated 5.5.1997 but the same was withdrawn by the petitioner Sh. Surinder Singh no dated 26.8.1997.

5. That the contents of this para are partly denied to the extent that no communication regarding the plan submitted was conveyed to him but rest of the contents of para are admitted that CWP No. 398/1997 was filed by him in this Hon'ble Court. The petitioner had submitted three plans out of which two were sanctioned and third was rejected.

6. That the contents of para 6 and sub para are admitted to the extent that Director, Town and Country planning filed reply to the petition in the CWP No. 298/97 on dated 23.12.1997. The plan submitted by the applicant was rejected by the director on dated 29.12.1997. The petitioner challenged the rejection before the Secretary (TCP) to the Govt. of Himachal Pradesh but the same was dismissed vide order on dated 1.3.2000."

29. Perusal of aforesaid reply filed by the respondents suggests that despite there being several reminders, petitioner failed to attend the observations made by the respondents as far as plan submitted by petitioner and as such respondents were not in a position to take decision on the same. Petitioner, by way of rejoinder, refuted the aforesaid claim of the respondents. Respondents placed on record certain documents in the shape of annexure P-15 (original plan) i.e. letter dated 26.12.1994 and 25.9.1996, annexure P-17 dated 23.6.1996. Perusal of aforesaid letter dated 26.12.1994 whereby original plan was submitted before authorities for consideration, clearly suggests that structural design was not furnished alongwith original plan. Similarly, perusal of communication dated 25.9.1996, suggests that department had raised certain queries with regard to structural designs having been not furnished by the petitioner alongwith original plan and pursuant to these queries, petitioner vide communication dated 23.6.1995, informed the respondents that structural designs would be submitted in the department, after approval of the government is conveyed to the petitioner. It also emerges from letter dated 25.9.1996 that structural designs were submitted vide communication dated 25.9.1996. Similarly, perusal of communication dated 23.6.1998(annexure P-17) clearly suggests that information called for by the respondents could not be submitted by the petitioner since she had to leave for Delhi for medical treatment. At this stage, it would be relevant to reproduce communication dated 23.6.1998 (annexure P-17) as under:

"BRIGHTLAND HOTEL, COSY NOOK ESTATE, SHIMLA-171003, TEL:72659, 213659

To,
The Executive Engineer III,
Town & Country Planning Deptt.,
Division No. III, Khalini, Shimla-2.

Sub: Planning permission/additions & alterations to the existing structure, observation letter No HIM/TP-Case No.Dy.471/94 Dt. 26/12/1994

Sir,

I am submitting the documents as required vide the observation letter mentioned above about.

This is to inform you that due to my old age and severe cold weather I had to leave for Delhi for medical treatment and, therefore, I could not submit the information /documents required vide the above mentioned letter received from your office. I am now submitting the following documents: -

1. Challan Fee acknowledgement
2. As per as the structural design details are concerned it is submitted that the same will be submitted in your office/dept. after the approval from the Govt. is conveyed.
3. The copies of completion /sanctioned plans have already been submitted as enclosures along with the case files case No.3475 recommended/ approved by the Govt. & the dept of H.P.T.C.P.

It is requested that the planning permission may kindly be granted.
Thanking you.

Yours faithfully,
Sd/-
(Smt. Shanti Devi)
Dt.23/6/95"

30. Perusal of annexure P-18 dated 25.7.1997 also suggests that since petitioner failed to submit relevant revenue record, Executive Engineer, Division No. 4, Town and Country Planning Department himself applied to Naib Tehsildar (Urban) Settlement of land, HP Shimla-6, for issuance of Jamabandi and Tatimas. Perusal of aforesaid letter suggests that revenue authorities were requested to issue copies of Jamabandi as well as Tatimas in respect of Khata/Khatauni No. 45/61 situate at Up-Mohal Station Ward, Shimla Main falling under Station Ward, Shimla, Main. Annexure P-19, letter dated 28.8.1997 further suggests that the petitioner failed to furnish documents relating to revenue record with the plan permission case and as such no inquiry, if any could be conducted by the authorities concerned. Accordingly, Executive Engineer, Division No. 4, TCP, sent a communication to Director, Town and Country Planning informing therein that since requisite documents have been received and case has been examined. Record further reveals that the petitioner withdrew her legal notice in the case and proposed to raise construction of ground floor besides three additional stories on it. Perusal of communication dated 28.8.1997 suggests that the planning permission complete in all respects was submitted to the Director, TCP on 28.8.1997 and petitioner withdrew her notice dated 5.5.1997 wherein authorities were advised to withdraw letter dated 11.3.1997 and to accord permission under 'deeming provisions'. Perusal of annexure P-20 placed on record i.e. affidavit filed by Shri Ali Raza Rizvi, the then Director, Town and Country Planning, further suggests that petitioner had submitted two building plans, which are as follows:

"(i) Construction of one additional storey over existing 3 storey hotel building on Khasra No. 314 to 318 and 320 to 327 or Old Khasra No. 602/1.

(ii) Construction of a 4 storey + 1 parking floor hotel building on Khasra No. 297 to 299, 281, 284, 288 to 290, 300, 305 to 308 or old Khasra No. 602 and 602/2"

31. It also emerges from the affidavit that Director, Town and Country Planning made recommendations in each of the above plans in following terms:

"(i) not to allow any additional storey over existing 3 storey hotel building.

(ii) to allow 2 storey + 1 parking floor instead of 4 storey + 1 parking floor."

32. Government, vide letter dated 8.1.1998, conveyed planning permission without mentioning the number of stories to be allowed to the petitioner. Consequently, respondent No.2 made further reference to the Government on 29.1.198 and 24.4.1998 to intimate the correct position about the case in respect of number of storeys allowed. Finally, vide letter dated 23.5.1998, Government decided to consider the case of the petitioner afresh but as far as third case i.e. case No. 471/94, which is subject matter of the present petition, same was rejected vide letter No. HIM/TP-PP(P.Reg.)/97-300-Case No.471/94-15719-20 dated 29.12.97.

33. After careful perusal of aforesaid averments contained in the affidavit of Director, TCP, it clearly emerges that matter remained pending with the authorities from 26.12.1994 till 29.12.1997, for want of certain documents as well as clarification of the Government.

34. At the cost of repetition, it may be again observed that petitioner vide communication dated 23.6.1995 (annexure P-17), informed the authorities that structural design details would be submitted to the respondents after approval from the Government is conveyed, meaning thereby other cases as have been mentioned herein above, in affidavit of Shri Ali Raza Rizvi, the then Director, were pending before the authorities and petitioner wanted to file structural designs after approval of the government in those cases. This court, after perusing aforesaid communication placed on record by the petitioner, is fully convinced and satisfied that the matter was under active consideration with the authorities after submission of plan on 26.12.1994 and same could not be decided finally for want of documents from the side of the petitioner, who despite there being several communications failed to submit the same and finally the Government decided to consider the case of the petitioner afresh vide communication dated 23.5.1998, after withdrawal of legal notice dated 5.5.1997, wherein petitioner unconditionally withdrew the legal notice with the prayer to consider the plan submitted on 26.12.1994.

35. Respondents No.1 to 3, in terms of order passed by this Court placed on record certain documents to demonstrate that original plan submitted by petitioner vide communication dated 26.12.1994 was duly replied to and predecessor-in-interest of the petitioner was asked to attend to the observations so that case is approved at the earliest. Perusal of annexures R-1/B dated 26.12.1994, R-1/D dated 22.6.1996, R-1/F dated 17.9.1996, R-1/H dated 17.10.1996 and R-1/J dated 11.3.1997, clearly suggests that the matter remained under active consideration of the authorities and same could not be decided finally for want of certain documents from the side of the petitioner.

36. Careful perusal of documents annexure R-1/C dated 23.6.1995, R-1/E dated 31.7.1996, R-1/G dated 25.9.1996, R-1/K legal notice dated 5.5.1997, R-1/L communication dated 26.8.1997, also suggests that aforesaid communications sent by the petitioner were suitably replied by the department and repeatedly time was taken by the petitioner to submit structural design details.

37. Interestingly, in the aforesaid communications sent by the petitioner, in reply to letter issued by the respondents, petitioner has nowhere claimed that his plan submitted on 26.12.1994 stands sanctioned under deeming provisions of Section 31 (5). Vide annexure P-5, legal notice dated 5.5.1997, respondents were advised to withdraw letter dated 11.3.1997, whereby petitioner was asked to furnish revenue record. But the fact remains that vide letter dated 26.8.1997, same was withdrawn, meaning thereby contents of letter dated 11.3.1997 were duly admitted by the petitioner. It may be noticed here that after withdrawal of legal notice, Government vide letter dated 23.5.1998, decided to consider the case of the petitioner afresh.

38. After careful perusal of pleadings available on record as well as the original record submitted before this Court, I am unable to accept the contention of the petitioner that his case deserves to be allowed in terms of Section 31 (5) of the Act, under deeming provisions, because close scrutiny of documents as have been discussed in detail, clearly suggests that after furnishing original plan on 26.12.1994, matter remained under active consideration with the

authorities, who were not in a position to process the case of the petitioner for want of certain documents from the side of the petitioner.

39. There are ample documents available on record suggestive of the fact that after submission of plan on 26.12.1994, respondents advised the predecessor-in-interest of the petitioner to submit certain documents i.e. structural designs and revenue papers and plans pertaining to existing building approved by Municipal Corporation, Shimla. Finally vide communication dated 11.3.1997, petitioner was advised to make available revenue record. Apart from above, when petitioner himself withdrew legal notice dated 5.5.1997, plea having been made by petitioner can not be accepted because, admittedly, after withdrawal of notice, government decided to consider the case afresh. This Court also perused impugned order dated 18.3.2008, perusal whereof suggests that same is based on correct appreciation of documents made available on record by the respective parties. It also suggests that both the parties were given due opportunity of hearing and to place on record documents.

40. Now, this Court would advert to the judgments having been relied upon by Mr. Gupta in support of his claim vis-à-vis facts of the present case. Mr. Gupta, has vehemently argued that since the respondents failed to respond to the plan submitted by the petitioner within stipulated period of six months, plan is deemed to have been sanctioned in terms of Section 31 (5) of the Act.

41. Petitioner, in support of his claim has relied upon judgment of the Hon'ble Apex Court in **Live Oak Resort (P) Ltd. v. Panchgani Hill Station Municipal Council** reported in (2001) 8 SCC 329, wherein their lordships have held as under:

> "29. As regards the issue of deemed sanction, the High court answered it in the negative recording therein that the appellants were refused of any sanction though beyond the period as such deemed sanction would not arise. Unfortunately, we cannot lend our concurrence thereto. Panchgani Municipal Council being a 'C' Class Municipal Council of Maharashtra in its Standardised Buildings Bye-laws, in particular, bye-law 9.2 records that while the authority may sanction or refuse a proposal, there stands an obligation on the part of the authority to communicate the decision and where no orders are communicated within 60 days from the date of submission of the plan either by way of a grant or refusal thereto, the authority shall be deemed to have permitted the proposed construction. In view of our observations noticed hereinbefore, we are not inclined to go into this issue in any detail suffice however to record that the submissions pertaining to deemed sanction has substance and cannot be brushed aside in a summary fashion. Eventual rejection does not have any manner of correlation with deemed sanction - it is only that expiry of the 60 days that the sanction is deemed to be given, subsequent rejection cannot thus affect any work of construction being declared as unauthorised. The deeming provision saves such a situation. As noticed above, we are not inclined to detain ourselves any further on this score."

42. Aforesaid judgment having been relied upon by the petitioner has been duly taken into consideration by the Hon'ble Apex Court, in case titled **Municipal Corpn. Shimla v. Prem Lata Sood** reported in (2007) 11 SCC 40, wherein their lordships have held as under:

> 33. Section 247 no doubt provides for a legal fiction specifying a period of sixty days, within which the application for grant of sanction of a building plan should be granted, but the said period evidently has been considered to be providing for a reasonable period during which such application should be disposed of. However, only because the period of sixty days has elapsed from the date of filing of application, the same by itself would not attract the legal fiction contained in Section 247 of the 1994 Act. When such an application is attended to and the defects in the said building plans are pointed out, there cannot be any doubt whatsoever that the applicant must satisfactorily answer the queries and/or remedy the defects in the building plans pointed out by the competent authority.

36. It is now well-settled that where a statute provides for a right, but enforcement thereof is in several stages, unless and until the conditions precedent laid down therein are satisfied, no right can be said to have been vested in the person concerned. The law operating in this behalf, in our opinion is no longer res integra.

38. The question again came up for consideration in Howrah Municipal Corpn. and Others v. Ganges Rope Co. Ltd. and Others [(2004) 1 SCC 663], wherein this Court categorically held:

> "37. The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to ownership or possession of any property for which the expression vest is generally used. What we can understand from the claim of a vested right set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a legitimate or settled expectation to obtain the sanction. In our considered opinion, such settled expectation, if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such settled expectation has been rendered impossible of fulfilment due to change in law. The claim based on the alleged vested right or settled expectation cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such vested right or settled expectation is being sought to be enforced. The vested right or settled expectation has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a settled expectation or the so-called vested right cannot be countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon."

44. There cannot be any doubt whatsoever that an owner of a property is entitled to enjoy his property and all the rights pertaining thereto. The provisions contained in a statute like the 1994 Act and the building bye-laws framed thereunder, however, provide for regulation in relation to the exercise and use of such right of an owner of a property. Such a regulatory statute must be held to be reasonable as the same is enacted in public interest. Although a deeming provision has been provided in sub-section (1) of Section 247 of the 1994 Act, the same will have restricted operation. In terms of the said provision, the period of sixty days cannot be counted from the date of the original application, when the building plans had been returned to the applicant necessary clarification and/or compliance of the objections raised therein. If no sanction can be granted, when the building plan is not in conformity with the building bye-laws or has been made in contravention of the provisions of the Act or the laws, in our opinion, the restriction would not apply despite the deeming provision.

45. A legal fiction, as is well-known, must be construed having regard to the purport and object of the Act for which the same was enacted. [See Ishikawajma-Harima Heavy Industries Ltd. v. Director of Income Tax, Mumbai 2007 (1) SCALE 140 Para 36].

47. The said decision having been rendered in the fact situation obtaining therein, which has no similarity to the facts of the present case, which in our opinion, cannot be said to have any application whatsoever. The submission of Mr. Ganguli that despite expiry of the period of sanction of the development plan by the State under the 1977 Act, the same should be held to be extended, in our opinion, cannot be accepted.

Reliance has been placed by Mr. Ganguli on M.C. Mehta (Badkhal and Suraj Kund Lakes Matter) v. Union of India and Others [(1997) 3 SCC 715]. Therein, it was held :

> "2. No construction of any type shall be permitted, now onwards, in the areas outside the green belt (as shown in Ex. A and Ex. B) up to one km radius of the Badhkal lake and Surajkund (one km to be measured from the respective lakes). This direction shall, however, not apply to the plots already sold/allotted prior to 10-5- 1996 in the developed areas. If any unallotted plots in the said areas are still available, those may be sold with the prior approval of the Authority. Any person owning land in the area may construct a residential house for his personal use and benefit. The construction of the said plots, however, can only be permitted up to two and a half storeys (ground, first floor and second half floor) subject to the Building Bye-laws/Rules operating in the area. The residents of the villages, if any, within this area may extend/reconstruct their houses for personal use but the said construction shall not be permitted beyond two and a half storeys subject to Building Bye-laws/Rules. Any building/house/commercial premises already under construction on the basis of the sanctioned plan, prior to 10-5-1996 shall not be affected by this direction"

50. Furthermore, since special regulations have been framed in the town of Shimla, the core area as provided for in the regulation is required to be protected. The area in question has been declared to be a heritage zone, and hence no permission to raise any construction can be issued, which would violate the ecology. Such regulations have been framed in public interest. Public interest, as is well-known, must override the private interest. [See Friends Colony Development Committee v. State of Orissa and Others AIR 2005 SC 1 para 22].

43. Careful perusal of aforesaid judgment passed by Hon'ble Apex Court in Municipal Corporation vs. Prem Lata Sood case, clearly suggests that deeming provisions as provided under Section 31 (5) of TCP Act, would have restricted operation and period of six months can not be counted from the date when original application was submitted, especially when building plan had been returned to applicant for necessary clarification and/or compliance of objections raised therein. Hon'ble Apex Court specifically held in the said judgment that If no sanction can be granted, when the building plan is not in conformity with the building bye-laws or has been made in contravention of the provisions of the Act or the laws, the restriction would not apply despite the deeming provision. Apex Court has specifically held that since special regulations have been framed in the town of Shimla, the core area as provided for in the regulation is required to be protected.

44. Petitioner further has relied upon judgment of this Court rendered in **M/s. Verma Traders and others v. The State of Himachal Pradesh and another**, reported in AIR 1983 HP 81, wherein it has been held as under:

> "9 Under Section 17(2) (f), the terms and conditions subject to which, and the manner in which, the permit may be granted under Section 19 (1) has been prescribed. In the absence of any rules framed under Section 17 of the Act, it is not possible to ascertain whether the above condition could be imposed or not. Even the guidelines are not indicated anywhere. An authority cannot assume arbitrary, unguided and unbridled power in a matter relating to the rights of a citizen. By imposing the above condition, the State Government indirectly made Section 4 of the Act applicable by defeating the purpose of Section 19 (1) thereof. Such a course cannot be considered legal or reasonable. The State Government cannot be permitted to achieve an object indirectly which is not permissible in terms of an enabling provision of the Act. Section 19 (1) being an exception to Section 4 of the Act, the action could be only taken in consonance with the spirit of the said section. It is strange that in the one hand the State Govt. permitted the petitioners to get the area demarcated, get the trees marked allowed their

> felling and to convert timber therefrom and on other hand when the forest produce reaches the stage of sale in the shape of timber, a condition like the one referred to above is imposed. Such an action is not justified and the principle of equitable and promissory estoppel will apply to the facts of the case. It is a matter of common knowledge that in the process of felling of trees and converting timber therefrom, a person has to incur heavy expenses. Now, when the timber is ready for sale, without any price having been fixed and without action having been taken under Sections 6 and 7 of the Act, it is not just and proper to impose such a condition. Since such a condition is not in consonance with the essence and spirit of Section 19 (1) of the Act, the same cannot be sustained Moreover, no such material has been placed on record to show that the restriction imposed is in the interest of general public. Since no rules are prescribed and nothing cap be spelled out from the record to justify the imposition of such a condition, the same is unwarranted under the law. The record reveals that the final decision of the imposition of the above condition has been taken at the final stage, without any material on record."

45. Aforesaid judgment relied upon by the petitioner, if read in its entirety, may be of no help to the petitioner. As has been discussed in detail, there was no occasion for the respondents to act within stipulated period as envisaged under Section 31 (5) of the Act, intimating therein ground for refusal because, at no point of time, petitioner submitted his plan complete in all respects. There is no quarrel that once authority in terms of Section 31 (5) of the Act had a provision of deemed sanction, it was incumbent upon it to sanction or refuse proposal within stipulated period. But in the case in hand, as has been noticed in detail, plan was not submitted complete in all respects, rather there are communications available on record suggestive of the fact that repeatedly petitioner failed to submit structural design and sought time from the authorities. Thus, it is not the case where deeming provisions would apply. Petitioner has also relied upon judgment of this Court rendered in **Smt. Kanta Sharma and others v. State of H.P. and another** decided on 18.10.2004. However, same is also not applicable to this case.

46. Hence, this Court after carefully examining the law laid down in **Municipal Corpn. Shimla v. Prem Lata Sood**, is fully convinced and satisfied that plan submitted by petitioner can not be held to sanctioned under deeming provisions especially in view of the fact that the petitioner has failed to remove the objections/ supply the documents called for by the respondents and during this period, petitioner never submitted plan, complete in all respects, to the authorities.

47. At this stage, Mr. G.C. Gupta, learned Senior Advocate disputed the correctness of the documents filed by the respondents by stating that none of these documents were ever received by the petitioner and as such same can not be taken into consideration. But this Court, after carefully perusing the documents placed on record by respondents juxtaposing same with the documents placed on record by the petitioner is satisfied and convinced that documents having been relied upon by the respondents were received and suitably replied by the petitioner. Moreover, dispute, if any, with regard to genuineness and correctness of the documents placed on record by respondents, can not be looked into by this Court in the present proceedings and this Court sees no reason to disbelieve the correctness and genuineness of the government record, which suggest that matter remained under active consideration and the case of petitioner could not be considered for want of certain clarifications from the petitioner.

48. Consequently, in view of detailed discussion made herein above, there is no merit in the petition and the same is dismissed. Pending applications are also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Company Limited ...Appellant.
Versus
Smt. Resha Devi and others ...Respondents.

FAO No. 364 of 2012
Decided on: 11.11.2016

Motor Vehicles Act, 1988- Section 149- No evidence was led by the respondents and the evidence led by the claimant remained unrebutted – it was for the insurer to plead and prove that the insured had committed willful breach of the terms and conditions of policy – drivinglicence was exhibited and no objection was raised at the time of exhibition – the issues were rightly decided against the insurer – appeal dismissed. (Para- 11 to 19)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, 2013 AIR SCW 6505
Rakesh Kumar & Etc. Etc. versus United India Insurance Company Ltd. & Ors. Etc. Etc., JT 2016 (6) SC 504

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Nemo for respondents No. 1 to 3.
Mr. Dheeraj K. Vashisth, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 24th March, 2012, made by the Motor Accident Claims Tribunal-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 06/2005 (79/2002), titled as Smt. Resha Devi and others versus Vijay Kumar and others, whereby compensation to the tune of ₹ 3,27,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. The claimants, owner-insured and driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has called in question the impugned award on the grounds taken in the memo of the appeal.

4. Learned counsel appearing on behalf of the appellant-insurer argued that the Tribunal has fallen in an error in saddling it with liability on the following two counts:

(i) That the driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident; and

(ii) That the risk of the deceased was not covered.

5. The arguments advanced by the learned counsel appearing on behalf of the appellant-insurer are not legally tenable for the reasons to be recorded hereinafter.

6. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, which have given birth to the appeal in hand.

7. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ 15 lacs, as per the break-ups given in the claim petition, on the ground that they became the victims of the vehicular accident, which was caused by the driver, namely Shri Balbir Singh, while driving tanker, bearing registration No. HP-20-8293, rashly and negligently on 13th June, 2002, near Village Karsal, in which Shri Bal Ram sustained injuries and succumbed to the said injuries.

8. The claim petition was resisted by the respondents by the medium of the replies and following issues came to be framed:

(i) Whether deceased Bal Ram died on 13-06-2002 near Karsal in motor accident due to rash and negligent driving of driver of vehicle No. HP-20-8293 as alleged? OPP

(ii) If issue No. 1 is proved in affirmative, as to whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP

(iii) Whether respondent No. 2 was not having valid and effective driving licence at the time of accident and vehicle was driven in contravention of the policy as alleged?

(iv) Relief.

9. The claimants led evidence, examined Shri Pyar Chand as PW-2, Dr. Nirdosh as PW-3 and one of the claimants, namely Smt. Resha Devi, herself stepped into the witness box as PW-1.

10. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants in terms of the impugned award and saddled the insurer with liability. Hence, the appeal.

11. It is apt to record herein that the respondents in the claim petition, i.e. appellant-insurer, owner-insured and driver of the offending vehicle have not led any evidence. Thus, the entire evidence led by the claimants have remained unrebutted.

12. It was for the insurer to plead and prove that the owner-insured of the offending vehicle has committed willful breach as per the mandate of Sections 147 and 149 of the MV Act read with the terms and conditions of the insurance policy, has not led any evidence, thus, has failed to do so.

13. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but

must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

14. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** has laid down the same principle. It is profitable to reproduce para 10 of the judgment herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."

15. So far as the question of valid and effective driving licence is concerned, the driving licence of the driver of the offending vehicle has been exhibited as Ext. R-2. The appellant-insurer has not raised any objection at the time when the same was exhibited, thus, is precluded from raising the same at this stage.

16. My this view finds support from the judgment rendered by the Apex Court in the case titled as **Rakesh Kumar & Etc. Etc. versus United India Insurance Company Ltd. & Ors. Etc. Etc**., reported in **JT 2016 (6) SC 504**, wherein it has been held that once the license was proved and marked in evidence without any objection by the Insurance Company, it has no right to raise any objection about its admissibility at a later stage. It is apt to reproduce paras 19 to 22 of the said judgment herein:

"19. In our considered opinion, the Tribunal was right in holding that the driver of the offending vehicle possessed a valid driving license at the time of accident and that the Insurance Company failed to adduce any evidence to prove otherwise. This finding of the Tribunal, in our view, should not have been set aside by the High Court for the following reasons:

20. First, the driver of the offending vehicle (N.A.-2) proved his driving license (Exhibit-R1) in his evidence. Second, when the license was proved, the Insurance Company did not raise any objection about its admissibility or manner of proving. Third, even if any objection had been raised, it would have had no merit because it has come on record that the original driving license was filed by the driver in the Court of Judicial Magistrate First class, Naraingarh in a criminal case arising out of the same accident. Fourth, in any event, once the license was proved by the driver and marked in evidence and without there being any objection by the Insurance Company, the Insurance Company had no right to raise any objection about the admissibility and manner of proving of the license at a later stage (See Oriental Insurance Company Ltd. Vs. Premlata Shukla & Ors. [JT 2007 (8) SC 575 : 2007 (13) SCC 476] and lastly, the Insurance Company failed to adduce any evidence to prove that the driving license (Ex.R1) was either fake or invalid for some reason.

21. In the light of foregoing reasons, we are of the considered opinion that the High court was not right in reversing the finding of the Tribunal. Indeed, the High Court should have taken note of these reasons which, in our view, were germane for deciding the issue of liability of the Insurance Company arising out of the accident.

22. We, therefore, find no good ground to concur with the finding of the High Court. Thus while reversing the finding, we hold that the driver of the offending vehicle was holding a valid driving license (Exhibit-R1) at the time of accident and since the Insurance Company failed to prove otherwise, it was liable to pay the compensation awarded by the Tribunal and enhanced by the High Court." (emphasis added)

17. Viewed thus, the Tribunal has rightly decided all the issues against the appellant-insurer . The impugned award is well reasoned and legal one, needs no interference.

18. Having said so, the impugned award is upheld and the appeal is dismissed.

19. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

20. Send down the record after placing copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Santosh Kumar .....Respondent.

Cr. Appeal No.687 of 2008
Decided on : 12/11/2016

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989- Section 3(1)(x)- Informant stated that accused called him Chamar and Dagi in presence of many people – the accused was tried and acquitted by the trial Court- held in appeal that the informant and PW-2 had a grouse against the accused and the motive to implicate the accused falsely– there was a delay of 32-34 days in reporting the matter to police, which makes the prosecution case suspect- the trial Court had rightly acquitted the accused- appeal dismissed. (Para-10 to 14)

For the Appellant: Mr. R.S.Thakur, Addl. A.G.
For the Respondent: Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 17.07.2008 by the learned Special Judge, Hamirpur, Himachal Pradesh, in Sessions Trial No. 08 of 2007, whereby the learned trial Court acquitted the respondent (for short 'accused') for the offences charged.

2. The brief facts of the case are that the complainant Bohra Ram is a member of a Scheduled Castes known as "Chamar" as per the certificate of Caste Ex. PW-1/F on record. He was posted as Head Teacher at Government Primary School, Garsian. On 15th November, 2006, he made a statement Ex. PW-1/A under Section 154 Cr.P.C. before the police that on 11th October, 2006 at about 10.30 a.m., he was present in his school on duty. At that time, accused Santosh Kumar, Pradhan, Gram Panchayat, Hanoh approached him. The complainant offered him a chair and also showed him the Sarv Shiksha Abhiyan register on demand. The accused checked the register. The complainant had spent Rs. 350/- vide Resolution No. 32 in accordance with the rules. The accused asked him as to why he had spent the amount without his permission. The complainant told him that he had spent the amount as per the directions received from the Centre. Santosh Kumar was enraged by this reply and called him "TU BIGRA HUA HAI, TU CHAMAR HAI, TU DAGI HAI" and told him that he would see him and get him transferred. It was further stated that Salochna Devi, Lady Teacher, Kashmir Singh, Water carrier, Jayanti Devi and Gian Chand were also present there who witnessed the incident. It was further reported that he had referred the matter to the Director of Education also. It was requested that action may be taken against the accused in accordance with law. On the basis of the aforesaid statement, a case was registered against the accused vide formal FIR Ex. PW-7/A. During the investigation of the case, the police prepared the site plan Ex. PW-8/A. The police also took into possession the Caste Certificate Ex. PW-1/F, copy of Resolution No. 32, Ex. PW-1/C, copy of Bill of expenditure of Rs. 350/- Ex. PW-1/D, copy of compromise deed Ex. PW-1/E, copy of Circular issued by the Director Land Records carrying the letter of Scheduled Castes and Scheduled Tribes for H.P. Statements of witnesses were recorded and the challan was prepared against the accused under Section 3(I)(x) of the Act and the same was put up in the Court of Judicial Magistrate 1st Class, Court No. II, Hamirpur on 13th December, 2006. The learned Magistrate committed the trial to the Court of learned Special Judge, Hamirpur vide order, dated 7th May, 2007 after supplying copies of the challan to the accused.

3. After completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, a challan was prepared and filed before the learned trial Court.

4. A charge stood put to the accused by the learned trial Court for his committing offences punishable under Sections 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He chooses to lead evidence in defence.

6. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal in favour of the accused. 7. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The purported vituperative penal casteist utterances pronounced upon the complainant by the accused-respondent herein, stood testified by the complainant while deposing as PW-1. His testification has attained corroborative vigour from the testifications of other prosecution witnesses wherebeforewhom they stood purportedly pronounced by the accused-respondent herein. The testification of the complainant whereto corroborative vigour stood purveyed by the testifications of prosecution witnesses wherebefore whom the penal vituperative casteist utterances stood pronounced by the accused upon the complainant, would per se, if unbereft of any taint of inter se or intra se contradictions facilitate this Court to record an order of conviction upon the accused/respondent. However, even if the complainant besides Gian Chand, Kashmir Singh and Jayanti Devi wherebeforewhom the penal vituperative casteist utterances stood purportedly pronounced by the accused/respondent upon the complainant are bereft of any stain of any inter se or intra se contradictions occurring in their respective examinations in chief vis.a.vis. their respective cross-examination besides in their respective testifications, would not for reasons hereafterstated, foment, any conclusion from this Court qua the findings of acquittal recorded by the learned trial Court warranting interference, significantly when on an incisive reading of their testifications visible upsurgences occur qua theirs holding inimicality towards the accused whereupon hence they stand denuded of their probative tenacity conspicuously when given their evident proven inimicality vis.a.vis the accused/respondent herein spurs an inference qua theirs thereupon standing goaded to falsely testify qua the guilt of the accused. Also their proven inimicality erodes the truthfulness besides the creditworthiness of the prosecution witnesses whereupon obviously even if their respective testifications are bereft of any other uncreditworthy taint, their respective testifications merely on anvil of proven evident inimicality nursed by them qua the accused hence stand denuded of their vigour.

10. An incisive traversing of the record unfolds qua the accused while holding the office of Pradhan of the Gram Panchayat concerned his making a complaint against the complainant herein, complaint whereof stands comprised in Ext.DW-1/A wherewithin recitals are held qua the complainant herein unauthorisedly denying the respondent herein to access the school register. It is evident qua Ext.DW-1/A standing transmitted to the Chief Minister. Obviously thereupon it is inevitable to record a conclusion of prior to the institution of the instant complaint by PW-1 against the accused, the former nursing a grouse besides rearing a vendetta against the accused/respondent, expression whereof found its outlet in his recording a complaint against the accused-respondent, complaint whereof when stands obviously stained with a vice of vendetta besides malafides it holds no vigour besides the testification of PW-1 in consonance therewith stands denuded of its probative sinew.

11. Likewise, the testimony of PW-2 in whose presence the penal vituperative casteist utterances stood purportedly made by the accused/respondent also acquires a taint of interestedness besides a taint of its standing generated by malafides arising from the factum of his in his cross-examination acquiescing qua his wife lodging a complaint against him in the Gram Panchayat concerned embodying therein a grouse qua his not maintaining her. Also with his acquiescing in his cross-examination qua the aforesaid complaint on the aforesaid ground made against him by his wife before the Gram Panchayat concerned generating issuance of notice upon him by the accused/respondent significantly renders his testimony to be discardable especially when it stands reared by his thereupon nursing a vendetta against the respondent herein. Moreover, the vigour, if any, carried by the testification of PW-3 in purported corroboration to the testifications of PW-1 and PW-2 qua the charge to which the accused

respondent stood subjected to trial also stands belittled arising from the fact of his in his cross-examination acquiescing to the suggestion of one Manohar instituting a complaint before the accused/respondent against his mother alleging therein qua the latter uprooting his plants. In aftermath when alike the testimonies of PW-1 and PW-2 his testimony when also stands coloured by a taint of vendetta nursed by him against the accused respondent spurring from the latter holding an inquiry upon the complaint aforesaid made before him by one Manohar Lal against his mother rendering it hence to not acquire any probative sinew.

12. Apart therefrom the purported vituperative penal casteist utterances stood made by the accused respondent upon the complainant on 11th October, 2006 whereas an F.I.R qua the aforesaid factum comprised in Ext.7/A stood registered at the Police Station concerned on 15th November, 2006. Obviously a delay of 32 to 34 days has visibly occurred since the penal misdemeanor ascribed by PW-1 to the respondent vis.a.vis. it standing reported to the Police Station concerned. The aforesaid delay has remained inexplicated by way of any tangible sound explanation standing purveyed by the complainant. As a corollary, the omission of the complainant to with promptitude report the penal misdemeanor ascribed by him to accused respondent when construed in entwinement with the factum of the prime prosecution witnesses testifying qua the relevant occurrence with evident inimicality nursed by them vis.a.vis the accused/respondent herein begets an obvious inference of the entire incident unraveled by them holding no truth rather it being a sequel of concoction and invention.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned Special Judge has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Special Judge does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Dharam Singh ...Appellant.

Versus

Braham Dass ...Respondent.

RSA No.244 of 2008.
Reserved on : 07.11.2016.
Decided on : 15.11.2016.

Code of Civil Procedure, 1908- Section 100- Father of the plaintiff was murdered by the defendant- an injury was also caused to the plaintiff- plaintiff had become handicapped and was unable to work - a sum of Rs.1 lac was sought as damages – the suit was partly decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that version of the plaintiff was duly proved by his witnesses while the version of the defendant was not proved- a sum of Rs.50,000/- was rightly awarded as damages- judgment in the criminal case is relevant for establishing that defendant was convicted by the Criminal Court- appeal dismissed.

(Para-10 to 13)

For the appellant: Mr. Raman Sethi, Advocate.
For the respondent : Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal under Section 100 of the Code of Civil Procedure is maintained by the appellant against the judgment and decree dated 29.3.2006, passed by the learned Additional District Judge, Presiding Officer, Fast Track Court, Hamirpur, in Civil Appeal No.12 of 2000/303 of 2004, whereby the learned Appellate Court has affirmed the judgment and decree passed by learned Civil Judge (Junior Division), Court No.1, Hamirpur, in Civil Suit No.82 of 1992, dated 26.11.1999.

2. Briefly stating facts giving rise to the present appeal are that respondent/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for recovery of Rs. 1,00,000/- against the appellant/defendant (hereinafter referred to as 'the defendant') on account of the damages suffered by him due to the act and conduct of the defendant. It is averred that plaintiff's father late Shri Basant Ram, was murdered by the defendant intentionally on 11.5.1991 and defendant caused grievous and dangerous injuries to the plaintiff, as a result of which, he has become handicapped from his right hand and unable to work. Due to these grievous and dangerous injuries suffered by him, he remained in District Hospital, Hamipur, from where he was referred to IGMC, Shimla and further referred to Chandigarh, for treatment and for this travelling, he had to spend about Rs. 14,000/- in all including the treatment. In addition to it, he had to spend about Rs. 10,000/- for performing the last rites of his father, who was murdered by the defendant. It has been further averred that his deceased father was able bodied person, being Carpenter, earning Rs. 70/- per day. The father of the plaintiff suffered loss of income approximately amounting to Rs. 20,000/- to Rs. 25,000/-. Plaintiff has also claimed that the act and conduct of the defendant rendered the plaintiff, as handicapped seeking medical advise and so, unable to earn his livelihood as Carpenter, as the plaintiff has claimed to be earning Rs. 70/- per day before the occurrence and in addition to that the plaintiff has been forced to seek medical treatment and thereby suffered loss of Rs. 25,000/-, by getting treatment in PGI, Chandigarh, as the plaintiff has to be accompanied by one attendant for coming and going to PGI, Chandigarh. The plaintiff has also claimed to have suffered mental agony and torture, as he has been deprived of the love and affection of his father and thereby the plaintiff has claimed total damages of Rs. 1,00,000/- from the defendant. The plaintiff has further averred that the defendant was tried and sentence to life imprisonment for an offence punishable under Section 302 of the Indian Penal Code as well as under Section 326 of the Indian Penal Code.

3. The suit was resisted and contested by raising preliminary objections qua limitation and cause of action. On merits, it has been contended that the defendant has denied the factum of committing murder to the father of the plaintiff as well as causing injuries to the plaintiff. However, the defendant has admitted the relationship between of the plaintiff and his father. The defendant has also denied the capacity to earn to the father of the plaintiff as well as to the plaintiff. The defendant has denied that the plaintiff and his father were working as Carpenter and claimed that the plaintiff was living separately from his deceased father. There is no question of depriving the plaintiff from the earning of his father as well as the loss of any love and affection. The defendant has admitted that in a case of murder registered against him, he has been convicted and sentenced to undergo life imprisonment, but the appeal against the same is pending before Hon'ble Apex Court. The defendant has denied any liability to pay any damages to the plaintiff.

4. The learned trial Court framed following issues on 27.12.1993 :

"1. Whether the plaintiff is entitled to damages as claimed, if so, to what extent? OPP.

13. Whether the suit is time barred ? OPD.

14. Relief."

5. The learned trial Court has decided Issue No.1 partly in favour of the plaintiff, Issue No.2 against the defendant and partly decreed the suit. Thereafter, the appeal was maintained by the defendant before learned Addl. District Judge, Presiding Officer, Fast Track Court, Hamirpur and the same was dismissed. Hence, the present regular second appeal, which was admitted on the following substantial questions of law:

> "1. Whether the judgment of both the Courts below can be upheld as it ignores important documents/oral evidence on record of the case ?
>
> 2. Does the conviction of the appellant have any bearing on the damages granted by the Civil Court ?"

6. Learned counsel appearing on behalf of the plaintiff has argued that the learned Courts below has failed to take into consideration the fact that the plaintiff was not in a position to make the payment of damages, as he was in jail. He has further argued that the damages awarded are on the higher side.

7. On the other hand, learned counsel appearing on behalf of the defendant has argued that the learned Court below has only awarded damages of Rs. 50,000/-, for such a great loss to the plaintiff i.e. Rs. 25,000/- for expenditure on the treatment, physical and mental agony due to the injuries inflicted by the defendant including the loss of love and affection and Rs. 25,000/- for loss of future earnings, as a result of which the injuries inflicted on his both hands. There is no ground to interfere with the well reasoned judgment passed by the learned Courts below. He has argued that the appeal deserves dismissal alongwith costs.

8. In rebuttal, learned counsel appearing on behalf of the plaintiff has argued that the plaintiff has already suffered imprisonment, so the appeal may be allowed.

9. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

10. The plaintiff in order to prove its case has examined as many as ten witnesses. PW-1 MHC Sukhdev Singh to prove the FIR. PW-2 Dhian Singh, who is taxi driver to prove the expenses for transportation. PW-3 Dina Nath, has deposed that Basant Ram was murdered by defendant Dharam Singh, as Basant Ram was working as Carpenter, who was earning Rs. 60/- or Rs. 70/- per day and was aged about 45 years having good health. He has also deposed that the defendant has cut both the hands of the plaintiff and the plaintiff also used to work as Carpenter and earning Rs. 80/- to Rs. 100/- per day. He has also stated that the plaintiff got treatment of his hands from Chandigarh by spending Rs. 50,000/- or Rs. 60,000/-. PW-4 Amar Nath, has also deposed that Basant Ram used to work as Carpenter and was earning Rs. 70/- per day, who was having good health having 45 to 50 years of age. He has deposed that the last rites of the father of the plaintiff were performed by the plaintiff by spending about Rs. 20,000/- to Rs. 25,000/-. He has further deposed that both the hands of the plaintiff were cut, the plaintiff is unable to work and has been deprived earn Rs. 60/- to Rs. 100/- per day, while working as Carpenter and in addition to that the plaintiff was forced to get treatment at Chandigarh. PW-5 Dr. N.K. Galoda, has proved on record that the plaintiff was referred to PGI, Chandigarh, for getting treatment. PW-6 Kamal Dev Sharma, also a witness to the receipt Ex.PW6/A, vide which the plaintiff was taken to Chandigarh. PW-8 Dr. M.K. Pathak, has proved on record the injuries on the person of plaintiff, vide MLC Ex.PW8/A, as injury No.1 on the left arm a curbed incised injury in which muscle, nerves, arteries and veins were found to be severed and the injuries have been opined to be grievous in nature and another incised injury on the right arm in which the muscles, veins, arteries and lower aspect of ulna were found to be severed and these injuries have been opined to be grievous in nature with sharp edged weapon like 'darat'. PW-9 Pritam Singh, has proved on record the discharge slip of the plaintiff from Chandigarh hospital with compound fracture of right ulna and cut flexar tendons and crush in its blend between the period of 12.5.1991 to 16.5.1991 and 21.6.1991 to 29.6.1991.

11. PW-10 Braham Dass (plaintiff), has specifically deposed with respect to the expenses, he has incurred for his treatment as well as for the loss of earning because both the

hands were cut and ultimately led to the disability, as he was Carpenter and even after treatment, he could not work properly. Taking into consideration the fact that the plaintiff was working as an unskilled labourer and the defendant has cut his both hands and killed his father. So, in these circumstances, it cannot be said that the amount awarded on account of the loss of future earning to the extent of Rs. 25,000/-, is at all excessive. At the same point of time, the plaintiff has proved that he has spent an amount not less than Rs. 25,000/-, for his treatment in various hospitals on transportation. So, I find that an amount of Rs. 25,000/-, awarded on account of the expenditure of treatment, physical and mental agony due to the injuries inflicted by the defendant, loss of love and affection of his father, who was killed by the defendant cannot be said to be excessive. So, substantial question of law No.1 is decided accordingly holding that the learned Courts below has considered all the documents oral as well as documentary evidence in totality and the judgments of the learned Courts below cannot be said to be perverse. Substantial question of law No.2 is decided accordingly holding that the conviction of the plaintiff, as one ingredient and other evidence which has come on record is considered. The plaintiff examined as many as ten witnesses and proved his case. Though, the defendant has also examined Smt. Sharda Devi and himself, as witness, but has failed to establish his case. So, this Court finds that the damages to the extent of Rs. 50,000/- granted by the Civil Court is after appreciating the facts which are brought on record. However, the judgment of conviction has only bearing in the case to the extent that the defendant was convicted in the case and nothing else.

12. From the above, it is clear that the findings arrived at by the learned Courts below are just, reasoned and after appreciating the evidence, which has come on record to its true perspective. Hence, needs no interference.

13. With these observations, the appeal of the appellant/plaintiff being without any merit deserves dismissal, hence the same is dismissed. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Jagdish Chand and others ....Petitioners.

Versus

State of Himachal Pradesh and another ....Respondents.

Cr.MMO No.141 of 2016.
Reserved on : 08.11.2016.
Date of Decision : 15.11.2016.

Code of Criminal Procedure, 1973- Section 498- An FIR was registered for the commission of offences punishable under Section 498-A and 406 read with Section 34 of Indian Penal Code – the matter has been compromised between the parties- hence, the prayer was made for quashing the proceedings- held that criminal proceedings can be quashed to meet ends of justice - where the Court is satisfied that parties have settled the dispute amicably, FIR, complaint and subsequent proceedings can be quashed – petition allowed -FIR and subsequent proceedings quashed. (Para-6 to 12)

Cases referred:

B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the petitioners Mr. Rahul Jaswal, Advocate.

For the respondents — Mr. Virender Kumar Verma, Addl. Advocate General, Mr. Pushpinder Singh Jaswal, Dy. Advocate General and Mr. Rajat Chauhan, Law Officer, for respondent No.1.
Mr. Sunny Modgill, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

This petition under Section 482 of the Code of Criminal Procedure (*for short 'Code'*) has been preferred by the petitioners for quashing of FIR No.201 of 2013, dated 27.12.2013, registered at Police Station, Amb, District Una, under Sections 498-A, 406 read with section 34 of the Indian Penal Code, pending before learned Addl. Chief Judicial Magistrate, Amb, District Una, H.P.

2. Briefly stating facts giving rise to the present petition are that because of the matrimonial dispute and the petitioners have been implicated in the aforementioned FIR, on the statement of Smt. Kanta Devi (respondent No.2) alleging therein that the marriage between petitioner No.3 and respondent No.2 was solemnized on 5.5.2011, according to Hindu rites and ceremonies. Out of the said wedlock one male child, namely, Surinder was born. The father of respondent No.2 gave a sufficient 'Istridhan' to the petitioners at the time of marriage. After the birth of son of petitioner No.3, all the petitioners started ill treating and maltreating with respondent No.2 regarding insufficient dowry articles given to them at the time of marriage as well as the birth of son of respondent No.2 and also started false allegations towards her character and using unsocial language, as respondent No.2 having illicit relation with some other person in her parental village and during the period of delivery. Respondent No.2 got decease and made request to petitioner No.3 to get treatment from some good hospital in District Kangra, H.P, but petitioner No.3, who is very clever person linger on the matter on one pretext or another. Respondent No.2 refused to took the treatment from the local "*Dongi Chela*", then all the petitioners mercilessly beaten respondent No.2 in the presence of other family members. Respondent No.2 in that compelling circumstances complaint about the behaviour of petitioner No.3 to her parents and the parents of respondent No.2 inquired from the petitioners regarding their inhuman behaviour. In the month of November, 2012 when respondent No.2 came in her parental house at village Ripoh Munchlian, Tehsil Amb, District Una, H.P, with the consent of petitioner No.3, on the occasion of "Tikka" ceremonies, thereafter father of respondent No.2 asked petitioner No.3 for the aforesaid illegal act and conduct towards her and also discuss about the decease of respondent No.2. The petitioners have treated respondent No.2 in such a cruelty manner and have deserted her from a matrimonial house and have caused mental and physical torture and also neglected to maintain respondent No.2 alongwith her minor son and so, respondent No.2 also filed a petition under Section 125 Cr. P.C before the learned Court below. After registration of the case, petitioners and respondent No.2 have compromise the matter. Roop Lal (petitioner No.3) and Smt. Kanta Devi (respondent No.2) recorded their statement before the learned Court below on 18.11.2015 in a Criminal Petition under Section 125 Cr. P.C, for granting maintenance allowance filed by respondent No.2. Now, both the parties have entered into compromise and do not want to pursue the case against each other.

3. Learned counsel for the petitioners has argued that as the parties have compromised the matter, vide Mutual Divorce Deed (Annexure P-3), no purpose will be served by keeping the proceedings against the petitioners and the FIR/Challan pending before the learned Court below may be quashed and set aside.

4. On the other hand, learned Additional Advocate General has argued that the offence is not compoundable, so the petition be dismissed.

5. Learned counsel for respondent No.2 has argued that the parties have entered into compromise and so, the proceedings pending before the learned Court below be quashed.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

7. Their Lordships of the Hon'ble Supreme Court ***B.S. Joshi and others*** vs. ***State of Haryana and another***, (2003) 4 SCC 675, have held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> [6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.
>
> [8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.
>
> [15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.

8. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667, have held that the ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

> [27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-
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> "Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

> [28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.
>
> [35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.
>
> 36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.
>
> [38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.

9. Their Lordships of the Hon'ble Supreme Court in ***Jitendra Raghuvanshi and others*** vs. ***Babita Raghuvanshi and another,*** (2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

> [13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application

filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.C.R.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore."

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties have already compromised the matter, which is placed on record. However, it is made clear that Smt. Kanta Devi (respondent No.2) doesn't want to continue with the present complaint in view of the compromise, the proceedings pending before the learned Court below are quashed, but as far as the right of the son of Roop Lal (petitioner No.3) and Smt. Kanta Devi (respondent No.3) is concerned, he can claim for maintenance from his parents out of the property of paternal as well as maternal side by way of inheritance. So, this fact cannot be compromised by anyone in this

world. As far as Roop Lal (petitioner No.3) is concerned, though as per the compromise Smt. Kanta Devi (respondent No.2) is taking the care of her son, but his right to inherit his father, paternal grand father, his coparcenary right, will remain intact and his father will never take any action in a manner so as to reduce or limit of the share of son of Roop Lal (petitioner No.3) and Smt. Kanta Devi (respondent No.2) in the ancestral property.

11. Accordingly, taking holistic view of the matter and looking into all attending facts and circumstances, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly FIR No. 201 of 2013, dated 27.12.2013, under Sections 498-A, 406 read with section 34 of the Indian Penal Code, registered at Police Station, Amb, District Una, is ordered to be quashed. Since FIR No. 201 of 2013, dated 27.12.2013, under Sections 498-A, 406 read with section 34 of the Indian Penal Code, registered at Police Station, Amb, District Una, has been quashed, consequent proceedings/Challan pending before the learned Addl. Chief Judicial Magistrate, Amb, District Una, H.P. against the petitioners, are thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion.

12. The petition stands allowed in the aforesaid terms. Pending application (s), if any, also stand (s), disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Krishan Lal Khimta .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

Cr.MMO No. 282 of 2016
Reserved on: 07.11.2016
Decided on: 15.11.2016

Code of Criminal Procedure, 1973- Section 482- Accused V met with an accident and was in a coma for one month – Medical Board concluded that he was unable to defend himself – trial was ordered to be stayed – it was ordered that the accused be examined every three months-aggrieved from the order, father of the accused filed a petition – held, that as per Medical Board V is not showing any sign of improvement – the petitioner submitted that he is incurring expenses on bringing V to the Medical Officer after three months- direction issued to the trial judge to re-consider the period of three months. (Para-8 to 10)

For the petitioner: Mr. Nitin Thakur, Advocate.
For the respondent: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner under Section 482 of Criminal Procedure Code (hereinafter referred to as 'Cr.P.C') seeking modification of order dated 29.05.2014, passed by the learned Sessions Judge (Forest), Shimla, in Sessions Trial No. 15-S/7 of 2012/09, whereby the trial against the son of the petitioner, who was booked as an accused alongwith another co-accused, was ordered to be stayed, as he was not found to be in a fit mental condition to defend himself. The other co-accused was acquitted by the learned Sessions Judge (Forest) Shimla, through its judgment dated 19.06.2016.

2. Briefly stating the facts giving rise to the present case, as per the petitioner, are that son of the petitioner (hereinafter referred to 'Vijay Kumar') was named as an accused in FIR No. 1 of 2008, dated 01.01.2008, registered under Sections 148, 307, 326, 324/149 of the Indian Penal Code (hereinafter referred to as 'IPC'). During the pendency of the trial, Vijay Kumar met with an accident on 09.03.2009 and remained hospitalized and was in a state of coma for a month. In order to ascertain his mental condition, the learned Sessions Judge considered the medical reports from Medical Superintendent, IGMC and Director/Medical superintendent, PGI, Chandigarh, and the learned Court below on 29.05.2014, to its satisfaction after recording the statement of the Chairman of the Medical Board, who conducted the examination of the son of the petitioner, after considering the report of the Medical Board, concluded that the son of the petitioner was not in a condition to defend himself. By medium of impugned order dated 29.05.2014, the trial against the son of the petitioner was ordered to be stayed.

3. Pursuant to the direction of the learned Court below, the petitioner herein, after an interval of every three months, medically examined his son from the Medical Board at IGMC, Shimla, and also from the Department of Psychiatry PGIMER, Chandigarh, however, the conditions of his son did not improve. The latest reports suggest that his mental condition is unlikely to improve. The petitioner has further submitted that he is the only bread winner of his family and is also suffering from heart disease. He is looking after an unmarried daughter of 36 years age, who was born as an unhealthy child, and as on date she is suffering from meningoencephalitis, which is the inflammation of the brain. As per the petitioner he is now being saddled with medical expenses of his ailing son. The income of the petitioner is wholly dependent upon the apple crop and his income fluctuates due to climatic conditions affecting the crop.

4. As per the petitioner, the trial against the co-accused stands completed and he is acquitted. This fact is fortified by Annexure P-5 (judgment of the trial Court, dated 19.06.2016). As the mental condition of Vijay Khimta (son of the petitioner), who is an accused in the above referred Sessions Trial, is very unlikely to improve, the petitioner is seeking modification of impugned order dated 29.05.2014.

5. The respondent filed reply to the petition, wherein it is contended that son of the petitioner (Vijay Khimta) was involved in FIR No. 1 of 2008, registered in Police Station East, Shimla, under Section 148, 307, 326, 324 and 149 IPC. As per the respondent, the allegations against the son of the petitioner and his accomplice were that on 31.12.2007 at about 6:30 p.m., complainant, Akshay Bhardwaj, received a call from one Naveen Jasal asking him to come to Brockhost, but he refused. On relentless requests, the complainant alongwith his friends Joginder and Rishi Dhawan went to Brockhost, at about 07:45 p.m., where Vijay Khimta and his companions were present. Vijay Khimta attacked the complainant and his friends by inflicting *darat* (sickle) blows, causing serious injuries to them. Police registered an FIR against the accused persons and as some of the accused persons were juvenile, *challan* against them was filed before the Juvenile Justice Board, Shimla. It is further contended that during the pendency of the trial accused Vijay Khimta was found mentally unsound to defend himself, so the trial against him was stayed. The learned Sessions Judge (Forest), acquitted the other accused, namely, Sunny vide judgment dated 19.06.2014 and observed that file after its due completion be consigned to Record Room to be recalled as and when accused Vijay Khimta recovers from his mental illness and is declared fit to defend himself.

6. The respondent has averred that the learned Court below passed the impugned order after taking into consideration all the germane medical record of accused Vijay Khimta. As per the respondent, the son of the petitioner inflicted *darat* blows on the person of Akshay and Joginder, due to which they suffered serious injuries. Latest medical record has not been annexed with the petition so as to highlight his current mental condition and the annexed medical record is of the years 2011-2012. In view of settled legal proposition of Cr.P.C. the trial against the son of the petitioner will resume as and when he ceases to be of unsound mind and capable of defending himself.

7. I have heard the learned counsel for the petitioner as well as learned Additional Advocate General for the respondent/State and have also gone through the record carefully.

8. At this stage, this Court takes into consideration the facts that as per the Medical Board, the son of the petitioner is not showing any signs of improvement and the averments made by the learned counsel for the petitioner that it is quite difficult for the petitioner to bring his son after every three months from his village to IGMC Hospital for his medical examination. The petitioner has also prayed that this period of three months may be enhanced. Evidently, the trial against the accused is pending adjudication before the learned Sessions Judge (Forest), Shimla, though the co-accused stands acquitted and some of the accused, who were juveniles at the time of the occurrence, are being proceeded before the learned Juvenile Justice Board, Shimla. As far as the son of the petitioner is concerned, this Court finds that the learned Sessions Judge (Forest), Shimla, after hearing the learned counsel for the parties, passed the impugned order dated 29.05.2014, which is extracted in *extenso* as under:

> *"Statement of Dr. Ramesh Chand, Chariman of the Medical Board recorded. In view of the statement of dr. Ramesh Chand, Chairman of the Medical Board and the report of the Medical Board Ext. CA, at this stage it is proved to the satisfaction of this Court that accused Vijay Khimta is not fit to defend himself due to his mental health. Therefore, the trial of the accused Vijay Khimta is stayed till he recovered from his mental illness. The father of the accused Shri Krishan Lal, who has taken the custody of accused Vijay Khimta is directed through Sh. Pawan Thakur Counsel for the accused to submit status report of the accused after every three months commencing from 01.06.2014. However, the trial against accused Sachin will continue."*

9. This Court finds that the ends of justice would be subserved in case the impugned order dated 29.05.2014 is set-aside and the learned Sessions Judge (Forest) Shimla, is directed to consider the matter afresh with respect to mental illness of the son of the petitioner as well as the time gap of three months for production of the accused before the Medical Board.

10. Keeping in mind the above set of circumstances, the impugned order dated 29.05.2014 is set-aside with a direction to the learned District Judge (Forest), Shimla, to decide the matter afresh with respect to mental illness of the accused and his production before the Medical Board after interval of every three months.

11. The parties are directed to appear before the learned Sessions Judge (Forest), Shimla, on ***5th December, 2016.*** In view of the above, the petition, as also pending application(s), if any, stand(s) disposed of. However, the parties are left to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

CWPs No. 3326 & 3820 of 2015
Reserved on: 09.11.2016
Decided on: 15.11.2016

CWP No. 3326 of 2013:

Neelam Sharma & another. .....Petitioners.

Versus

State of Himachal Pradesh & others. .....Respondents.

CWP No. 3820 of 2015:

Meena Sharma & others. .....Petitioners.

Versus

State of Himachal Pradesh & others. .....Respondents.

Constitution of India, 1950- Article 226- Petitioners had done B.Sc. Medical Lab Technology from respondent No.4 – it was mentioned in the prospectus and the notice that students would be eligible for obtaining degree in B.Sc. in para medical – petitioners approached respondent No.2 for registration of their names as medical Lab Technologists, however, respondent No.2 refused to enter their names on the basis that petitioners had not done higher secondary in science stream and they are ineligible for registration- the petitioners had done B.Sc. after fully understanding the fact that they would be registered with respondent No.2- hence, direction issued to respondent No.1 to issue appropriate guidelines –respondent No.2 directed to consider the case of the petitioners in accordance with the guidelines. (Para-9 to 12)

CWP No. 3326 of 2015:

For the petitioners:	Mr. S.D. Gill, Advocate.
For the respondents:	Mr. Virender K. Vrma, Adl. AG, with Mr. Rajat Chauhan, Law Officer, for respondent No. 1/State. Mr. S.K. Banyal, Advocate, for respondent No. 2. Mr. V.B. Verma, Advocate, for respondent No. 3. Mr. Arun Kumar, Advocate, for respondent No. 4.

CWP No. 3820 of 2015:

For the petitioners:	Mr. S.D. Gill, Advocate.
For the respondents:	Mr. Virender K. Vrma, Adl. AG, with Mr. Rajat Chauhan, Law Officer, for respondent No. 1/State. Mr. S.K. Banyal, Advocate, for respondent No. 2. Mr. V.B. Verma, Advocate, for respondent No. 3. Mr. Arun Kumar, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

Since common questions of facts and law are involved in the both these writ petitions, they are taken up together for disposal.

2. The petitioners have maintained these petitions seeking appropriate writ or directions to the respondents, especially to respondent No. 2, Para Medical Council (hereinafter referred to as 'PMC') to give registration numbers to the petitioners in PMC as Medical Lab Technologists. The petitioners are also seeking a direction to respondent No. 1/State for registration of their names with the PMC.

3. Succinctly, as per the petitioners, the facts giving rise to the present petitions are that they had done B.Sc. in Medical Lab. Technology from respondent No. 4/University. It is further contended by the petitioners that in the notice published by respondent No. 4 as well as in the prospectus it was clearly mentioned that students of any stream are eligible for obtaining degree in B.Sc. Para Medical. Classes were conducted by respondent No. 3 on behalf of respondent No. 4/University and the petitioners successfully qualified all the examinations. After completion of the degree, the petitioners approached respondent No. 2 for registration of their names with PMC as Medical Lab. Technologists, however, respondent No. 2 refused to enter their names solely on the basis that the petitioners have not done higher secondary in science stream, hence rendered them ineligible for the registration.

4. Reply to the petitions were filed by the respondents and respondent No. 2 (PMC) in its reply has averred that Para Medical Council is a statutory organization of Himachal Pradesh Government under Section 3 of the H.P. Para Medical Council Act, 2003. As per respondent No. 2, the primary functions of the Council is to register Himachal Pradesh para-medicals and the staff working in the government hospitals, private institutions and private hospitals within the state of Himachal Pradesh. It also registers various para medical officials as per qualifications

mentioned in the Schedule of H.P. Para Medical Council Act. On merits, respondent No. 2, has submitted that PMC vide its meeting dated 23.02.2008 decided that para-medicals are required to register their qualification.

5. Though the petitioners have specifically averred that the similarly situated persons before 2008 were registered with the Para Medical Council, but in reply thereto, respondent No. 2 has stated that in its meeting held on 23.02.2008 it was decided as under:

> *"Registration of Para-Medicals w.e.f. 2008*
>
> *It has been decided that the registration of Para-Medicals (laboratory Technician and Radiographer) shall be done if they fulfill the qualification 10+2 (medical) with 2 year Diploma from recognized institution. Candidates possessing BSc Medical laboratory Technology qualification should have 3 years Degree course from recognized institution after 10+2 qualification."*

6. From this it is clear that it is three years' degree course after 10+2 from a recognized institution. It is nowhere mentioned that 10+2 qualification is required to be in science stream only. Now whether it is an omission or the respondents wanted to have only 10+2/Higher Secondary qualification in any stream is not clarified, though from the stand of the respondents it seems that they wanted 10+2/Higher Secondary in medical stream.

7. At the same point of time, if prospectus of respondent No. 4 /University is seen, under the head salient features, it specifically states as under:

> *"Salient Features*
>
> *UGC Nomenclature*
>
> *All courses offered by PTU are as per the nomenclature and guidelines of University Grants Commission that makes these courses universally acceptable.*
>
> *DEC Approval*
>
> *All courses offered by PTU under this program had been approved by DEC, Distance Education Council, IGNOU, New Delhi, vide its letter no. F.1-1/2006(JS/SU) dated 6th January, 2006 with retrospective effect."*

8. Likewise, Indira Gandhi National Open University (IGNOU) has issued a letter (Annexure R-4/2) which reads as under:

> *"With reference to your letter dated 20th August, 2009, regarding the above subject, I am conveying herewith the decisions of the Distance Education Council taken at its meeting held on 10th March, 2010:*
>
> *i) Territorial jurisdiction for Distance Education Programmes: (Item 35.01). the Council resolved that Distance Education and On-line Education cannot have the territorial jurisdiction and in the case of Central universities and State Universities, the territorial jurisdiction shall be as per the Act, Statutes and Distance Education regulations of the respective Universities for all their programmes.*
>
> *ii) Recognition of PTU Distance Education Programmes: The Distance Education Council noted the acceptance of the compliance report submitted by the Punjab Technical University in response to the UGC-AICTE-DEC joint committee's recommendations. The Council ratified the decision (item 35.06.vi) taken by the Chairman in accepting the compliance report and 2012 for all programmes through Distance Mode, as recommended by the joint committee. The University may offer the programmes following these provisions.*
>
> *All courses offered by PTU are as per the nomenclature and guidelines of University Grants Commission that makes these courses universally acceptable.*
>
> *DEC Approval*

All courses offered by PTU under this program had been approved by DEC, Distance Education Council, IGNOU, New Delhi, vide its letter no. F.1-1/2006(JS/SU) dated 6th January, 2006 with retrospective effect."

9. Manifestly, the petitioners have done B.Sc. degree after fully understanding the fact that they will be registered with respondent No. 2. In these circumstances, this Court is not going into the stand taken by respondent No. 2 that the petitioners cannot be registered, as Government of Himachal Pradesh has not decided to part this education in the private colleges in Himachal Pradesh, but the above discussion shows that the petitioners are either eligible for registration or they are misguided/misled by respondents No. 3 and 4 and their precious time of three years is wasted. In these circumstances, this Court finds that as it is for respondent No. 2 (PMC) to take a decision in this matter with regard to registration of the petitioners and respondent No. 1 has to issue appropriate guidelines for this purpose, which has not been issued, therefore, respondent No. 1 is directed to consider the case of the petitioners in the light of the observations made hereinabove as well as in the writ petition and issue appropriate directions and respondent No. 2 (PMC) is directed to consider the case of the petitioner in right perspective in view of the observations made hereinabove, as well as seek guidance for respondent No. 1.

10. Respondent No. 3 (Institution) is functioning within the State of Himachal Pradesh under respondent No. 4 (Punjab Technical University) and it was incumbent upon respondents No. 1 and 2 to have monitored this institution and if the institution is awarding degree which is not recognized then respondents No. 1 and 2 must have taken proper care. At this stage, the only direction, which this Court deems fit in the facts and circumstances of the case, can be passed is that respondents No. 1 and 2 will treat these writ petitions as representations of the respective petitioners and after considering the available material and the observations made hereinabove, take appropriate decision in the matter within a period of two months from today. Needless to say, if the degrees of the petitioners, after spending three precious years of their lives, are not of any value, then respondents No. 1 and 2 should take appropriate action against respondents No. 3 and 4. It is also needless to say that the petitioners have right to get compensation under the ordinary law, if their degrees are not recognized, after leading cogent and reliable evidence in appropriate civil proceedings.

11. The petitioners (in CWP No. 3326 of 2015) have also filed an application, bearing CMP No. 7982 of 2015, before this Court for allowing them to participate in the test/interview which was published/notified for the post of Medical Lab. Technologists. As the petitions have already been ordered to be treated as representations of the petitioners, this prayer of the petitioners be also considered by respondents No. 1 and 2.

12. In view of the above, the petitions stand disposed of. However, in view of peculiar facts and circumstances of the case, parties are directed to bear their own costs. Pending application(s), if any, stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Shri Rajiv Bansal son of late Shri Mohinder Kumar Bansal ..Revisionist/Judgment Debtor

Versus

Shri Mange Ram Chaudhary son of Shri Prittam Singh & others ..Non-Revisionists/Decree Holder

Civil Revision No. 57 of 2015
Order Reserved on 29th September 2016
Date of Order 15th November 2016

Code of Civil Procedure, 1908- Order 21 Rule 1- Section 47- Objections were filed to the execution petition, which were dismissed by the Executing Court – held in revision that Executing

Court cannot go behind the decree – plea that provisions of Section 118 of H.P. Tenancy and Land Reforms Act were violated could have been taken in a suit but was not taken – this objection cannot be taken before the Executing Court – Court cannot disturb finding of fact in exercise of revisional jurisdiction- revision dismissed. (Para- 8 to 12)

Cases referred:

Narinder Singh vs. Kishan Singh, AIR 2002 SC 2603
V.D. Modi vs. R.A.Rehman, AIR 1970 SC 1475
Hira Lal vs. Kali Ram AIR 1962 SC 199
E.T.G.U.S. Society vs. M/s S.W.Corporation AIR 1971 Bombay 91
H.Rahim-Ud-Din vs. Tirlok Singh AIR 1971 Delhi 319
Manohar Lal vs. Topan Ram, AIR 1964 Punjab 311
Narmada Devi vs. Ram Nandan Singh AIR 1987 Patna 33 (Full Bench)
Masjid Kacha Tank Nahan vs. Tuffail Mohammed, AIR 1991 SC 455
Municipal Corporation Indore vs. K.N. Palsikar AIR 1969 SC 580
P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another AIR 1995 SC 1357
Gurdial Singh vs. Raj Kumar Anjela AIR 2002 SC 1004.

For the Revisionist:	Mr. P.S. Goverdhan, Advocate
For Non-Revisionist No. 1:	Mr. Neeraj Gupta Advocate
For otherNon-revisionists.:	None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of the Code of Civil Procedure 1908 against order passed by learned Executing Court dated 6.12.2013 and against order passed by learned Appellate Authority whereby learned Appellate Authority affirmed the order of learned Executing Court.

Brief facts of the case

2. Decree holder namely Mange Ram filed civil suit No. 213/1 of 1991 title Mange Ram vs. Mohinder Kumar pleaded therein that judgment debtor has illegally raised the retaining wall upon the land of decree holder measuring 11 sq. metres. Mange Ram also filed civil suit No. 214/1 of 1991 title Mange Ram vs. Hem Lata pleaded therein that judgment debtor Hem Lata has encroached 8 sq. metres of land owned by decree holder. Decree holder sought relief of mandatory injunction in both civil suits and in alternate decree holder also sought relief of compensation.

3. Learned Trial Court clubbed civil suits No. 213/1 of 1991 and civil suit No. 214/1 of 1991 and disposed of both civil suits by way of common judgment. Learned Trial Court dismissed both civil suits filed by Mange Ram. Thereafter Mange Ram filed appeal before learned Appellate Court. Learned Appellate Court also dismissed both appeals filed by Mange Ram. Thereafter Mange Ram filed RSA No. 143 of 2002 title Mange Ram vs. Hem Lata and also filed RSA No. 144 of 2002 title Mange Ram vs. Mohinder Kumar Bansal (died) through LRs Vikas Bansal and others before Hon'ble High Court of H.P. Hon'ble High Court on 4.9.2012 disposed of both RSAs bearing Nos. 143 of 2002 and 144 of 2002 by way of common judgment. Hon'ble High Court of H.P. set aside the judgment and decree passed by learned Trial Court and Appellate Court and decreed both civil suits filed by Mange Ram. Hon'ble High Court of H.P. passed decree for compensation of Rs. one lac in civil suits No. 213/1 of 1991 and passed decree of compensation of Rs.75000/- (Rupees seventy five thousand) in civil suit No. 214/1 of 1991.

4. Thereafter decree holder filed execution petition before learned Trial Court. Judgment debtors filed objections before learned Executing Court and objections were dismissed

by learned Executing Court and thereafter order of learned Executing Court was affirmed by learned Additional District Judge Solan on 27.11.2014.

5. Feeling aggrieved against order of learned Executing Court and learned Appellate Court revisionist/judgment debtor namely Rajiv Bansal filed present civil revision petition under Section 115 of Code of Civil Procedure 1908.

6. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist No.1 and Court also perused entire record carefuly.

7. Following points arise for determination in civil revision petition:-

Point No.1 Whether revision petition filed under Section 115 of Code of Civil Procedure 1908 is liable to be accepted as mentioned in memorandum of grounds of civil revision petition?

Point No.2 Relief.

Findings upon point No.1 with reasons

8. Submission of learned Advocate appearing on behalf of revisionist that decree holder has flouted Section 118 of H.P. Tenancy and Land Reforms Act 1972 and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that in RSA No. 144 of 2002 Mohinder Kumar died during pendency of RSA and thereafter his legal representatives were impleaded as co-party in RSA No. 144 of 2002 before Hon'ble H.P. High Court. It is also proved on record that Rajiv Bansal was also impleaded as legal representative of deceased Mohinder Kumar in RSA No. 144 of 2002 before Hon'ble High Court of H.P. Court is of the opinion that plea regarding violation of Section 118 of H.P. Tenancy and Land Reforms Act 1972 ought to be taken by revisionist in RSA No. 144 of 2002 because in RSA No. 144 of 2002 revisionist Rajiv Bansal was impleaded as co-party. RSA No. 143 of 2002 and RSA No. 144 of 2002 were finally disposed of by Hon'ble High Court of H.P. on 4.9.2012 by way of consolidated judgment and same attained the stage of finality. Revisionist did not file any SLP before Hon'ble Apex Court of India against judgment and decree passed by Hon'ble High Court of H.P. in RSA No. 143 of 2002 and RSA No. 144 of 2002.

9. It is well settled law that learned Executing Court cannot question correctness or validity of decree except where decree is passed without jurisdiction and where decree is passed against dead person. Judgment debtor cannot be allowed to prevent decree holder from getting full benefit of decree. ***See AIR 2002 SC 2603 Narinder Singh vs. Kishan Singh. See AIR 1970 SC 1475 V.D. Modi vs. R.A.Rehman. See AIR 1962 SC 199 Hira Lal vs. Kali Ram. See AIR 1971 Bombay 91 E.T.G.U.S. Society vs. M/s S.W.Corporation. See AIR 1971 Delhi 319 H.Rahim-Ud-Din vs. Tirlok Singh. See AIR 1964 Punjab 311 Manohar Lal vs. Topan Ram.***

10. It is well settled law that after amendment in CPC vide Act No. 104 of 1976 w.e.f. 1.2.1977 order passed under Section 47 by learned Executing Court is not decree as define in Section 2 (2) CPC. Section 47 of Code of Civil Procedure 1908 is omitted from definition of decree vide amendment No. 104 of 1976. ***See AIR 1987 Patna 33 (Full Bench) Narmada Devi vs. Ram Nandan Singh.***

11. Submission of learned Advocate appearing on behalf of revisionist that grave miscarriage of justice has been caused to revisionist by learned Executing Court and further submission of learned Advocate appearing on behalf of revisionist that order of learned Executing Court is *ipso facto* contrary to law is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law High Court cannot reverse the findings of facts of learned Executing Court in revision petition unless findings of facts are perverse. ***See AIR 1991 SC 455 Masjid Kacha Tank Nahan vs. Tuffail Mohammed. See AIR 1969 SC 580 Municipal Corporation Indore vs. K.N. Palsikar. See AIR 1995 SC 1357 P.Udayani Devi vs. V.V.Rajeshwara Prasad Rao and another. See AIR 2002 SC 1004 Gurdial Singh vs. Raj Kumar Anjela.*** Hence it is held that orders of learned Executing Court is not perverse but is

based upon judgment and decree passed by Hon'ble High Court of H.P. in RSA No. 143 of 2002 and RSA No. 144 of 2002 decided on 4.9.2012. In view of above stated facts and case law cited supra point No.1 is answered in negative.

Point No. 2 (Relief)

12. In view of findings upon point No.1 revision petition is dismissed. Parties are left to bear their own costs. Record of learned Executing Court and learned Additional District Judge Solan be sent back forthwith along with certified copy of order. Revision petition is disposed of. All pending miscellaneous application(s) if any also disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

State of H.P. and another .....Appellants.

Versus

Rakesh Kumar .....Respondents.

LPA No.162 of 2016.
Decided on: November 15, 2016.

Industrial Disputes Act, 1947- Section 17(B)- Writ Court had fallen in error in granting the wages from 16.8.2012 as they were to be granted from the date of filing of the affidavit as per the judgment of the Supreme Court in **Uttaranchal Forest Development Corporation Versus K.B. Singh, (2005) 11 SCC 449**- however, the writ petition has already been dismissed and the benefits are to be granted as per the order of the Labour Court- writ petition dismissed as infructuous. (Para-2 to 4)

Case referred:
Uttaranchal Forest Development Corpn. and Another vs. K.B. Singh and others, (2005) 11 SCC 449

For the appellants: Mr.Shrawan Dogra, Advocate General, with Mr.Anup Rattan & Mr.Varun Chandel, Addl.A.Gs., and Mr.Kush Sharma, Dy.A.G.

For the Respondent: Mr.Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This Letters Patent Appeal is directed against the order, dated 19th August, 2015, passed in CMP No.7560 of 2015, (filed in CWP No.7122 of 2012), by the learned Single Judge of this Court, whereby application under Section 17(B) of the Industrial Disputes Act, 1947 (for short, the Act), came to be determined.

2. During the course of hearing, Mr.Anup Rattan, learned Additional Advocate General, submitted that the Writ Court has fallen into an error in granting wages from 16th August, 2012, whereas the same were to be granted from the date of filing of the affidavit in terms of Section 17(B) of the Act. In support of his submission, he has relied upon the decision of the Apex Court in **Uttaranchal Forest Development Corpn. and Another vs. K.B. Singh and others, (2005) 11 SCC 449.**

3. We are in agreement with the submission made by the learned Additional Advocate General that benefits under Section 17(B) of the Act are to be granted from the date of filing of the affidavit.

4. At this stage, the learned counsel for the respondent stated that the main writ petition filed by the appellant-State has already been dismissed and the writ respondent is entitled to the benefits as per the award passed by the Labour Court.

5. In view of the above stated position, the instant appeal has become infructuous and the same stands disposed of as such alongwith pending CMPs, if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Subhash Chand ....Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No.1339 of 2016.
Decided on: 15th November, 2016.

Code of Criminal Procedure, 1973- Section 439- 30 bottles of Relaxcofwere recovered from the possession of the accused, which were containing 100 ml. each codeine phosphate- 60 strips of Tramadol Hydrochloride Paracetamol, each containing 10 tablets were also found – two bottles were recovered during investigation- held, that the petitioner is involved in a crime, which affects the society at large – many cases were registered against the petitioner for the commission of similar offences- hence, the discretion to admit the petitioner on bail cannot be exercised in favour of the petitioner- petition dismissed. (Para-6 to 8)

For the petitioner : Ms. Shetal Vyas, Advocate.

For the respondent : Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Rajat Chauhan, Law Officer.
SI Roshan Lal, Police Station Ghumarwin, District Bilaspur, present in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present bail application is maintained by the petitioner under Section 439 of the Code of Criminal Procedure for releasing him on bail in case FIR No.43 of 2016, dated 9.3.2016, under Sections 21 and 29 of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act'), registered at Police Station, Ghumarwin, District Bilaspur, H.P.

2. As per the petitioner, he is innocent and is falsely implicated in this case.

3. As per the prosecution story, 30 bottles of Relaxcof were recovered from the conscious and exclusive possession of the accused, having 100 ml. each codeine phosphate. Accused was also found in possession of 60 strips of Tramadol Hydrochloride Paracetamol tablets containing 10 tablets in each strip i.e. 600 tablets. During the course of investigation, two bottles of Relaxcof was also recovered from the possession of accused Subhash Chand son of Ram Parkash without any valid permit or licence. Total 32 bottles of Relaxcof containing 100 ml. each recovered alongwith 600 tablets.

4. Learned counsel for the petitioner has argued that the petitioner is innocent, falsely implicated in this case and may be released on bail.

5. Learned Additional Advocate General has argued that the petitioner has committed serious crime and in fact is spoiling the atmosphere of new generation by supplying narcotics to the small children and otherwise also the quantity is commercial in nature.

6. After going through the record of this case, this Court finds that the petitioner is involved in the crime which is affecting the society. It has also come on record that so many cases were registered against the accused by the police for the similar offences.

7. Taking into consideration the above facts, it is clear that the offence is affecting a very large number of people and there is every possibility that accused shall repeat such offence. This Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is not required to be exercised in favour of the petitioner.

8. In view of the above, the petition, being devoid of any merits, deserves dismissal and is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

The Executive Engineer, HPSEB Electrical Division, Joginder Nagar. ...Petitioner.

Versus

Shri Jagdish Chand. ...Respondent.

CWP No. 9825 of 2013
Reserved on: 08.11.2016
Decided on: 15.11.2016

Industrial Disputes Act, 1947- Section 25- The workman was engaged as beldar – he was given fictional break and his services were terminated orally on the pretext that funds were not available and he would be re-engaged on the availability of the funds- the reference petition was allowed by the Industrial Tribunal –workman was ordered to be re-engaged with seniority and continuity in service - direction was issued for regularization of the services –held in writ petition, the engagement of the workman was not disputed – it was admitted that no notice was issued to the workman – plea of abandonment of the service is not acceptable in absence of notice – workman had completed 240 days – new person was appointed after terminating the services of the workman – the Tribunal had rightly ordered the re-engagement- petition dismissed.

(Para- 6 to 11)

Case referred:
Uptron India Ltd. Vs. Shammi Bhan and another, (1998) 6 Supreme Court Cases 538

For the petitioner: Mr. Satyen Vaidya, Sr. Advocate, with
Mr. Vivek Sharma, Advocate.
For the respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner/HPSEB/employer (hereinafter referred to as 'the employer') laying challenge to the award of the learned Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., dated 15.10.2013, passed in Reference No. 281 of 2012, whereby the reference petition of the petitioner therein, who was workman and respondent herein (hereinafter referred to as 'the workman'), was partly allowed and he was held entitled to seniority, continuity in service from the date of his termination i.e. 25.04.1998 except back wages and the petitioner herein was also directed to regularize the services of the workman.

2. Briefly stating, the facts giving rise to the petition are that the learned Tribunal below determined and adjudicated the following reference:

"Whether termination of the services of Shri Jagdish Chand s/o sh. Tulsi Ram, Village & Post Office Chalarag, Tehsil Joginder Nagar, Distt. Mandi by the Executive Engineer, H.P.S.E.B. Electrical Division, Joginder Nagar, Distt. Mandi, H.P. w.e.f. 25.4.1998 without following the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, to what amount of back wages, seniority, past service benefits and compensation the above workman is entitled to from the above employer?"

3. As per the workman, he was engaged by the respondents/employer as *Beldar* on and w.e.f. 25.11.1997 and he worked as such upto 24.04.1998 under the supervision of the Assistant Engineer, HPSEB Sub Division, Makriri. The workman was given fictional breaks and on 25.04.1998 his services were terminated by verbal orders. Before his alleged termination, neither notice was served upon him nor he was charge sheeted. No inquiry of misconduct was ever conducted and no compensation was paid to him by the employer. As per the workman his services were terminated only on the pretext that work and funds are not available and he will be re-engaged as and when the same will be available. The workman has further contended that he approached the authorities for his re-engagement, but in vain. The workman approached the H.P. State Administrative Tribunal by filing an original application, but the same was dismissed on 27.02.2002 for want of jurisdiction. The fact qua dismissal of the original application was not conveyed to the workman by his counsel and he only came to know about this when he personally visited his counsel. Subsequently, a demand notice under Section 2-A of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') was served to the employer by him. Conciliation proceedings failed and the failure report was submitted to the appropriate Government, but the appropriate Government did not refer the matter to the learned Court on the ground that the workman did not complete 240 days preceding his retrenchment. The workman challenged the same order of not referring the matter in the Hon'ble High Court of H.P. by way of maintaining CWP No. 2758 of 2008, which was decided on 14.05.2012. The Hon'ble High Court of H.P. through its judgment dated 14.05.2012, set aside the order, dated 04.04.2008, of the Labour Commissioner, Shimla, whereby the Commissioner refused to refer the matter to the Court. Thus, the above said reference was referred by the appropriate Government to the learned Tribunal below for determination and adjudication. The workman has further contended therein that some of his juniors were retained at the time of his termination and some fresh hands have also been engaged by the respondent/employer. The workman was not re-engaged and persons, whose services were engaged by the respondent/employer on daily wage basis w.e.f. 25.11.1997, were regularized by them. The workman had also contended that the act and conduct of the respondent was not only illegal and unjustified but was also violative of Sections 25-F, 25-G and 25-H of the Act. Lastly, the workman prayed for the substantives reliefs, viz., setting aside the termination order dated 25.04.1998, reinstatement, full back wages, seniority and continuity of service from the date of his initial appointment i.e. 25.11.1997.

4. In reply to the reference petition, the petitioner herein, (employer) averred that the workman was engaged as daily waged *beldar* on 25.11.1997 and he worked as such upto 24.04.1998. As per the employer, the workman was never disengaged, in fact, he left the job voluntarily and he did not approach Assistant Engineer or Junior Engineer for re-engagement. It is further contended that against the termination order, workman firstly approached the H.P. State Administrative Tribunal then Hon'ble High Court of H.P. The workman abandoned the job despite availability of work and thus he cannot claim parity with the workmen, who have been named by the workman, since they worked continuously. The workman, as per the knowledge of the employer, had undertaken SSB training at Sarahan after abandoning the job. The employer has further contended that no provision has been violated and now re-engagement of the workman is not possible due to unavailability of work. Ultimately, the respondent therein prayed for dismissal of the reference petition.

4. The learned Tribunal below has framed the following issues for determination:

"1. Whether the termination of services of the petitioner by the respondent w.e.f. 25.04.1998 is illegal and unjustified as alleged? OPP

2. Relief."

After deciding issue No. 1 in favour of the workman, the reference was partly allowed by the learned Tribunal below and the workman was ordered to be re-engaged forthwith with seniority, continuity in service from the date of his illegal termination, i.e. 25.04.1998, except back wages, and the respondent was also directed to consider the case of the workman for regularization of service. The learned Tribunal below also clarified that if the services of any person junior to the workman have already been regularized, the workman shall be entitled to regularization from the date/month of the regularization of the services of his juniors.

5. I have heard the learned counsel for the parties and have gone through the record carefully.

6. The workman tendered in affidavit, Ex. PW-1/A, wherein he reiterated the contents of the reference petition. In his cross-examination he has denied that he was not disengaged. He had undergone SSB training at Sarahan in the year 1994-95. On the other hand, Shri Atul Mehta, Executive engineer, HPSEB, Jogindernagar (RW-1) also tendered his affidavit, Ex. RW-1/A. He, in his cross-examination, has deposed that no notice was served to the petitioner for resuming the duties and no departmental proceedings were initiated. This witness has admitted that persons junior to the workman are serving under him. He has also admitted that after 25.04.1998, new/fresh hands have been employed and no opportunity was afforded to the workman.

7. Both workman and the employer acknowledge that the workman was engaged as a daily waged *beldar* on 25.11.1997 and he continued as such upto 24.04.1998. As per the workman, he was terminated on and w.e.f. 25.04.1998, whereas as per the employer, he abandoned the job on his own. Abandonment is to be established and not to be presumed lightly. In the given facts and circumstances, when no notice was ever served upon the workman by the employer calling him to resume his duties, abandonment cannot be attributed to the workman. Moreover, nothing is emanating from the record that proceedings were ever initiated against the workman for willful absence. Thus, the plea of willful abandonment by the workman raised by the employer goes unestablished. The workman, in his cross-examination, deposed that he had undergone SSB training during the years 1994-95, then also there is no question of abandonment of services by him.

8. Mandays chart, Ex. RW-1/B, portrays that the workman did not complete 240 days in a calendar year preceding the date of his termination, i.e. 25.04.1998, as mandated by Section 25-B of the Act. Therefore, the provisions of Section 25-B are not attracted. A bare perusal of seniority list of daily waged *beldars,* Ex. PW-1/B, reveals that persons junior to the workman were retained. This fact is further fortified by RW-1 that persons junior to the workman are working under him and new persons have also been appointed. Thus, after perusal of seniority list and scrutiny of statement of RW-1, it clearly and unambiguously stands established that there had been violation of the provisions of Sections 25-G and 25-H of the Act, rendering the termination of the workman illegal. It is not at all obligatory for a workman to have completed 240 days in a calendar year preceding his termination to take benefits of the provisions of Sections 25-G and 25-H of the Act.

9. In ***Uptron India Ltd. Vs. Shammi Bhan and another, (1998) 6 Supreme Court Cases 538,*** the Hon'ble Apex Court has held that the employer cannot terminate the services of the workman until and unless principles of natural justice have been followed and the workman has been provided reasonable opportunity to explain himself before terminating his services on the basis of abandonment of job.

10. In view of what has been discussed hereinabove, I find no infirmity in the award passed by the learned Tribunal below. The award passed by the learned Tribunal below is just,

reasoned and after properly appreciating the facts to their right perspective and the law has been applied correctly. The petition being devoid of merits, deserves dismissal and is accordingly dismissed. However, in view of peculiar facts and circumstances of the case, the parties are directed to bear their own costs.

11. Pending application(s), if any, shall also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

CWPs No. 9241 & 9789 of 2013
Reserved on: 08.11.2016
Decided on: 15.11.2016

CWP No. 9241 of 2013:

Shri Udham Singh. .....Petitioner.

Versus

Himachal Pradesh State Electricity Board Limited and others. .....Respondents.

CWP No. 9789 of 2013:

The Executive Engineer (E) Division HPSEB Rajgarh & another. .....Petitioners.

Versus

Shri Udham Singh. .....Respondent.

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged by the respondent as Beldar- his services were terminated without assigning any reason- the Tribunal allowed the reference and the petitioner was ordered to be reinstated with seniority but without back wages- held, that the plea of the petitioner was not supported by documents- the plea of the respondent that the petitioner had left the job on his own was not supported by the repeated requests for re-engagement- the case was dismissed in default and the workman had not taken steps to get the same restored- the order was passed rightly by the Industrial Tribunal-cum-Labour Court- appeal dismissed.(Para-6 to 13)

Case referred:

Uptron India Ltd. Vs. Shammi Bhan and another, (1998) 6 Supreme Court Cases 538

CWP No. 9241 of 2013:

For the petitioner: Mr. V.D. Khidta, Advocate.

For the respondents: Mr. Ashok Thakur, Advocate, vice Ms. Sharmila Patial, Advocate, with Mr. Satyen Vaidya, Sr. Advocate.

CWP No. 9789 of 2013:

For the petitioners: Mr. Ashok Thakur, Advocate, vice Ms. Sharmila Patial, Advocate, with Mr. Satyen Vaidya, Sr. Advocate.

For the respondent: Mr. V.D. Khidta, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition (CWP No. 9241 of 2013) is maintained by the petitioner/workman (hereinafter referred to as 'the workman') laying challenge to the award of the learned Industrial Tribunal-cum-Labour Court, Shimla, dated 17.09.2013, passed in Reference No. 4 of 2008, whereby he was not granted full back-wages and seniority w.e.f. 07.07.2009 to 22.08.2012. On the other hand, the petitioners (in CWP No. 9789 of 2013), being employer (Himachal Pradesh State Electricity Board) of the workman (hereinafter referred to as the

respondents), have also assailed the same award by way of another writ petition, on the ground that the same may be quashed in entirety and the claim of the workman is required to be disallowed.

2. Briefly stating, the facts giving rise to both the petitions are that as per the workman, he was engaged by the respondents/employer as *Beldar* on and w.e.f. 21.08.1994 and he worked as such in the office of Junior Engineer, HPSEB, Section Chandal, Division Rajgarh, District Sirmour, till 15.06.1996, when verbally the respondents illegally terminated his services. As per the workman, he had completed 240 days in a calendar year. The respondents did not comply the obligatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') and no reason was assigned for the termination of the workman. The workman time and again visited the office of the respondents in a hope that he will be re-engaged, but despite written requests no action was taken. The respondents assured him that he will be re-engaged and he waited till September, 2003, and ultimately he issued a demand notice before the Labour-cum-Conciliation Officer, Solan. The respondents remained obstinate during the conciliation proceedings and lastly the reference was made to the learned Tribunal below. As per the workman, the respondents had engaged new persons in contravention of Section 25-H of the Act and the provisions of Sections 25-N, 25-F, 25-G and 25-H of the Act have also been contravened. The workman has further averred that no notice had been issued to him nor any compensation was paid. The workman prayed for setting aside his oral termination order dated 15.06.1996 with simultaneous prayer for his reinstatement in service on and w.e.f. 15.06.1996 with all consequential benefits, including back wages, seniority etc.

3. In reply to the reference petition, the respondents have taken preliminary objections, viz., maintainability, estoppel, delay and laches. It is contended by the respondents that the workman was engaged as *Beldar* on daily wage basis on and w.e.f. 16.11.1993 by SDO (E) HPSEB, Rajgarh, and he had worked upto 15.03.1994. As per the respondents, since the workman was not regular in his duties, he did not complete 240 days in any calendar year, so no notice was required to be served upon him in view of the Standing Orders, Clause 14(2) A under the Act. The respondents had further averred that the workman had left the job on his own without informing the respondents and he was casual in attending his duties, therefore, there had been no violation of Sections 25-G and 25-H of the Act.

4. The learned Tribunal below has framed the following issues for determination:

> "1. Whether the services of the petitioner have been illegally terminated by the respondents without complying with the provisions of the Industrial Disputes Act, 1947. If so, its effect? OPP
>
> 2. If issue No. 1 is proved in affirmative, to what relief the petitioner is entitled to? OPP
>
> 3. Whether the petitioner has no locus standi and the application is not maintainable? OPR
>
> 4. Relief."

After deciding issue No. 1 in favour of the workman and issue No. 3 against the respondents, the reference was allowed and the workman was ordered to be reinstated with seniority and continuity w.e.f. 15.03.1994 till passing of the award, except from 07.07.2009 to 22.08.2012, however, without back-wages.

5. I have heard the learned counsel for the parties and have gone through the record carefully.

6. As per the workman (petitioner) he was engaged as *beldar* on and w.e.f. 21.08.1994 and was terminated on 15.06.1996. However, as per reply of the respondents, the workman was engaged as *beldar* by SDO (E), HPSEB, Rajgarh on 16.11.1993 and he worked upto 15.03.1994. The workman left the job on his own without informing the respondents. Thus,

manifestly the workman had worked upto 15.03.1994 and not 15.06.1996 when he was allegedly terminated.

7. The workman while deposing as PW-1 has stated that he was engaged as *beldar* by the Junior Engineer, HPSEB, Section Chandal and he worked upto 15.06.1996 when he was disengaged/terminated without any notice and compensation. As per the workman, he had been engaged by the Junior Engineer, as *beldar.* Meaning thereby, the contention of the workman that he was engaged on 21.08.1994 is false. PW-2 (Shri Adhoya Kumar) has deposed that the workman worked under his control during the year 1993-94. Nothing is emanating from the record that the workman had been engaged on 21.08.1994. Conversely, the stand of the respondents is fortified by a document pertaining to the detail of the working days qua the workman, which demonstrates that as per Muster Roll No. 876 he had been engaged on 16.11.1993.

8. RW-1 (Shri Shashi Kant) deposed that the workman had been engaged as *beldar* on 16.11.1993, and he worked for three days in that year. Thus from the close scrutiny of the testimonies of PW-1 and RW-1, it is crystal clear that the workman had been engaged, as *beldar,* on 16.11.1993 and not on 21.08.1994.

9. It can easily be construed from the analysis of the record that the petitioner had worked as *beldar* on and w.e.f. 16.11.1993 to 15.03.1994. As the workman did not complete 240 days in a calendar year preceding his disengagement, the provisions of Section 25-F are not at all applicable to the present case. The workman had further contended that after his disengagement new persons, who were junior to him, were engaged/retained by the respondents in utter violation of the provisions of Sections 25-G and 25-H of the Act. However, it is imperative to take into consideration the fact that whether the workman left the job on his own or his services were terminated by the respondents. As per the workman, his services were terminated and he wrote letter, Ex. PW-1/A to Ex. PW-1/C, requesting the respondents to re-engage him. On examination of these letters, it stands testified that letters, Ex. PW-1/A, Ex.PW-1/B and Ex. PW-1/C are dated 14.04.1997, 26.06.1997 and 25.07.2000, respectively. RW-1 (Shri Sashi Kant) in fact, admitted that after termination of the workman, workman wrote letters, Ex. PW-1/A to Ex. PW-1/C, to the respondents. Therefore, patently the workman had been requesting the respondents, orally and through letters, to re-engage him. Thus, given the fact that the workman had been making repeated requests to the respondents for his re-engagement, it cannot be said the workman had left the job on his own.

10. The evidence in the present case suggests that after termination of the workman, he ran from pillar to post for his re-engagement that is by way of writing letters and making oral requests to the respondents. Thus, the workman made himself available for re-engagement. Manifestly, the respondents engaged new workers, who are junior to the workman. As the workman time and again requested the respondents for his re-engagement and his juniors were engaged, there is clear cut violation of Section 25-H of the Act. Therefore, the most probable ratiocination which emerges is that after termination of the workman, persons junior to him were engaged by the respondents, which action of the respondents is not only erroneous, but in violation of Sections 25-G and 25-H of the Act.

11. It has also come on record that the workman did not pursue his case between 07.07.2009 to 05.04.2013 and the same remained dismissed in default during this period. As the respondents had violated the provisions of Sections 25-G and 25-H of the Act and it is the workman who did not pursue his case w.e.f. 07.07.2009 to 22.08.2012 and only on 22.08.2012 the workman, for the first time, moved an application for restoration of his reference after 07.07.2009, this Court finds no illegality in the order passed by the learned Tribunal below in not granting back wages for the period and break in service. As the workman did not care to get his case restored as well as he also did not prove before the Court by leading cogent and reliable evidence that he was not doing anything during all these years and it is otherwise also not acceptable that a person will remain sleeping in his house for such a substantial time.

12. In ***Uptron India Ltd. Vs. Shammi Bhan and another, (1998) 6 Supreme Court Cases 538,*** the Hon'ble Apex Court has held that the employer cannot terminate the services of the workman until and unless principles of natural justice have been followed and the workman has been provided reasonable opportunity to explain himself before terminating his services on the basis of abandonment of job.

13. In view of what has been discussed hereinabove, I find no infirmity in the award passed by the learned Tribunal below. The award passed by the learned Tribunal below is just, reasoned and after properly appreciating the facts to their right perspective and the law has been applied correctly. The petitions being devoid of merit, deserve dismissal and are accordingly dismissed. However, in view of peculiar facts and circumstances of the cases, the parties are directed to bear their own costs.

14. Pending application(s), if any, shall also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Karan Singh ...Revisionist.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Revision No.:18 of 2009.
Date of Decision: 16.11.2016

Code of Criminal Procedure, 1973- Section 482- Petitioner was convicted for the commission of offence punishable under Section 325 of I.P.C – an appeal was preferred, which was dismissed – the matter was compromised during the pendency of the revision and a prayer was made for acquitting the accused in view of the compromise – held, that the accused and the informant have stated that the matter has been compromised between them in order of maintain peace and promote good will- the permission granted to compound the offence – revision petition allowed- conviction and sentence imposed upon the accused/convict by both the Courts set aside and the accused/convict is acquitted. (Para-2 to 4)

For the petitioner: Mr. Anup Chitkara, Advocate.
For the respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The learned Chief Judicial Magistrate, Lahaul-Spiti at Kullu, pronounced an order of conviction upon the revisionist herein qua commission of an offence punishable under Section 325 IPC. In an appeal preferred therefrom by the accused before the learned Additional Sessions Judge, Fast Track Court, Kullu, sequelled the latter affirming the pronouncement recorded upon the accused by the learned Chief Judicial Magistrate, Lahaul-Spiti. The accused/convict standing aggrieved by the concurrently recorded renditions of both the Courts below proceeded to assail them by preferring a revision herebefore.

2. During the pendency of the revision before this Court the learned counsel for the accused/convict revisionist herein, has instituted an application under Section 320 read with Section 482 Cr.P.C. whereby he seeks permission of this Court for compounding the offence committed by him under Section 325 IPC. The application aforesaid also holds the signatures of the complainant.

3. The offence qua which a concurrent order of conviction stood pronounced upon the accused/convict is compoundable yet the accused/convict and the complainant while

endeavouring to seek composition of the offence whereupon an order of conviction stood concurrently pronounced upon the accused/convict, are enjoined to obtain the permission of this Court.

4. Be that as it may, this Court would proceed to accord the apposite permission to them only when satiation stands begotten qua the relevant principles encapsulated in the pronouncement of the Hon'ble Apex Court reported in Ramji Lal and another Vs. State of Haryana, 1983(1) SCC 368, Mohd. Rafi vs. State of U.P., *1998(2) R.C.R.(Criminal 455,* M.D.Balan Mian and another vs. State of Bihar and another *2001 AIR (SCW) 5190,* Khursheed and another vs. State of U.P in Appeal (Crl.) No. 1302 of 2007, Dasan vs. State of Kerala and another *2014(2) ECrC 384*. The aforestated pronouncements of the Hon'ble Apex Court empower Courts of law to proceed to permit the accused/convict and the informant/complainant to enter into a compromise also empower the Court concerned to grant the apposite permission to them for compounding the offence(s) only on vivid display occurring qua its facilitating restoration of harmony in society besides its promoting goodwill and amity amongst them.

5. Since both the accused/convict and the complainant/informant in their respective statements recorded on oath reduced into writing and respectively signatured by them echo therein qua their apposite conjoint endeavour intending to promote goodwill and peace amongst them necessarily hence the aforesaid principle encapsulated in the aforereferred judgements of the Hon'ble Apex Court for thereupon this Court holding a facilitation to permit them to compound the offence whereupon the accused stood concurrently convicted by both the Courts below stands visibly satiated.

6. Consequently, this Court accepts their joint proposal to compound the offence committed by the accused/convict. In sequel thereto the revision petition is allowed. The conviction and sentence concurrently imposed upon the accused/convict by both the Courts below is set aside. The accused/convict is acquitted. Bail bonds are cancelled.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Kewal Ram Siranta & Ors. ...Petitioners.

Versus

HP Voluntary Health Association & Anr. ...Respondents.

Civil Revision No.150 of 2016.
Reserved on: 27.10.2016.
Decided on: November 16, 2016.

Code of Civil Procedure, 1908- Order 7 Rule 11- A civil suit for declaration was filed challenging the election of various office bearers of the society – an application for rejection of the plaint was filed, which was dismissed – held, that the application was filed belatedly – the time for which the office bearers were elected has lapsed but that is not sufficient to dismiss the suit – the Court has already framed issue regarding the maintainability which is yet to be adjudicated- petition dismissed. (Para-4 to 8)

For the Petitioners: Mrs. Pratima Malhotra, Advocate.
For the Respondents: Mr. Sandeep Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Sanjay Singh Chauhan in the capacity of Secretary of Himachal Pradesh Voluntary Association instituted a suit wherein on the ground of the apposite elections

contravening the constitution of the "Society" he hence constituted a challenge to the election of respondents No.1 to 9, as President, vice President, Secretary, Treasurer besides Members and office bearers of the aforesaid association. He also canvassed therein qua rendition of a declaratory decree qua the election of the afore-stated defendants being quashed and set aside. The suit aforesaid stood instituted in the year 2011.

2. The defendants contested the suit by instituting a written statement thereto wherein they raised a trite objection qua with the aforesaid plaintiff not at the apposite stage donning the capacity of Secretary of the Himachal Pradesh Voluntary Health Association, a registered Society under the Societies Registration Act, 1860 (for short 'the Society') rather the capacity afore-stated standing extantly manned by its newly elected Secretary rendering hence the frame of array of plaintiff(s) being mis-constituted also a contest was made therein qua the relief canvassed therein being unaffordable to the plaintiff. Also on anvil of omission of joinder of the "Society" in the array of defendants, an apposite objection qua the maintainability of the suit stood raised therein.

3. On the contentious pleadings of the parties, the learned trial Court under its orders made on 10.01.2014 struck the relevant issues arising from the contentious pleadings of the parties at contest where-amongst one, is an issue qua the plaintiff holding a legally enforceable cause of action vis-à-vis the defendants. Previous thereto an application under the provisions of Section 151 of the CPC stood instituted by the defendants before the learned trial Court holding a prayer therein qua the suit of the plaintiffs being ordered to be dismissed. On the afore-stated application the learned trial Court below pronounced the impugned orders whereby the relief as canvassed therein stood refused to the defendants wherefrom the defendants stand aggrieved, hence are constrained to prefer herebefore the instant petition for quashing them.

4. The application preferred under Section 151 CPC subsequent to completion of pleadings inter se the litigating parties before the Court concerned purportedly appears to stand instituted under the provisions of Order 7 Rule 11 CPC, provisions whereof embody therein the grounds whereupon a civil Court can order for rejection of plaint, one amongst which is non-existence of a disclosure therein qua any cause of action accruing to the plaintiff, ground whereof stands apparently reared in the apposite pleadings of the defendants, whereon an apposite issue also stands struck by the learned trial Court. The availment of the aforesaid provisions of Order 7 Rule 11 CPC by the defendants, provisions whereof stand extracted hereinafter:-

> **"11. Rejection of plaint.-** The plaint shall be rejected in the following cases:—
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
>
> (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;
>
> (d) where the suit appears from the statement in the plaint to be barred by any law;
>
> (e) where it is not filed in duplicate;
>
> (f) where the plaintiff fails comply with the provision of Rule 9.
>
> Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the

> requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff."

stood enjoined to occur at the outset, precisely at the stage whereat they stood efficaciously served by the learned trial Court. However, visibly the defendants procrastinated theirs availing the aforesaid provisions of the CPC comprised in theirs constituting besides rearing pleadings in their written statement with a disclosure therein qua no cause of action subsisting vis-à-vis the plaintiff. The learned trial Court had concluded qua with an apposite issue qua the plaintiff holding no enforceable cause of action vis-à-vis the defendants standing ordered to be struck, whereupon evidence remaining yet un-adduced hence rendered the apposite application to warrant rejection. The impugned order pronounced by the learned trial Court does not suffer from any apparent illegality or impropriety conspicuously when the defendants at the stage whereat they initially received copy of the summons from the learned trial Court they abandoned besides waived their statutory right qua theirs thereat promptly availing the relevant grounds embodied in Order 7 Rule 11 CPC, for thereupon theirs seeking an apposite relief, relief whereof rather subsequent thereto stood constituted in the application at hand, also imperatively when availment thereof thereat constituted the apposite stage for theirs availing them contrarily when rather they procrastinated their availment even up to the stage whereat they in their written statement raised an apposite contention in consonance therewith bespeaks of the principle of thereupon theirs standing estopped to subsequent thereto unveil a ground in tandem thereof whereby they hence stand baulked in making their relevant espousal qua the plaintiffs extantly holding no subsisting cause of action vis-à-vis them. Moreso, when the factum aforesaid is construed along with the factum qua an apposite issue standing struck thereon by the learned trial Court whereon evidence remains yet un-adduced whereupon an inference is engendered qua prima facie hence this Court standing not constrained to pronounce qua the suit of the plaintiff warranting dismissal especially when the aforesaid pronouncement would be a premature closure besides termination of the suit even when the relevant issues are open for trial. Also with the relevant constitution of the "Society"/"Association" holding a mandate therein qua its authorized Secretary holding an authorization to enjoy the apposite term for a period of three years, period whereof may stand completed by the Secretary whose election stands challenged by Sanjay Singh Chauhan, may also obviously be a relevant factor before the Court below to make its relevant pronouncement thereon. In face thereof, when the suit of the plaintiff may prima facie ultimately suffer the fate of dismissal whereupon any adverse pronouncement qua the plaintiffs by this Court at this stage may ultimately forestall the learned trial Court to record an apposite verdict thereupon rather would present it with a *fait accompli*. For obviating any occurrence of the aforesaid casualty, this Court does not deem it fit and proper to interfere with the impugned order of the learned Court below.

5. The learned counsel appearing for the defendants has submitted before this Court that even the term of the defendants who stand elected in various capacities in the "society"/"Association" has ended whereupon she contends of the suit warranting dismissal. However, the aforesaid submission is open to be addressed before the learned trial Judge, who on adduction of germane evidence in substantiation thereof may record an apposite verdict thereon.

6. Be that as it may, the learned counsel appearing for the defendants has contended qua Sanjay Singh Chauhan mis-reflecting himself to be the Secretary of the Society significantly when he stands substituted by a newly elected Secretary besides she contends of the suit being bad for non-joinder of the "Society"/"Association" in the array of defendants whereas its joinder in the array of co-defendants was imperative. However, all the aforesaid defects in the frame of the suit or in the constitution of the litigating parties may be curable by an appropriate application standing preferred by the plaintiff before the learned Court below whereon it is open for the learned trial Court to record an appropriate decision thereon.

7. The factum of the suit being barred by statutory provisions engrafted in the relevant statute besides its thereupon being not maintainable may also not warrant this Court to record a pronouncement thereupon significantly when an apposite issue qua the facet aforesaid

stands struck by the learned trial Court whereon the parties may adduce the relevant evidence for facilitating the learned trial Court to record a clinching finding thereon.

8. For all the reasons, which stand assigned herein-above, the reasoning afforded by the learned Court below in dismissing the application of the defendants is free from any fault. In sequel, there is no merit in the instant petition, the same is dismissed. However, it is made clear that any observation made herein-above will have no bearing on the merits of the case and the learned trial Court shall decide the suit uninfluenced by any observation made hereinabove. All pending application(s) shall also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

LPA No.210 of 2015, CR Nos.159 of 2003, 26 of 2005, 115 of 2012 & 134 of 2015, RFAs No.343 of 2008, 265 of 2011, CMPMO Nos.213, 284 and 285 of 2012
Reserved on : 27.10.2016
Pronounced on: November 16, 2016.

1. LPA No.210 of 2015
Mumtaz Ahmed — Appellant.
Versus
State of H.P. and others — Respondents.

2. CR No.159 of 2003
Harjinder Singh — Petitioner.
Versus
Himachal Wakf Board and others — Respondents.

3. CR No.26 of 2005
Punjab Wakf Board — Petitioner.
Versus
Harjinder Singh and others — Respondents.

4. CR No.115 of 2012
Nanhe Khan — Petitioner.
Versus
H.P. Wakf Board and another — Respondents.

5. CR No.134 of 2015
H.P. Waqf Board — Petitioner.
Versus
Khwaja Khallilula and another — Respondents.

6. RFA No.343 of 2008
Kamla Mohini — Appellant.
Versus
Himachal Pradesh Wakf Board and another — Respondents.

7. RFA No.265 of 2011
Maulana Abdul Subhan Khan — Appellant.
Versus
Himachal Pradesh Wakf Board — Respondent.

8. CMPMO No.213 of 2012
His Holiness The Dalai Lama & another — Petitioners.
Versus
H.P. Wakf Board — Respondent.

9. CMPMO No.284 of 2012

Noor Mohammad & another — Petitioners.
Versus
H.P. Wakf Board — Respondent.

10. CMPMO No.285 of 2012

Nayab and others — Petitioners.
Versus
H.P. Wakf Board — Respondent.

Constitution of India, 1950- Article 226- Petitioner was appointed as Imam -he submitted his resignation reserving his right to continue as voluntary Imam and to keep the residential accommodation allotted to him -his resignation was accepted on 31.7.2003 -it was resolved to discontinue voluntary Imamat of the writ petitioner and all the facilities -a civil suit was filed for the recovery of possession and use and occupation charges, which was decreed -regular first appeal was filed, which was dismissed - a writ petition was filed for quashing the resolution - various other Civil revisions and Civil Miscellaneous Petitions (CMPMO) were also filed against various orders passed by Wakf Tribunal - all these petitions were taken for decision together-it was held, that Section 6 and 7 of the Wakf Act, 1995 provide for determination of certain disputes regarding wakf property only by Wakf Tribunal -sub Section 9 of Section 83 of the Act provides that no appeal shall lie against any decision or order whether interim or otherwise, passed by the Tribunal established under the Act - still the RFA and Writ Petitions are being filed and entertained by the Court -remedy of revision has been provided by the Act - since revision lies against the order; therefore, writ petition is not maintainable - it was further held that sections 6 and 7 of the Act do not cover the dispute of eviction relating to the immovable property, which is admittedly a Wakf property - such disputes are triable by the Civil Courts - writ petitions and RFAs dismissed as not maintainable - direction issued to treat CMPMO as civil revision.

(Para-26 to 44)

Cases referred:

Mohd. Abdul Kareem And Anr. vs. Andhra Pradesh State Wakf Board, 2004(2) ALD 345,
Faseela M. vs. Munnerul Islam Madrasa Committee and another, 2014 AIR SCW 2503

LPA No. 210 of 2015

For the appellant: Ms. Seema K. Guleria, Advocate, vice Ms. Anjana Khan, Advocate.

For the respondents: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 1.

Ms. Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate, for respondents No. 2 and 3.

CR No.159 of 2003

For the petitioner: Mr. Bhupender Gupta, Sr. Advocate with Mr. Himanshu Sharma, Advocate.

For the Respondents: Mr. B.C. Negi, Senior Advocate, with Mr. Pranay Pratap Singh, Advocate, for respondent No. 1.

Mr. Ajit Jaswal, Advocate, for respondents No. 3 and 4.

Nemo for other respondents.

CR No.26 of 2005

For the Petitioner: Ms.Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate.

For the respondents: Mr. Bhupender Gupta, Sr. Advocate with Mr. Himanshu Sharma, Advocate, for respondent No.1.

Nemo for other respondents

CR No.115 of 2012

For the Petitioner: Mr. Bhupender Gupta, Sr. Advocate with Mr. Himanshu Sharma, Advocate.

For the respondents: Ms. Seema Guleria, Advocate, vice Ms. Anjana Khan, Advocate.

CR No.134 of 2015

For the Petitioner: Mr. B.C. Negi, Senior Advocate, with Mr. Pranay Pratap Singh, Advocate.

For the respondents: Mr. Arvind Sharma, Advocate.

RFA No.343 of 2008

For the appellant: Ms. Seema Guleria, Advocate, vice Ms. Anjana Khan, Advocate.

For the respondents: Ms. Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu Bhatnagar, Advocate, for respondent No.1.
Respondent No. 2 already ex parte.

RFA No.265 of 2011

For the appellant: Ms. Seema Guleria, Advocate, vice Ms. Anjana Khan, Advocate.

For the respondents: Mr. B.C. Negi, Sr. Advocate with Mr. Pranay Partap Singh, Advocate.

CMPMO No.213 of 2012

For the petitioner: Ms. Nishi Goel, Advocate.

For the respondent: Mr. B.C. Negi, Sr. Advocate with Mr. Pranay Partap Singh, Advocate.

CMPMO Nos.284 & 285 of 2012

For the petitioners: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.

For the respondents: Mr. B.C. Negi, Sr. Advocate with Mr. Pranay Partap Singh, Advocate

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Common question – Whether the instant cases are maintainable in the present form - is involved in all these cases, therefore, the same were clubbed and are taken up together.

2. Before the above question is determined, let us have a brief glance of the facts of the each case as under.

LPA No.210 of 2015

3. This appeal is directed against the judgment, dated 27th October, 2015, passed by a learned Single Judge of this Court, in CWP No.3635 of 2015, titled Mumtaz Ahmad vs. State of H.P. and others, whereby the writ petition filed by the petitioner (appellant herein) came to be dismissed, (for short the impugned judgment).

4. The writ petitioner was appointed as Immam of Boileauganj Mosque, submitted his resignation on 22.7.2003 reserving his right to continue as voluntary Immam and to keep residential accommodation allotted to him, resignation was accepted on 31st July, 2003.

5. Vide Annexure P-3 (resolution dated 5th February, 2007), it was resolved by the writ respondents to discontinue the voluntary immamt of the writ petitioner and all facilities. The writ petition filed representations, but of no avail.

6. Thereafter, on 22.6.2007, writ respondents filed a civil suit before the Wakf Tribunal, Shimla for possession of the accommodation provided to the writ petitioner as well as for occupation and recovery of use and occupation charges against the petitioner, which was decreed. Writ petitioner filed Regular First Appeal, being RFA No.484 of 2011, before this Court, which was dismissed on 25th August, 2014.

7. The writ petitioner filed the writ petition for quashing Annexure P-3 i.e. resolution and for declaring entire proceedings initiated on the basis of Annexure P-3 as null and void. The writ petitioner also prayed that the respondents be directed to allow the petitioner to continue with honorary Immamt with all facilities provided to him.

8. The writ petition came to be dismissed vide the impugned judgment, hence the instant appeal.

CR No.159 of 2003

9. This Civil Revision Petition has been filed by the petitioner under Section 83 of Wakf Act, 1995 against the judgment and decree passed by Wakf Tribunal, Kangra, Hamirpur, Kullu, Una, Lahaul and Spiti, and Chamba at Dharamshala in Civil Suit No.2-D/1/2002/(1994), dated 25.3.2003, whereby the suit of the plaintiff/respondent herein was decreed.

10. Plaintiff-Punjab Wakf Board, (now Himachal Wakf Board), filed a suit for possession and for demolition of the structure, being owner of the suit property the description of which has been given in the plaint. The Tribunal decreed the suit of the plaintiff (respondent No.1 herein), sale deed dated 14.2.1984 and 23.1.1984 executed in favour of defendant No.1 (appellant herein) by the mother of defendant No.2 were declared to be null and void and illegal. Accordingly, defendant No.1 was restrained from changing the nature of the suit land. Hence the instant revision petition.

CR No.26 of 2005

11. This petition has been filed by the plaintiff under Section 83(9) of Wakf Act, 1995 against the judgment and decree passed by Wakf Tribunal in Civil Suit No.2-D/1/2002/(1994), dated 25.3.2003, (also subject matter of CR No.159 of 2003 supra), whereby the plaintiff has challenged the impugned judgment on the sole ground that the Tribunal has not granted the relief of possession by demolishing the structure standing on the suit land.

CR No.115 of 2012

12. This Civil Revision Petition under Section 83(a) of Wakf Act, 1995 is the outcome of the judgment and decree, dated 20.7.2012, passed by the Wakf Tribunal, Shimla in Civil Suit No.6-S/1 of 2008, whereby the suit of the plaintiff/petitioner herein was dismissed, (for short, the impugned judgment).

13. It was averred by the Plaintiff in the plaint that he had been statutory tenant in possession of top floor alongwith attic in Kutub Mosque Subzi Mandi, Shimla under defendant No.1 i.e. H.P. Wakf Board, on rent and paying rent to the Wakf Board. Defendant No.1/H.P. Wakf Board initiated eviction proceedings under Section 54 of the Wakf Act, 1955 against the plaintiff. It was further averred that the order dated 28.12.2007 passed by defendant No.1 was wrong, illegal, void and not biding on the plaintiff. Thus, the suit filed by the plaintiff (petitioner herein) for permanent injunction.

14. The Tribunal, vide the impugned judgment, dismissed the suit of the plaintiff and held that the plaintiff was rank trespasser and liable to be evicted.

CR No.134 of 2015

15. This Civil Revision Petition under Section 83(9) of Wakf Act, 1995 is directed against the judgment and decree passed by Wakf Tribunal, Shimla in Civil Suit No.19-S/1 of 2008, dated 19.3.2015, whereby the suit of the plaintiff-H.P. Wakf Board has been dismissed, (for short the impugned judgment).

16. The plaintiff-H.P. Wakf Board filed a suit for declaration to the effect that plaintiff-Board was owner of shops in Middle Bazar Shimla, the description of which has been given in the plaint itself, and also prayed that the revenue entries showing defendants/respondents herein to be in possession of the suit property be declared as null, void, illegal and inoperative.

17. The Tribunal, vide the impugned judgment, dismissed the suit of the plaintiff, hence the present petition.

RFA No.343 of 2008

18. The instant Regular First Appeal has been preferred under Section 96 of the Code of Civil Procedure (for shot, CPC) by defendant No.1 against the judgment and decree, dated 30th August, 2008, passed by Wakf Tribunal, Kangra at Dharamshala, whereby suit of the plaintiff-Wakf Board was decreed, (for short, the impugned judgment).

19. Plaintiff-Board filed a suit for permanent injunction against the defendants, being the owner of the suit property as the same was the property of the mosque. It was averred that the entries reflecting defendant No.1 as owner in possession of the suit land were wrong and illegal.

20. The suit was decreed by the Tribunal, vide the impugned judgment, and the defendants were restrained from raising construction over the suit land or changing nature thereof, hence the present appeal.

RFA No.265 of 2011

21. This appeal under Section 96 of the CPC arises out of the judgment and decree, dated 31st May, 2011, passed by the Wakf Tribunal, Shimla, whereby the suit of the plaintiff-Wakf Board, for possession and recovery, was decreed, the defendant was ordered to be dispossessed from the suit property and the plaintiff-Board was also held entitled for Rs.1,09,400/- as use and occupation charges, (for short, the impugned judgment). Feeling aggrieved, the defendant has filed the instant appeal.

CMPMO No.213 of 2012

22. This petition has been filed under Article 227 of the Constitution of India read with Section 83(9) of the Wakf Act, 1995, against judgment and decree dated 31.12.2011, passed by the Wakf Tribunal, Kangra at Dharamshala, vide which the suit of the plaintiff/respondent herein was partly decreed inasmuch as the decree for possession was granted, while relief of mandatory injunction by way of demolition was declined.

CMPMO No.284 of 2012

23. This petition has been filed under Section 83(9) of the Wakf Act, 1995, read with Article 227 of the Constitution of India, against the judgment and decree, dated 4.6.2012, passed by Wakf Tribunal, Shimla, whereby petition under Section 7 read with 83(2) of the Wakf Act, 1995, was dismissed, hence, the present petition by the petitioners.

CMPMO No.285 of 2012

24. The present petition has been filed under Section 83(9) of the Wakf Act, 1995, read with Article 227 of the Constitution of India, against the order 4.6.2012, passed by Wakf Tribunal, Shimla, whereby petition under Section 7 read with 83(2) of the Wakf Act, 1995, was dismissed, (for short, the impugned judgment).

25. Thus, the question to be determined in the present cases is – Whether Regular First Appeal or Civil Revision or petition under Article 227 of the Constitution of India would lie against the order passed by the Wakf Tribunal.

To answer the question framed hereinabove, relevant provisions of the Wakf Act, 1995, (for shot, the Act), are to be noticed.

26. In order to settle the disputes qua the Wakf properties, the Act provides for establishment of Wakf Tribunals which have to determine the disputes, as detailed in Sections 6 of the Act. It is apt to reproduce Section 6 of the Act hereunder:

> *"6. **Disputes regarding wakfs** :- (1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final :Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of wakfs.*
>
> *(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.*
>
> *(3) The Survey Commissioner shall not be made a party to any suit under sub- section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.*
>
> *(4) The list of wakfs shall, unless it is modified in pursuance of a decision or the Tribunal under sub-section (1), be final and conclusive.*
>
> *(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a court in that State in relation to any question referred to in sub-section (1)."*

27. Section 7 of the Act, reproduced below, deals with the powers of the Wakf Tribunal:

> *"7. Power of Tribunal to determine disputes regarding wakfs :- (1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final; Provided that -(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs; and*
>
> *(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement :Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.*
>
> *(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this section in respect of any wakf shall be stayed by any court, tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.*
>
> *(3) The Chief Executive Officer shall not be made a party to any application under sub-section (1).*
>
> *(4) The list of wakfs and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.*
>
> *(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of section 6 , before the commencement of this Act or which is the subject-matter of any*

appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be."

28. Thus, Sections 6 and 7 of the Act provides for determination of certain disputes regarding wakf properties only by the Wakf Tribunal. But the question arises that after determining the dispute by the Tribunal, what remedy is available to the aggrieved party.

29. Before the establishment of the Wakf Tribunal, District Judge was hearing the cases and determining the disputes under the Act. After amendment in the Act, under Section 83 of the Act, Tribunals are constituted having three members i.e. District Judge as Chairman, one person from the State Civil Services of the rank of Additional District Magistrate and one person having knowledge of Muslim Law and jurisprudence, as members. It is apt to reproduce Section 83 of the Act hereunder

"**83. Constitution of Tribunals, etc :-** (1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.

(2) Any rnutawalli person interested in a wakf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the wakf.

(3) Where any application made under sub-section (1) relates to any wakf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the rnutawalli or any one of the mutawallis of the wakf actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any applica- tion for the determination of such dispute, question or other matter :Provided that the State Government may, if it is of opinion that it is expedient in the interest of the wakf or any other person interested in the wakf or the wakf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such wakf or wakf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of –

(a) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, who shall be the Chairman;

(b) one person, who shall be an officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, Member;

(c) one person having knowledge of Muslim law and jurisprudence, Member,

and the appointment of every such person may be made either by name or by designation."

(5) The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under Code of Civil Procedure, 1908 , while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in Code of Civil Procedure, 1908 , the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court.

(8) The execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of Code of Civil Procedure, 1908 .

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit."

30. Sub Section 9 of Section 83 of the Act provides that no appeal shall lie against any decision or order whether interim or otherwise, passed by the Tribunal established under the Act. Still, it is astonishing that Writ Petitions and Regular First Appeals are being preferred by the aggrieved parties before this Court challenging the decisions rendered by the Tribunals constituted under the Act. It is also not understandable how such appeals or writ petitions are being entertained once there is specific bar in terms of Section 83(9) of the Act that no appeal will lie against the order of the Tribunal. We were told that it is a practice in this Court and the decisions have been made and such decisions have attained finality.

31. We may make it clear that we are not giving findings viz. a viz. those judgments which have attained finality. It is also made clear that this judgment is prospective in nature and will not, in any way, have retrospective effect.

32. In terms of proviso to Sub Section (9) of Section 83 of the Act, any person aggrieved by the orders of the Tribunals can invoke the revisional jurisdiction of the High Court. Thus, remedy is provided to the aggrieved person by way of filing revision petition and not by the medium of appeal.

The Act contains the mechanism for filing revision petition, thus, providing efficacious alternative remedy to the aggrieved party, rendering the writ petition not maintainable against the orders passed by the Tribunal. This view has been taken by this Court in case titled as **M/s Indian Technomac Company Ltd. versus State of H.P. & others, being CWP No.4779 of 2014, decided on 4th August, 2014**, and restated in plethora of judgments.

In a similar case, the High Court of Andhra Pradesh in case titled as **Mohd. Abdul Kareem And Anr. vs. Andhra Pradesh State Wakf Board, 2004(2) ALD 345,** held that the jurisdiction of the High Court in disputes pertaining to Wakfs can be invoked by way of filing revision petition and not by the medium of a writ petition. It is apt to reproduce paragraph 13 of the said decision hereunder:

> *"13. As seen from the above, the jurisdiction of the High Court in disputes relating to Wakfs can be invoked only when an aggrieved party files a revision petition under Sub-section (9) of Section 83 of the Act and a writ. petition would not be maintainable. In view of the binding precedents, this Court is not inclined to go into the merits of the contentions on other two questions raised by the learned Counsel for respective parties. These are left open to be decided at an appropriate stage in appropriate proceedings."*

33. In view of the above discussion, the question supra is answered accordingly.

34. Next question, which arises for determination is whether a suit for eviction and recovery of use and occupation charges against a person, who, admittedly, is a tenant, will lie before the Wakf Tribunal or before the Civil Court.

35. This point was neither raised before us by any of the parties nor arguments were addressed. However, we may observe that Sections 6 and 7 of the Act, reproduced above, nowhere encompasses the disputes relating to eviction of a tenant occupying the wakf property.

Therefore, such disputes are triable by the civil court and not by the Tribunal established under the Act.

36. Our this view is fortified by the judgment rendered by the Apex Court in **Faseela M. vs. Munnerul Islam Madrasa Committee and another, 2014 AIR SCW 2503,** wherein it was held by their Lordships that suit for eviction from wakf property is triable by a civil court and not by the Wakf Tribunal since the Act does not provide determination of dispute of eviction by the Tribunal. It is apt to reproduce paragraphs 12 to 17 of the said judgment hereunder:

> "12. The Court in para 35, page 738 held as follows:
>
> > "35. In the cases at hand the Act does not provide for any proceedings before the Tribunal for determination of a dispute concerning the eviction of a tenant in occupation of a wakf property or the rights and obligations of the lessor and the lessees of such property. A suit seeking eviction of the tenants from what is admittedly wakf property could, therefore, be filed only before the civil court and not before the Tribunal."
>
> 13. Mr. Renjith Marar, learned Counsel for Respondent No. 1, submits that in a subsequent decision in Bhanwar Lal and Anr. v. Rajasthan Board of Muslim Wakf and Ors., 2013 11 SCALE 210, this Court has taken a different view. According to him, Section 85 of the Act leaves no manner of doubt that the Waqf Tribunal has jurisdiction to decide the suit for eviction. It is so because one of the questions for determination is whether the suit property is waqf property or not.
>
> 14. The Court in Bhanwar Lal & Anr V/S Rajasthan Board Of Muslim Wakf & Ors, 2013 11 SCALE 210 considered the decision in at quite some length. Besides Ramesh Gobindram (Dead) Through LRs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, the Court in Bhanwar Lal & Anr V/S Rajasthan Board Of Muslim Wakf & Ors, 2013 11 SCALE 210 also considered two other decisions, one, Board of Wakf, West Bengal and Anr. v. Anis Fatma Begum and Anr., 2010 14 SCC 588 and two, Sardar Khan and Ors. v. Syed Najmul Hasan (Seth) and Ors., 2007 10 SCC 727. In Anis Board of Wakf, West Bengal and Anr. v. Anis Fatma Begum and Anr., 2010 14 SCC 588, this Court had held that the Waqf Tribunal constituted Under Section 83 of the Act will have exclusive jurisdiction to deal with the questions relating to demarcation of the waqf property.
>
> 15. Pertinently, the Court in Bhanwar Lal & Anr V/S Rajasthan Board Of Muslim Wakf & Ors, 2013 11 SCALE 210 held that the suit for cancellation of sale deed was triable by the civil court.
>
> 16. Bhanwar Lal & Anr V/S Rajasthan Board Of Muslim Wakf & Ors, 2013 11 SCALE 210 follows the line of reasoning in Ramesh Gobindram (Dead) Through LRs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, The decision of this Court in BHANWAR LAL & ANR V/S RAJASTHAN BOARD OF MUSLIM WAKF & ORS, 2013 11 SCALE 210 is not in any manner inconsistent or contrary to the view taken by this Court in Ramesh Gobindram (Dead) Through Lrs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, . We fully concur with the view of this Court in Ramesh Gobindram : (2010) 8 SCC 726, particularly with regard to construction put by it upon Sections 83 and 85 of the Act. In Ramesh Gobindram (Dead) Through LRs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, the Court said:
>
> > "32. There is, in our view, nothing in Section 83 to suggest that it pushes the exclusion of the jurisdiction of the civil courts extends (sic) beyond what has been provided for in Section 6(5), Section 7 and Section 85 of the Act. It simply empowers the Government to constitute a Tribunal or Tribunals for determination of any dispute, question of other matter relating to a wakf or wakf property which does not ipso facto mean that the jurisdiction of the civil courts stands completely excluded by reasons of such establishment.

> 33. It is noteworthy that the expression "for the determination of any dispute, question or other matter relating to a wakf or wakf property" appearing in Section 83(1) also appears in Section 85 of the Act. Section 85 does not, however, exclude the jurisdiction of the civil courts in respect of any or every question or disputes only because the same relates to a wakf or a wakf property. Section 85 in terms provides that the jurisdiction of the civil court shall stand excluded in relation to only such matters as are required by or under this Act to be determined by the Tribunal."
>
> 34. The crucial question that shall have to be answered in every case where a plea regarding exclusion of the jurisdiction of the civil court is raised is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought before a civil court. If it is not, the jurisdiction of the civil court is not excluded. But if the Tribunal is required to decide the matter the jurisdiction of the Civil Court would stand excluded."
>
> 17. The matter before us is wholly and squarely covered by Ramesh Gobindram (Dead) Through LRs V/S Sugra Humayun Mirza Wakf, 2010 8 SCC 726, . The suit for eviction against the tenant relating to a waqf property is exclusive triable by the civil court as such suit is not covered by the disputes specified in Sections 6 and 7 of the Act."

37. Thus, it is held that the suit for eviction against the tenant in regard to wakf property is triable by the Civil Court.

38. In view of the above findings, let us take the instant cases one by one and settle whether they are maintainable in the present form or not.

RFA Nos.343 of 2008 & 265 of 2011

39. These regular first appeals have been filed by the appellants against the impugned judgments passed by the Wakf Tribunal. Since we have held above that no appeal against the orders of the Wakf Tribunal will lie, therefore, these appeals merit to be dismissed and the same are dismissed accordingly. However, the aggrieved party may seek appropriate remedy, if any, available in terms of the Act. It is made clear that in case any party resort to appropriate proceedings, the time spent in pursuing these appeals is to be excluded while computing the period of limitation.

LPA No.210 of 2015:

40. This appeal has been filed by the appellant/writ petitioner against the impugned judgment passed by the learned Single Judge, whereby the writ petition filed by the petitioner came to be dismissed. It is worthwhile to record herein that earlier the Wakf Board had filed a civil suit, which came to be decreed. Feeling aggrieved, the writ petitioner filed RFA No.484 of 2011, which was dismissed by this court vide judgment dated 10th September, 2014. Thereafter, the writ petitioner filed the writ petition giving rise to the instant appeal. In fact, the writ petition was filed for the same relief, which already stands determined by the Wakf Tribunal and upheld by this Court in regular first appeal supra. As we have held above, though regular first appeal against the order of the Tribunal was not maintainable, however, since the judgment rendered by this Court has attained finality, therefore, we are not going into the said question.

41. Thus, the writ petition on the same cause of action was not maintainable and therefore, the learned Single Judge has rightly held that the writ petition was not maintainable. It is apt to reproduce paragraphs No.13 and 16 of the impugned judgment hereunder:

> "13. Be that as it may, the power of this Court to exercise extraordinary jurisdiction under Article 226 of the Constitution is to ensure that rule of law prevails and not to issue directions or writ to perpetuate illegality or to act in disregard to the settled decisions, statutory provisions, regulations and policy decisions etc. and in such situation, this Court can only sympathize with the plight of such students who for no fault of their own are being dislodged. Here, it shall be apt to reproduce the following

passage from the judgment delivered by the Hon'ble Supreme Court in K.S. Bhoir vs. State of Maharashtra and others, AIR 2002 SC 444 wherein it was held as under:

> "11 ..... In such a situation one can sympathise with the plight of such students who for no fault of their own were to be dislodged. However, the compassion and sympathy has no role to play where a rule of law is required to be enforced....."

14. ....

15. ....

16. Even this argument is not available with the petitioner for the simple reason that the findings in this regard on the aforesaid issues have already been returned against him in RFA No. 484 of 2011 as is evident from the perusal of para 14 of the judgment (quoted supra) and the same have admittedly attained finality."

42. Having said so, the instant appeal merits dismissal and the same is dismissed as such.

CMPMOs No.213, 284 and 285 of 2012

43. These petitions have been filed by the petitioner(s) under Section 83(9) of the Act. The Registry has wrongly treated these petitions as having been filed under Article 227 of the Constitution of India and has wrongly diarized them as CMPMO, rather they should have been diarized as Civil Revisions. The Registry is directed to diarize these petitions as Civil Revisions.

CR Nos.159 of 2003, 26 of 2005, 115 of 2012 and 134 of 2015

44. Keeping in view the discussion made hereinabove, these revision petitions and the revision petitions, after diarizing the CMPMOs supra as Civil Revisions, be listed for hearing before the Division Bench on 01.12.2016.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Roop Singh (since dead) through LRs & Ors. ...Appellants.

Versus

Prabha Ram & Ors. ...Respondents.

RSA No.351 of 2008.
Reserved on: 24.10.2016.
Decided on: November 16, 2016.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit pleading that the possession of plaintiffs over the suit land is open, peaceful, hostile continuous and without interruption to the knowledge of the defendants from January, 1960 and has matured into title- plaintiffs have become the owners by way of adverse possession – defendants No.1 and 2 had obtained a collusive judgment from Assistant Collector, Sarakaghat which does not affect the right of the plaintiffs- the suit was decreed by the Trial Court- an appeal was preferred, which was partly allowed- held in second appeal that proceedings were initiated by Assistant Collector for evicting the deceased defendant – the bartandarans were not impleaded and the suit was decreed in their absence- this shows that the judgment was passed by A.C. 1st Grade collusively and without following the principle of natural justice- the Courts below had passed the judgments rightly – appeal dismissed.(Para-9 to 13)

Case referred:

State of Himachal Pradesh versus Bagshi Ram, 2001 (2) Current Civil Law Journal 520

For the Appellants: Mr.R.L.Chaudhary, Advocate.

For the Respondents: Mr.Vijay Verma, Advocate for respondents No.1 to 7.
Mr.Vivek Singh Attri, Dy.A.G., for respondent No.8.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The learned trial Court had rendered a decree holding a pronouncement therein qua the judgment recorded by the learned Assistant Collector 1st Grade, Sarkaghat on 24.12.1992 being non-est. Also it pronounced a decree qua the plaintiffs becoming owners of the suit land by way of adverse possession. The defendants standing aggrieved by the rendition of the learned trial Court preferred an appeal therefrom before the learned District Judge who while affirming the verdict recorded by the learned trial Court qua the judgment recorded by the Assistant Collector 1st Grade, Sarkaghat on 24.12.1992 being non-est yet proceeded to rescind the decree of the learned trial Court whereby the plaintiffs were declared to become owners of the suit land by way of adverse possession. The defendants standing aggrieved by the findings recorded by the learned District Judge, for reversal whereof they institute the instant appeal here-before.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiffs filed a suit for declaration with consequential relief of permanent prohibitory injunction and averred that land comprised in Khewat No.57 min Khatauni No.141 Min Khasra No.1075 measuring 0-62-10 hectare is situated at village Kailag, illaqua Anatpur, Tehsil Sarkaghat, District Mandi, H.P. (for short 'the suit land') and there is house of defendant No.1 with verandah double storeyed over Khasra No.1075/1 measuring 0-01-40 hectares and cow shed consisting of three rooms with its courtyard over Khasra No.1075/2 measuring 0-04-42 hectares. The possession of the plaintiff No.1 over the suit land is open, peaceful hostile, continuous, without interruption and to the knowledge of the defendants from January 1960 and has now matured into title. Thus, the plaintiffs have become owners by way of adverse possession and the same is reflected in red ink in the spot map. The land comprised in Khasra No.1075/4 measuring 0-15-17 hectare is also in adverse possession of the plaintiffs No.2 to 7 as their possession is peaceful, continuous and hostile since the time of their father and the same has matured into title. It is averred that the defendant No.1 in collusion with the defendant No.2 has obtained fraudulently a collusive judgment on 24.12.1992 of the suit land from Assistant Collector 1st Grade, Sarkaghat exercising the powers of Civil Court on the basis of adverse possession which judgment is result of fraud and the same is liable to be set aside. Thereafter, mutation was also got sanctioned on the basis of the above judgment in favour of defendant No.1 and the same is void and not operative qua the rights of the plaintiff. The defendants for the first time on 24.12.1992 disclosed that he has obtained judgment of the suit land in his favour and has also got the mutation attested in his favour. All the above acts have been done by the defendant No.1 in collusion with the Patwari Halqua as well as Assistant Collector 1st Grade, Sarkaghat whereby an ejectment file was prepared against the defendant No.1 of the suit land and false reports were also got prepared. The plaintiff requested defendant No.1 to get the judgment of 24.12.1992 set aside as the same has been obtained by him with fraud and in collusion with defendant No.2 but of no use, hence the suit.

3. The suit of the plaintiff was resisted and defendant No.1 filed separate written statement taking preliminary objection inter alia of cause of action, maintainability, jurisdiction, valuation and the plaintiff having no locus standi to file the present suit. The description of the suit land given in para No.1 of the plaint was admitted. However, the defendant denied that the plaintiff is in adverse possession of the suit land. The defendant No.1 also alleged that the plaintiff should have filed appeal against the judgment of the Assistant Grade 1st Grade. It is also denied that there are different types of trees over the suit land. The defendant denied other averments made in the plaint.

4. Defendant No.2 filed separate written statement and took preliminary objection of jurisdiction, want of notice under Section 80, cause of action, valuation and limitation. It was denied that the plaintiff No.1 has his house with verandah over Khasra No.1075/1. It is also alleged that defendant No.1 Roop Singh filed application for adverse possession before the Assistant Collector 1st Grade, SArkaghat in respect of Khasra No.1075 measuring 0-62-10 and the judgment was passed in his favour on 24.12.1992. Mutation has also been attested in favour of the said defendant. It was also submitted that the suit land is in exclusive possession of State of H.P. and the entries made in the revenue record are on the basis of judgment of the Assistant Collector 1st Grade exercising the powers of Civil Court, the same is legally binding and is in accordance with law. The defendant denied other averments made in the plaint.

5. In the replication filed on behalf of the plaintiff the averments as contained in the plaint were reiterated and those of the written statements contrary to the plaint were refuted.

6. On the pleadings of the parties, the trial Court struck following issues inter-se the parties in contest:-

(i) Whether the plaintiffs have perfected their title to suit land by way of adverse possession? OPP.

(ii) Whether the defendants are interfering in the ownership and possession of the plaintiffs, as alleged? OPP

(iii) Whether the judgment dated 24.12.1992, passed by AC 1st Grade Shri J.P.Sharma, is the result of fraud and same is liable to be set aside? OPP.

(iv) Whether the plaintiffs have no cause of action to file the suit? OPD.

(v) Whether the suit is not maintainable? OPD

(vi) Whether this Court has no jurisdiction to try this suit? OPD

(vii) Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD

(viii) Whether the plaintiffs have no locus standi to file the present suit? OPD

(ix) Whether the defendant No.1 has become owner of the suit land by virtue of judgment by the competent authority? OPD-1

(x) Relief.

7. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs whereas the learned First Appellate Court had partly allowed the appeal preferred before it by the defendant/appellant.

8. Now the appellant/defendant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court, in, its impugned judgment and decree. When the appeal came up for admission on 13.07.2009, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

1. Whether both the Courts below have mis-read and mis-construed oral as well as documentary evidence on record and arrived at a wrong conclusion?

2. Whether both the Courts below have wrongly decided Issue No.5 in respect of maintainability of the suit in view of the fact that judgment was passed on 24.12.1992 by the AC 1st Grade, Sarkaghat while exercising the power of Civil Judge under the proceedings under Section 163 of the HP Land Revenue Act and the respondents/plaintiffs have not preferred any appeal from the said judgment to the District Judge and the judgment has attained finality?

3. Whether bothe the Courts below have wrongly decided the matter wherein proprietary rights were vested in favour of the appellant/defendant

on 24.12.1992 and as per the law laid down by this Hon'ble Court in Chunia Versus Jindu, Sim. Law Cases (1991) Full Bench, whereby Civil Court having no jurisdiction to interpret in respect of proprietary rights?

4. Whether both the Courts below are wrong in holding that the judgment dated 24.12.1992 is a result of fraud in view of the fact that ingredients of fraud were neither pleaded nor proved in accordance with Order 6 Rule 4 of CPC?

5. Whether both the Courts below were wrong while decreeing the suit in favour of the respondents/plaintiffs on ground of adverse possession in view of the admission of appellant/defendant, wherein possession of respondents/plaintiffs has been admitted from 1990 but against the State, possession should be more than 30 years?

Substantial questions of law:

9. The judgment of learned Assistant Collector 1st Grade, Sarkaghat stood pronounced on 24.12.1992. It stands embedded in Ext.PW-4/A whereupon the defendant No.1/appellant herein stood declared to become owner(s) of the suit land by way of adverse possession. The aforesaid judgment recorded by the Assistant Collector 1st Grade stood preceded by the Patwari concerned making a report qua the suit land, described in the relevant records to be holding a classification of "Makbuja Malik Tabe Hakuk Bartandaran Mutabik Bartan", whereon the entire village body holds customary rights qua its user in consonance with the apposite reflections in the apposite record, standing subjected to encroachment in sequel whereto appropriate proceedings under Section 163 of the H.P. Land Revenue Act stood initiated against the purported encroachers. A perusal of Ext.PW-4/A omits to make a disclosure therein qua any representation standing caused therebefore on behalf of the State of Himachal Pradesh whereas it had initiated proceedings therebefore against the deceased defendant for seeking his eviction therefrom. It appears qua hence the Assistant Collector 1st Grade, Sarkaghat, proceeding to make his pronouncement even when the State of Himachal Pradesh stood unrepresented therebefore. Also a perusal of the relevant records emanating from the office of Assistant Collector 1st Grade, Sarkaghat make a disclosure therein qua his ordering for the State of Himachal Pradesh which had instituted before him apposite proceedings for eviction of the deceased defendant from the suit land being ordered to be proceeded against ex-parte. Consequently, the State of Himachal Pradesh did not hold the defendants' witnesses to cross examination while they therebefore propagated in their respective statements qua theirs by prescription ensuing from completion of the statutorily mandated period of time hence perfecting their title qua the suit land. Also when as afore-stated, with the suit land standing recorded in the apposite revenue record to hold the classification "Makbuja Malik Tabe Hakuk Bartandaran Mutabik Bartan", whereon the entire village body holds customary rights qua its user in consonance with the apposite reflections held in the apposite revenue record whereupon the individuals whose names occur in the list of "Bartandarans" stood enjoined to in the apposite lis to stand therein arrayed in the apposite array of litigants also when hence theirs being heard therebefore was imperative significantly when their rights thereon would stand substantially affected by an adverse decision recorded qua them. However, even without their impleadment, the Assistant Collector 1st Grade, Sarkaghat proceeded to record an order declaring the deceased defendant to become owner of the suit land by way of adverse possession. All the aforesaid facts are magnificatory qua the rendition comprised in PW-4/A standing stained with a vice of complicity besides collusion occurring inter se the Assistant Collector concerned vis-à-vis the defendants. Also it stands vitiated with a vice of its infracting the principle of *audi alteram partem*. The aforesaid inference stands aggravatedly accentuated by the pronouncements made by PW-9 qua their existing no person named as Kanu Ram son of Sadhu Ram who however stood examined before the Assistant Collector 1st Grade for succoring the claim of the defendants qua the suit land. The aforesaid deposition of PW-9 qua the aforesaid fact stands corroborated by PW-13. In aftermath, reliance, if any, placed upon the deposition of Kanu Ram son of Sadhu Ram who purportedly corroborated the testification of the deceased defendant recorded before the

Assistant Collector 1st Grade qua his acquiring title to the suit land by way of adverse possession, hence holds visible bespeakings of the deceased defendant by practicing fraud upon the Assistant Collector 1st Grade, Sarkaghat, his obtaining from him the pronouncement occurring in Ext.PW-4/A. Even otherwise the factum of the house of the defendants existing on the suit land stands falsified by an admission made in his written statement by the deceased defendant conveying qua contrarily the house of the plaintiff existing thereupon, whereupon hence it was imperative for the Assistant Collector concerned to on a motion standing made therebefore by the deceased defendant cause their impleadment in the apposite array of defendants whereas the deceased defendant despite holding knowledge qua the plaintiffs raising a house on the suit land his omitting to beget their impleadment in the apposite array of defendants, is an open proclamation qua his contriving behind the back of the plaintiffs also his by practicing fraud upon the Assistant Collector his obtaining therefrom the apposite pronouncement of 24.12.1992, whereupon necessarily it hence stands ingrained with a pervasive stain of vitiation, spurred by the factum qua the entrenched interests of the plaintiffs upon the suit land standing throttled besides by theirs coming to be condemned unheard. Also for reasons as assigned hereinabove the pronouncement occurring in Ext.PW-4/A visibly emanates on collusion occurring inter se the deceased defendant vis-à-vis the Assistant Collector 1st Grade, Sarkaghat.

10. Be that as it may, with an entrenched stain of nullity for reasons aforesaid gripping Ext.PW-4/A, thereupon the rigour of the mandate of the relevant provisions of the H.P. Land Revenue Act whereupon a civil Court is barred to exercise jurisdiction qua verdicts recorded in proceedings embarked under Section 163 of the HP Land Revenue Act stands benumbed also the statutory bar constituted in the relevant statutory provisions engrafted in the H.P. Land Revenue Act against a Civil Court trying a lis arising from proceedings launched under the provisions of 163 of the H.P. Land Revenue Act, lis whereof is statutorily exclusively triable by a Revenue Officer(s), remains unattracted hereat significantly when the plaintiffs herebefore were not a party in the hitherto lis whereupon the verdict pronounced stands evidently stained with an infirmity qua its infracting the principle of *audi alteram partem* whereupon reiteratedly the rigor of the relevant statutory bar against a civil Court trying a civil suit arising from verdict(s) recorded by Revenue Officer(s) in proceedings drawn under Section 163 of the H.P. Land Revenue Act, gets benumbed besides gets relaxed. Also for lack of occurrence of the names of the plaintiffs in the apposite array of litigants in the rendition pronounced by the Assistant Collector 1st Grade, Sarkaghat comprised in PW-4/A whereas for reasons afore-stated their impleadment therebefore was imperative also does not attract qua the extant suit the principle of res-judicata obviously when the pronouncement comprised in Ext.PW-4/A was not qua similar parties/combatants hereat.

11. The learned counsel appearing for the plaintiffs has contended on anvil of a judgment of the Himachal Pradesh High Court reported in **State of Himachal Pradesh** versus **Bagshi Ram**, 2001 (2) Current Civil Law Journal 520, relevant paragraph-11 stands extracted hereinafter:-

> "11. It is not even the contention of the learned counsel for the respondent that an appeal lies before the District Judge against the order passed by the Collector in exercise of the power under Section 14 of the Act. The Scheme of the Act is that if the Assistant Collector exercises jurisdiction under sub-section (3) and (4) of Section 163 of the Act "as if a Civil Court", that an appeal would lie to the District Judge. In the instant case, the order passed by the Assistant Collector was confirmed by the Collector under Section 14 of the Act. Hence, the District Judge could not have entertained the appeal and hence the judgment and decree are liable to be quashed and set aside."

wherein it is propounded qua the Assistant Collector while exercising jurisdiction under sub-section (3) and (4) of Section 163 of the HP Land Revenue Act his exercising the apposite jurisdiction of a Civil Court wherefrom preferment of an appeal therefrom before the learned District Judge constituting the appropriate statutory remedy wherefrom he canvasses qua the

rendition recorded on the civil suit by the learned trial Court besides the verdict recorded by the learned District Judge in an appeal preferred therefrom before him, both acquiring a taint of theirs being jurisdictionally void. However, the aforesaid submission holds no vigour in the face of the aforestated discussion holding upsurgences qua the impugned rendition of the Assistant Collector 1st Grade, Sarkaghat emanating on fraud standing practiced upon it by the deceased defendant also its infracting the principle of *audi alteram partem* whereupon hence with a visible contradistinctivity occurring hereat vis-à-vis the factual matrix prevailing in the citation propounding the aforestated principle wherefrom hence it is to be aptly concluded qua the apposite remedy available for availment by the plaintiffs standing comprised in theirs instituting a civil suit, as tenably done by them. Also for unmasking the stains of nullity on aforestated grounds embodying the impugned rendition warranted striking of apposite issues in consonance therewith besides adduction of germane evidence thereon whereas availment by the plaintiffs of the prescribed statutory remedy would for want of apposite pleadings hence preclude them to constrain the learned District Judge to strike an apposite issue on facet aforesaid conspicuously when they were not parties in the earlier lis. Also they would stand interdicted to adduce germane evidence thereon whereas when the aforesaid facilitations would accrue to the plaintiffs only on theirs instituting a civil suit before a civil Court renders hence the remedy as availed by them to not attract the jurisdictional bar expostulated in the judgment afore-stated.

12. Reiteratedly, with the plaintiffs pleading in the suit qua the rendition of the learned Assistant Collector 1st Grade, Sarkaghat standing stained with a vice of fraud and collusion, in sequel thereto with the plaintiffs also casting an apposite averment in their suit vis-à-vis the defendants is also a sufficient factum qua thereupon theirs making a tenable onslaught qua hence the frailty of the rendition afore-stated. Substantial questions of law are answered in favour of the plaintiffs/respondents and against the appellants/defendants.

13. Accordingly, there is no merit in the instant appeal and the same is dismissed. All pending application(s) shall also stand disposed of. No costs. The records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Soma Devi ...Appellant/Plaintiff.

Versus

Mast Ram ..Respondent/Defendant.

R.S.A. No. 243 of 2013
Judgment reserved on: 09.11.2016
Date of decision: 16 . 11. 2016.

Indian Succession Act, 1925- Section 63- Plaintiff claimed that she is legally wedded wife of P who died without executing any Will- the Will set up by the defendant is forged and fictitious document - the defendant pleaded that the plaintiff had taken divorce from the deceased and had contracted second marriage- he had executed a Will on being satisfied by the services rendered by the defendant – the suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff has not disputed the execution of the Will but has pleaded the same to be the result of fraud and undue influence – no specific particulars of fraud or undue influence were given and a general plea is not sufficient to amount to a plea of fraud- the pleas of fraud, undue influence, coercion etc. are to be proved by the person taking the plea – once a doubt is created regarding the free will of the deceased, the burden shifts upon the propounder to dispel the doubt - the Will is registered one and there is presumption of its valid execution- the court should not start with the presumption that Will is not genuine or that it is fraudulent – the conduct of the person who raises the ground for suspicion is also to be looked at in order to judge the credibility of the ground of suspicion- it was proved that plaintiff was

married to P, when she was 10 years of age and had not resided with P thereafter - in these circumstances, it was possible for P to execute a Will disinheriting the plaintiff - the suit was rightly dismissed by the Courts- appeal dismissed.(Para-10 to 35)

Cases referred:
Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and others AIR 1967 SC 878
Afsar Shaikh and another v. Soleman Bibi and others AIR 1976 Supreme Court, 163
Upasna and others vs. Omi Devi, 2001 (2) Current Law Journal (H.P.) 278
H. Venkatachala Iyengar vs. B.N. Thimmajamma and others AIR 1959 SC 443
Shashi Kumar Banerjee and others vs. Subodh Kumar Banerjee and others AIR 1964 SC 529
Jaswant Kaur vs. Smt. Amrit Kaur and others (1977) 1 SCC 369
Ningawwa vs. Byrappa Shiddappa Hireknrabar AIR 1968, SC 956
Prem Singh vs. Birbal (2006) 5 SCC 353
Indu Bala vs. Mahindra Chandra 1982 SC 133
Janki Narayan Bhoir vs. Narayan Namdeo Kadam 2003 AIR SC 761
Joseph Antony Lazarus vs. A.J. Francis (2006) 9 SCC 515
Sham Singh vs. Smt. Rano Devi, 2007 Latest HLJ, 352
Bal Krishan and another vs. Shangri Devi, 2008 (2) Latest HLJ 799
Ashok Bansal vs. Anju Goel, (2011) 3 SLC 52

For the Appellant : Ms. Ritta Goswami, Advocate.
For the Respondent : Mr. Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The plaintiff is the appellant, who has lost in both the Courts below and has filed the second appeal praying therein for setting aside the judgments and decrees so passed by the Courts below.

2. The plaintiff/appellant (hereinafter referred to as the 'plaintiff') sought a declaration to the effect that the alleged Will dated 14.6.2000 allegedly executed by Paras Ram in favour of the respondent/defendant (hereinafter referred to as the 'defendant'), was fictitious and is the result of undue influence and, therefore, he be restrained by way of permanent prohibitory injunction from interfering in the suit land comprised in Khewat No. 213, Khatauni No. 240, Khasra Nos. 701, 713, Kita-2, measuring 3-16-17 situated in Muhal Dehar/75, Tehsil Sundernagar, District Mandi, H.P.

3. The plaintiff claimed herself to be the legally wedded wife of Paras Ram, who expired on 19.5.2001, that too, after suffering long ailment. It was claimed that the plaintiff was the sole surviving legal heir of Paras Ram, who was owner in possession of the suit land and had expired without leaving behind any Will regarding the suit land. It was further averred that she came to know about the forged and fictitious Will when the same was presented before the Assistant Collector 2nd Grade, Sundernagar. It was also contended that Paras Ram was not in a sound disposing mind due to long ailment and had therefore not executed the Will, which is the result of undue influence. Hence the suit.

4. The defendant contested the suit of the plaintiff by filing written statement wherein preliminary objection regarding locus standi was raised. On merits, it was claimed that the plaintiff was the divorced wife of Paras Ram and, therefore, she has no right, title and interest over the suit land in any manner whatsoever. It was pleaded that after getting divorce from Paras Ram, the plaintiff had contracted second marriage and was therefore, not entitled to the property left behind by him. It was further pleaded that Paras Ram had executed a Will on

account of the services rendered by the defendant and the same was registered on 14.6.2000 and it was by virtue of this Will that the defendant had now become owner in possession of the suit land. It was lastly contended that the Will was genuine and valid and accordingly dismissal of the suit alongwith costs was prayed for.

5. In her replication, the plaintiff reiterated the contents of the plaint in totality and refuted the averments as contained in the written statement.

6. On 17.5.2003, the learned trial Court framed the following issues:

1. Whether the plaintiff is legally wedded wife of Paras Ram and she inherited his property as alleged? OPP
2. Whether the plaintiff is owner in possession of the suit land? OPP
3. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction as prayed? OPP
4. Whether Paras Ram executed a due and valid Will in favour of the defendant on 14.6.2000 as alleged? OPD
5. Whether the plaintiff has no locus-standi to file the suit? OPD
6. Whether the Will dated 14.6.2000 executed by Paras Ram in favour of the defendant is a result of undue influence as alleged? If so, to what effect? OPD
7. Relief.

7. After recording the evidence and evaluating the same, the learned trial Court dismissed the suit and the appeal preferred against such judgment and decree was also dismissed by learned Additional District Judge, Mandi vide its judgment and decree dated 21.12.2012.

8. Aggrieved by the judgment and decree passed by the learned lower Appellate Court, the appellant has filed the instant appeal which has been admitted by this Court on 10.6.2013 on the following substantial question of law:

> *"1. Whether the Courts below have misread and mis-appreciated the evidence on record to come to the conclusion that the Will (Exhibited DW-2/A) is a genuine document?"*

9. I have heard learned counsel for the parties and have gone through the records of the case carefully.

10. At the outset, it may be noticed that the plaintiff had not disputed the execution of the Will but has only claimed the same to be an outcome of fraud and is a result of undue influence. Therefore, the first question that arises for consideration is as to whether the plaintiff has failed to raise these pleas as contemplated under Order 6 Rule 4 CPC which reads as follows:

> *"**4. Particulars to be given where necessary**.- In all cases in which the party pleadings relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."*

11. The answer to this question is definitely in the negative for the simple reason that apart from using the words like fraud, undue influence, not genuine, there is no specific particulars having set-forth and it is more than settled that a vague of general plea can never serve this purpose and the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence and the unfair advantage obtained by the other.

12. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and others AIR 1967 SC 878*** wherein it was held as under:

> *"10. Before, however a court is called upon to examine whether undue influence was exercised or not, it must scrutinize the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6 Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal (1964) 1 SCR 270: (AIR 1963 SC 1279) above referred to. In that case it was observed (at p. 295 of SCR): (at p. 1288 of AIR):*
>
> > *"A vague of general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other."*
>
> *"25. There was practically no evidence about the domination of Balaram over Prasanna at the time of the execution of the deed of gift or even thereafter. Prasanna, according to the evidence, seems to have been a person who was taking an active interest in the management of the property even shortly before his death. The circumstances obtaining in the family in the year 1944 do not show tht the impugned transaction was of such a nature as to shock one's conscience. The plaintiff had no son. For a good many years before 1944 he had been making a living elsewhere. According to his own admission in cross-examination, he owned a jungle in his own right (the area being given by the defendant as 80 bighas) and was therefore possessed of separate property in which his brother or nephew had no interest. There were other joint properties in the village of Parbatipur which were not the subject matter of the deed of gift. It may be that they were not as valuable as the Lokepur properties. The circumstances that a grandfather made a gift of a portion of his properties to his only grandson a few years before his death is not on the face of it an unconscionable transaction. Moreover, we cannot lose sight of the fact that if Balaram was exercising undue influence over his father he did not go to the length of having the deed of gift in his own name. In this he was certainly acting very unwisely because it was not out of the range of possibility that Subhas after attaining majority might have nothing to do with his father."*

13. It shall be apt to make reference to the judgment of the Hon'ble Supreme Court in ***Afsar Shaikh and another v. Soleman Bibi and others AIR 1976 Supreme Court, 163,*** wherein the Hon'ble Supreme Court has held as under:

> *"While it is true that 'undue influence', 'fraud', 'misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, Rule 2 of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court."*

14. Yet again on the subject, reference to a judgment rendered by this Court in ***Upasna and others vs. Omi Devi, 2001 (2) Current Law Journal (H.P.) 278*** is also essential as the law on the subject was lucidly dealt and it was held as under:

> *".....The allegation of fraud, coercion and undue influence could not be proved by the plaintiffs and as such both the courts below have rightly held that the plaintiffs have failed to prove that the gift deed was as a result of fraud, coercion*

and undue influence. The possession of the land in dispute was given to the defendant and the mutation of entry in the revenue record in her name was made by the Patwari in the presence of Beli Ram during his life time. The execution of the gift deed was the personal right of the donor and since Beli Ram had not assailed the gift made by him in favour of the defendant during his life time, the plaintiffs have failed to establish that the donee had not rendered any service to the donor during his life time. The gift has been validly made by the donor in favour of the donee voluntarily and with his free will and accepted by the donee it cannot be said that the gift was induced by undue influence under Section 16 (2) & (3) of the Indian Contract Act, 1872 and was as a result of fraud as defined under Section 1 of the Act. The ratio of the judgment in Ladli Parshad Jaiswal v. The Karnal Distillery Co., Ltd. Karnal & Ors., AIR 1963 Supreme Court 1279 strongly relied on by the learned counsel for the plaintiffs in my view does not advance the case of the plaintiffs that the gift in question was as a result of undue influence under S. 16 (2) & (3) of the Contract Act, 1872. In Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib & Ors., AIR 1967 Supreme Court 878, it has been observed that law under Section 122 of the Transfer of Property Act, 1882 as to undue influence is the same in case of a gift inter vivos as in case of a contract. It has further been held that the court trying a case of undue influence under Section 16 of the Contract Act, 1872 must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these issues a third point emerges, which is that or the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. The judgment further proceeded to observe that merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. In this view of the matter, as noticed hereinabove, the plaintiffs have miserably failed to establish that the gift deed was executed by donor in favour of the donee under undue influence or fraud……"

15. It is surprising that though the plaintiff had herself raised the plea of fraud and undue influence but strangely enough, learned trial Court did not even bother to frame an issue and straightway placed the onus upon the propounder of the Will to dispel the so called suspicious circumstances.

16. It is high time the Courts clearly understand the legal position and desist from placing the onus directly upon the propounder of the Will irrespective of the case set up by the opposite party. The correct legal position in matters of Will was laid down by the three Hon'ble Judges of the Hon'ble Supreme Court in ***H. Venkatachala Iyengar vs. B.N. Thimmajamma and others AIR 1959 SC 443*** and thereafter approved by the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***Shashi Kumar Banerjee and others vs. Subodh Kumar Banerjee and others AIR 1964 SC 529*** and thereafter reiterated in a number of cases including three Judges of the Hon'ble Supreme Court in ***Smt. Jaswant Kaur vs. Smt. Amrit Kaur and others (1977) 1 SCC 369***, wherein the legal position was succinctly summed up in the following manner:

"10. *"There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in R. Venkatachala Iyengar v.B.N. Thirnmajamma & Others.(AIR 1959 SC 443). The Court, speaking through Gajendragadkar J., laid down in that case the following propositions :*

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent

mind in such matters. As in the ease of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 63 of the Evidence Act, one attesting witness at least has .been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death o[the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surround- ed by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he re- ceives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

17. Thus, it is absolutely clear from the aforesaid exposition of law that if a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him and only where the circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will, then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

18. Adverting to the facts of the case, it would be noticed that as regards the oral evidence, the plaintiff has examined another witness besides herself. She appeared as PW-1 and

stated that she was married with Paras Ram about 40 years back, but no legal heir was born out from the wedlock. Her husband had expired on 19.5.2001 and therefore, she became the owner of the land in question. She performed his last rites and prior to his death, he was not in a position to understand about his good and bad and had in fact at one time killed an ox. The Will was claimed to be false one. However, when it got down to cross-examination, she candidly admitted that right from the date of her birth, she had been residing at the house of her parents. Though, she denied the suggestion that divorce had taken place with Paras Ram. She also denied Paras Ram was being looked after by the family of his brother and further denied that the defendant was looking after Paras Ram and in lieu of his services had executed a Will in his favour.

19. PW-2 Kali Dass is the brother of Paras Ram, who claimed that Paras Ram was of unsound mind from his childhood and he had killed an ox. He further stated that Paras Ram was not able to understand about his good and bad and in his cross-examination, stated that it is known that Paras Ram had executed a Will in favour of Mast Ram as Mast Ram had been looking after him.

20. As against this evidence, Mast Ram, defendant, appeared as DW-1 and deposed that he was looking after Paras Ram and due to that reasons he had executed a Will in his favour on 14.6.2000 which was registered with the Sub Registrar, Sundernagar and mutation on this basis had also been attested. He further stated that the plaintiff was divorced 20-25 years ago and it was Hari Mohan son of brother of Paras Ram, who had performed his last rites. He further stated that Will was executed by Paras Ram in a sound disposing state of mind. In cross-examination, the witness admitted that the Will was scribed in his presence and further stated that Chaman Lal's house is 5 KM away from Alsu and the house of witness was 26-27 kilometers away from village Alsu. The witnesses signed the Will in his presence. However denied that the Will was executed by him by exercising undue influence over Paras Ram. He admitted that Paras Ram was alone and helpless and claimed that he looked after him.

21. DW-2 Onkar Singh is the Document Writer, who proved the Will Ex.DW-2/A, which is scribed by him on 14.6.2000 at the instance of Paras Ram. He stated that at the time of execution of the Will, Paras Ram was in sound disposing state of mind. After scribing the Will, he had read over and explained the contents of the Will to Paras Ram and the witnesses also and after admitting the contents to be correct by all of them, the same was signed by Paras Ram and thereafter the witnesses had put their signatures on it. The Will was thereafter taken to Tehsil office where the same was attested by the Tehsildar. The signature of Paras Ram was in red circle. In cross-examination, the witness stated that Paras Ram was not personally known to him. He stated that he was identified by Sh. D. K. Abrol, Advocate, but denied the suggestion that the Will had drafted at the instance of Sh. Abrol. He denied the suggestion that Paras Ram while executing the Will was not in sound disposing mind. Lastly, he denied the suggestion that neither Paras Ram nor witnesses signed the Will in his presence.

22. DW-3 Chaman Lal deposed that Paras Ram got executed a Will in favour of defendant which was scribed by DW-2 at his instance. He alongwith Paras Ram son of Hiru Ram had witnessed the Will which had been read over by the scribe to Paras Ram, who after understanding the same as correct, put his signature on the Will and thereafter he alongwith another witnesses had put their signatures on the Will. He categorically stated that Paras Ram had signed the Will in his presence and Ext.DW-2/A is the same Will. He further deposed that after signing the Will, he went to the Tehsil office where Tehsildar asked Paras Ram about the Will and it is only after satisfying him regarding the execution of the Will that the same had been registered. In cross-examination the witness stated that his house was 3 KM away from Alsu and he admitted that there were other houses at Alsu. He could not tell about the other relatives of Paras Ram and the details of other family members. He stated that the Will was prepared of about 4 bighas of land and denied the suggestion that the Executant Paras Ram was not in sound disposing mind or that he had not executed the Will.

23. DW-4 Hem Raj deposed that the Will Ex.DW-2/A was registered with Sub Registrar Office, Sundernagar at serial No. 133 dated 14.6.2000. DW-5 D.K.Abrol, Advocate,

deposed that he had been practicing as an Advocate since 1967 and late Paras Ram was known to him. He stated that on 14.6.2000 Paras Ram had executed a Will in favour of Mast Ram and he had identified Paras Ram before Sub Registrar, Sundernagar. He proved the Will Ex.DW-2/A by identifying his signatures in circle red. He further stated that Sub Registrar read over and explained the contents of the Will to Paras Ram and had also made an inquiry and only thereafter the Will had been registered. In cross-examination, the witness stated that he put his signatures on the Will only as an identifier and denied the suggestion that the testator Paras Ram was not in sound disposing mind or that the Will had been prepared fraudulently.

This is the entire oral evidence led by the parties.

24. At this stage, it may be stated that the Will in question is a registered one and, therefore, there is a presumption to its being validly executed and onus of proof will be on the other party, who wants to set off the above presumption.

25. It is settled law that it is for the propounder of the Will to repel all the suspicious circumstances surrounding the Will and to prove the genuineness of the Will. Besides this, the propounder would also to satisfy the following points qua the due execution of the Will.

(i) the Will was signed by the testator;

(ii) at the relevant time, testator was in sound disposing state of mind;

(iii) testator had understood the nature and effect of depositions and had put his signature on the document of his own free volition and will.

26. In ***Ningawwa*** vs. ***Byrappa Shiddappa Hireknrabar AIR 1968, SC 956,*** the Hon'ble Supreme Court held as under:

> *"27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima-facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption."*

27. In ***Prem Singh*** vs**. *Birbal (2006) 5 SCC 353***, it was held as under:

> *"27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima-facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, respondent No.1 has not been able to rebut the said presumption."*

28. It however, needs to be clarified that though it is always for the propounder of the Will to repel all the suspicious circumstances surrounding the Will and to prove its genuineness, the testamentary Court is a Court of conscience and not a Court of suspicion. It is not the law that, whenever a Will is sought to be proved in the Court, the Court should start with the presumption that the Will is not genuine or that it is fraudulent or that the person who chooses to establish the Will must remove all such suspicions even when they are unreal.

29. The object of the Court proceedings is not to render the testamentary document ineffective but to make it effective and render the terms of that Will operative. In doing so, the Court has to bear in mind and has to take note of the fact that the testator is not available before the Court to state as to whether the document in fact was his or her last Will or as to whether he or she had signed the same and whether the attestors had signed receiving an acknowledgment from him about the execution of the Will. It is for that reason that the Courts should be cautious while dealing with the evidence placed before it in relation to the execution and attestation of the Will as also the disposing state of mind of the testator. This need for caution cannot be exploited by unscrupulous caveators who choose to cull out imaginary suspicious with a view to prevent the legatees under the Will from claiming the benefit thereunder and to render the Will of the

deceased wholly ineffective. In this context, the conduct of the persons who raise the alleged ground for suspicion is also to be looked at in order to judge as to how credible are the grounds for suspicion as sought to be raised by such person.

30. Adverting to the facts of the case, it would be noticed that the defendant has been able to prove the Will by removing all the so called suspicious circumstances to the judicial conscious of this Court. It has come on record that the appellant, who claimed herself to be the wife of deceased Paras Ram had apparently got married to him when she was hardly 10 years and had never stayed in his house and had been residing at the house of her parents. That apart, what strikes the judicial conscious of this Court is the fact that if the plaintiff was really so called wife of Paras Ram, then would she have left him simply to die because while appearing as PW-1 she herself claims that Paras Ram was not in sound disposing mind, whereas PW-2 goes to the extent of stating that Paras Ram was of unsound mind.

31. The word 'wife' is not simply a word. In relationship of husband and wife, there are certain obligations and duties which both the spouse have to discharge and that would not only mean the obligation in matter of leading conjugal life but would include the obligation to take care of husband when he is ill, infirm or sick. Even if these obligations are not taken to be legal, these can definitely be considered as moral obligations.

32. Ms. Ritta Goswami, learned counsel for the plaintiff would vehemently argue that even if the plaintiff has failed to prove the so called fraud or undue influence, even then the onus to dispel the Will from all the aforesaid rests upon the propounder of the Will and would rely upon the following judgments: ***Indu Bala vs. Mahindra Chandra 1982 SC 133, Janki Narayan Bhoir vs. Narayan Namdeo Kadam 2003 AIR SC 761***, ***Joseph Antony Lazarus vs. A.J. Francis (2006) 9 SCC 515, Sham Singh vs. Smt. Rano Devi, 2007 Latest HLJ, 352.***. There cannot be any quarrel with the proposition of law as laid down in the aforesaid judgments and this question has already been dealt with by me in the earlier part of the judgment.

33. It is next contended by learned counsel for the plaintiff that the testator has given no reasons in the Will to exclude the natural heir and would rely upon the judgment rendered by this Court in ***Bal Krishan and another vs. Shangri Devi, 2008 (2) Latest HLJ 799*** and ***Ashok Bansal vs. Anju Goel, (2011) 3 SLC 52.***

34. As regards the recording of reasons in the Will, once it has come on record that the appellant never resided with the deceased, then obviously Paras Ram never considered her to be his legally wedded wife, the same need not necessarily be disclosed in the Will and it was always open to the propounder of the Will to establish that she carried out her matrimonial obligation by taking care of Paras Ram, which unfortunately she neither alleged or proved.

The substantial question of law is accordingly answered against the appellant.

35. In view of aforesaid detailed discussion, I find no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

The Himachal Pradesh State Cooperative Milk Producers Federation Limited
.....Petitioner

Versus

Surinder Kumar and others .....Respondents

CWP No. 1636 of 2016
Reserved on: November 3, 2016
Decided on: November 16, 2016

Constitution of India, 1950- Article 226- Respondents 1 to 12 sought a direction to promote them to the post of technical superintendent – the claim was opposed on the ground that diploma obtained by the respondents is through distance learning and for one year - degree in dairy technology/dairy husbandry or diploma in dairy technology/dairy husbandry is required under Rules – the Tribunal allowed the application - held, that respondents possess essential qualification of five years regular service on the post- they had obtained diploma in dairy technology from IGNOU – once diploma has been awarded by IGNOU, it is not open for the federation to say that the same is not equivalent to the diploma of two years awarded by other institutions – the genuineness of the diploma has not been disputed by any authority- the petition is without any merit and the same is dismissed. (Para- 8 to 18)

Case referred:
Annamalai University v. Secy. to Govt. (2009)4 SCC 590

For the petitioner	Ms.Ranjana Parmar, Senior Advocate with Mr. M.R. Verma, Advocate.
For the respondents:	Mr. Satyen Vaidya, Senior Advocate with Mr. Surinder Saklani, Advocate, for respondents No.1 to 12. Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondent No.13.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

Present petition has been filed by the petitioner-H.P. State Cooperative Milk Producers Federation Limited (hereinafter referred to as 'Federation'), against order dated 11.4.2016 passed by the Himachal Pradesh Administrative Tribunal in TA No. 5397/2015 and OA No. 3261/2015, whereby the learned Tribunal, while accepting the claim of the respondents No.1 to 12 directed the Federation to consider the cases of all the respondents for promotion to the post of Technical Superintendents within three months from the date of production of a certified copy of the order.

2. Briefly stated facts as emerge from the record are that respondents No. 1 to 12, who are In-charge Chilling Centres owned by the Federation, filed a writ petition before this Court for the redressal of their grievances but the same was transferred to the Himachal Pradesh Administrative Tribunal and was registered as TA No. 5397/2015, praying therein for a direction to the Federation to promote them to the post of Technical Superintendents in the Federation, after declaring them as qualified and eligible to be promoted to the said post from the date of their having completed five years of service as In-charge Chilling Centres, with all consequential benefits. Aforesaid claim of the respondents was opposed by the Federation on three grounds, viz. 1. the diploma acquired by the respondents from Indira Gandhi National Open University ('IGNOU', for short) is only of one year duration, 2. aforesaid diploma is through distance learning and as such respondents have no practical experience, and 3. Service Rules occupying the field were framed in the year 1994, whereas diploma was started in the year 2005. As per Federation, respondents can not be promoted to the post of Technical Superintendents, in terms of service Rules, wherein, vide Rule-13, post of Technical Superintendents (Production/Store/Marketing/MIS/P&I), is required to be filled up by way of promotion on seniority-cum-merit basis from amongst the In-charge Chilling Centres, having five years regular service on the post, provided that the eligible candidates possess Degree in Dairy Technology/Dairy Husbandry or Diploma in Dairy Technology/Dairy Husbandry. If eligible candidates are not available in the feeder cadre, then posts of Technical Superintendents are to be filled up by way of direct recruitment.

3. In the instant case, main contention of the Federation before the Tribunal was that the diploma obtained by the respondents in Dairy Technology/Dairy Husbandry from IGNOU is only of one year duration and that too through distance learning, and, as such, they can not be given promotion on the basis of same. Learned Tribunal, on the basis of pleadings as well as record made available to it, allowed the Original Application as well as TA from the due date alongwith consequential benefits, in accordance with service rules.

4. Being aggrieved and dissatisfied with aforesaid directions issued by the learned Tribunal, Federation has approached this Court, praying therein for the following main relief:

> "i) That the order dated 11.4.2016 (Annexure P-2) passed by the Ld. Administrative Tribunal in TA No. 5397/2015 titled as Surinder Kumar & others Vs. H.P. State Cooperative Milk Producers Federation Ltd., may kindly be quashed and set aside."

5. Ms. Ranjana Parmar, learned Senior Advocate duly assisted by Mr. M.R.Verma, Advocate, vehemently argued that the impugned order passed by the learned Tribunal below is not sustainable as the same is not based on correct appreciation of the Service Rules, wherein it has been specifically provided that In-charge Chilling Centre must posses five years service and a degree or diploma in Dairy Technology/Dairy Husbandry, as such, same deserves to be set aside. She further contended that though the respondents fulfill the criteria of minimum 5 years' service as provided under Rule-13, but they do not fulfill criteria of educational qualification because Diploma in Dairy Technology possessed by them has been awarded by IGNOU on the basis of training imparted for a few days i.e. 90 days by the officials of the Federation, who were not professionally qualified. She further stated that training was imparted by the Federation and tuition fee was paid to IGNOU by it and participating candidates were given TA/DA as and when they attended the classes and they were treated on duty at that time. She further stated that representation preferred by the respondents to treat the Diploma in Dairy Technology awarded by IGNOU at par with the diploma issued by the other Institutions after regular course, was considered by the Board of Directors and it was decided that the short term Diploma in Dairy Technology can not be equated with two years regular course provided by Agriculture University. She further stated that in addition to above, reference was made to the Director General, National Dairy Research Institute ('NDRI', in short), Education Division, New Delhi, who replied to the reference and informed that Diploma in Dairy Technology is offered by IGNOU of one year duration without practical training and it can not be considered equal to two years Diploma in Dairy Technology with regular practical and theory course offered by NDRI.

6. Mr. Satyen Vaidya, learned Senior Advocate duly assisted by Mr. Surinder Saklani, Advocate, supported the order passed by the learned Tribunal below stating that there is no scope of interference, whatsoever, by this Court, in the order aforesaid, as the same is based on correction appreciation of Service Rule-13.

7. We have heard the learned counsel for the parties and gone through the record carefully.

8. It is undisputed that the respondent are In-charge, Chilling Centres owned and controlled by the Federation and they possess essential qualification of 5 years regular services on the post. Before adverting to the merits of the submissions having been made by the learned counsel for the parties, it would be apt to reproduce the Rule 13 of the Service Rules, as under:

> "13. TECHNICAL SUPERINTENDENTS (PRODUCTION /STORE/ MARKETING/ MIS/P&I):
>
> i) By promotion on seniority-cum-merit basis from amongst Incharge Chilling Centres having atleast 5 years regular service on the post, provided that eligible candidates should either be a Graduate in Dairy Technology/Dairy Husbandry or a Diploma Holder in Dairy Technology/Dairy Husbandry.
>
> Or

ii) By Direct Recruitment in case eligible candidates are not available in the feeder category."

9. Perusal of Rule 13 clearly suggests that there are two ladder of promotion to the post of Technical Superintendents (Production/Store/Marketing/MIS/P&I). Since, respondents are in-service candidates, they are to be governed by Rule 13(i), which provides that the candidate should possess 5 years regular service and he should be either be a Graduate in Dairy Technology/Dairy Husbandry or a Diploma Holder in Dairy Technology/Dairy Husbandry.

10. Since there is no dispute regarding condition contained in Rule 13 with regard to possessing 5 years service, this Court only needs to examine the aspect with regard to educational qualification.

11. Careful perusal of Rule-13, as reproduced herein above, clearly suggests that the candidate should either possess a degree or a diploma in Dairy Technology/Dairy Husbandry. Perusal of certificates placed on record by the respondents clearly suggest that Diploma in Dairy Technology was awarded by IGNOU on 1.3.2010 (available at page 200 of the paper-book). Close scrutiny of certificate suggests that respondents have been awarded Diploma in Dairy Technology, after having undergone above prescribed course of study in the examination. Once there is specific provision in the Rules that the incumbent should possess Diploma in Dairy Technology/Dairy Husbandry, it is not open for the Federation to take stand that diploma offered by IGNOU is only of one year duration and same can not be equated with diploma of two years offered by other institutions. Rules specifically provide for Diploma in Dairy Technology/Dairy Husbandry and it nowhere talks about duration, be it of one year or two years. It is not the case of the Federation that the diploma awarded by IGNOU is not recognized by University Grants Commission (in short, 'UGC') and as such same can not be considered in light of Rule 13 aforesaid. Even the Indian Council of Agricultural Research (in short 'ICAR') Education Division, while answering the reference made by the Federation, has nowhere disputed the correctness and genuineness of the diploma, admittedly offered by the IGNOU, rather they have stated that the diploma offered by IGNOU can not be equated with two years Diploma in Dairy Technology offered by NDRI.

12. At the cost of repetition, it may be again stated that this is not a condition precedent under rule 13 (i). Rule 13 (i) specifically talks about Diploma in Dairy Technology/Dairy Husbandry and there is no condition that diploma should be from NDRI. Record reveals that the Diploma in Dairy Technology was imparted to the respondents by IGNOU at the instance of the Federation, which itself sent the respondents to undergo the course/training, rather, entire expenses on account of course fee were borne by the Federation. Perusal of letter dated 15.10.2008, (available at page 311 of the paper-book) itself suggests that the Federation itself sponsored the respondents for Diploma in Dairy Technology through IGNOU, New Delhi, meaning thereby the Federation was fully aware that the respondents sent for course referred to herein above, would be awarded Diploma in Dairy Technology through IGNOU. Leaving everything aside, this Court, after perusing Rule-13, is fully convinced that the respondents, who had passed Diploma in Dairy Technology from IGNOU, had all the essential qualification as required for promotion to the post of Technical Superintendents.

13. Rule-13 of the Service Rules, framed by Federation clearly suggest that appointment to the post of Technical Superintendents, in the first instance, is by way of promotion from amongst the In-charge Chilling Centres having five years service (after amendment, now three years) having a degree or diploma in Dairy Technology/Dairy Husbandry, or, in the alternative, by way of direct recruitment, in case eligible candidates are not available in the feeder cadre. There is no ambiguity in the rule which can persuade this Court to take a different view than the one taken by the learned Tribunal below.

14. Further arguments having been advanced by Ms. Parmar that the candidates should have two years Diploma in Dairy Technology/Dairy Husbandry also needs to be rejected because there is no mention, if any, with regard to duration of course in Service Rule-13, as such

we are not inclined to accept the unreasonable distinction being portrayed by Ms. Parmar. Opinion, if any, expressed by the ICAR, which has been heavily relied upon by the Federation while opposing claim of the respondents, definitely can not override the specific provision of Service Rules, until and unless same are amended suitably. But as of today, this Court sees no ambiguity in Rule 13 and there is no illegality or infirmity in the order passed by Himachal Pradesh Administrative Tribunal, as such, same deserves to be upheld.

15. Otherwise also, IGNOU is a recognized University and courses offered by it are by and large recognized /authorized by UGC, which is the apex body to recognize courses/Universities. Since there is no challenge to the validity of the course/diploma offered by IGNOU, this Court sees no force in the contentions raised on behalf of the Federation that the diploma offered by IGNOU can not be taken into consideration in terms of Rule-13.

16. This Court is not competent to decide the validity/ equivalence of a degree/diploma for appointment/promotion, awarded by an open university and it is not in the domain of the Court to decide issue of equivalence of degree/diploma obtained through open universities and regular universities. Issue with regard to equivalence of diploma obtained by the respondents from IGNOU vis-à-vis diploma offered by NDRI as a valid qualification for promotion to the post of Technical Superintendents, can be decided only by UGC. Federation is bound to approach UGC for getting clarification whether diploma obtained by respondents from IGNOU i.e. Diploma in Dairy Technology is a valid qualification equivalent to diploma obtained by students attending regular course. Hon'ble Apex Court in **Annamalai University v. Secy. to Govt**. reported in (2009)4 SCC 590, while considering conflict of UGC Act, 1956 and IGNOU Act, 1985 held that merely because the Distance Education Council of IGNOU, which is an authority under Statute 28 of IGNOU Act, has granted its approval, will not validate the degree awarded by the open university. Hon'ble Apex Court further held that UGC Act will prevail over IGNOU Act, as UGC Act will bind all universities, whether conventional or open. Regulations framed by it in terms of clauses (e), (f) (g) and (h) of sub-section (1) of Section 26 are of wide amplitude. They apply equally to Open Universities and also to formal Conventional Universities. In the matter of higher education, it is necessary to maintain minimum standard of instructions and such minimum standards are required to be defined by UGC, meaning thereby that issue, if any, with regard to equivalence of degree/diploma obtained through open university and regular universities can only be decided by UGC, which is competent authority to do so. Their lordships of the Hon'ble Supreme Court have held as under:

> "40. UGC Act was enacted by the Parliament in exercise of its power under Entry 66 of List I of the Seventh Schedule to the Constitution of India whereas Open University Act was enacted by the Parliament in exercise of its power under Entry 25 of List III thereof. The question of repugnancy of the provisions of the said two Acts, therefore, does not arise. It is true that the statement of objects and reasons of Open University Act shows that the formal system of education had not been able to provide an effective means to equalize educational opportunities. The system is rigid inter alia in respect of attendance in classrooms. Combinations of subjects are also inflexible.
>
> 41. Was the alternative system envisaged under the Open University Act was in substitution of the formal system is the question. In our opinion, in the matter of ensuring the standard of education, it is not. The distinction between a formal system and informal system is in the mode and manner in which education is imparted. UGC Act was enacted for effectuating co- ordination and determination of standards in Universities. The purport and object for which it was enacted must be given full effect.
>
> 42. The provisions of the UGC Act are binding on all Universities whether conventional or open. Its powers are very broad. Regulations framed by it in terms of clauses (e), (f), (g) and (h) of sub-Section (1) of Section 26 are of wide amplitude. They apply equally to Open Universities as also to formal conventional universities. In the matter of higher education, it is necessary to maintain minimum standards of instructions. Such minimum standards of instructions are required to be defined by

UGC. The standards and the co- ordination of work or facilities in universities must be maintained and for that purpose required to be regulated.

43. The powers of UGC under Sections 26(1)(f) and 26(1)(g) are very broad in nature. Subordinate legislation as is well known when validly made becomes part of the Act. We have noticed hereinbefore that the functions of the UGC are all pervasive in respect of the matters specified in clause (d) of sub-section (1) of Section 12A and clauses (a) and (c) of sub- section (2) thereof. Indisputably, as has been contended by the learned counsel for the appellant as also the learned Solicitor General that Open University Act was enacted to achieve a specific object. It opens new vistas for imparting education in a novel manner. Students do not have to attend classes regularly. They have wide options with regard to the choice of subjects but the same, in our opinion, would not mean that despite a Parliamentary Act having been enacted to give effect to the constitutional mandate contained in Entry 66 of List I of the Seventh Schedule to the Constitution of India, activities and functions of the private universities and open universities would be wholly unregulated.

44. It has not been denied or disputed before us that in the matter of laying down qualification of the teachers, running of the University and the matters provided for under the UGC Act are applicable and binding on all concerned. Regulations framed, as noticed hereinbefore, clearly aimed at the Open Universities. When the Regulations are part of the statute, it is difficult to comprehend as to how the same which operate in a different field would be ultra vires the Parliamentary Act. IGNOU has not made any regulation; it has not made any ordinance. It is guided by the Regulations framed by the UGC. The validity of the provisions of the Regulations has not been questioned either by IGNOU or by the appellant - University. From a letter dated 5.5.2004 issued by Mr. H.P. Dikshit, who was not only the Vice-Chancellor but also the Chairman of the DEC of IGNOU it is evident that the appellant - University has violated the mandatory provisions of the Regulations."

17. In the present case, as has been observed above, there is nothing in Service Rule-13 framed by the Federation-petitioner, which suggests that department had specifically provided duration, if any, of Diploma in Dairy Technology, as such it does not lie in the mouth of Federation at this stage to refute the claim of the respondents on the ground that they have not acquired two years diploma as recognized by NDRI. Since the Federation failed to place on record any document suggestive of the fact that diploma awarded by IGNOU i.e. Diploma in Dairy Technology is not recognized by University Grants Commission, this Court, sees no reason to conclude that respondents were not having requisite qualification in terms of Service Rule-13 aforesaid.

18. Consequently, there is no merit in the present petition and the same is dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Cr. Revision No.: 288 of 2014 a/w Cr. Revision No.: 292 of 2014
Reserved on: 09.11.2016
Date of Decision: 17.11.2016

Cr. Revision No.: 288 of 2014

Amar Dev ....Petitioner.

Vs.

State of Himachal Pradesh ....Respondent.

Cr. Revision No.: 292 of 2014

Nand Lal ....Petitioner.

Vs.

State of Himachal Pradesh ....Respondent.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused N was the conductor of the bus while accused A was the driver of the bus – the conductor did not take precaution to close the door of the bus and the driver drove the bus in a high speed – the driver applied the brakes abruptly- L, who was standing near the door was thrown out of the bus and fell down – the accused were tried and convicted by the trial Court- separate appeals were preferred, which were dismissed- held in revision that eye witnesses had consistently deposed that accident had taken place due to sudden application of brakes and not due to the closing of the door of the bus – the defence version that L was repeatedly opening the door of the bus despite requests not to do so was not established – the prosecution case was proved beyond reasonable doubt in these circumstances and the accused were rightly convicted – the High Court cannot interfere with the findings of facts in exercise of revisional jurisdiction unless, there is an error on point of law – no such error was shown – however, considering the time elapsed since the incident, sentence modified. (Para-8 to 21)

Cases referred:

Shlok Bhardwaj Vs. Runika Bhardwaj and others (2015) 2 Supreme Court Cases 721

Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke and others (2015) 3 Supreme Court Cases 123

For the petitioner(s): Mr. Gaurav Sharma, Advocate.

For the respondent(s): Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

These two revision petitions are being decided by a common judgment as both the petitions arise out of a common judgment passed by the Court of learned Additional Sessions Judge–(II), Shimla in Criminal Appeal No. 105-S/10 of 2014/2012 and Criminal Appeal No. 106-S/10 of 2014/2012 dated 01.09.2014, vide which learned appellate Court while dismissing the appeals so filed by both the present petitioners, upheld the judgment of conviction passed against the petitioners/accused by the Court of learned Chief Judicial Magistrate, Shimla in Criminal Case No. 30/2 of 2010/2007 dated 03.04.2012, whereby the learned trial Court convicted accused Nand Lal for commission of offences punishable under Sections 279, 337 and 338 of the Indian Penal Code and accused Amar Dev for commission of offences punishable under Sections 337 and 338 of the Indian Penal Code and sentenced Nand Lal to undergo simple imprisonment for three months and to pay a fine of Rs. 1,000/- under Section 279 of the Indian Penal Code, to undergo simple imprisonment for three months and to pay a fine of Rs. 500/- under Section 337 of the Indian Penal Code and to undergo simple imprisonment for one year and to pay a fine of Rs. 1,000/- under Section 338 of the Indian Penal Code and sentenced Amar Dev to undergo simple imprisonment for three months and to pay a fine of Rs. 500/-under Section 337 of the Indian Penal Code and to undergo simple imprisonment for six months and to pay a fine of Rs. 1,000/- under Section 338 of the Indian Penal Code.

2. The case of the prosecution in brief was that on 17.09.2007, Lal Singh, who at the relevant time was a school-going student boarded a bus bearing registration No. HP-51-4777, which was being driven by accused Nand Lal and conductor of which bus was accused Amar Dev. Lal Singh boarded the said bus from BCS, Shimla and the bus was on its way towards Shimla Bus Stand. This bus was full of passengers which also included school students. When the said

bus left BCS Bus Stand, accused Amar Dev, conductor of the Bus did not take precaution to close the doors of the same. Accused driver drove the bus in high speed and when the bus reached near Jai Mata Truck Union, New Shimla at around 9:30 a.m., the driver of the bus abruptly and forcefully applied breaks which resulted in a jerk and as a result of the same, Lal Singh, who was standing near the door was thrown out from the bus and he fell on the road, as a result of which, he sustained multiple injuries on his person. After the accident, the injured was taken to Ayurvedic Hospital Chhota Shimla, from where he was referred to IGMC, Shimla. Police at Police Post, New Shimla was informed about the said accident by the Health Authorities of Ayurvedic Hospital, Chotta Shimla and from there HC Budhi Singh was deputed to inquire into the matter. He went to IGMC, Shimla, but the injured was not found fit to give any statement and under these circumstances, one of the passengers who was travelling in the said bus, namely, Kamal Sood gave a statement under Section 154 of the Code of Criminal Procedure to HC Budhi Singh, on the basis of which, FIR was registered against the accused. Site plan etc. was prepared and the MLC and other reports of the injured were taken into possession by the police. The bus was also got mechanically examined and necessary mechanical report of the same was also obtained by the police.

3. After completion of investigation, challan was filed in the Court and as a prima facie case was found against the accused, accordingly accused driver was charged for commission of offences punishable under Sections 279, 337 and 338 of the Indian Penal Code, whereas accused Conductor was charged for commission of offences punishable under Sections 337 and 338 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. On the basis of evidence produced on record by the prosecution both ocular as well as documentary, learned trial Court held that the prosecution was able to prove that accused No. 1, i.e. the driver of the bus was driving the bus in high speed and that he abruptly applied forceful brake without any reasonable cause, which resulted in a jerk, as result of which, Lal Singh was hurled out of the door of the vehicle and fell on the road and sustained injuries. Learned trial Court further held that accused conductor had not taken precaution to ensure that doors of the vehicle were closed before its movement, which had resulted in simple as well as grievous injuries on the person of Lal Singh. On these bases, learned trial Court convicted the accused driver for commission of offences punishable under Sections 279, 337 and 338 of the Indian Penal Code, whereas accused No. 2 was convicted for commission of offences punishable under Sections 337 and 338 of the Indian Penal Code.

5. In appeal, learned appellate Court while dismissing the appeals filed both by the accused driver and accused conductor, affirmed the findings of conviction returned against them by the learned trial Court. It was held by the learned appellate Court that the factum of the injured travelling in the bus was not in dispute and this was proved by eye witnesses Kamal Sood (PW-1) and Chaman Lal (PW-3). Learned appellate Court further held that it was also proved fact that injured fell down from the bus and was rushed to IGMC, Shimla. It further held that the only line of defence raised by the accused was that the injured was opening the window time and again and he was asked by the conductor not to do so. The injured and his companions were about to beat the conductor and driver and further the bus which was being driven in the second gear was not in speed. Learned appellate Court while disbelieving the said version of the accused held that there was enough evidence to show that accused persons had acted in a rash and negligent manner while driving the vehicle and not closing the door from inside at the time of accident and that accident was proved with all necessary details by the eye witnesses, therefore, there was no error committed by the learned trial Court in appreciating the evidence. On these basis, learned appellate Court while upholding the judgment of conviction passed by the learned trial Court dismissed the appeals filed by the driver as well as the conductor.

6. Feeling aggrieved by the said judgments passed by both the learned Courts below, the accused driver and the accused conductor have filed these revision petitions.

7. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

8. The factum of the accident having been caused on account of rash and negligent driving on the part of accused driver and omission on the part of the accused driver in closing the doors of the bus from inside has been held against the accused by both the learned Courts below. The finding so arrived at by the learned trial Court is based on the appreciation of prosecution evidence, which includes the statements of PW-1 Kamal Sood, i.e. the complainant, PW-2 Lal Singh, the injured person and PW-3 Chaman Lal, who was also one of the passengers travelling at the relevant time in the bus.

9. Dr. Abhinay Sharma, who entered the witness box as PW-7 deposed that on 17.09.2007 at about 11:30 a.m., he examined Lal Chand, who was brought by Police with alleged injuries which he had sustained by falling down from a private bus. He also proved the MLC Ex. PW7/A. The final opinion of the doctor as it finds mention in Ex. PW7/A is as under:

> *"Final opinion:*
>
> *Injuries 1,2,3,4 and 5 were simple. As per case summary from Surgery, the injury was dangerous to life."*

10. Mechanical report of the bus is Ex. PW9/A and the same has been duly proved by HC Gian Chand PW-9, who was serving as a Motor Mechanic in the Police Department and who had mechanically examined the bus in issue. It is evident from a perusal of his statement as well as his report that there was no mechanical defect in the vehicle.

11. In these circumstances, what has to be examined by this Court while exercising its revisional jurisdiction is whether the finding of conviction returned against both the accused by the learned trial Court and upheld by the learned appellate Court is perverse finding or the same is borne out from the records of the case.

12. As I have already mentioned above, PW-1 Kamal Sood and PW-3 Chaman Lal are eye witnesses. PW-1 Kamal Sood has clearly and categorically stated that the accident took place on account of rash and negligent driving of the driver of the bus, who all of a sudden applied the breaks of the same without any obvious reason and further on account of the negligence of the conductor, who had not properly closed the doors of the bus. Though this witness was subjected to lengthy cross-examination by the defence, however, nothing could be elucidated from him by the defence to cast suspicion on his deposition.

13. Similarly, PW-3 Chaman Lal who is also an eye witness and was travelling in the bus has also clearly deposed that the accident took place as a result of rash and negligent driving of the driver of the bus who abruptly applied the breaks and further on account of the negligence on the part of the conductor of the bus who had not properly closed the doors of the same. The credibility of this witness also could not be impinged in his cross-examination by the defence.

14. Besides these two witnesses, the complainant entered into the witness box as PW-2 and he also duly proved the case of the prosecution and his credibility also could not be impinged in his cross-examination by the defence.

15. The Investigating Officer HC Budhi Singh, who entered the witness box as PW-10 also duly corroborated the case of the prosecution and though he was also subjected to lengthy cross-examination, however, his credibility could also not be impinged by the defence.

16. On the other hand, the defence could not probablise and establish its case that injured Lal Singh was opening the door of the bus again and again and he was not listening to the conductor and the boys who were alongwith him were on the verge of physically abusing the conductor and the driver.

17. Therefore, in this view of the matter, on the basis of the evidence, which was produced on record by the prosecution both ocular as well as documentary, it cannot be said that the finding of conviction returned against the accused by the learned trial Court and affirmed by the learned appellate Court is perverse or not borne out from the records of the case. Even during

the course of arguments, learned counsel for the petitioner could not point out that what was the perversity with the findings so returned by both the learned Courts below against the petitioners viz-a-viz evidence on record.

18. It is well settled law that the jurisdiction of High Court in revision is severely restricted and it cannot embark upon re-appreciation of evidence. The High Court in revision cannot in the absence of error on a point of law, re-appreciate evidence and reverse a finding of law. It has been further held by the Hon'ble Supreme Court that the object of the revisional jurisdiction was to confer upon superior criminal Courts a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted in undeserved hardship to individuals.

19. It has been reiterated by the Hon'ble Supreme Court in **Shlok Bhardwaj** Vs. **Runika Bhardwaj and others** (2015) 2 Supreme Court Cases 721 that the scope of revisional jurisdiction of the High Court does not extend to re-appreciation of evidence.

20. It has been further reiterated by the Hon'ble Supreme Court in **Sanjaysinh Ramrao Chavan** Vs. **Dattatray Gulabrao Phalke and others** (2015) 3 Supreme Court Cases 123:

> *"14. In the case before us, the learned Magistrate went through the entire records of the case, not limiting to the report filed by the police and has passed a reasoned order holding that it is not a fit case to take cognizance for the purpose of issuing process to the appellant. Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non- consideration of any relevant material or there is palpable misreading of records, the revisional court is not justified in setting aside the order, merely because another view is possible. The revisional court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. Revisional power of the court under Sections 397 to 401 of Cr.PC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction.*

21. However, taking into consideration the alternative argument made by the learned counsel for the petitioners that this Court may sympathetically consider the reduction of the sentences imposed upon the petitioners in view of the fact that the petitioners have been undergoing the ordeal of trial since 2007, in my considered view, the interest of justice will be served in case the sentence imposed upon accused Nand Lal by the learned trial Court under Section 338 of the Indian Penal Code is modified from one year to three months and similarly the sentence imposed upon accused Amar Dev under Section 338 of the Indian Penal Code is reduced from six months to three months. Ordered accordingly. However, it is made clear that fine imposed by the learned trial Court against both the petitioners for being convicted under Section 338 of the Indian Penal Code is upheld and is not modified. Similarly, the sentence and fine imposed against petitioner Nand Lal under Sections 279 and 337 of the Indian Penal Code is upheld and not modified and sentence and fine imposed against petitioner Amar Dev under Section 337 of the Indian Penal Code is upheld and not modified.

The revision petitions are disposed of in above terms.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Shri Banshi Ram Chauhan .....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No.: 2072 of 2011
Date of Decision: 17.11.2016

Himachal Pradesh Panchayati Raj (Election) Rules, 1994- Rule 96- An election petition was filed by respondent No.3 against the election of respondent No.4 and 5 – the same was listed for announcement of the order when it was withdrawn without issuing notice to any person – held, that the election petition could have been withdrawn by following the procedure laid down in the rules – notice should have been given to the parties after fixing the date of hearing, which is mandatory – there was no application of mind while permitting the withdrawal of the election petition- however, considering the fact that the term of the person whose election was challenged has expired, no order of restoration passed. (Para-7 to 9)

For the petitioner: Mr. B.C. Negi, Senior Advocate, with Mr. Narender Thakur, Advocate.

For the respondents: Mr. Vikram Thakur & Ms. Parul Negi, Deputy Advocate Generals, for respondents No. 1 and 2.
Mr. Debender Sharma, Advocate, vice Mr. C.N. Singh, Advocate, for respondents No. 3 to 5.
None for respondents No. 6 to 9.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this writ petition, the petitioner has challenged order dated 14.03.2011 (Annexure P-5) passed by respondent No. 2 {Sub-Divisional Officer (Civil), Poanta Sahib, District Sirmour}, vide which the said respondent permitted an Election Petition filed by Shri Mohar Singh (respondent No. 3 in the present petition) to be withdrawn without following the provisions of Rule-96 of Himachal Pradesh Panchayati Raj (Election) Rules, 1994.

2. Facts as are borne out from the file are that an Election Petition was filed by respondent No. 3 Mohar Singh against the election of respondents No. 4 and 5 as Chairman and Vice-Chairman, respectively of Panchayat Samiti, Shillai, which elections were conducted in the year 2010. Petitioner before this Court was also an elected Member of the Panchayat Samiti, Shillai and was impleaded as a party respondent in the Election Petition, though he was impleaded only as a proforma respondent as his election was not under challenge. The Election Petition was heard by respondent No. 2 on 10.03.2011, on which date, after hearing the arguments, the case was fixed for 14.03.2011 for announcement of the order. However, on 14.03.2011 itself, Mohar Singh moved an application for withdrawal of the Election Petition so filed by him which was allowed by respondent No. 2 on 14.03.2011 itself without issuance of any notice to the respondents in the Election Petition including the present petitioner and without fixing a date of hearing of the application as per the provisions of Rule-96(2) of Himachal Pradesh Panchayati Raj (Election) Rules, 1994.

3. Feeling aggrieved by the same, the petitioner has filed this petition.

4. According to Mr. B.C. Negi, learned Senior Counsel appearing for the petitioner, Rule-96 of Himachal Pradesh Panchayati Raj (Election) Rules, 1994 lays down the procedure as to how an Election Petition filed under the Panchayati Raj Act can be withdrawn. Mr. Negi has submitted that an Election Petition so filed under the Panchayati Raj Act can be withdrawn only

after the permission of the Authorized Officer to whom the petition has been presented and when an application for withdrawal is in fact made, a notice thereof fixing a date for hearing of the application is mandatorily required to be given to all the parties to the petition. According to Mr. Negi, the present petitioner, who was one of the respondents in the Election Petition which was filed by Shri Mohar Singh, was never served upon any notice for withdrawal of the petition which was filed by Mohar Singh and the appropriate authority, i.e. respondent No. 2 ordered the petition to be withdrawn without following the provisions contemplated in Rule-96 (supra), which order thus passed by respondent No. 2 was not sustainable in law and was liable to be quashed.

5. In counter to the arguments made on behalf of the petitioner, learned counsel for the respondents have submitted that no prejudice has been caused to the petitioner by the withdrawal of the Election Petition as neither the election of the petitioner was under challenge in the Election Petition and therein also he was only impleaded as a formal party/proforma respondent. It was further urged by learned counsel for respondents that with the efflux of time, the petition has been rendered as infructuous.

6. I have heard the learned counsel for the parties and also perused the pleadings of the parties.

7. Keeping in view the fact that the elections which were assailed by Mohar Singh by way of Election Petition were held in December, 2010 and the term of the Members so selected in the said elections is since over and thereafter fresh Panchayat elections have also been conducted in the entire State, no fruitful purpose shall be served by granting the prayers which have been prayed for by the petitioner in the present writ petition. However, this Court can also not ignore the fact that there is merit in the contention of the learned Senior Counsel for the petitioner that respondent No. 2 permitted the Election Petition to be withdrawn in utter violation of the provisions of Rule 96 (2) of Himachal Pradesh Panchayati Raj (Election) Rules, 1994. This Court is not even remotely suggesting that respondent No. 2 was not having authority to permit Shri Mohar Singh to withdraw the Election Petition, however, the said withdrawal should have been permitted by following the procedure laid down in Rule-96 of Himachal Pradesh Panchayati Raj (Election) Rules, 1994.

8. After receiving the application for withdrawal of the Election Petition, a notice thereof should have been given to all other parties to the petition by respondent No. 2 after fixing a date for hearing the application. It is pertinent to take note of the fact that word used in Sub-rule (2) of Rule 96 is “shall”, meaning thereby that after receiving the application for withdrawal of Election Petition, it is not the discretion of the Authorized Officer whether or not to issue notice of the same to all other parties to the petition, rather it is mandatory for the Authorized Officer to issue notice thereof after fixing a date for hearing of the application to all other parties to the petition.

9. Coming to the facts of the present case, the hot haste manner in which respondent No. 2 has acted in the matter is evident from the fact that not only the application for withdrawal of the Election Petition was filed by Mohar Singh on 14.03.2011, after taking the same on record, respondent No. 2 passed orders on the same at 10:15 a.m. itself. Respondent No. 2 has not even appreciated that before permitting the Election Petition to be withdrawn, there has to be an application of mind made by the Authorized Officer to the effect that as to whether the application so filed for withdrawal of the Election Petition was induced by bargain or consideration or not. This Court deprecates the manner in which the Election Petition was permitted to be withdrawn by respondent No. 2. However, as I have already mentioned above, keeping in view the fact that term of the Members whose election was under challenge has expired and new incumbents have come in their place, this Court is not interfering with the order passed by respondent No. 2, however, respondent No. 1 is directed to ensure that all Authorized Officers contemplated under Rule- 96 of Himachal Pradesh Panchayati Raj (Election) Rules, 1994 are issued instructions that in future while dealing with application for withdrawal of Election Petition, the procedure prescribed under Rule-96 (supra) shall be strictly adheared to.

With the said directions, the present writ petition is disposed of. No order as to costs.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Smt. Lajja Devi wife of Sh Bhagat Ram ....Revisionist/Decree Holder.

Vs.

Sh. Kanshi Ram son of Sh Gurbax and others. ...Non-revisionists/Judgment Debtors.

Civil Revision No. 133 of 2004.
Order reserved on:23.9.2016.
Date of Order: November 17, 2016.

Code of Civil Procedure, 1908- Order 21 Rule 32- An execution petition was filed, which was dismissed by the Executing Court – held in revision that witnesses of decree holder had deposed that no construction was raised after passing of decree- J.D. No.7 had died and cause of action came to an end on his death- High Court cannot reverse the finding of facts unless the same is perverse- no illegality was committed by the trial Court- revision dismissed. (Para-9 to 14)

Cases referred:

Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality Vs. K.N.Palsikar, AIR 1969 SC 580
P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao, AIR 1995 SC 1357
Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 SC 1004

For revisionist: Mr.G.C.Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For Non-revisionists. Mr.G.D.Verma, Sr. Advocate with Mr. B.C.Verma Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed under section 115 of code of civil procedure 1908 against order dated 12.5.2004 passed by learned Civil Judge Junior Division Karsog District Mandi H.P. in Execution Petition No. 17-X of 2001 title Smt. Lajja Devi Vs. Kanshi and others.

BRIEF FACTS OF CASE:

2. Decree holders instituted civil suit for partition and separate possession against judgment debtors. Decree holders also sought relief of perpetual injunction restraining judgment debtors from raising any type of construction upon suit land comprised in khasra Nos. 1450, 1451, 1452, 1447, 1448 and 1449 situated in mauja Churag Tehsil Karsog District Mandi HP. Learned Trial Court dismissed civil suit filed by decree holders.

3. Feeling aggrieved against the judgment and decree passed by learned Trial Court decree holders filed civil appeal No. 61 of 1993 title Yog Raj and others Vs. Kanshi Ram and others which was disposed of by learned Appellate court on 12.3.1999. Learned Appellate court allowed appeal filed by appellants. Learned Appellate court set aside judgment and decree passed by learned Trial Court. Learned Appellate court passed preliminary decree for partition of suit property comprised in khasra Nos. 1450, 1451 and 1452 situated in mauja Churag District Mandi H.P Learned Appellate court further directed that suit property comprised in khasra Nos. 1447, 1448 and 1449 situated in mauja Churag District Mandi H.P. would be partitioned through revenue courts. Learned Appellate court also passed decree of perpetual injunction against

judgment debtors restraining judgment debtors not to raise any construction in suit property till partition of suit land.

4. Decree holder Smt. Lajja Devi filed Execution Petition No. 17-X of 2001 title Smt. Lajja Devi Vs. Kanshi Ram and others. Learned Executing Court on the basis of pleadings of parties framed following issues in execution petition on dated 5.7.2002.

1. Whether as per judgment and decree passed by learned Additional District Judge dated 12.3.1999 judgment debtors were ordered not to raise any construction on khasra Nos. 1450, 1451, 1452, 1447, 1448 and 1449 situated at mauja Churag Tehsil Karsog District Mandi HP? ..OPDH

2.Whether judgment debtors during the pendency of execution have started raising construction?. ..OPDH

3.In case issues No. 1 and 2 are proved in affirmative whether judgment debtors should be detained in civil prison or their property should be attached and should be sold in auction?. …OPDH.

4. Whether judgment debtors are not raising any construction over suit land?. …OPJDs 1 to 6.

5 Relief.

Learned Executing court decided issues No. 1 to 3 in negative. Learned Executing Court decided issue No.4 in affirmative. Learned Executive court dismissed execution petition filed by decree holder Smt. Lajja Devi.

5. Feeling aggrieved against order of learned Executing Court Smt. Lajja Devi has filed present revision petition.

6. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionists and also perused entire record carefully.

7. Following points arise for determination in present revision petition:

1. Whether revision petition filed under Section 115 of code of civil procedure 1908 by revisionist is liable to be accepted as mentioned in memorandum of grounds of revision petition?.

2. Relief.

8.Findings upon point No.1 with reasons:

8.1. DHW1 Smt. Lajja Devi has stated that decree holders have filed civil suit against judgment debtors. She has stated that appeal was also filed against judgment and decree passed by learned Trial Court. She has also stated that learned Appellate court has directed judgment debtors not to raise any type of construction over suit land till partition. She has stated that copy of jamabandi is Ext PA and copy of decree is Ext PB. She has stated that Keshav Ram judgment debtor has raised construction over vacant portion of suit land. She has stated that Keshav Ram judgment debtor be directed to demolish construction raised over vacant portion of suit land prior to partition. In cross-examination she has stated that judgment debtors No.1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi did not raise construction over vacant portion of suit land after judgment and decree passed by learned Appellate court.

8.2 DHW2 Chandermani has stated that parties are known to him and he has also seen suit land. He has stated that Keshav Ram started construction over vacant portion of suit land and also raised lintel over suit land. In cross-examination he has stated that judgment debtors No. 1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi did not raise construction over vacant suit land after passing of decree.

8.3 DHW3 Naru Ram has stated that parties are known to him. He has stated that Keshav Ram has started construction over vacant portion of suit land and started raising pillars. He has stated that Keshav Ram was requested not to raise construction over suit land in view of decree passed by Court but Keshav Ram did not stop construction work. In cross-examination he has stated that judgment debtors 1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi did not raise construction over vacant portion of suit land.

8.4 DHW4 Param Dev Naib Tehsildar Karsog has stated that he visited the spot as Local Commissioner as directed by court and submitted report Ext PW4/A. He has stated that field book is Ext PW4/B. He has stated that new constructions raised as mentioned in field book Ext PW4/B. He has stated that report and field map have been signed by him. He has stated that Smt. Lajja Devi has raised new construction over suit land comprised in khasra No. 1448/6, 1449/5 and 1450/4 kita 3 measuring 0-1-13 bighas. He has stated that Smt. Lajja Devi told that she is in possession of above stated khasra numbers. He has denied suggestion that he did not prepare field book Ext PW4/B as per factual position.

8.5 JDW1 Sh Kanshi Ram has stated that his house and land is situated in village Sanoti. He has stated that his old house was since time of his ancestral. He has stated that about 8/9 years ago he uprooted old house and raised new house. He has stated that thereafter he did not raise any new construction. In cross examination he has stated that in judgment and decree judgment debtors were directed not to raise any construction over vacant land. He has admitted that DHW4 Naib Tehsildar visited spot. He has denied suggestion that it was observed by Local Commissioner that constructions were raised over vacant portion of land.

8.6 JDW2 Keshav Ram has stated that they are five brothers and one sister. He has stated that suit land was joint earlier upon which his father had raised house. He has stated that his father had given constructed house to his three brothers and allotted vacant land to his two brothers and one sister. He has stated that vacant land was given to Gytri Devi, Bhagat Ram and Yog Raj. He has stated that Gytri Devi and Yog Raj have given their shares to Bhagat Ram. He has stated that Bhagat Ram is raising five stories building. He has stated that he did not raise any new construction. He has stated that he repaired his kitchen in the year 1999. He has denied suggestion that in the year 2001 and 2002 he has forcibly raised construction over vacant portion of decretal land.

8.7 JDW3 Mahesh Sharma has stated that parties are known to him and he has seen house of parties. He has stated that Bhagat Ram has raised three stories building. He has stated that Bhagat Ram has raised projection of his house upon the house of Keshav Ram. He has stated that Bhagat Ram has raised construction by way of RCC manner. He has stated that Keshav Ram did not raise any new construction. He has admitted that he is tenant of Keshav Ram. He has stated that he took shop on rent in the year 1995 from Keshav Ram. He has stated that he does not know that in the year 2001 and 2002 Keshav Ram has raised new construction over land mentioned in decree sheet. He has denied suggestion that projection of the house of Bhagat Ram is not upon the house of Keshav Ram.

9. Submission of learned Advocate appearing on behalf of revisionist that findings of Executing Court upon issue Nos 1,2,3 and 4 are contrary to law and contrary to prove facts is rejected being devoid of any force for reasons hereinafter mentioned. DHW1 namely Lajja Devi when she appeared in witness box has specifically stated in cross examination that judgment debtors Nos. 1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi did not raise any construction over vacant portion of suit land after passing of decree by learned Appellate court. It is well settled law that facts admitted need not to be proved under section 58 of Indian Evidence act 1872. Testimony of DHW1 is also corroborated by DHW2 Chandermani and DHW2 has specifically stated when he appeared in witness box that judgment debtors No. 1 to 6 did not raise any type of construction over vacant land after passing of decree by learned Appellate court. Similarly DHW3 Naru Ram has also stated in positive manner that judgment debtors No. 1 to 6 did not raise any construction over

vacant portion of suit land after passing of decree. DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram have exonerated judgment debtors No. 1 to 6. As per testimonies of DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram it is proved beyond reasonable doubt that judgment debtors No. 1 to 6 did not violate decree of learned Appellate court at any point of time intentionally and voluntarily.

10. Submission of learned Advocate appearing on behalf of revisionist that it is proved on record beyond reasonable doubt that Sh Keshav Ram judgment debtor has violated judgment and decree passed by learned Appellate court intentionally and voluntarily and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Revisionist Smt. Lajja Devi filed CMP No. 8659 of 2015 in present revision petition under order 1 rule 10 CPC and pleaded that Smt. Padma Devi widow of Sh Gurbax Singh expired and her legal representatives are already co-party as co-respondents No. 1 to 4 in revision petition. Revisionist further pleaded in CMP No. 8659 of 2015 that judgment debtor Keshav Ram also expired and pleaded that allegations against judgment debtor No. 7 Keshav Ram are personal in nature and upon his death cause of action comes to an end and sought permission of Court to delete the name of Keshav Ram judgment debtor from memo of parties in revision petition. Thereafter Hon'ble High Court vide order dated 18.8.2015 deleted names of Smt. Padma Devi and Sh Keshav Ram from memo of parties in revision petition. In view of the fact that revisionist has herself admitted that cause of action against non-revisionist Keshav Ram is personal in nature and comes to an end after his death court is of the opinion that no action is warranted against deceased Keshav Ram and his L.Rs in present revision petition.

11. It is well settled law that judicial proceedings under order 21 rule 32 CPC are punitive in nature. It is well settled law that positive, cogent and reliable evidence is required in judicial proceedings filed under order 21 rule 32 CPC. In view of the fact that DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram did not state anything about judgment debtors No. 1 to 6 in examination-in-chief and cross examination and in view of fact that revisionist has herself admitted that cause of action against Keshav Ram was personal in nature and comes to an end after his death court is of the opinion that it is not expedient in the ends of justice to interfere in the order of Executing Court.

12. Submission of learned Advocate appearing on behalf of revisionist that in view of report of Local Commissioner placed on record present revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. In view of the testimonies of DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram wherein they have specifically stated that judgment debtors No. 1 to 6 did not raise any type of new construction over vacant portion of suit land after passing of decree by learned Appellate court no action is warranted. Even DHW1 Lajja Devi, DHW2 Chandermani and DHW3 Naru Ram did not state in examination-in-chief and in cross-examination that judgment debtors No. 1 to 6 namely Kanshi Ram, Chaman Lal, Joginder Pal, Harish Chander, Smt. Champa Devi and Smt. Padma Devi have raised construction over suit land mentioned in decree sheet after passing of decree. DHW1 Lajja Devi and DHW2 Chandermani and DHW3 Naru Ram have stated that only Keshav Ram has raised construction over vacant land after passing of decree by learned Appellate court and in revision petition revisionist Smt. Lajja Devi has herself admitted in CMP No. 8659 of 2015 that cause of action against Keshav Ram judgment debtor has comes to end after his death. Smt. Lajja Devi has admitted in CMP No. 8659 of 2015 that cause of action against deceased Keshav Ram was personal in nature. Smt. Lajja Devi herself filed application under order 1 rule 10 CPC in revision petition and sought deletion of name of Keshav Ram from revision petition. Smt. Lajja Devi did not implead L.Rs of Keshav Ram as co-party in revision petition. It is well settled law that no order can be passed against any person who is not impleaded as co-party in judicial proceedings on the concept of audi alteram partem (No one should be condemned unheard).

13. It is well settled law that High Court cannot reverse findings of fact in revision petition unless findings of fact are perverse. See AIR 1991 SC 455 Masjid Kacha Tank Nahan Vs. Tuffail Mohammed. See AIR 1969 SC 580 Indore Municipality Vs. K.N.Palsikar. See AIR

1995 SC 1357 P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao. See AIR 2002 SC 1004 Gurdial Singh Vs. Raj Kumar Aneja. It is held that findings of learned executing court are not perverse nor illegal. It is held that learned executing court did not commit any material irregularity in execution. In view of the above stated facts and case law supra point No.1 is answered in negative.

Point No.2 (Relief).

14. In view of findings upon point No.1 revision petition is dismissed. Parties are left to bear their own costs. File of learned executing Court along with certify copy of order be sent back forthwith. Revision petition is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Pavinder Singh ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 384 of 2012
Date of Decision : November 17, 2016

Indian Penal Code, 1860- Section 420- **Prevention of Corruption Act, 1988-** Section 13(d)(ii)- The land belonging to accused No. 4 and D (since deceased) relatives of accused No. 3 got washed away – they applied for grant of two biswas of land – accused No. 3 was posted as patwari/nautor clerk and he got manipulated a false report from accused No. 1 and 2 – two Biswas of land was allotted in favour of accused No. 4 and D -subsequently order was reviewed and FIR was registered- the accused No. 4 was convicted while other accused were acquitted- held in appeal that accused No. 4 had not prepared any document or report – he was not a recommending authority – recommendations were made by the Competent Authority on the basis of reports prepared by accused No. 1 and 2- PW-13 had made an improvement in her statement- recommending authority was Tehsildar a Gazetted Officer who remains uninfluenced by the fact that accused No. 4 and D were close relatives of accused No. 3 – sanctioning authority was Deputy Commissioner who had applied his mind prior to the sanction of nautor – no person had deposed that accused No. 3 had influenced the sanctioning of the land – the Trial Court had wrongly convicted the accused- appeal allowed – judgment of the Trial Court set aside.

(Para-7 to 22)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519

For the appellant : Mr. N. S. Chandel, Advocate, for the appellant.
For the respondent : Mr. R. S. Verma and Mr. Ram Murti Bisht, Addl. Advocate Generals for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Assailing the judgment dated 23.8.2012, passed by the learned Special Judge, Chamba Division, Chamba, H.P. in Corruption Case No. 3 of 2011, titled as *State of Himachal Pradesh vs. Sudhir Singh & others,* whereby present appellant Pavinder Singh (Accused No. 3) stands convicted for having committed offences punishable under the provisions of Section 420 Indian Penal Code read with Section 13(d)(ii) of the Prevention of Corruption Act, 1988

(hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of two years and pay fine of Rs.10,000/- and in default thereof, to further undergo simple imprisonment for two months for offence punishable under Section 420 IPC and rigorous imprisonment for a period of two years and pay fine of Rs.10,000/- and in default thereof to further undergo simple imprisonment for two months for offence punishable under Section 13(2) of the Act, he has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. Facts leading to the filing of the present appeal are as under:

In the year 1995, as a result of a natural calamity (flash floods), land belonging to Chetna Devi (Accused No. 4) and Dhano Devi (since deceased), relative of Pavinder Singh (Accused No.3), got washed away. In consonance with the scheme so framed by the State for allotment of nautor land (grant), Chetna Devi and Dhano Devi applied for grant of two biswas (98 Sq. mts.) of land. Since Pavinder Singh was posted as a Patwari/Nautor Clerk, he manipulated in getting a false report prepared from Kanungo, Sudhir Singh (Accused No. 1) and Halka Patwari, Kamal Singh (Accused No. 2). On the basis of such report and the order scribed by Accused No. 3, two biswas of land came to be allotted in favour of applicants Chetna Devi and Dhano Devi. This was so done on 29.6.1998 (Ext. PW-7/D). Subsequent realization of the land having been allotted in violation of the Rules (Ext. PW-1/A) and Policy Decision (Ext. PW-1/B), led to the passing of order dated 17.5.1999 (Ext.PW-7/A-6), reviewing the sanction of grant.

3. But the matter did not rest here. Since Revenue Officials had connived with the private applicants, F.I.R. No. 4/2010, (Ext.PW-21/A), came to be registered on 26.3.2010 at Police Station SV & ACB, Chamba under the provisions of Sections 420/467/468/471/120B IPC and 13/132 of the Act. Investigation, prima facie, revealed complicity of all the accused in the alleged crime, which led to the filing of challan in the Court for trial.

4. All accused were charged for having committed offences punishable under the provisions of Sections 420, 467, 468, 471 and 120B of the Indian Penal Code. Additionally the Revenue Officials, including the present appellant, were also charged for having committed an offence punishable under the provisions of Section 13(2) of the Act, to which, they all did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 29 witnesses and statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which they took plea of innocence and false implication. No evidence in defence was led by the accused.

6. In terms of the impugned judgment dated 23.8.2012, except for accused Pavinder Singh, all the accused stand acquitted on all counts. The said accused stands convicted for having committed an offence punishable only under the provisions of Section 420 IPC read with Section 13(d)(ii) of the Act and sentenced as aforesaid. Hence the present appeal.

7. Having heard learned counsel for the parties as also perused the record, I am of the considered view that the reasoning adopted by the trial Court is perverse and is not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question insofar as it relates to the conviction of the appellant, is not based on correct and complete appreciation of evidence and the material placed on record, hence causing serious prejudice to the appellant, resulting into miscarriage of justice.

8. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an

> appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ....
>
> (Emphasis supplied)

9. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

10. Also it is settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

11. It is a matter of record that no appeal against the judgment of acquittal of co-accused Sudhir Singh, Kamal Singh and Chetna Devi stands filed by the State. Also State has not preferred any appeal assailing the judgment of acquittal of the present appellant, in relation to the charges he stands acquitted for. Hence, this Court is called upon to examine the correctness of findings returned by the Court below.

12. It is a settled principle of law that when allegedly several persons commit an offence in furtherance of common intention and all except one are acquitted, it is open to the appellate court to find out, on reappraisal of evidence whether some of the accused persons stood wrongly acquitted, although it would not interfere with such acquittal in the absence of any appeal by the State Government. The effect of such finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. (See: *Brathi alias Sukhdev Singh v. State of Punjab,* (1991) 1 SCC 519).

13. It is a matter of record that save and except for one document i.e. letter of recommendation (Ext. PW7/A-12), and that too so made by the concerned Tehsildar, the present appellant has himself neither prepared any report nor authored any document. Bare perusal of this recommendation only reveals the present appellant to a scribe and not the recommending authority. It is not the case of prosecution that he had colluded with the Tehsildar in making such recommendation. Significantly such recommendation came to be made by the competent authority on the basis of field reports so prepared by Sudhir Singh (Accused No. 1) and Kamal Singh (Accused No. 2), who already stood acquitted. This report has not been proved to have been prepared falsely.

14. To establish involvement of the accused in the alleged crime, prosecution case primarily hinges on the ocular version with which the Court shall deal herein subsequently.

15. Record reveals that both Dhano Devi and Chetna Devi made applications (Ext. PW 7/A and Ext. PW 7/A-2) for grant of nautor land. These applications were processed in the office, not by accused Pavinder Singh, but other authorized/competent revenue officials. After processing, they were forwarded to the concerned field staff, who prepared their reports (Ext. PW 7/A-8 and Ext. PW 7/A-9). Even at this point in time, the present appellant did not deal with these applications. The field staff is not directly reporting to him.

16. Prosecution wants the court to believe, through the testimony of Smt. Rekha Devi (PW-13), Patwari posted in the Tehsil Office at Chamba, that it was the appellant who was dealing with the Nautor files. She does state that at the time of preparation of report on the application (Ext. PW7/A), appellant was in the office and she did make it so on his behalf. But then such version of hers is totally uninspiring in confidence, for in the cross examination part of her testimony, she categorically admits such fact not to be there in her pervious statement, so recorded by the police. In fact, she goes on to add that "*It is correct that I am deposing for the first time that I had made the noting on the applications at the asking of accused Pavinder*". If only one were to believe her, she would be no less than an accomplice in the crime. Significantly with the preparation of her report, the matter did not come to an end. Also she was not the final authority in the preparation of the document, for recommendation of the case for grant. One must record

that the recommending authority is none else but the Tehsildar, a Gazetted Officer, who undoubtedly remained uninfluenced from the fact that the applicants were close relatives of the appellant. Crucially none of the prosecution witnesses have testified to the contrary.

17. At this juncture, it be only observed that the sole ground for cancellation of grant was infraction of Rule (Ext. PW-1/A), which, to some extent, prohibits grant of land, outside the mohal of normal residence of the applicants. Pertinently, the authority sanctioning grant was no less than a person of the level of the Deputy Commissioner, Chamba who presumably had applied his mind before allotting the land outside the mohal. Otherwise there is no bar in the authority exercising discretion in the allotment of land outside the mohal.

18. It was incumbent upon the prosecution to have established that the appellant got recommended allotment of nautor land of two biswas in favour of Dhano Devi and Chetna Devi in connivance with other accused, in violation of the Rules and instructions in this regard, so issued by the State Government and thereby dishonestly induced the State Government and also committed criminal misconduct by misusing his official position in the allotment of the said nautor land, by causing wrongful loss to the State and wrongful gain to himself.

19. Now if one were to peruse the testimonies of 26 prosecution witnesses, one finds that emphasis was more to prove the execution of the documents referred to herein earlier. But save and except, the testimony of Rekha Devi (PW-13), none has come forward to depose about the alleged involvement of the present appellant, in the preparation of the field reports or for that matter sanction of grant. Perusal of order, reviewing the sanction of grant (Ext PW 7/A-6), also does not indicate involvement of the present appellant in the alleged crime. Significantly it is not the case of prosecution that (i) the applicants were otherwise not entitled to the grant in accordance with the Rules and (ii) the land of the applicants had not washed away in a natural calamity.

20. Hence, from the material placed on record, prosecution has failed to establish that the appellant is guilty of having committed the offences, he stands charged for. The circumstances cannot be said to have been proven by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt.

21. Findings returned by the trial Court, convicting the appellant, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the appellant. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as the appellant stands wrongly convicted.

22. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 23.8.2012, passed by the learned Special Judge, Chamba Division, Chamba, H.P. in Corruption Case No. 3 of 2011, titled as *State of Himachal Pradesh vs. Sudhir Singh & others,*, is set aside and the appellant is acquitted of the charged offences. Fine amount, if deposited, be refunded to the accused. Bail bonds furnished by the accused are discharged. Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Sh. Ranjeet Singh ...Appellant

Versus

Sh. Prithvi Singh & others ...Respondents

FAO No. 406 of 2014

Date of Decision : November 17, 2016

Code of Civil Procedure, 1908- Order 41 Rule 25- Matter was remanded by the Appellate Court after framing issues – the order is challenged before the High Court- held, that the Court had not considered the provisions of Order 41 Rule 25 of C.P.C – the Court had erred in framing the issues – the case was pertaining to the execution of the Will and the burden is always on the propounder to establish the same – the order of the Appellate Court set aside and the matter remanded to the Appellate Court for a fresh decision. (Para-7 to 13)

Cases referred:

Nagar Mal and another v. Bimal Kumar and another, Latest HLJ 2005(HP) 679

Prem Kumar and others v. Parkash Chand and others, 2002(3) SLC 358

Jabbar Singh v. Shanti Swaroop, 2006 (3) SLC 58

H. Venkatachala Iyengar vs. B. N. Thimmajamma & others, AIR 1959 SC 443

Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao & others, AIR 2007 SC 614:(2006) 13 SCC 433

For the appellant : Mr. B. N. Sharma, Advocate, for the appellant.

For the respondent : Mr. I. N. Mehta, Advocate, for respondents No. 1, 5, 6 and 7.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Sunder Singh and Mehar Singh jointly owned certain properties. Sunder Singh had two wives namely Misru Devi (defendant No. 2) and Isru (defendant No. 9) who respectively gave birth to sons Ranjeet Singh (defendant No. 1) and Prithvi Singh (plaintiff). Dispute pertaining to the inheritance of estate of Sunder Singh resulted into the parties litigating amongst themselves. The dispute is primarily between Prithvi Singh and Ranjeet Singh. Resultantly Prithvi Singh (respondent No. 1 herein) filed a suit, *inter alia*, against Ranjeet Singh (appellant herein) seeking declaration of his right in the estate of Sunder Singh. In defence Ranjeet Singh claimed absolute ownership on the basis of Will dated 7.2.2009, allegedly executed by Sunder Singh, excluding Prithvi Singh from inheritance.

2. Based on the respective pleadings of the parties, trial Court framed the following issues:

1. Whether the will dated 07.02.2009 executed by Sunder Singh is declared to be null and void, as alleged? OPP
2. Whether mutation No. 19/09 dated 07.02.2009 on the basis of will is also declared to be null and void? OPP
3. Whether suit of the plaintiff is not maintainable in the present form? OPD
4. Whether suit is bad for non-joinder and misjoinder of necessary parties? OPD.
5. Whether suit of plaintiff is not properly valued for the purpose of court fee and jurisdiction? OPD
6. Relief.

3. Finding, the plaintiff not to have established its case, issues came to be decided in favour of the defendant and, as such, trial Court dismissed the suit in terms of judgment and decree dated 7.12.2013 passed in Civil Suit No. S.D./0300063/2009, titled as *Prithvi Singh vs. Ranjeet Singh & others*.

4. In the plaintiff's appeal, the lower Appellate Court, by framing the following two additional issues, remanded the matter back to the trial Court, for deciding all the issues on the strength of the evidence, which may be led by the parties:

5-A. Whether Sh. Sunder Singh has executed a valid and legal Will dated 7-2-2009 in favour of defendants, if so, its effect? OPD

5-B Whether there was a family partition between Sunder Singh and Mehar Singh upon which Sunder Singh became absolute owner in possession of the suit property? OPD

However while doing so, it set aside the judgment and decree passed by the trail Court.

5. It is this order dated 4.11.2014, passed by District Judge, Kinnaur Civil Division at Rampur Bushahr, Distt. Shimla in plaintiff's Civil Appeal No. 0000007/2014, titled as *Prithvi Singh vs. Ranjeet Singh & others*, which is subject matter of challenge in the present appeal filed by the defendant.

6. Having heard learned counsel for the parties as also perused the record, one finds that the lower appellate Court committed grave illegality and irregularity by totally setting aside the judgment and decree, in remanding the matter back to the trial Court. It amounts to a wholesale remand.

7. In somewhat similar circumstances, this Court in *Nagar Mal and another v. Bimal Kumar and another,* Latest HLJ 2005(HP) 679, deprecated the practice of wholesale remand of the case by the appellate Court, more so keeping in view the provisions of Order 41 of the Code of Civil Procedure.

8. A Division Bench of this Court in *Prem Kumar and others v. Parkash Chand and others,* 2002(3) SLC 358, while dealing with an identical issue, held that:-

> "6. Learned Counsel for the appellants contended that the directions issued by the learned Additional District Judge are not in accordance with the provisions of Rules 23, 23-A or 25 of Order 41, Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code'). He submitted that the appellate Court can make an order of remand either under Rule 23 or 23-A or Rule 25 of Order 41 of the Code.
>
> 7. So far as Rule 23 is concerned, the said provision obviously is not applicable to the case in hand in view of the fact that the trial Court had not disposed of the suit on a preliminary point. The question, therefore, is either the order is passed by the first appellate Court under Rule 23-A or Rule 25 of Order 41 of the Code. But, in either case, contended the learned Counsel, it was obligatory on the part of the first appellate Court to frame issue(s). If the first appellate Court was of the view that the decree passed by the trial Court was liable to be reversed which had been passed on merits, it was open to the appellate Court if it thought fit to remand the matter by directing what issue or issues should be framed in the case so remanded and by sending a copy of the judgment or order to the Court from whose decree the appeal was preferred, i.e., to the trial Court. But the said course has not been adopted by the first appellate Court. Similarly, Rule 25 has also not been invoked inasmuch as it was incumbent upon the first appellate Court to frame issue or issues and refer the same to the trial Court from whose decree the appeal is preferred by directing the said Court to take additional evidence if required, proceed to try such issue or issues and return the evidence to the appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the appellate Court. That is, however, not done. Hence, in either case, the order passed by the first appellate Court deserves to be quashed and set aside.
>
> 8. We find considerable force in the argument of the learned Counsel for the appellants. In our opinion, in either case, i.e. either under Rule 23-A or under Rule 25 of Order 41 of the Code, the first appellate Court ought to have framed additional issue(s) and ought to have issued necessary directions. In our considered opinion, the order passed by the first appellate Court is not in conformity with law. It is, therefore, liable to be quashed and set aside.

Accordingly, the appeal filed by the appellants stands allowed. The order passed by the Additional District Judge, Mandi, dated 30th June, 2001 is hereby quashed and set aside by directing the appellate Court to pass an appropriate order by framing necessary issue(s) and by making necessary directions to the trial Court. In the facts and circumstances of the case, no order as to costs."

(Emphasis supplied)

9. Lower appellate Court, rather than setting aside the judgment and decree, without adjudicating the issues on merit and remanding the matter for trial and consideration of all issues, ought to have resorted to the provisions of Order 41 Rule 25 of the Code of Civil Procedure as stands clarified by the Apex Court in *Jabbar Singh v. Shanti Swaroop,* 2006 (3) SLC 58.

10. The subject matter of suit, was only about inheritance to the estate of Sunder Singh. Whether it stood partitioned by metes and bounds or otherwise, with Mehar Singh or not, was neither an issue agitated by the parties, nor required to be considered in the *lis, inter se* them. As such, lower appellate Court exceeded its jurisdiction in framing issue No. 5-B.

11. Insofar as Issue No. 5-A is concerned, again the lower appellate Court erred in framing the same, entitling the parties to lead further evidence. Fact that the trial Court itself had framed an issue, pertaining to the validity of the Will (Issue No. 1), perhaps, escaped its attention, which erroneously led to the framing of additional issue No. 5-A.

12. It is a settled principle of law that regardless of the onus, which the parties are required to discharge, in a case of Will, it is always the propounder thereof, who has to establish its valid execution, in accordance with law. Hence it did not matter as to whether the trial Court placed the onus on the plaintiff or not, for what was required to be considered by the Court is as to whether the propounder was able to discharge its burden, so cast upon him under law, of proving the Will, to have been validly executed or not. The position is no longer *res integra* as stands settled by the apex Court in *H. Venkatachala Iyengar vs. B. N. Thimmajamma & others,* AIR 1959 SC 443 and *Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao & others,* AIR 2007 SC 614: (2006) 13 SCC 433.

13. Thus, for the aforesaid reasons, appeal is allowed and the impugned judgment dated 4.11.2014, passed in Civil Appeal No. 0000007/2014, titled as *Prithvi Singh vs. Ranjeet Singh & others*, quashed and set aside.

14. Matter is remanded back to the lower appellate Court with a direction to consider and decide the appeal on the basis of material already on record. At the cost of repetition, it is reiterated that the onus of discharging the burden of proving the Will, shall always be upon the propounder.

15. Parties are directed to appear before the lower appellate Court on 9.12.2016. Hearing is expedited. Parties undertake to fully cooperate. Records of the Courts below be returned immediately.

Appeal stands disposed of, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Piar Chand & another .....Respondents.

Cr. Appeal No. 608 of 2008
Decided on : 17/11/2016

Indian Penal Code, 1860- Section 336 and 304-A- Accused were posted as linemen and junior engineer they were entrusted with a duty to maintain 33 KV Rohtang- Keylong electricity line – one wire of the line fell on the vehicle due to which two persons got electrocuted – the accused were tried and acquitted by the Trial Court- held in appeal that prosecution evidence does not establish that accused had failed to rectify the fault despite knowledge rather it is established that accused were maintaining the tower and line efficiently – maintenance register was also not produced before the Court and an adverse inference has to be drawn – the trial Court had rightly appreciated the evidence – appeal dismissed. (Para-9 to 12)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondents: Mr. K.S.Banyal, Sr. Advocate with Mr. Vijender Katoch, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 11.06.2008 by the learned Chief Judicial Magistrate, Lahaul-Spiti at Keylong, Himachal Pradesh, in Criminal Case No16-r of 2003, whereby he acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that in the year 2002 accused/respondents Ram Singh and Piar Chand were posted as Linemen and Junior Engineers, respectively in H.P.S.E.B. Section at Koksar in District Lahaul and Spiti. It is alleged that both these accused/respondents were entrusted with a duty to maintain 33 KV Electricity Rohtang-Keylong Line. It is further alleged that on 6.5.2002 around 8.00 a.m. Kama Lama (complainant) was traveling in Taxi No. HP-02-8378 including other persons, namely Ses Ram, Ashwani Kumar, K.R. Chaudhary and deceased Dal Bahadur and Vijay Kumar. While the aforesaid vehicle reached near Doharani Bye-Pass on Rohtang-Keylong Highway, one line wire of 33 KV Electricity Rohtang-Keylong Line had fallen on the vehicle and as a result of the same the driver, namely Vijay Kumar and Nepali youth, namely, Dal Bahadur, who were passengers in the said vehicle, got electrocuted and died on the spot. This mishap has resulted due to rash and negligent act of both the accused/respondents herein, since they were entrusted with the maintenance of aforesaid electricity line and which they failed to maintain. It is further alleged that the death of Vijay Kumar and Dal Bahadur not amounting to culpable homicide was caused due to rash or negligent act of both the accused/respondents. The matter was reported to the police and FIR was lodged at police Station, Keylong. During the course of investigation, the site plan of the place of occurrence, where both the deceased expired, was prepared. The Investigating Officer concerned took into possession broken burnt pieces of live wire and bag which was kept on the roof of the vehicle in question vide memo Ex. PD. The vehicle was impounded alongwith documents. Broken Electric parts, wall cleeves, I-Socket were also taken in possession by the police and sent to Forensic Science Laboratory, Bharari, Shimla. Postmortem examination of Vijay Kumar and Dal Bahadur was conducted. Inquest report of the cause of their death was prepared by the police. Photographs of the place of occurrence were taken. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 336 and 304-A to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 14 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. Vijay Kumar and Dal Bhadur, who at the relevant time stood borne on vehicle bearing No. HP-02-8378, suffered fatal electrocution on theirs coming in contact with high tension 33 KV line. The aforesaid had come to contact with high tension 33 KV lines given their concerting to remove it from the top of the aforesaid vehicle whereon it had fallen. Penal culpability for the aforesaid hence suffering demise would stand attracted vis.a.vis the accused respondents only when forthright potent evidence stood adduced before the learned trial Court wherefrom upsurgings occur qua despite their holding the enjoined responsibility to maintain it, theirs intentionally derelicting from performing their enjoined duty. However, in case evidence surgesforth qua the falling of 33 KV line onto the relevant vehicle being abrupt besides its fall thereon occurring without the accused respondents derelicting from their enjoined duty, the charge qua which the accused respondents stood subjected to would stand concluded to not stand proven.

10. The prosecution while concerting to nurse the charge whereupon the accused respondents stood subjected to trial, depended upon the testimony of 14 witnesses. Preponderantly the testimony of PW-7 unveils qua the falling of 33 KV line onto the relevant vehicle being abrupt. The aforesaid disclosure occurring in the testimony of PW-7, an occupant of the relevant vehicle inhibits this Court in underscoring an inference qua both the accused respondents despite theirs at the relevant time sighting the vehicle theirs omitting to take the relevant due care and caution while theirs purportedly proceeding to undertake the relevant maintenance work of 33 KV line. Contrarily, the testification of PW-7 foments a firm conclusion qua the falling of 33 KV line onto the relevant vehicle being abrupt also its fosters a derivative of both the accused respondents at the relevant time not holding its repair nor they at the relevant time standing positioned in close proximity to the relevant site of occurrence. Also the testimony of PW-7 obviously underscores qua thereupon this Court holding leverage to erect an inference of the accused respondents not derelicting in performing their enjoined duties in maintaining it. The testification of the relevant prosecution witness stands comprised in the deposition of PW-1 who in his deposition unveils qua the Ball Clive Eye Socket of the relevant tower wherefrom 33 KV line originated begetting a rupture. He in his cross-examination has accepted the suggestion put to him by the learned defence counsel while holding him to cross-examination qua the falling of the aforesaid line onto the relevant vehicle spurring from the aforesaid rupture occurring in the tower wherefrom the relevant 33 KV line originated not standing sequelled for lack of its proper maintenance by the accused/respondents. The aforesaid acquiescence of PW-1 to the apposite suggestion put to him by the learned counsel for the accused while holding him to cross-examination remains unshred of its efficacy comprised in the learned APP concerned subsequent thereto seeking to re-examine him whereupon it acquires immense credence qua the facet of his exculpating the guilt, if any, of the respondents/accused in the manner alleged against them. The aforesaid disclosure made by PW-1 qua the aforesaid cause sequelling the falling of 33 KV line onto the relevant vehicle also his communicating therein qua the relevant cause not being

attributable to the accused respondents derelicting in maintaining it, gains vigour from the testimony of PW-10. PW-10 in his testification has voiced qua the Guarding below the line standing broken. He communicates therein qua in case the relevant Guarding of the wire had not suffered any rupture thereupon the illfated mishap would not have occurred. Even though he in his testification articulates a cause for the relevant mishap contradictory to the one spelt out by PW-1 yet he alike the testimony of PW-1 has therein exculpated the negligence, if any, of the accused respondents in maintaining the relevant tower besides the 33 KV line, by his voicing therein qua on his inspecting the relevant maintenance register his not detecting qua the accused respondents derelicting in their enjoined duty to promptly maintain it. The aforesaid testimonies of the relevant prosecution witnesses do not unveil qua the accused respondents despite holding knowledge qua the relevant defect occurring respectively in the tower and in 33 KV line, theirs omitting to rectify it. Contrarily evidence stands adduced qua the accused respondents efficiently maintaining the tower besides the 33 KV line evidence whereof stands comprised in the relevant manifestations occurring in the maintenance register which stood inspected by PW-10 besides by PW-1.

11. The prosecution would succeed in falsifying the relevant entries echoed the relevant maintenance register when evidence of immense vigour stood adduced before the learned trial Court wherewithin apposite portrayals are held. However, the aforesaid relevant evidence stood omitted to be adduced by the prosecution before the learned trial Court. Omission of adduction by the prosecution before the learned trial Court of relevant cogent evidence for eroding the efficacy of relevant entries disclosed in the relevant maintenance register wherewithin unveilings occur qua the accused respondents not derelicting in maintaining both the tower and 33 KV line, forecloses an inference of no imputation of penal negligence being ascribable qua them.

12. Be that as it may, the prosecution would also succeed qua the accused respondents despite holding knowledge qua the relevant defect occurring in the tower besides in the 33 KV line, they yet omitting to promptly rectify them only when best evidence in consonance therewith stood adduced before the learned trial Court. The best evidence qua the aforesaid facet would stand comprised in the prosecution adducing before the learned trial Court evidence personifying qua the distance occurring inter se the control room manned by the respondents vis.a.vis the location of the tower besides the location of 33 KV line. In case the distance inter se both was minimal, the court would conclude qua theirs not promptly rectifying the relevant defects nor also the relevant reflections borne on the relevant register holding any tenacity. However, for omission of adduction of the aforesaid evidence it can be forthrightly concluded qua the distance inter se the control room/repair room which stood manned by the accused respondents vis.a.vis the relevant tower besides 33 KV line being immense wherefrom it is to be concluded qua the relevant defect which evidently occurred abruptly standing unnoticed by the accused respondents thereupon neither any relevant knowledge can stand imputed to the accused respondents nor their omission if any to promptly rectify the defects can constrain a conclusion of theirs being hence penally inculpable.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

United India Insurance Company .....Appellant.
Versus
Dhananjoy Dass and others .....Respondents.

FAO No.: 351 of 2014.
Date of Decision : 17/11/2016

Workmen Compensation Act, 1923- Section 4- Son of the claimant died in the course of performing his duties as a labourer – claimant filed a claim petition and a compensation of Rs. 4,45,000/- was awarded to the claimant – held in appeal that no objection regarding limitation was taken in the reply – Commissioner had power to condone the delay on sufficient cause being shown by the Claimant – monthly wages of the deceased could be quantified at Rs. 2,591.72/- - 50% of the amount is to be deducted in accordance with Section 4- therefore, the claimant is entitled to Rs. 222.71 x 1295.86= Rs. 2,88,600.98/- along with interest @ 12% per annum- penalty of Rs. 20,000/- also imposed upon respondents No. 2 and 3. (Para-3 and 4)

For the Appellant: Mr. Ashwani Kumar Sharma, Sr.Advocate with Mr. Ishan Thakur, Advocate.
For the respondents: Mr. Tek Chand Sharma and Mr. K.C.Sankhyan, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (Oral)*

The instant appeal stands directed against the impugned award rendered by the learned Commissioner, Employees Compensation, Mandi, District Mandi, in Workmen Compensation Petition No. 40/2011 whereby on occurrence of demise of the son of the claimant during the course of his performing employment as a labourer under his employer respondents No. 2 and 3. he determined compensation vis.a.vis the claimant in the sum comprised therein.

2. This appeal was admitted on 7.12.2015 on the hereinfafter extracted substantial questions of law:-

> "1. Whether the claim petition filed beyond the prescribed limitation period of two years after death of deceased workman, Sh. Bapi Das on 27.09.2003, was time barred and thus, did not deserve to be entertained?
>
> 2. Whether amount of compensation to the tune of Rs.4,45,000/- awarded to the claimant is legal and justified as per provisions of the Employee's compensation Act or on the basis of proved income of deceased and his age the claimant is entitled only to an amount of Rs.2,85,124/- alongwith interest."

The learned counsel for the appellant has not concerted to repel the legality of the findings recorded by the learned Commissioner qua the demise of the deceased occurring during the course of his performing employment as a labourer under respondents No. 2 and 3. He also does not controvert the findings recorded by the learned Commissioner qua the claimant holding the capacity of a dependant of his deceased son.

3. Be that as it may, the substantial question of law occurring at Sr. No.1 stands enjoined to be adjudicated upon. The learned counsel appearing for the appellant has submitted qua with the demise of the son of the claimant occurring on 27.09.2003 whereas the apposite claim petition standing preferred on 29.10.2005 wherefrom he contends qua with the preferment of the apposite claim petition before the learned Commissioner occurring after more than two years elapsing since the demise of claimants' son renders attractable qua the claim petition the

mandate of the provisions engrafted in Section 10(1) of the Workmen's Compensation Act (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter, significantly when hence it evidently stood preferred therebefore beyond the statutorily prescribed period of limitation:-

> "10. Notice and claim:- (1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years of the occurrence of the accident or in case of death, within two years from the date of death."

thereupon he canvasses qua the Commissioner standing statutorily barred to exercise jurisdiction upon the apposite claim petition reiteratedly when its preferment occurred after more than two years since the demise of a workman during the course of his performing employment under his employer. Apparently, the claim petition stood preferred by the claimant before the learned Commissioner with a minimal delay of one month occurring since elapse of the statutorily prescribed period of two years since the illfated demise of his son for thereupon rendering it to be maintainable. However, the rigour of the mandate of sub section (1) of Section 10 of the Act which stands extracted hereinabove stands relaxed by its proviso engrafted therein, which also stands extracted hereinafter

> "Provided that, where the accident is the contracting of a disease in respect of which the provisions of sub-section (2) of section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease:
>
> Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the workman to absent himself from work, the period of two years shall be counted from the day the workman gives notice of the disablement to his employer: Provided further that if a workman who, having been employed in an employment for a continuous period, specified under sub-section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:
>
> Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim
>
> (a) if the claim is preferred in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or
>
> (b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other Source at or about the time when it occurred:
>
> Provided further, that the Commissioner may [entertain] and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been [preferred], in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or [prefer] the claim, as the case may be, was due to sufficient cause."

relevant proviso whereof embodies therein a diktat qua the learned Commissioner even when the apposite claim petition stands preferred before him beyond a period of two years since the illfated demise of a workman during the course of his performing employment under his employer, his

yet holding jurisdiction to thereupon pronounce an adjudication on his demonstrably besides explicitly evincing satisfaction qua the sufficiency of cause which precluded the claimant to file it therebefore within the statutorily prescribed period of limitation engrafted in sub section (1) of Section 10 of the Act. He contends qua the mandate of the relevant proviso to sub section (1) of Section 10 of the Act for hence its standing attracted hereat for thereupon rendering maintainable a claim petition preferred beyond the statutorily prescribed period of limitation obviously does not empower the learned Commissioner to draw satisfaction qua the good and sufficient cause which precluded besides deterred the claimant to within time file his apposite claim petition before him unless an apposite motion in consonance with its mandate stands made therebefore by the claimant. He proceeds to argue qua with the relevant record omitting to make any disclosures qua the learned Commissioner within the ambit of the relevant proviso to sub section (1) of Section 10 of the Act explicitly drawing satisfaction qua the sufficiency of cause which deterred the claimant to file a claim petition before him, renders it to be unworkable vis.a.vis the claimant. He hence contends qua the pronouncement recorded by the learned Commissioner being jurisdictionally nonest. The aforesaid submission made by the learned counsel for the appellant has been made on a stricto sensu interpretation by him of the ambit besides the amplitude of the apposite proviso (1) of Section 10 of the Act. The learned counsel for the appellant has remained oblivious to the factum of a minimal delay of only one month occurring on elapsing of the statutorily mandated period of two years since the ill fated demise of the son of the claimant upto the stage whereat the apposite claim petition stood preferred before the learned Commissioner. He also remained unmindful qua the factum of the aforesaid contention standing not raised by the appellant herein while instituting a reply to the claim petition preferred by the claimant before the learned Commissioner. Consequently, no apposite issue struck thereon by the learned Commissioner also no evidence thereon stood adduced therebefore. Even though the objection raised herebefore by the learned counsel for the appellant stands anvilled upon evident infraction of statutory provisions also any omission(s) qua the facets aforesaid would not beget any inference of thereupon the award recorded by the learned Commissioner not suffering from any vice of jurisdictional statutory disempowerment. However, the effect of omissions aforesaid when coalesced with the learned Commissioner ultimately recording his pronouncement upon the claim petition does convey qua his impliedly drawing satisfaction qua the sufficiency of good cause which precluded the claimant to within the statutorily mandated period of time prefer the apposite claim petition before him. The play of the apposite proviso to sub section (1) of Section 10 of the Act is not enjoined to be inhibited by rigidly insisting upon the learned Commissioner to in terms thereof explicitly record the sufficiency of cause which deterred or precluded the claimant to within the statutorily mandated period of time prefer the apposite claim petition before him. Contrarily the workability of the proviso would remain alive given the factum of the impact of the aforesaid omissions construed in coagulation with his ultimately pronouncing an award upon it hence facilitating impetus to a deduction qua thereupon the learned Commissioner impliedly drawing satisfaction qua good and sufficient cause which deterred the claimant to within the statutorily prescribed time file his apposite claim petition before him. As aforesated hence it would be insagacious to insist upon the learned Commissioner to within the ambit of the relevant proviso explicitly make a pronouncement qua its provision standing attracted qua the claim significantly when hence it would denude the salutary purpose of the Act also would ultimately work hardship to the dependents of the deceased workman especially when he was performing employment under his employer as an unskilled labourer besides with the claimant likewise being a resident of Bengal situated at a location remotely distanced from the place of work whereat his deceased son was performing employment, also given the semi illiteracy of his deceased son besides of the claimant, any insistence with rigour upon him qua his remaining alive to the statutory mandate of sub section (1) of Section 10 of the Act would rather aggravate his hardship. For mitigating the aforesaid hardships besides for carrying forward the salutary purpose of the Act necessarily when the aforesaid discussion forecloses an inference qua the learned Commissioner hence impliedly drawing satisfaction qua the good and sufficient cause which deterred the claimant to within the statutorily prescribed period of time prefer his claim petition before him. Consequently, the submission made by the learned counsel for the appellant

qua the learned Commissioner standing jurisdictionally disempowered to record his award given the claim petition standing preferred before him beyond the period of limitation prescribed under sub section (1) of Section 10 is liable to be discountenanced. Accordingly, the substantial question of law No.1 is answered in favour of the claimant.

4. The learned counsel for the appellant has submitted with much vigour qua with the employer of the deceased workman making a disclosure in Mark-E6 qua the deceased workman from his relevant employment under him drawing per mensum wages quantified at Rs.2591.72, constituted the sum aforesaid to be construable to be the relevant per mensum quantum of monthly wages drawn by the deceased workman from his employment under his employer whereas the learned Commissioner anvilling his relevant findings merely on an affidavit sworn by the claimant holding therewithin reflections of his deceased son drawing per mensum wages quantified at Rs.5,000/- whereto he applied the relevant statutory principles, has thereupon committed an inherent error. Apparently Mark E6 submitted by the employer of the deceased son of the claimant holds reflections of the deceased from his relevant employment drawing per mensum wages quantified at Rs.2591.72. The disclosure aforesaid occurring therewithin constitutes formidable evidence qua the relevant facet significantly when the apposite disclosure occurring therein has emanated from the employer of the deceased workman who obviously held the best knowledge to pronounce qua the relevant fact. The relevant sole testimony of the claimant even if it holds any vigour its sinew stands benumbed by Ext.E6 also by the claimant in his cross-examination acquiescing to a suggestion put to him by the learned counsel for the appellant while holding him to cross-examination qua his holding no knowledge qua the wages per mensum drawn by his deceased son from his relevant employment under his employer. Consequently, the reliance placed qua the relevant fact by the learned Commissioner upon the sole testimony of PW-1 is grossly inapt it being wholly surmisal whereas he was enjoined to mete reverence to the apposite reflections occurring in Mark E6. The learned Commissioner has hence committed a gross illegality. The sequel of the above discussion is qua in the manner prescribed by the apposite provisions of the Workmen's Compensation Act embedded in Section 4(1)(a) provision whereof stands extracted hereinafter:

> "4. Amount of compensation.-
>
> (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-- (a) where death results from the injury
>
> An amount equal to fifty percent of the monthly wages of the deceased workman multiplied by the relevant factor,"

After meteing 50% deduction to the sum of Rs.2591.72 i.e. Rs.1,295.86/- whereupon on application thereto of the relevant factor which stands correctly applied by the learned Commissioner, the amount of compensation which is to be determined to be payable to the claimant stands comprised in a sum Rs.222.71x1,295.86= 2,88,600.98/-.

Accordingly, the substantial question of law No.2 answered in favour of the appellant. The appeal is partly allowed. The award of the learned Commissioner is modified to the extant that the respondents/claimants 1 and 4 herein shall be entitled to compensation comprised in a sum of Rs. 2,88,600.98/-. alongwith interest @ 12 per cent per annum to be levied thereon since the elapsing of one month after the accident. Statutory penalty for omission of the employer to beget satiation of the mandate of Section 4-A is quantified at Rs.20,000/- liability whereof stands fastened upon the employers i.e. respondents No. 2 and 3 herein. The compensation amount shall be equally apportioned amongst the claimants/ respondents No. 1 and 4 herein.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Sh. Ajit Singh son of Sh. Bidhi Chand. .....Revisionist/Co-defendant No.2..

Vs.

Sh. Mukhtiar Singh son of Sh. Bidhi Chand. .....Non-revisionist/Plaintiff.

Civil Revision No. 74 of 2015.
Order reserved on:23.9.2016.
Date of Order: November 18, 2016.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit seeking relief of permanent prohibitory injunction- an application seeking interim relief was filed, which was dismissed by the trial Court- an appeal was filed, which was partly allowed and parties were directed to maintain status quo- held in revision that previous suit was dismissed in default and principle of res-judicata was not applicable- dismissal will not affect the present suit- the order of status quo is necessary to preserve the property during the pendency of the suit – revision dismissed. (Para- 7 to 11)

Cases referred:

Inacio Martins Vs. Narayan Hari Naik, AIR 1993 SC 1756
Lonakutty Vs. Thomman and another, AIR 1976 SC 1645
Satyadhyan Ghosal and others Vs. Smt. Deorajin Debi and another, AIR 1960 SC 941
Masjid Kacha Tank Nahan Vs. Tuffail Mohammed, AIR 1991 SC 455
Indore Municipality Vs. K.N.Palsikar, AIR 1969 SC 580
P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao, AIR 1995 SC 1357
Gurdial Singh Vs. Raj Kumar Aneja, AIR 2002 SC 1004

For revisionist: Mr.R.R.Rahi Advocate.
For Non-revisionist. Ms. Kiran Lata Sharma, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed under Section 115 of code of civil procedure 1908 against order of learned District Judge Hamirpur HP dated 19.2.2015 passed in civil miscellaneous appeal No. 23 of 2014 whereby learned District Judge Hamirpur set aside order of learned Trial Court dated 27.9.2014 and partly allowed appeal with direction to parties to maintain status quo with regard to nature and alienation of suit land till final disposal of main suit on merits.

BRIEF FACTS OF CASE:

2. Sh. Mukhtiar Singh plaintiff filed suit under section 77 of Registration Act 1908 for declaration to the effect that Will dated 15.1.2008 executed by late Sh. Bidhi Chand father of plaintiff Mukhtiar Singh and co-defendant No.2 Ajit Singh is valid Will and same is liable to be registered under Registration Act 1908. Consequential relief of permanent prohibitory injunction also sought restraining co-defendant No.2 Ajit Singh from dis-possessing plaintiff from suit land and alienating the land and changing the nature of land comprised khata No. 41 khatauni No. 52 khasra No. 49, 50, 67, 75, 1076/98, 144, 145, 150, 1097/273, 432 and 867 kitas 11 measuring 20 kanals 4 marlas situated in village Beer tappa Beer Baghera Tehsil Sujanpur District Hamirpur HP. Additional relief for mandatory injunction also sought directing Sub Registrar Sujanpur District Hamirpur HP to register Will dated 15.1.2008.

3. Per contra written statement filed on behalf of co-defendants No. 2 and 3 pleaded therein that plaintiff has got no cause of action and plaintiff has got no locus standi to file present suit. It is pleaded that plaintiff is estopped from filing suit by his own act and conduct. It is pleaded that suit is bad for want of necessary parties. It is pleaded that suit is not legally maintainable for declaration as the plaintiff is out of possession over suit land. It is pleaded that suit is not properly valued for the purpose of court fee and jurisdiction. It is pleaded that suit property is self acquired property of deceased Bidhi Chand son of Daulat Ram. It is pleaded that Bidhi Chand has not executed any Will on 15.1.2008. It is pleaded that suit is hit by principle of resjudicata under section 11 CPC and under order 2 rule 2 CPC. It is pleaded that defendants are entitled to special cost under section 35A CPC. It is pleaded that former civil suit No. 16 of 2008 titled Mukhtiar Singh Vs. Ajit Singh was filed by plaintiff before civil Court in which both Wills dated 15.1.2008 and 18.5.2007 were directly and substantially in dispute. It is pleaded that civil suit No. 16 of 2008 titled Mukhtiar Singh Vs. Ajit Singh was dismissed in default by learned Civil Judge (Junior Division) Court No. 3 Hamirpur HP on dated 23.1.2009. It is pleaded that interim application filed under order 39 rules 1 and 2 CPC was also dismissed. It is pleaded that CMA No. 47 of 2008 titled Mukhtiar Singh Vs. Ajit Singh was also filed before learned District Judge Hamirpur and same was also dismissed in default on 24.3.2009. It is pleaded that fresh present civil suit on the basis of Will dated 15.1.2008 is not maintainable.

4. During pendency of civil suit No. 119 of 2014 Mukhtiar Singh plaintiff filed application under order XXXIX rule 1 and 2 CPC for grant of ad-interim injunction. Learned Trial Court dismissed application filed under order XXXIX rule 1 and 2 CPC by plaintiff. Feeling aggrieved against order of learned Trial Court plaintiff Mukhtiar Singh filed appeal under order XLIII CPC. Learned Appellate court partly accepted appeal and set aside order of learned Trial Court dated 27.9.2014. Learned Appellate court directed parties to maintain status quo with regard to nature and alienation of suit land till final disposal of main suit on merits. Feeling aggrieved against order of learned Appellate court revisionist filed present revision petition.

5. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and also perused entire record carefully.

6. Following points arise for determination in present revision petition:

1. Whether revision petition filed under section 115 of code of civil procedure 1908 by revisionist is liable to be accepted as mentioned in memorandum of grounds of revision petition?.

2. Relief.

Findings upon point No.1 with reasons:

7. Submission of learned Advocate appearing on behalf of revisionist that non-revisionist has earlier filed civil suit No. 16 of 2008 titled Mukhtiar Singh Vs. Ajit Singh which was dismissed in default on dated 23.1.2009 in which two Wills i.e. Will dated 18.5.2007 and 15.1.2008 were directly and substantially in issue and subsequent civil suit No. 119 of 2014 is barred on the concept of resjudicata under section 11 CPC and under order II rule 2 CPC is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that two Wills dated 18.5.2007 and dated 15.1.2008 were in dispute in civil suit No. 16 of 2008 titled Mukhtiar Singh Vs Ajit Singh. It is proved on record that Civil Judge did not dispose of civil suit No. 16 of 2008 on merits but civil suit No. 16 of 2008 was dismissed in default. It is also proved on record that learned District Judge did not dismiss civil appeal No. 47 of 2008 on merits but dismissed the appeal in default. It is held that when civil suit is dismissed in default then provision of resjudicata would not apply in subsequent civil suit when subsequent civil suit is filed upon different cause of action and title. See AIR 1993 SC 1756 Inacio Martins Vs. Narayan Hari Naik. See AIR 1976 SC 1645 Lonakutty Vs. Thomman and another. See AIR 1960 SC 941 Satyadhyan Ghosal and others Vs. Smt. Deorajin Debi and another.

8. Submission of learned Advocate appearing on behalf of revisionist that non-revisionist filed application for registration of Will dated 15.1.2008 before learned Sub Registrar

under Registration Act 1908 and application of non-revisionist was dismissed by learned Sub Registrar on dated 15.2.2011 and thereafter appeal was filed by non-revisionist before learned Registrar and same was also dismissed by learned Registrar on dated 23.7.2014 and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Registration Act 1908 is special Act. As per section 18 E of Registration Act 1908 registration of Will is optional. As per section 77 of Registration Act 1908 suit can be filed before civil court against order of refusal of registration by learned Registrar. Present civil suit No. 119 of 2014 is filed under section 77 of Registration Act 1908 upon different cause of action and upon different title.

9. As per section 59 of Indian Succession Act 1925 every person of sound mind not being a minor may dispose of his property by way of Will. It is well settled law that Will are of two types (1) Privileged Will as defined under section 65 of Indian Succession Act 1925 and un-privileged Will as defined under section 63 of Indian Succession Act 1925. It is well settled law that privileged Will is always executed by soldier being employed in an expedition or engaged in actual warfare.

10. Court is of the opinion that in order to avoid multiplicity judicial proceedings inter se parties it is expedient in the ends of justice to direct both parties to maintain status quo as of today qua nature and possession of suit property till disposal of civil suit No. 119 of 2014. It is well settled law that in revision proceedings High Court cannot reverse the order of subordinate court unless order of subordinate court is perverse. See AIR 1991 SC 455 Masjid Kacha Tank Nahan Vs. Tuffail Mohammed. See AIR 1969 SC 580 Indore Municipality Vs. K.N.Palsikar. See AIR 1995 SC 1357 P.Udayani Devi Vs. V.V.Rajeshwara Prasad Rao. See AIR 2002 SC 1004 Gurdial Singh Vs. Raj Kumar Aneja. In view above stated facts and case law cited supra it is held that order of learned District Judge Hamirpur HP dated 19.2.2015 announced in civil miscellaneous appeal No. 23 of 2014 is not perverse. Point No.1 is answered in negative.

Point No.2 (Relief).

11. In view of findings upon point No.1 revision petition is dismissed. Parties are left to bear their own costs. Observations will not effect merits of civil suit in any manner. File of learned Trial Court and learned Appellate Authority along with certify copy of order be sent back forthwith. Parties are directed to appear before learned Trial Court on 5.12.2016. Revision petition is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Braham Dev Sood ... Appellant

Versus

Jugal Kishore ... Respondent

RSA No. 586 of 2007
Reserved on: 03.11.2016
Date of decision: 18.11.2016

Transfer of Property Act, 1882- Section 106- Plaintiff pleaded that tenancy of the defendant was terminated by issuing a notice – the possession of the defendant was unlawful – hence, the mesne profits were sought along with the interest- the suit was decreed by the trial Court- an appeal was filed, which was dismissed – held in second appeal that mesne profits are to be determined on the basis of cogent and credible evidence like recent registered lease deeds of the locality – plaintiff had not brought on record lease deed or registered documents showing the rent of the similar premises – the findings recorded by the Court cannot be said to be perverse- appeal dismissed. Para- 12 to 17)

For the appellant: Mr. K.S. Kanwar, Advocate.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned Additional District Judge, Fast Track Court, Solan, in Civil Appeal No. 27 FTC/13 of 2007 dated 16.08.2007, vide which, learned Appellate Court dismissed the appeal so filed by the present appellant against the judgment and decree passed by the Court of learned Civil Judge (Senior Division), Kandaghat, in Civil Suit No. 47-K/1 of 2001 dated 31.07.2006, whereby learned trial Court had partly decreed the suit filed by the plaintiff for recovery.

2. Brief facts necessary for adjudication of the present case are that the appellant/plaintiff, hereinafter referred to as the plaintiff, filed a suit for recovery of Rs.28,696/- w.e.f. 01.07.1998 to 30.06.2001 @ Rs.700/- per mensem i.e. Rs.25,200/- as principal amount and Rs.3,496/- on account of interest @ 9% per annum, on the ground that the plaintiff was owner of a single storeyed house consisting of 2 rooms and 2 kitchen, situated below the Parkash Saw Mill on Kalka Shimla Road in Kandaghat Town, Tehsil Kandaghat, District Solan and the said accommodation was given to defendant on rent for residence purpose in the month of April, 1984 by the plaintiff @ Rs.300/- per mensem and besides this, the defendant was also required to pay Rs.15/- per mensem as water charges to the plaintiff. As per the plaintiff, he determined the tenancy of the defendant from 31.07.1996 by issuance of a notice under Section 106 of the Transfer of Property Act. Therefore, as per the plaintiff, the possession of the defendant since 01.08.1996 was unlawful and unauthorized. It was further pleaded by the plaintiff that had the defendant vacated the house on or before 31.07.1996, then the plaintiff could have gained more benefits from the said premises. The demised premises in the year 1996 could have had been rented out by the plaintiff @ Rs.800/- per mensem which was the rent prevalent in the vicinity. On these basis, the plaintiff claimed mesne profit w.e.f. 01.07.1998 upto 30.06.2001 @ Rs.700/- per annum alongwith interest.

3. The suit so filed by the plaintiff was contested by the defendant, inter aia, on the ground that the demised premises were not rented out to the defendant by the plaintiff at the rate of Rs.300/- P.M. but were in fact rented out at the rate of Rs.150/- P.M., as has been held by the Court of learned Additional District Judge in its judgment and decree dated 08.12.2003 passed in Civil Appeal No. 2-S/13 of 2003 in case titled Jugal Kishore Vs. Braham Dev Sood. It was further the case put up by the defendant that the alleged determination of the tenancy by way of alleged notice w.e.f. 31.07.1996 was totally wrong and illegal and the same stood set aside by learned Additional District Judge, Solan, in Civil Appeal No. 2-S/13 of 2003. It is further denied that premises in issue could have been rented out for an amount of Rs.800/- per mensem in the year 1996 and as per the defendant, there was no such rent prevalent in the vicinity for such like accommodation as alleged. Thus, the suit of the plaintiff was resisted by the defendant inter alia on the said grounds.

4. On the basis of the pleadings of the parties, learned trial Court framed the following issues:-

1. Whether the plaintiff is entitled for the recovery of Rs.28,696/- as prayed? … OPP
2. Whether the plaintiff is entitled for the payment of interest at the rate of Rs.9% per annum as alleged? … OPP
3. Relief.

5. On the basis of the evidence which was led by the respective parties before learned trial Court, the following findings were returned to the issues so framed by it:-

Issue No. 1:	Yes.
Issue No. 2:	Yes.
Relief	The suit filed by the plaintiff is decreed as per operative portion of this judgment.

6. Accordingly, the suit so filed by the plaintiff was decreed by learned trial Court for recovery of Rs.7344/- on account of rent and mesne profit from 01.07.1998 to 30.06.2001 and future interest @ 15% per annum till the realization of the amount alongwith cost of the suit throughout with special cost of Rs.3,000/-. It was held by learned trial Court that it stood proved on record that the plaintiff had filed suit for possession of demised premises in the year 1996 and due notice was issued to the defendant but legal position changed during the pendency of the trial. It was further held by learned trial Court that learned Appellate Court in Civil Appeal No. 2-S/13 of 2003 had set aside the prayer of the plaintiff for the possession of the shop and determined the rent at Rs.150/- P.M. Learned trial Court further held that it was also admitted fact that the appeal against the judgment and decree passed by the First Appellate Court was pending in the High Court. Learned trial Court further held that the plaintiff had already shown his intention to terminate the tenancy and he had no intention to keep the defendant as a tenant on the demised premises and as Urban Rent Control Act was not applicable to Kandaghat area at the relevant time then the occupation of the defendant cannot be treated to be that of a tenant but he was merely a trespasser who was using the property of the plaintiff without any authority. On these basis, it was held by learned trial Court that till the decision of High Court, the tenancy of the defendant cannot be terminated and possession cannot be given to the plaintiff but the plea of the defendant that he was not liable to pay any amount to the plaintiff as mesne profit, was not acceptable as the defendant could not use the property of the plaintiff without paying any rent. On these basis, it was held by learned trial Court that the plaintiff was entitled for the recovery of Rs.5,400/- as a principal amount on account of monthly rent @ Rs.150/-. Learned trial Court further held that as the defendant had not paid any rent from 1996 onwards, therefore, the plaintiff was also entitled for the interest @ Rs.12% per annum.

7. Feeling aggrieved by the judgment so passed by learned trial Court, the plaintiff filed an appeal on the ground that learned trial Court had erred in not granting mesne profit to the plaintiff as Rs.700/- P.M. as claimed by him, whereas cross-objections were preferred against the judgment and decree passed by learned trial Court by the defendant on the ground that the plaintiff was not entitled for the decree which was passed in his favour by learned trial Court qua interest.

8. Vide its judgment and decree dated 16.08.2007, learned Appellate Court while affirming the judgment and decree passed by learned trial Court dismissed the appeal filed by the plaintiff/appellant as well as cross-objections filed by the defendant. While arriving at the said conclusion it was held by learned Appellate Court that judgment passed by learned Additional District Judge, Solan, in Civil Appeal No. 2-S/13 of 2003, showed that the rent of the premises in dispute was held Rs.150/- P.M. and on these basis, it was held by learned Appellate Court (in the present case) that there was no irregularity or illegality in the findings returned by learned trial Court, vide which, the plaintiff was awarded rent of Rs.150/- P.M. It was further held by learned Appellate Court that contention of the defendant that learned trial Court had erred in granting interest more than what was claimed by the plaintiff had no legal force and as the Court has inherent powers to grant any relief to the party which it deems fit and proper in the facts and circumstances of the case. Learned Appellate Court held that the rent of the premises was very nominal i.e. Rs.150/- P.M. as held by learned trial Court but despite this defendant had neither paid any rent to the plaintiff nor deposited in the Court, which had forced the plaintiff to file the suit. It further held that keeping in view the conduct of the defendant, learned trial Court had not committed any error in awarding special cost of Rs.3000/- to the

plaintiff and interest @ 15% per annum. On these basis, learned Appellate Court dismissed the appeal as well as cross-objections.

9. The judgment and decree so passed by learned Appellate Court is under challenge in this appeal, which has been filed by the plaintiff. No appeal against the dismissal of cross-objections has been filed by the defendant.

10. The appeal was admitted on the following substantial question of law:

> "Whether the learned Court below while fixing the mesne profits has rightly relied upon judgment dated 10.12.2003 passed by the learned Addl. District Judge, Solan, modifying judgment and decree in Civil Suit No. 85/1 of 1996 wherein rent has been fixed by virtue of application of H.P. Urban Rent Control Act, 1987 and which judgment is under challenge by way of Regular Second Appeal pending before this Hon'ble Court."

11. It is a matter of record that Regular Second Appeal which was filed against the judgment referred to in the substantial question of law stands disposed of by this Court on 26.02.2013 by passing the following order:

> "When both appeals were taken up for hearing, it was submitted by the learned counsel appearing for the parties that the suit premises have since been handed over to the landlord Sh. Braham Dev. In these circumstances, I hold that both appeals have become infructuous and disposed of as such. No finding is given on the merits of the points of law and facts of the case.
>
> 2. Submission is made on behalf of the learned counsel appearing for the appellant-Braham Dev that some amount of Rs. 6,000/-as arrear remains due and recoverable from the respondents. In the changed circumstances, I do not deem it necessary to go into this fact."

12. In this view of the matter, now the issue which has to be determined by this Court is as to whether the findings returned by learned trial Court to the effect that the plaintiff was entitled to mesne profit per mensem @ Rs.150/- is correct finding or whether the plaintiff was entitled for an amount of Rs.700/- P.M. for mesne profit.

13. Before proceeding further, it is pertinent to take note of the fact that it is settled law that determination of mesne profits is to be done on the basis of cogent and credible evidence like recent registered lease deeds of locality to show the amount of rent which is payable and inadmissible evidence is not to be taken into account for this purpose. The basic principle which is to be kept in mind is that tenant is under a bounden duty to pay the rent which is akin to the market rent.

14. A perusal of the records of the case demonstrates that to substantiate his claim that he was entitled for mesne profits @ Rs.700/- P.M. after the determination of the tenancy of the defendant, the plaintiff examined two witnesses including himself. PW-1 Umesh Kumar, owner of Uco Bank building in Kandaghat, stated that he had rented out house for residential purposes and in the year 1996 rent for premises having two rooms and two kitchens was Rs.1000/- P.M. He further stated that now-a-days the said premises could be rented out for Rs.1,500/- P.M. In his cross-examination, he stated that he could not state as to what should be the rent for the premises which were with the respondent.

15. Plaintiff entered the witness box as PW-2 and he reiterated his version that he was entitled for mesne profit @ Rs.700/- P.M. In his cross-examination, he denied that the premises were rented out to the defendant for an amount of Rs.150/- P.M. Besides this, the plaintiff produced on record a copy of judgment passed by the Court of learned Civil Judge (Junior Division), Kandaghat, in Civil Suit No. 46-K/1 of 2003 titled Rajeev Sharma & Ors. Vs. Brij Mohan.

16. A perusal of the evidence on record demonstrates that there was no cogent and convincing evidence led by plaintiff either by way of latest lease deed or by way of any other registered document from which it could be inferred that the rental rates of the premises akin to that of plaintiff which were with the defendant was around Rs.700/- P.M. The onus to prove as to what were the occupation charges to which he was entitled to was upon the plaintiff. In my considered view, the plaintiff on the basis of evidence which was led by him miserably failed to discharge the said onus. There was no cogent and reliable evidence placed on record from which it could be inferred that the premises of the plaintiff in possession of the defendant in fact demanded occupation charges @ Rs.700/- P.M. or more.

17. Therefore, in these circumstances, in my considered view, no error was committed by learned trial Court in granting mesne profits in favour of the plaintiff on the basis of the findings returned by learned Additional District Judge in Civil Appeal No. 1-S/13 of 2003 titled Jugal Kishore Vs. Braham Dev Sood, dated 10.12.2003, which judgment passed by learned Appellate Court otherwise has now attained finality. Reliance placed upon by learned trial Court on the judgment passed by learned Additional District Judge dated 10.12.2003 in Civil Appeal could have been faulted with, if there was any other material available with learned trial Court on the basis of which learned trial Court could have had inferred that the premises in dispute in fact commanded better occupation charges. The factum of pendency of Regular Second Appeal in this Court against the judgment passed by learned Appellate Court lost relevance with the passage of time as during the pendency of this litigation, it is an admitted position that the demised premises stand vacated by the defendant. Learned Appellate Court also rightly upheld the findings returned by learned trial Court by correctly appreciating the evidence on record as well as the judgment passed by learned trial Court. Further it cannot be said that the findings returned by both learned Courts below are either perverse or not borne out from the records of the case.

18. Therefore, in view of the above discussion, there is no merit in the present appeal and the same is dismissed. Substantial question of law is answered accordingly. Miscellaneous application(s) pending, if any, stand disposed of. Interim order, if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Desh Raj Sharma .....Appellant

Versus

Chitra Rai and others .....Respondents

FAO No.272 of 2012
CO No.57 of 2014
Reserved on : 11.11.2016.
Pronounced on : 18 .11.2016

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 50% disability, which is permanent in nature and is in regard to whole body- the claimant was an advocate by profession – the disability suffered by him has shattered his physical frame- he would not be in position to do the job of an advocate as he was doing prior to the accident- his income can be taken as Rs.10,000/- per month – considering the permanent disability, it can be safely held that the claimant had lost 20% earning capacity and loss of earning capacity will be Rs.2,000/- per month – the age of the claimant was 49 years and multiplier of 13 is applicable – thus, the claimant is entitled to Rs.2000 x12 x 13= Rs. 3,12,000/- under the head loss of earning capacity – the claimant remained admitted for over one month in the hospital and he would have taken some time in recuperation – hence, the loss of income can be assessed as Rs. 10,000 x 6= Rs. 60,000/- Rs. 50,000/- each awarded under heads painand suffering and loss of amenities of life

– the claimant would have spent Rs.100/- per day or Rs.3,000/- per month on account of special diet- hence, the claimant is held entitled to Rs.3000 x6= Rs.18,000/- under the head special diet – Rs.20,000/- awarded under the medical expenses and Rs.10,000/- awarded under the head future medical treatment – the attendant charges for six months come to Rs.18,000/-- the claimant is held entitled to Rs.3000/- under the head transportation charges- the claimant was occupant of the car and the insurance policy shows the sitting capacity as 1 + 3- no breach of terms and conditions was proved – hence, insurer directed to satisfy the award.(Para-11 to 36)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120.
S. Iyyapan versus United India Insurance Company Limited and another, (2013) 7 Supreme Court Cases 62

For the appellant: Mr.Jai Dev Thakur, Advocate, vice Mr.H.S. Rangra, Advocate.
For the respondents: Mr.G.R. Palsara, Adovcate, for respondents No.1 and 2.
Respondent No.3 deleted.
Mr.P.S. Chandel, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This appeal is directed against the award, dated 21st February, 2012, passed by the Motor Accident Claims Tribunal(II), Mandi, H.P., (for short, the Tribunal), in Claim Petition No.58 of 2004, titled Desh Raj Sharma vs. Ram Pyari and others, whereby compensation to the tune of Rs.2,44,000/, alongwith interest at the rate of 7.5% per annum, came to be awarded in favour of the claimant and the owner and the driver came to be saddled with the liability jointly and severally, (for short, the impugned award).

2. Feeling aggrieved, the claimant has questioned the impugned award by the medium of instant appeal on the ground that the amount awarded by the Tribunal is on the lower side. On the other hand, the legal representatives of the owner (respondents No.1 and 2 herein) have filed Cross Objections seeking exoneration and have prayed that the insurer be saddled with the liability.

3. The driver and the insurer have not challenged the impugned award on any ground, thus, the same has attained finality so far as it relates to them.

4. Facts of the case, in brief, are that on 28th October, 2003, at about 10 p.m., the claimant boarded Maruti Car bearing No.HP-22-5911, owned by respondent No.1 Ram Payari (since dead) and being driven by respondent No.2, from Karsog to Mandi. Further averred that when the said Car reached at Village Bagla, due to the rash and negligent driving of respondent No.2, the car hit with the rear portion of the truck going ahead, as a result of which the claimant sustained injuries, was taken to Zonal Hospital, Mandi, remained admitted there till 13th November, 2003, was referred to Indira Gandhi Medical College and Hospital, Shimla where the claimant was operated upon for neck injury and was discharged on 3rd December, 2003. Thus,

the claimant filed the claim petition for compensation to the tune of Rs.10.00 lacs, as per the break-ups given in the claim petition.

5. The owner and the driver filed joint reply and resisted the claim petition. The insurer also filed reply and contested the claim petition on the grounds taken in the memo of reply.

6. On the pleadings of the parties, the following issues were framed by the Tribunal on 24th August, 2015:

"1. Whether the petitioner had sustained injuries due to the rash and negligent driving of Maruti Car No.HP-22-5911 on 28.10.2003 at place Bagla, being driven by respondent No.2 as alleged? OPP

2. If issue No.1 is proved in affirmative to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Whether respondent No.2 was not having a valid and effective driving license at the time of accident? OPR-3

4. Whether the offending vehicle was being driven in contravention of the terms and condition of the Insurance Policy? OPR-3.

5. Relief."

7. In support of his claim, the claimant examined Dr.Manoj Thakur as PW-1, ASI Joginder Pal as PW-2, Suresh Kumar from the office of S.P., Mandi, as PW-3, Dr.Renu Behal as PW-4, while he himself stepped into the witness box as PW-5. On the other hand, the insured/owner, the driver and the insurer have not led any evidence. Thus, the evidence led by the claimant has remained un-rebutted.

8. The Tribunal, after appreciating the pleadings and the evidence, allowed the claim petition, vide the impugned award and saddled the owner and the driver with the liability.

9. Feeling aggrieved, the claimant has questioned the impugned award on the ground of adequacy of compensation, while the owner has laid challenge to the impugned award by filing cross objections.

10. Thus, following points arise for determination in the instant lis:

i) Whether the amount awarded is inadequate?

ii) Whether the Tribunal has fallen into an error in discharging the insurer form the liability and directing the owner/insured to satisfy the same?

Point No.i)

11. The claimant has examined PW-4 Dr.Renu Behal, Zonal Hospital, Mandi, who stated that the claimant suffered five injuries and that the injury in the neck was grievous in nature. PW-4 has proved on record the MLC Ext.PW-4/A. The claimant also examined Dr.Manoj Thakur, Associate Professor, Department of Orthopedics, IGMC, Shimla, who stated that he was one of the members of the Medical Board, which issued the disability certificate. The disability certificate has been proved on record as Ext.P-I. A perusal of the disability certificate Ext.P-1 does disclose that the claimant suffered 30% disability, which is permanent in nature and is in regard to the whole body.

12. Thus, this being an injury case, the compensation is to be assessed keeping in view the disability suffered by the claimant i.e. 30%.

13. The Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how

compensation has to be awarded in cases where the claimants have suffered permanent disability and how the assessment is to be made.

14. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his/her life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the whole life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> ....
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

15. The claimant-injured was an Advocate by profession. The disability suffered by the claimant has shattered his physical frame and, in all probabilities, he would not be in a position to do the job of an Advocate, as he would have been doing prior to the accident.

16. It has been pleaded by the claimant in the Claim Petition that he, at the time of accident, was earning Rs.20,000/- per month. No evidence has been led by the claimant in support of his assertion that he was earning Rs.20,000/- by practicing as an Advocate. In the circumstances, the Tribunal has rightly assessed the income of the claimant at Rs.10,000/- per month. However, the Tribunal has fallen into an error in assessing the loss of earning capacity to the tune of only 10% in view of the fact that the claimant suffered 30% permanent disability in regard to whole body. Thus, it can safely be concluded that the claimant lost 20% earning capacity because of the disability suffered by him. Therefore, loss of earning capacity can roughly be said to be Rs.2,000/- per month.

17. The age of the claimant, at the time of accident, was 49 years. The Tribunal has rightly applied the multiplier of 13 in view of 2nd Schedule attached to the Motor Vehicles Act, 1988, (for short, the Act) and the dictum of the Apex Court in **Sarla Verma (Smt.) and others vs.**

Delhi Transport Corporation and another, (2009) 6 SCC 121, which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120.**

18. Having said so, the claimant is held entitled to Rs.2,000 x 12 x 13 = Rs.3,12,000/- under the head loss of future earning capacity.

19. The accident had taken place on 28th October, 2003, the claimant remained admitted till 13th November, 2003 in Zonal Hospital, Mandi, from where was referred to IGMC, Shimla, was operated upon for neck injury and discharged from the hospital on 3rd December, 2003. The discharge certificate has been proved on record as Ext.P-2. Thus, the claimant remained admitted for over one month in the hospital. For recuperation, the claimant would have also remained out of profession after discharge from the hospital. Thus, such period, during which the claimant would have remained out of profession, including the period of hospitalization, can be said to be six months.

20. The income of the claimant has been assessed at Rs.10,000/- per month. Thus, the claimant is held entitled to Rs.10,000/- x 6 = Rs.60,000/- under the head 'loss of earning during treatment'.

21. Discussion in the preceding paragraphs shows that the claimant has suffered a lot and because of the disability suffered by him, has to struggle throughout his life. In the given circumstances, read with the law laid down by the Apex Court, the claimant is held entitled to Rs.50,000/- under the head 'pain and sufferings'.

22. Owing to the disability suffered by the claimant, he is deprived of all comforts and amenities of life. Therefore, the claimant is held entitled to Rs.50,000/- under the head 'loss of amenities of life'.

23. The claimant would have also spent at least 100/- per day i.e. Rs.3,000/- per month on account of special diet during the period of treatment. Accordingly, the claimant is held entitled to Rs.3,000/- x 6 = Rs.18,000/- under the head 'special diet'.

24. In order to prove the expenses incurred by the claimant for purchasing medicines etc., the claimant has only placed on record the photocopies of the medical bills, which have not been proved on record as per law. Therefore, keeping in view the injury sustained by the claimant, hypothetically, it can be said that the claimant would have spent Rs.20,000/- on medicines. Accordingly, the claimant is held entitled to Rs.20,000/- under the head 'medical expenses incurred'.

25. Keeping in view the expert evidence, the claimant has to undergo medical check-ups/treatment, at intervals, throughout his life and I deem it proper to award Rs.10,000/- under the head 'future medical treatment'.

26. During the period of hospitalization and recovery i.e. six months, as has been discussed supra, the claimant would have needed special care and attendance, and would have hired attendant. The attendant charges at the rate of Rs.3,000/- per month, for six months, comes to Rs.18,000/- and the said amount is awarded in favour of the claimant under the head 'attendant charges'.

27. The Tribunal has rightly awarded Rs.3,000/- under the head 'transportation charges' and is maintained.

28. Having glance of the above discussion, the claimant is awarded Rs.5,41,000/- under different heads as given below:

Sl.No.	***Heads***	***Amount***
1	*Loss of earning during treatment*	*Rs.60,000/-*
2.	*Loss of future income*	*Rs.3,12,000/-*

3.	*Pain and sufferings*	*Rs.50,000/-*
4.	*Loss of amenities of life*	*Rs.50,000/-*
5.	*Attendant charges*	*Rs.18,000/-*
6.	*Special diet*	*Rs.18,000/-*
7.	*Future medical treatment*	*Rs.10,000/-*
8.	*Medical expenses incurred*	*Rs.20,000/-*
9.	*Transportation charges*	*Rs.3,000/-*
	Total	***Rs.*5,41,000/-**

29. Point No.i) is answered accordingly and the compensation is enhanced.

Point No.ii)

30. Factum of insurance is admitted. The claimant was traveling in the Maruti Car, thus, was an occupant and was third party. As per Insurance Policy Ext.RX, the seating capacity of the Maruti Car was 1+3, meaning thereby, the risk of the claimant, being an occupant/third party, is covered.

31. The mandate of Sections 146, 147 and 149 of the Act is to protect the rights of third parties and that is why, compulsory duty has been imposed upon the owners to get the vehicles insured, so that, claim of third parties cannot be defeated.

32. The same question arose before the Apex Court in a case titled as **S. Iyyapan versus United India Insurance Company Limited and another,** reported in **(2013) 7 Supreme Court Cases 62.** It is apt to reproduce para 16 of the judgment herein:

> *"16. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force."*

33. The same principle has been laid down by this Court in a series of cases.

34. Onus to prove issues No.3 and 4 was on the claimant, has failed to discharge. Accordingly, the said issues were decided against the insurer by the Tribunal. The insurer has failed to prove that the owner has committed willful breach of the terms and conditions contained in the insurance policy. The said findings recorded by the Tribunal have not been challenged by the insurer by filing an appeal or cross objections, thus have attained finality.

35. It is not out of place to mention that the Tribunal on one hand has decided issue No.3 against the insurer and held that the insured has not committed any willful breach of the terms and conditions contained in the insurance policy, and on the other hand, has saddled the insured with the liability.

36. Having glance of the above discussion, the impugned award is modified, the appeal filed by the claimant and the cross objections filed by the owner are allowed, as indicated above, and the insurer is saddled with the liability. The insurer is directed to deposit the amount in the Registry of this Court, alongwith interest, as awarded by the Tribunal, within eight weeks from today and on deposit, the Registry is directed to release the amount in favour of the claimant, through his bank account. The statutory amount deposited by the owner is also

awarded as costs in favour of the claimant. The appeal and the cross objections stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Devinder Singh .....Appellant
Versus
Geetan Devi and others .....Respondents

FAO No.81 of 2012
Date of decision: 18.11.2016

Motor Vehicles Act, 1988- Section 166- Deceased was 59 years of age at the time of incident – deceased was earning Rs.25000/- per month by maintaining accounts of various firms- he was also earning Rs.5,000/- per month from agricultural activities- MACT had treated the income of the deceased as Rs.10,000/- per month or Rs.1,20,000/- per annum - after deducting 1/3rd the loss of dependency will be Rs.80,000/- per annum- multiplier of 8 was applied by the Tribunal, whereas multiplier of 6 is applicable- thus, claimants are entitled to Rs.80,000 x 6= Rs.4,80,000/- under the head loss of dependency – claimants are also entitled to Rs.10,000/- each under the head loss of love and affection, loss of estate, funeral expenses and loss of consortium- thus, claimants are entitled to Rs.4,80,000 +Rs. 40,000= Rs.5,20,000/-.

(Para-9 to 13)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant: Mr.Neel Kamal Sharma, Advocate.
For the respondents: Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 28th November, 2011, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P., (for short, "the Tribunal") in Claim Petition No.19 of 2009, titled Geetan Devi and others vs. Devinder Singh, whereby the claim petition was allowed and compensation to the tune of Rs.6,50,000/-, with interest at the rate of 7.5% per annum, came to be awarded in favour of the claimant and the owner/appellant was saddled with the liability, (for short the "impugned award").

2. The claimants have not questioned the impugned award on any ground, thus, the same has attained finality so far as it relates to them. Feeling aggrieved, the owner has challenged the impugned award on the grounds taken in the memo of appeal.

3. Facts of the case, in brief, are that on 7th July, 2009, at about 4.45 p.m., deceased Tilak Raj was crushed by the Motorcycle bearing No.JK-02AE-4687, near Bus Stand, Hamirpur, being driven by the original respondent (appellant herein) rashly and negligently, as a result of which the deceased sustained injuries and succumbed to the same lateron. Claimants filed the claim petition before the Tribunal claiming compensation to the tune of Rs.7.00 lacs, as per the break-ups given therein.

4. The claim petition was resisted by the respondent by filing reply and following issues came to be framed:

"1. Whether the death of Tilak Raj alias Uttam Chand was caused due to rash and negligent driving of Motorcycle No.JK-02AE-4687, by its owner-cum-driver, Devinder Singh, at the relevant time, as alleged?

2. If issue No.1 is proved in affirmative, whether the petitioners/claimants are entitled to compensation, if so, to what amount and from whom? OPP

3. Relief."

5. The claimants examined as many as eight witnesses. One of the claimants namely, Naresh Shama, stepped into the witness box as PW-7. On the other hand, respondent Devinder Singh appeared as RW-1 and also examined one Sunil Sharma as RW-2.

6. The Tribunal, after examining the pleadings and the evidence, allowed the claim petition and saddled the owner with the liability, as detailed above.

7. During the course of hearing, the learned counsel for the appellant-owner argued that the Tribunal has wrongly saddled him with the liability as the driver/owner had not caused the accident. Though FIR was lodged against the driver, but he now stands acquitted of the charge. Secondly, it was submitted that the amount awarded by the Tribunal is excessive.

8. Heard learned counsel for the parties and gone through the record.

9. In regard to the accident, FIR No.218, dated 7th July, 2009, was lodged at Police Station, Sadar, District Hamirpur, H.P. and the same has been proved on record as Ext.PW-1/A. The challan i.e. final report in terms of Section 173 of the Code of Criminal Procedure was presented before the court of competent jurisdiction. While answering issue No.1 in favour of the claimants and against the respondent/owner, the Tribunal has rightly made discussion in paragraphs 8 to 15, are borne out from the records and are accordingly upheld.

10. As far as issue No.2 is concerned, the same pertains to the quantum of compensation. The deceased was 59 years of age at the time accident. It was pleaded in the claim petition that the deceased was earning Rs.25,000/- per month by maintaining accounts of various persons/firms. Besides this, the deceased was also earning Rs.5,000/- per month from agricultural activities. However, the Tribunal after referring to the statements of witnesses examined by the claimants and the evidence brought on record, assessed the monthly income of the deceased at Rs.10,000/-. The Tribunal has discussed the evidence meticulously in paragraphs 16 to 25 and has rightly assessed the income of the deceased at Rs.1,20,000/- per annum. After deducting 1/3rd from the total income of the deceased, loss of source of dependency to the claimants, per annum, can be said to be Rs.80,000/-.

11. The deceased was 59 years of age. The Tribunal has fallen into an error in applying the multiplier of 8, instead, in view of the law expounded by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120** and the 2nd Schedule attached with the Motor Vehicles Act, 1988, multiplier of 6 was just and appropriate and is applied accordingly.

12. In view of the above discussion, the claimants are held entitled to compensation to the tune of Rs.80,000/- x 6 = Rs.4,80,000/- under the head loss of source of dependency. In addition, the claimants are also held entitled to Rs.10,000/- each i.e. Rs.40,000/- in all under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'.

13. Thus, the claimants are held entitled to Rs.4,80,000/- + Rs.40,000/- = Rs.5,20,000/-.

14. Having said so, the impugned award is modified, as indicated above. The appellant is directed to deposit the amount in the Registry of this Court within eight weeks from today, alongwith interest as awarded by the Tribunal, and on deposit, the Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award.

15. The appeal is disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

H.R.T.C. through its Managing Director and another .....Appellant

Versus

Sanjay Kumar and another .....Respondents.

FAO (MVA) No. 376 of 2012.
Date of decision: 18th November, 2016.

Motor Vehicles Act, 1988- Section 166- Claimant had sustained injury in a motor vehicle accident- he was aged 27 years at the time of accident- he remained in hospital for a period of about 2 months- he was coming up for follow up after every 4-6 weeks – he is having difficulty in walking and speaking and he has lost all charms of life- he had spent Rs.1,94,428/- on his treatment- the Tribunal had rightly awarded the compensation- appeal dismissed.

(Para- 12 to 16)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

For the appellants: Mr. Vikrant Thakur and Mr. Purshotam Chaudhary, Advocates.
For the respondents: Mr.Pushpender Jaswal, Advocate, for respondent No.1
Mr. Onkar Jairath, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 3.3.2012, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P. hereinafter referred to as "the Tribunal", for short, in MAC Petition No.03 of 2010, titled *Sanjay Kumar versus H.R. T.C. and others,* whereby compensation to the tune of Rs.5,45,000/- alongwith interest @ 7.5% per annum came to be awarded in favour of the claimant and HRTC was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimant has not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to him.

3. The H.R.T.C. has questioned the impugned award on the grounds taken in the memo of appeal.

4. Claimant being the victim of a vehicular accident, filed claim petition before the tribunal for the grant of compensation to the tune of Rs. 20 lacs, as per the break-ups given in the claim petition on account of the injuries suffered by him due to rash and negligent driving of HRTC Bus driver, namely, Sukh Dev, while driving HRTC Bus No. HP-36-A-7505 at Kaloor, was taken to hospital at Nadaun and thereafter shifted on the same day to Dayanand Medical College hospital Ludhiana where he remained admitted till 21.10.2009.

5. The claim petition was resisted by the respondents and following issues came to be framed.

1. *Whether the petitioner has suffered injuries due to use/rash and negligent driving of Bus No. HP-36-A-7505 by its driver-respondent No. 3 as alleged? OPP*
2. *If issue No. 1 is proved in affirmative, whether the petitioner/claimant is entitled to compensation, if so, to what amount and from which of the respondents? OPP*
3. *Whether the petition is not maintainable in the present form? OPRs.*
4. *Whether the petitioner is estopped from filing the present petition by his act and conduct? OPRs.*
5. *Relief.*

6. Claimants have examined the witnesses and the Tribunal, after scanning the evidence oral as well as documentary, held that the driver has driven the offending vehicle rashly and negligently and caused the accident. The driver has not questioned the said findings. Thus, the appellant cannot question the same. However, I have gone through the pleadings and evidence. FIR Ext. PW1/A does disclose that the driver had driven the offending vehicle rashly and negligently and caused the accident. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

7. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 and 4. It was for the appellant to lead evidence, has not led any evidence. Thus, failed to discharge the onus. The Tribunal has rightly made discussion in paras 17 and 18 of the impugned award and decided the issues against the appellant, needs no interference.

Issue No.2.

8. It is beaten law of land that the compensation is to be awarded in an injury case under pecuniary and non-pecuniary heads by making guess work.

9. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

10. This Court has also laid down the same principle in a series of cases.

11. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the*

trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.

…… …… ……

18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."

12. The injured was 27 years of age at the time of accident, was admitted in the hospital from 23.8.2009 to 21.10.2009. The claimant examined PW3 Dr. R.K. Kaushal who is Head of neurosurgery department in DMC Hospital Ludhiana, who deposed that the injured was deeply comatosed. C.T. Scan of his head was done which showed fluid on left side of brain. He was operated twice. Bone flap was placed on the head on 29.9.2009 and after treatment he was discharged on 21.10.2009. He has further stated that the claimant was coming on for regular follow up after every 4-6 weeks. He is having difficulty in speaking and walking. Discharge summary Ext. PW3/A and other certificates Ext. PW3/B and Ext. PW3/C do disclose that the claimant has become permanently disabled and has lost charm of his life. The bill Ext. PW3/D do disclose that the claimant had spent Rs.1,94,428/- on his treatment in DMC Ludhiana. The tribunal has rightly made discussion in paras 10 to 15 of the impugned award and has given the details how the claimant is entitled to compensation.

13. It is apt to record herein that the learned counsel for the appellant was not in a position to indicate how the Tribunal has fallen in an error in making assessment. In fact he has not disputed the impugned award to that effect.

14. The entire evidence on the record do disclose that the claimant has to suffer forever life. The injuries have shattered his physical frame and he has lost amenities of life.

15. I have gone through the impugned award. The amount awarded is adequate needs no interference.

16. Accordingly, the impugned award is upheld and the appeal is dismissed.

17. The HRTC-appellant is directed to deposit the amount alongwith interest, as awarded by the Tribunal, within eight weeks from today in the Registry, if not deposited. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

18. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No. 382 and 416 of 2012.
Date of decision: 18th November, 2016.

FAO No. 382 of 2012.

ICICI Lombard General Insurance Co. Ltd. .....Appellant

Versus

Sh. Ram Prakash and others .....Respondents.

FAO No. 416 of 2012.

Ram Parkash .....Appellant

Versus

Sh. Rajinder Singh and others .....Respondents.

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 50% permanent disability- he was treated as a skilled labourer earning Rs.5,000/- per month -at the relevant time labourer would have been earning Rs.4000/- per month by guess work – considering the disability, the loss of income can be taken as Rs.2000/- per month – the claimant was 25 years of age at the time of accident – claimant was entitled to Rs.2,000 x 12 x 15= Rs.3,60,000/- under the head loss of future income- the tribunal had rightly awarded Rs.75,000/- on account of cost of medical treatment past and prospective, Rs.5,000/- on account of travel expenses, Rs.20,000/- on account of attendant charges for six months, Rs.10,000/- on account of physical pain and shock and Rs.50,000/- for the loss of amenities of life - thus, total compensation of Rs.5,20,000/- awarded with interest @ 7.5% per annum. (Para- 9 to 17)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771.

Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

For the appellant(s): Mr. Jagdish Thakur, Advocate, for the appellant in FAO No. 382 of 2012 and Mr. Kanwar Bhupinder Singh, Advocate, for the appellant in FAO No. 416/2012.

For the respondent(s): Mr. Vishwa Bhushan, Advocate, for respondents No. 1 and 2 in FAO No. 416 of 2012 and for respondents No. 2 and 3 in FAO No. 382 of 2012.

Mr. Kanwar Bhupender Singh, Advocate, for respondent No.1 in FAO No. 382 of 2012 and Mr. Jagdish Thakur, Advocate, for respondents No. 3 in FAO No. 416 of 2012.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

Both these appeals are outcome of one award, hence are taken up together for disposal by this common judgment.

2. Both these appeals are directed against the judgment and award dated 19.6.2012, passed by the Motor Accident Claims Tribunal, Shimla, H.P. hereinafter referred to as "the Tribunal", for short, in MAC Petition No.5-S/2 of 2010, titled *Sh. Ram Parkash versus Sh. Rajinder Singh and others,* whereby compensation to the tune of Rs.6,70,000/- alongwith costs assessed at Rs.5000/-, came to be awarded in favour of the claimant and insurer was saddled with the liability, with direction to deposit the amount within two months, in default had to satisfy the amount with simple interest @ 9% from the date of claim petition, on the grounds taken in the memo of appeals.

3. Claimants being the victims of a vehicular accident invoked the jurisdiction of the Tribunal for the grant of compensation as per the break-ups given in the claim petition, which was resisted by the respondents and following issues came to be framed.

1. *Whether petitioner suffered injuries on account of rash and negligent driving of vehicle by the respondent No.2.OPP.*
2. *If issue No. 1 is proved, to what amount of compensation and from whom is the petitioner entitled to? OPP*
3. *Whether the respondent No. 2 had not been in possession of a valid and effective driving licence, if so, with what effect? OPR-3.*
4. *Whether the petitioner was travelling as gratuitous passenger in the vehicle, if so, with what effect? OPR-3.*
5. *Relief.*

4. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant has proved that the respondent No. 2 before the Tribunal, namely, Mohan Lal has driven the offending vehicle rashly and negligently in which the claimant sustained the injuries and became permanently disabled to the extent of 40%. The findings on issue No. 1 are not in dispute are accordingly upheld.

5. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 and 4.

Issues No. 3 and 4.

6. It was for the appellant/insurer to plead and prove both the issues, has not led any evidence, thus failed to discharge the onus. It is also apt to record herein that the learned counsel for the insurer has not seriously contested issue No.4. There is nothing on the record to indicate that the injured was travelling in the offending vehicle as gratuitous passenger. The Tribunal has rightly made discussion from paras 26 to 28 of the impugned award, needs no interference. Accordingly, the findings returned on these issues by the Tribunal, are upheld.

Issue No.2.

7. Admittedly, the deceased was 25 years of age at the time of accident, FIR Ext. PW3/A was lodged and he was taken to IGMC Shimla where he remained under treatment for a pretty long time, was operated, discharged and had to undergo follow up for long period. The Tribunal has reproduced the statements of PW4 Dr. Ravinder Mokta and PW5 Dr. L.R. Verma in the impugned award. Thus, I deem it proper not to reproduce the same in this judgment. Dr. Ravinder Mokta (PW4) has stated that the claimant has sustained the permanent disability to the extent of 40% in terms of disability certificate Ext. PW4/A.

8. The question is-whether the compensation has been rightly assessed by the Tribunal?.

9. It is beaten law of land that the compensation is to be awarded in an injury case under pecuniary and non-pecuniary heads by making guess work.

10. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

11. This Court has also laid down the same principle in a series of cases.

12. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.

....

18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."

13. The disability has affected his earning capacity in *toto* for one year and it has also affected his earning capacity to the extent of 50% for ever. The Tribunal has held the injured as skilled labourer, earning Rs.5000/- per month at that time. It appears that the Tribunal has fallen in an error. At the relevant point of time, at best, a labourer would have been earning Rs.4000/- per month while making a guess work. The claimant has suffered 40-50% disability and it can safely be held that the claimant has lost source of income to the tune of Rs.2000/- per month, was 25 years of age, the multiplier applicable is "15".

14. Thus, the claimant is entitled to compensation to the tune of Rs.2000x12x15= Rs.3,60,000/-, under the head "loss of future income."

15. The Tribunal has rightly awarded a sum of Rs.75000/- on account of cost of medical treatment past and prospective, Rs.5,000/- on account of travel expenses, Rs.20,000/- on account of attendant charges for six months and Rs.10,000/- on account of physical pain and shock.

16. The Tribunal has fallen in an error in not awarding compensation for loss of amenities of life. Thus, the claimant also held entitled to Rs.50,000/- for loss of amenities of life.

17. Thus, in all, the claimant is entitled to compensation to the tune of Rs.3,60,000/-+Rs.75000/-+Rs.5000/-+Rs.20,000/ +Rs.10,000/- + Rs.50,000/- = Total Rs.5,20,000/-., with interest @ 7.5% per annum from the date of impugned award on the amount of Rs.3,60,000/- and from the date of claim petition on the amount of Rs.1,60,000/-.

18. The insurer is directed to deposit the amount alongwith interest @ 7.5% as indicated hereinabove, within eight weeks from today in the Registry, if not already deposited. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by

depositing the same in his bank account, after proper verification. Excess amount, if any be release in favour of the appellant-insurer through payees cheque account.

19. Viewed thus, impugned award is modified as indicated hereinabove and the appeals are disposed of accordingly, alongwith pending applications, if any.

20. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

ICICI Lombard General Insurance Company Ltd. ....Appellant

Versus

Rakesh Kumar @ Suresh Kumar & others ....Respondents

FAO No. 405 of 2012
Decided on : 18.11.2016

Motor Vehicles Act, 1988- Section 166- It was contended that Tribunal fell in error in assessing compensation under the head loss of earning/future income and in granting interest from the date of filing of the claim petition- the injured was a student aged 14 years – he had sustained 15% permanent disability – his right leg was operated – it can be safely held that after attaining the age of majority, he would have earned atleast Rs.4,000/- per month- he is working as a driver and his income can be taken as Rs.6,000/- per month- the loss under the future head will be Rs.600/- per month – multiplier of 12 is applicable and claimant is entitled to Rs.600 x 12 x 15= Rs. 1,08,000/- under the head loss of earning/future income- Rs.10,000/- awarded under the head medical expenses for the future medical treatment- interest awarded on all heads except the future income from the date of claim petition and on the future income from the date of the award. (Para-6 to 18)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the Appellant : Mr. Jagdish Thakur, Advocate.

For the Respondents: Mr. Dinesh Bhanot, Advocate, for respondent No. 1.

Mr. Piyush, Advocate vice Mr. T.S. Chauhan, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the judgment and award, dated 6th July, 2012, made by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P. (for short 'the Tribunal') in MAC Petition No. 41/NL/2 of 2008, titled as **Rakesh Kumar alias Suresh Kumar** versus **Ashok Dharmani & others**, whereby compensation to the tune of Rs. 3,35,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-injured and insurer was saddled with liability (for short 'the impugned award').

2. The claimant-injured, owner-insured and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

4. Learned Counsel for the appellant-insurer argued that the Tribunal has fallen in an error in assessing compensation under the head 'loss of earning/future income' and in granting interest under the aforesaid head from the date of filing of the claim petition.

5. Admittedly, the claimant-injured was a student of the age of 14 years at the time of accident and was a minor. He suffered 15% permanent disability in terms of Disability Certificate Ext. PW-1/A. PW-1, Dr. Amarjeet Singh has given details of the injuries suffered by the claimant-injured in his statement before the Tribunal.

6. I have gone through the record. The claimant-injured remained admitted in the hospital w.e.f. 16.08.2008 to 04.09.2008 and his right leg was got operated.

7. By guess work, it can safely be held that on attaining the age of majority, he would have earned at least Rs. 4,000/- per month.

8. At this stage, learned Counsel for the claimant-injured stated at the Bar that at present, the claimant-injured is working as a driver.

9. In the given circumstances, at the best, the monthly income of the claimant can be taken as Rs. 6,000/-. Thus, loss under the head 'future income' comes to Rs. 600/- per month.

10. The multiplier of '12' is applicable in this case in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

11. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 600 x 12 x 15 = Rs. 108,000/- under the head 'loss of earning/future income'.

12. The Tribunal has also fallen in an error in not granting compensation under the head 'expenses for future treatment'.

13. Accordingly, I deem it proper to award Rs. 10,000/- under the head 'medical expenses for future treatment'.

14. The compensation amount awarded by the Tribunal under the other heads is not challenged. Accordingly, the amount awarded under the other heads is maintained.

15. The Tribunal has fallen in an error in awarding interest 7.5% per annum under all the heads from the date of the claim petition. Interest at the rate of 7.5% per annum was to be awarded for all heads except for future income from the date of the claim petition and for future income, it was to be awarded from the date of impugned award.

16. Accordingly, the claimant-injured is held entitled to total compensation under the following heads:

1.	Loss of earning/future income	Rs. 108,000/-
2.	Medical expenses	Rs. 10,000/-
3.	Loss of amenities of life	Rs. 75,000/-
4.	Attendant charges	Rs. 25,000/-
5.	Pain and sufferings	Rs. 40,000/-
6.	Special diet and nutrition	Rs. 5,000/-
7.	Medical expenses on future treatment	Rs. 10,000/-
	Total:	Rs. 2,73,000/-

17. On the aforesaid amount of compensation, interest @ 7.5% per annum is payable for all heads except for future income from the date of the claim petition and under the head 'loss of earning/future income', it is payable from the date of impugned award.

18. The Registry is directed to release the entire amount in favour of the claimant-injured, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing it in his account. The excess amount be refunded to the insurance company through payees' cheque account or by depositing it in its bank account.

19. Accordingly, the impugned award is modified and the appeal is disposed of.

20. Send down the records after placing a copy of the judgment on the file of the claim petition.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Smt. Inder Kaur & others ....Appellants

Versus

Smt. Shanti Devi & others ....Respondents

FAO No. 398 of 2012
Decided on : 18.11.2016

Motor Vehicles Act, 1988- Section 149- Driver was having a license to drive light motor vehicle – he was driving a three wheelers, which falls within the definition of light motor vehicle- no endorsement of PSV was required- the Tribunal fell in error in concluding that the Driver did not have a valid licence at the time of accident- appeal allowed – award modified and the insurer saddled with liability. (Para- 5 to 15)

Cases referred:

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791

National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

For the Appellants : Mr. B.C. Negi, Senior Advocate with Mr. Narender Thakur, Advocate.

For the Respondents: Mr. N.K. Tomar, Advocate, for respondents No. 1 to 4.
Mr. N.K. Gupta, Advocate, for respondent No. 5.
Ms. Devyani, Sharma, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the judgment and award, dated 4th June, 2012, made by the Motor Accident Claims Tribunal-I, Sirmour, District Sirmour at Nahan, H.P. (for short 'the Tribunal') in MAC Petition No. 49-MAC/2 of 2009, titled as **Smt. Shanti Devi & others versus Kuldeep Singh & others**, whereby compensation to the tune of Rs. 3,70,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the legal heirs of the owner-insured were saddled with liability (for short 'the impugned award').

2. The claimants, insurer and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The legal heirs of the insured-owner have questioned the impugned award on the grounds that the Tribunal has fallen in an error in discharging the insurer from liability and saddling them with the same.

4. The entire controversy in this appeal revolves around Issues No. 4 & 5 framed by the Tribunal in the claim petition. It is apt to reproduce the aforesaid issues herein:

> *"4. Whether the driver of the vehicle did not possess a valid and effective driving licence at the relevant time, as alleged? …OPR-3*
>
> *5. Whether the vehicle was being plied without a valid permit and in violation of the terms and conditions of insurance policy, as alleged? …OPR-3.*

5. Admittedly, the driver was having driving licence to drive the 'light motor vehicle' and vehicle involved in the accident was Three Wheeler bearing No. HP-50-0102, which falls within the definition of 'light motor vehicle' in terms of Section 2(21) of the Motor Vehicles Act, 1988, for short 'the MV Act'.

6. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-*
>
> > *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
> >
> > *.....*
> >
> > *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive*

any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."

In the given circumstances of the case PSV endorsement was not required at all."

7. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

8. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

9. The Apex Court in the latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that PSV endorsement is not required.

10. The same principle has been laid down by this Court in a series of cases.

11. Viewed thus, the Tribunal has fallen in an error in holding that the driver was not having a valid and effective driving licence at the relevant point of time. Accordingly, Issue No. 4 is decided in favour of the driver and owner-insured and against the insurer.

12. It was for the insurer to prove this issue, has not led any evidence, thus has failed to discharge the onus. Accordingly, this issue is also decided in favour of the driver and owner-insured and against the insurer.

13. Having said so, the impugned award is modified by holding that the insurer has to satisfy the impugned award.

14. The insurer is directed to deposit the award amount alongwith interest, within a period of eight weeks from today before the Registry. On deposit, the Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in their accounts.

15. Learned Counsel for the appellants-legal heirs of the owner-insured stated at the Bar that the entire award amount stands deposited before the Registry.

16. The amount deposited by the appellants/legal heirs of the owner-insured be released in their favour through payees' account cheque or by depositing the same in their accounts.

17. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Inderjit Singh Bawa ....Plaintiff
Versus
Dr. Vani Sharma ...Defendant

C.S. No. 44 of 2013.
Judgment reserved on: 10.11.2016
Date of Decision: 18.11.2016.

Code of Civil Procedure, 1908- Order 2 Rule 2- Plaintiff filed a civil suit for recovery of money – he had already instituted a suit in the Court of Civil Judge (Senior Division), Kangra prior to the institution of the present suit – held, that the defendant should not be vexed time and again for the same cause by splitting the claim and causes of action - while determining whether the subsequent suit is barred or not, the Court has to find out whether the claim in the new suit is founded upon a cause of action which was the foundation in the former suit – the burden is upon the defendant to prove the identity of the cause of action in the two suits – plaintiff had filed the earlier suit for declaration and permanent injunction for restraining the defendant from leaving the services of Kangra Valley Hospital in violation of the agreement executed between the parties- the present suit has been filed for damages on the ground of cancellation of the agreement – the plea raised in the suit was available at the time of filing of the earlier suit – the plaintiff had not sought the relief, which was available to him and plaintiff is clearly precluded from instituting the suit – the suit is held to be barred by Order 2 Rule 2 and is dismissed. (Para-6 to 35)

Cases referred:

Gurubux Singh vs. Bhooralal, 1964 AIR (SC) 1810
Sidramappa vs. Rajashetty and others 1970 AIR (SC), 1059
Kewal Singh vs. Mt. Lajwanti, 1980 AIR (SC) 161
Bengal Waterproof Ltd. vs. Bombay Waterproof Mfg. Co. 1997 AIR (SC) 1398
Kunjan Nair Sivaraman Nair vs. Narayanan Nair and others 2004 AIR (SC) 1761
N.V. Srinivasa Murthy and others vs. Mariyamma (dead) by Proposed LRs and Others, 2005 AIR (SC) 2897
Alka Gupta vs. Narender Kumar Gupta, (2010) 10 SCC 141
Inbasagaran and another vs. S. Natarajan (dead) through Legal Representatives (2014) 11 SCC 12
Rathnavathi and another vs. Kavita Ganashamdas, (2015) 5 SCC 223

For the Plaintiff — Ms. Bhavana Datta, Advocate.
For the Defendant — Mr. Bhupender Gupta, Senior Advocate, with Mr. Ajeet Pal Singh Jaswal, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The plaintiff has filed the instant suit for recovery of Rs. 63,58,827/- alongwith future interest at the rate of 18% per annum from the date of institution of the suit till payment thereof.

2. It is not in dispute that before filing this suit, the plaintiff had already instituted a suit in the Court of Civil Judge (Senior Division), Kangra, H.P.

3. This Court on 25.9.2014 framed the following issues:

1. *Whether the plaintiff is entitled to a decree of Rs. 63,58,827/- alongwith interest @18% per annum against the defendant? OPP*

2. *Whether the suit is not maintainable in its present form? OPD*

3. *Whether the suit is not maintainable in view of Order 2 Rule 2 of the Code of Civil Procedure, if so, its effect? OPD*

4. *Whether the plaintiff has no enforceable cause of action to file and maintain the present suit, if so, its effect? OPD*

5. *Whether the plaintiff is estopped to file and maintain the present suit on account of his act, deeds, conduct and acquiescence, if so, its effect? OPD*

6. *Relief.*

4. Issue No.3 was treated as preliminary issue. The defendant on 4.12.2014 tendered documents Ex.D-1 to D-4 and closed her evidence and thereafter from one reason or the other, the plaintiff did not lead his evidence and it is eventually on 15.7.2016 that the statement of one witness was recorded and thereafter the plaintiff closed his evidence.

I have heard learned counsel for the parties and have gone through the records of the case carefully.

Issue No.3.

5. Before going into the factual aspects, it would be necessary to advert to the legal position.

6. In ***Gurubux Singh vs. Bhooralal, 1964 AIR (SC) 1810***, the Hon'ble Supreme Court held as under:

> *"6. In order that a plea of a bar under 0. 2. r. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under 0. 2. r. 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits."*

7. In ***Sidramappa vs. Rajashetty and others 1970 AIR (SC), 1059,*** the Hon'ble Supreme Court held as under:

> "7. *The High Court and the trial court proceeded on the erroneous basis that the former suit was a suit for a declaration of the plaintiff's title to the lands mentioned in Schedule I of the plaint. The requirement of Order 2, rule 2, Code of Civil Procedure is that every suit should include the whole of the claim which the plaintiff is entitled to make in in respect of a cause of action. - 'Cause of action' means the 'cause of action for which the suit was brought'. It cannot be Said that the cause of action on which the present suit was brought is the same as that in the previous suit. Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause, ,of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot*

afterwards seek to recover the balance by independent proceedings(See. Mohd. Hafiz vs. Mohd. Zakaria, 1922, AIR (PC) 23.)"

8. In ***Kewal Singh vs. Mt. Lajwanti, 1980 AIR (SC) 161,*** the Hon'ble Supreme Court held as under:

"5. *A perusal of Order 2 Rule 2 would clearly reveal that this provision applies to cases where a plaintiff omits to sue a portion of the cause of action on which the suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application to cases where the plaintiff basis his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. In such cases, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished."*

9. In ***Bengal Waterproof Ltd. vs. Bombay Waterproof Mfg. Co. 1997 AIR (SC) 1398,*** the Hon'ble Supreme Court held as under:

"8. As seen earlier, Order 2 Rule 2 sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based and unless there is identity of causes of action in both the suits the bar of Order 2 Rule 2 sub-rule (3) will not get attracted.

20. In cases of continuous causes of action or recurring causes of action bar of Order 2 Rule 2 sub-rule (3) cannot be invoked. In this connection it is profitable to have a lock at Section 22 of the Limitation Act, 1963. It lays down that `in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the beach or the tort, as the case may be, continues'."

10. In ***Kunjan Nair Sivaraman Nair vs. Narayanan Nair and others 2004 AIR (SC) 1761,*** the Hon'ble Supreme Court held as under:-

"10. Order II Rule 2, sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based. Therefore, there must be identical cause of action in both the suits, to attract the bar of Order II sub-rule (3). The illustrations given under the rule clearly brings out this position. Above is the ambit and scope of the provision as highlighted in Gurbux Singh's case (supra) by the Constitution Bench and in Bengal Waterproof Limited (supra). The salutary principle behind Order II Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicated in successive litigations. It is, therefore, provided that the plaintiff must not abandon any part of the claim without the leave of the Court and must claim the whole relief or entire bundle of reliefs available to him in respect of that very same cause of action. He will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the Court."

11. In ***N.V. Srinivasa Murthy and others vs. Mariyamma (dead) by Proposed LRs and Others, 2005 AIR (SC) 2897,*** the Hon'ble Supreme Court held as under:

"*13. In paragraph 11 of the plaint, the plaintiffs have stated that they had earlier instituted original suit No.557 of 1990 seeking permanent injunction against defendants and the said suit was pending when the present suit was filed. Whatever relief the petitioners desired to claim from the civil court on the basis of averment with regard to the registered sale deed of 1953 could and ought to have been claimed in original civil suit No.557 of 1990 which was pending at that time. The second suit claiming indirectly relief of declaration and injunction is apparently barred by Order 2, Rule 2 of the Code of Civil Procedure."*

12. In ***Alka Gupta vs. Narender Kumar Gupta, (2010) 10 SCC 141,*** the Hon'ble Supreme Court held as under:

"18. Further, while considering whether a second suit by a party is barred by Order 2 Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 of the Code."

13. In ***Inbasagaran and another vs. S. Natarajan (dead) through Legal Representatives (2014) 11 SCC 12,*** the Hon'ble Supreme Court held as under:

"20. *Indisputably, cause of action consists of a bundle of facts which will be necessary for the plaintiff to prove in order to get a relief from the Court. However, because the causes of action for the two suits are different and distinct and the evidences to support the relief in the two suits are also different then the provisions of Order 2 Rule 2 CPC will not apply."*

14. In ***Rathnavathi and another vs. Kavita Ganashamdas, (2015) 5 SCC 223***, the Hon'ble Supreme Court held as under:-

"26. *One of the basic requirements for successfully invoking the plea of Order II Rule 2 of CPC is that the defendant of the second suit must be able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based. As mentioned supra, since in the case on hand, this basic requirement in relation to cause of action is not made out, the defendants (appellants herein) are not entitled to raise a plea of bar contained in Order II Rule 2 of CPC to successfully non suit the plaintiff from prosecuting her suit for specific performance of the agreement against the defendants.*

27. Indeed when the cause of action to claim the respective reliefs were different so also the ingredients for claiming the reliefs, we fail to appreciate as to how a plea of Order II Rule 2 could be allowed to be raised by the defendants and how it was sustainable on such facts.

28. We cannot accept the submission of learned senior counsel for the appellants when she contended that since both the suits were based on identical pleadings and when cause of action to sue for relief of specific performance of agreement was available to the plaintiff prior to filing of the first suit, the second suit was hit by bar contained in Order II Rule 2 of CPC.

29. The submission has a fallacy for two basic reasons. Firstly, as held above, cause of action in two suits being different, a suit for specific performance could not have been instituted on the basis of cause of action of the first suit. Secondly, merely because pleadings of both suits were similar to some extent did not give any right to the defendants to raise the plea of bar contained in Order II Rule 2 of CPC. It is the cause of action which is material to determine the applicability of bar under Order II Rule 2 and not merely the pleadings. For these reasons, it was not necessary for plaintiff to obtain any leave from the court as provided in Order II Rule 2 of CPC for filing the second suit.

30. Since the plea of Order II Rule 2, if upheld, results in depriving the plaintiff to file the second suit, it is necessary for the court to carefully examine the entire factual matrix of both the suits, the cause of action on which the suits are founded, reliefs claimed in both the suits and lastly the legal provisions applicable for grant of reliefs in both the suits."

15. From the aforesaid exposition of law, it can safely be concluded that the salutary principle behind Order 2 Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicated in successive litigations. One of the objects of Order 2 Rule 2 is to avoid multiplicity of proceedings.

16. Sub-rule (1) to Rule 2 deals with the frame of the suit and enables the plaintiff to abandon or relinquish a part of his claim before filing his plaint. The provisions of Order 2 Rule 2 indicate that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, it cannot spilt up the claim so as to omit one part of the claim and sue for the other. It is, therefore, provided that the plaintiff must not abandon any part of the claim without the leave of the Court and must claim the whole relief or entire bundle of reliefs available to him in respect of that very same cause of action. He will thereafter be precluded from doing so in any subsequent litigation that he may commerce if he has not obtained the prior permission of the Court.

17. To constitute a bar to fresh suit under Order 2 Rule 2 (3) CPC, three elements are required to be proved. Firstly, it must be established that the second suit was in respect of the same cause of action as that on which the previous suit was based; secondly, in respect of that cause of action the plaintiff is entitled to more than one relief and lastly, that being so, the plaintiff without leave obtained from the Court, omitted to sue for the relief for which the second suit has been filed.

18. The correct test in cases falling under Order 2 Rule 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit."

19. "Cause of action" means the bundle of facts which the plaintiff must prove in order to succeed in his action. The cause of action for which the suit was brought means, the cause of action, which gives occasion for and forms the foundation of the suit. Generally stated, the cause of action means every fact which is necessary to establish to support a right or obtain judgment. Another shade of meaning is that a cause of action means every fact which will be necessary for the plaintiff to prove (if traversed). The cause of action for the purpose of this Rule means all the essential facts constituting the right of its infringement. In other words, the cause of action consists of all the facts which are essential for the plaintiff to allege and to establish, if denied or controverted, for instance, the bundle of facts which taken with the law applicable to them gives him a right of some relief against the defendant.

20. The burden is on the defendant to establish that the subsequent suit is founded on a cause of action which is identical with that of which the earlier suit was founded. If the cause of action which is identical with that of which the earlier suit was founded. If the cause of action and the relief claimed in the second suit are not the same as the cause of action and relief claimed in the first suit, the second suit is not barred. It is settled law that when the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter.

21. A plea of bar under Order 2 Rule 2 is a highly technical plea. It tends to defeat justice and to deprive the party of a legitimate right. Therefore, care must be taken to see that complete identity of cause of action is established. It has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. Since the plea of Order 2 Rule 2, if upheld, results in depriving the plaintiff to file the second suit, it is necessary for the court to carefully examine the entire factual matrix of both the suits, the cause of action on which the suits are founded, reliefs claimed in both the suits and lastly the legal provisions applicable for grant of reliefs in both the suits.

22. Where the essential requirement for the applicability of Order 2 Rule 2 viz., the identity of the cause of action in the previous suit and subsequent suit is not established, the subsequent suit cannot be said to be barred by Order 2 Rule 2 CPC. Besides identity of cause of action, identity of the plaintiff also be looked into to invoke the bar under this Rule.

23. In case of continuous cause of action or recurring cause of action, bar under Order 2 Rule 2 (3) cannot be invoked.

24. If the cause enables a man to ask for a larger and wider relief than to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. Where the cause of action for seeking a particular relief is not available to a plaintiff at the time of filing the earlier suit, the bar under Order 2 Rule 2 is not applicable.

25. Adverting to the facts, it would be noticed that the defendant has placed on record the certified copy of the Civil Suit Ex.D-1 filed earlier before the court of learned Civil Judge (Senior Division), Kangra wherein the plaintiff prayed for a decree for declaration with permanent injunction against the defendant restraining her from leaving the services of the Kangra Valley Hospital and going to any other hospital or service in violation of the agreement dated 21.10.2007 executed between the plaintiff and defendant until the determination of the agreement as per the terms and conditions contained therein.

26. It was alleged that the defendant was a doctor by profession and had approached the plaintiff and offered her services to treat patient in the hospital, which was accepted and an agreement was thereafter entered into between the parties containing therein certain stipulations and conditions of service. It was alleged that the defendant had not been performing her duties properly and had not been attending the hospital regularly and had been coming at late hours and would leave early as a result thereof the patients remained unattended. The plaintiff had served a legal notice dated 17.3.2010 but the reply thereof was entirely evasive constraining him to file the earlier suit.

27. Now, coming to the facts of the instant suit, the plaintiff has filed the instant suit for recovery of Rs. 63,58,827/- by way of damages alongwith interest on the allegation that the defendant had approached the plaintiff and thereafter had executed an agreement on 9.7.2007. Though, certain additional averments regarding certain machines equipments etc. having been installed by the plaintiff. However, nonetheless the substantive pleading with regard to the service of legal notice and receipt of reply remain the same in both the suits. The cause of action pleaded in para-6 of the earlier suit reads thus:

> *"6. That cause of action arose to the plaintiff in beginning of July 2010 when she threatened to cancel the agreement and to leave plaintiff's hospital and join other hospital or Government institution at Mohal and Mauza Kangra, Tehsil and District Kangra, H.P."*

Whereas, the cause of action as pleaded in the instant suit in para 21 reads thus:

> *"21. That the cause of action accrued to the plaintiff in his favour and against the defendant firstly on dated 31.3.2010 when the defendant left the Kangra Valley Hospital of the plaintiff at her own sweet will without any notice, secondly, on dated 12.7.2010 when the defendant had served a legal notice on the plaintiff whereby the defendant informed the plaintiff that she is not willing to work in Kangra Valley Hospital and due to which the plaintiff has to suffer the financial losses to the tune of Rs.63,58,827/- as the defendant failed to discharge her duty and got indulged in unfair practices, gross negligence and misconduct and the cause of action is still continuing as the defendant has failed to make payment to the tune of Rs.63,58,827/- with interest @ 18% per annum from the date of institution of the present suit."*

28. Ms. Bhavana Datta, learned counsel for the plaintiff would vehemently argue that no doubt the plaintiff had filed the instant suit when the former suit was pending, however, the same was not adjudicated upon merits and therefore nothing prevents the plaintiff from filing the instant suit. She would further argue that once the Court at Kangra admittedly lacked the pecuniary jurisdiction to entertain and try the instant suit, therefore, the instant suit cannot be said to be barred by the principles laid down in Order 2 Rule 2 CPC.

29. On the other hand, Mr. Bhupender Gupta, Senior Advocate assisted by Mr. Ajeet Pal Singh Jaswal, Advocate, learned counsel for the defendant would argue that in case the plaintiff had not chosen to include the relief which was available to him at the time when he filed

the earlier suit, this would be relinquishment of claim which will preclude the plaintiff from filing the subsequent suit irrespective of whether the same is adjudicated on merits or not. He would further argue that merely because the Civil Court at Kangra would not have pecuniary jurisdiction cannot be a ground to claim that the suit would not be barred under the aforesaid provision.

30. Order 2 Rule 2 CPC reads thus:

> ***"2. Suit to include the whole claim.***- *(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
>
> *(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
>
> *(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.*
>
> *Explanation.- For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."*

31. It is well settled that in order to attract the bar created by this rule, it is necessary that earlier suit should be founded on the same cause of action on which the subsequent suit is based, and if in the earlier suit the plaintiff omitted to sue in respect of or intentionally relinquished any portion of his claim, he would not be entitled to sue subsequently in respect of the portion of his claim so omitted or relinquished. The bar is not avoided by an expression of intention to sue again. Nor is it avoided, by obtaining leave to sue in respect of the portion so omitted. The reason is that the leave contemplated by this section is the leave to sue for one of the several reliefs, referred to in sub rule (3) and it does not relate to ' the portion so omitted' referred to in sub rule (2).

32. Where a person is entitled to more than one relief in respect of the same cause of action, he may sue for all the reliefs or he may sue for one or more of them and reserve his right with the leave of the court to sue for the rest. However, if no such leave is obtained, he will be precluded from afterwards suing for any relief so omitted.

33. Having given my conscious consideration to the legal position as also to the arguments raised by learned counsel for the parties, I have no hesitation to conclude that it is on the same cause of action that the plaintiff has filed the instant suit. The plea as raised in this suit was already available to him at the time when he filed the earlier suit. Rather, the instant suit is based upon a cause of action of earlier date i.e. 31.3.2010, whereas, the earlier suit is based upon a cause of action of a latter date i.e. July, 2010.Having omitted to sue for the relief which was available to the plaintiff, he is now clearly precluded from raising the same. After all, the defendant cannot vexed twice for the same cause of action.

34. At this stage, it may be noticed that there are some decisions of the different High Courts which indicate that what attracted the bar under Order 2 Rule 2 CPC, the earlier suit should have been decided on merits, but was dismissed in default. However, it would not make a difference as eventually what the plaintiff is seeking is re-litigation and the same clearly defeats the salutary purpose of enacting Order 2 Rule 2 which seeks to usurp and prevent this practice and is based on the principle that no person shall be vexed twice for the same cause of action.

35. In view of the aforesaid discussion, preliminary issue No.3 is answered in favour of the defendant by holding that the instant suit is not maintainable in view of Order 2 Rule 2

CPC and the same is accordingly dismissed, so also the pending application(s) if any. The parties are left to bear their own costs. Decree sheet be drawn accordingly.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No. 1283 of 2006 a/w CWP No. 1788 of 2007.
Judgment reserved on: 10.11.2016
Date of decision: 18.11.2016

1. **CWP No. 1283 of 2006**

National Insurance Co. Ltd. . ..... Petitioner

Versus

State of Himachal Pradesh and Ors. ..... Respondents

2. **CWP No. 1788 of 2007**

National Insurance Co. Ltd. ..... Petitioner

Versus

Smt. Dev Mani & Ors. ..... Respondents

Constitution of India, 1950- Article 226- One S, son of C, husband of respondent No.3 and father of respondents No.4 and 5 was engaged as work charged mate by PWD- he had gone by bus to the headquarter and while coming back in a private bus met with an accident- accident report was submitted to the authorities and a copy of the same was sent to the Commissioner- compensation along with interest and penalty was awarded by the Commissioner – in the meantime, claimants filed a petition before MACT, which was allowed –separate review petitions were filed before MACT and Employees Compensation Commissioner – claimants exercised an option to get the compensation from MACT- review petition was dismissed by MACT- held, that once a judgment is pronounced or order is made, a Court Tribunal or adjudicating authority becomes functus officio – authorities under Workmen Compensation Act and Motor Vehicles Act are exercising statutory power – power of review is not inherent and must be conferred specifically- a claimant can file a claim petition before the Commissioner or MACT but not before both- claimants had not approached the Commissioner for grant of compensation- he started the proceedings after the receipt of the information of accident – claimants had opted to approach the Tribunal for grant of compensation – recording of statement of Commissioner will not make any difference – the insurance company was liable to indemnify the insured and was rightly held liable. (Para-24 to 43)

Cases referred:

Patel Narshi Thakershi & Ors. vs. Pradyuman Singhji Arjun Singhji, 1971 3 SCC 844
Oriental Insurance Co. Ltd. vs. Kala Devi, 1997 ACJ 17
National Insurance Co. Ltd. vs. Khub Ram & Anr., 2015 4 ILR 488
United India Insurance Co. Ltd. vs. Rajinder Singh & Ors., AIR 2000, SC 1165
United India Insurance Co. Ltd. vs. Bhagat Ram and Anr., 1991 ACJ 288
United India Insurance Co. Ltd. vs. Anipeddi Dhanalakshmi and Ors., 1994 ACJ 98
National Insurance Co. Ltd. vs. Mastan and Anr., 2006 ACJ 528
Oriental Insurance Co. Ltd. vs. Sudip Ranjan Deb and others, 2009 ACJ 22
Gomti Bai and Ors. vs. Dyshyant Kumar and Ors., 2012 ACT 2069
Gulamrasul Rehman Malek vs. Gujarat State Road Transport Corporation, 2015 ACJ 20
United India Insurance Co. Ltd. vs. Anthony Selvam and another, 2015 ACJ 1936

For the petitioner(s): Ms. Devyani Sharma, Advocate, in CWPs No. 1283 of 2006 and CWP No. 1788 of 2007.

For the respondents: Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals with Mr. J.S. Guleria, Assistant Advocate General for respondents No. 1, 2 and 7 in CWP No. 1283 of 2006 and for respondents No. 5 and 6 in CWP No. 1788 of 2007.

Mr. Jagdish Thakur, Advocate, for respondent No. 3 to 5 in CWP No. 1283 of 2006 and for respondents No. 1 to 3 in CWP No. 1788 of 2007.

Mr. Satyen Vaidya, Senior Advocate, with Mr. Varun Chauhan, Advocate, for respondents No. 6 in CWP No. 1283 of 2006 and for respondent No. 4 in CWP No. 1788 of 2007.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common question of law and facts arise for consideration in these appeals, therefore, they were taken up together for hearing and are being disposed of by way of this common judgment.

2. The brief facts as pleaded are that one Shyam Sukh son of Shri Chhopal Sukh, who was the husband of respondent No. 3 and father of respondents No. 4 and 5 was engaged as work-charged Mate by the Public Works Department in Karchham Sub Division. On 15.6.2004, the deceased had gone by Bus to the headquarter and while coming back in a private bus owned by respondent No. 6 and insured with the petitioner Company, he met with an accident as the bus fell down in Sutluj river and was washed away. The dead body of the deceased was found near Nathpa on 6.7.2004. The employer of the deceased i.e., the Assistant Engineer, H.P.P.W.D, Karchham Sub Division submitted the accident report to the authorities concerned and copy of the same was also sent to the Court of learned Commissioner under the Workmen's Compensation Act-cum-Land Acquisition Collector (in short 'Commissioner') vide endorsement dated 16.6.2004.

3. The claimants thereof filed an application for compensation in Form-F under Rule 20 of the Workmen's Compensation Rules and the said petition was not resisted by respondents No. 1 and 2 rather the liability was admitted on their behalf.

4. Smt. Dev Mani - respondent No. 3 appeared as her own witness before the Commissioner and submitted various documents in support of her claim. The claim was admitted by the Udai Ram, Junior Engineer of the Division concerned and it was admitted that the compensation be paid to the claimants. After recording the evidence, learned Commissioner vide his award dated 23.2.2005 allowed the petition by awarding a sum of Rs. 3,38,880/- alongwith interest at the rate of 12% per annum w.e.f. 15.6.2004 to 23.2.2005 amounting to Rs. 28,299/- and directed the amount to be deposited within two months failing which the award was to carry interest at the rate of 12% till the same was deposited and in addition thereto a further sum not exceeding 50% of such amount was to be recovered as penalty.

5. In the interregnum i.e. before actually filing the claim petition before the Commissioner, the claimants preferred a petition under Section 166 of the Motor Vehicle Act (in short ' M.V. Act') before the Motor Accident Claim Tribunal (in short 'Tribunal'), Kinnaur, which was registered as MACT Case No. 51 of 2004. This petition was filed with respect to the same accident and with regard to the compensation for the death of Shri Shyam Sukh.

6. This petition came to be decided on 15.3.2015 whereby a compensation of Rs. 3,47,040/- was awarded in favour of the claimants and the same was directed to be deposited within two months from the date of award failing which it was to carry simple interest at the rate of 9% per annum from the date of award till its realization. The award was passed against the owner of the vehicle i.e. respondent No. 6 on account of the vehicle being insured with the petitioner. It was ultimately the petitioner, who was held liable to indemnify the insured.

7. In the later case the statement of the claimant was recorded on 28.2.2005 and even till then claimant did not disclose that the statement had already been recorded before the Commissioner under the Workmen's Compensation Act. That being so, the petitioner was unaware of any award having been passed by the Commissioner under the Act.

8. On coming to know about the award, the petitioner filed review petition before the Motor Accident Claim Tribunal. In the meanwhile, the State of Himachal Pradesh i.e. respondent No. 2 also filed review before the Commissioner for the review of the award dated 23.2.2005 on the ground that petitioners have already been awarded compensation by the Commissioner.

9. On 20.5.2006, the Commissioner recorded the statement of the claimant regarding the option of claim and the claimants by way of a joint petition under Section 151 C.P.C. stating therein that they wish to receive compensation under the award passed by the Tribunal and not from the Commissioner. Commissioner on the basis of such statement passed an order on 26.8.2006, which reads thus:-

"26.8.2006
Case called.
Present: Shri Liak Ram Claimant
Shri Rajiv Kumar JE PWD for PWD
Shri H.K. Sharma, for NIC.

The claimants stated on oath and also through their reply that they have preferred claim under MACT-cum-District Judge, Rampur and do not want to get compensation from Commissioner WC Act, though the award under WC Act has already been announced on 23.2.2005 in favour of the claimants. But the claimants do want to get compensation under MACT from D.J., Rampur. The claimants cannot get claim-compensation from both the forum. Thus, in view of the option of claimants the award passed by this Forum is directed not to be executed or enforced. The amount of money deposited by the respondent be returned to them through Bank draft.

Announced.

Sd/-
Commissioner,
Workmen's Compensation Act."

It is this order which found the subject matter of CWP No. 1283 of 2006.

10. After filing of the aforesaid writ petition CWP No. 1283 of 2006, the review petition filed by the petitioner came up for consideration before the Tribunal, however, the Tribunal vide its order dated 3.7.2007 held the review petition to be not maintainable and accordingly dismissed the same, which has given rise to CWP No. 1788 of 2007.

11. As regards CWP No. 1283 of 2006, the order passed by the Commissioner has been assailed primarily on the ground that it had no jurisdiction to entertain the review petition. In addition to that, it is averred that since the claimants themselves had elected to resort to the remedy available under the Act, it was this award which was binding upon the claimants, more particularly, when it had been passed earlier to the award passed by the Tribunal and was even otherwise more beneficial to the claimants.

12. As regards CWP No. 1788 of 2007, it is directed against the order passed by the Tribunal on 3.7.2007 and it is averred that the view of the Tribunal that it had no jurisdiction to entertain the review petition is totally based on misconception of law.

I have heard learned counsel for the parties and have gone through the records of the case.

13. It is more than settled that normal principle of law is that once a judgment is pronounced or order made, a Court, Tribunal or adjudicating authorities becomes '*functus-officio*' ceases to have control over the matter, such judgment or order is 'final' and cannot be altered, changed, verified or modified.

14. It is not in dispute that both the authorities below i.e. Commissioner and Tribunal are specifically constituted under the Act and are not "having plenary powers" but exercising statutory power as conferred under the provisions of the respective Act under which they have been so constituted. They, therefore, cannot act outside or *de hors* the Act nor can exercise powers not expressly and specifically conferred by law.

15. It is well settled that the power of review is not an inherent power. Right to seek review of an order is neither natural nor fundamental right of any aggrieved party. Such power must be conferred by law, therefore, if there is no power of review the order, cannot be reviewed.

16. In **Patel Narshi Thakershi & Ors. vs. Pradyuman Singhji Arjun Singhji, 1971 3 SCC 844**, while dealing with the provisions of the Saurashtra Land Reforms Act, 1951 and reference to order 47 Rule 1 of the Code of Civil Procedure, 1908, the Hon'ble Supreme Court held that there is no inherent power of review with the adjudicating authorities. It was held that it is well settled that "the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implications. No provision in the Act was brought to the notice from which it could be covered that the government had power to review its own order. If the government had no power to review its own order, it is obvious that its delegate could have reviewed its order."

17. A Division Bench of this Court in **Oriental Insurance Co. Ltd. vs. Kala Devi, 1997 ACJ 17** has held that the Commissioner under the Act has no power to review his order. It is apt to reproduce the relevant observations, which reads as under:-

> "10. There is yet another aspect of the case. Admittedly, the claim petition filed by the claimants was disposed of on June 12, 1984 as having been compromised between the parties whereby the claimants had accepted the compensation of Rs. 10,000 in full and final settlement of their claim. The order dated June 12, 1984, dismissing the claim petition as having been compromised was reviewed by the compensation officer and fresh assessment of compensation was made.
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> 11. The question which thus arises for consideration is whether the Commissioner under the Act has the power of review.
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> 12. A Division Bench of this Court in East India Hotels Ltd. v. Union of India and Ors., C. W. P. No. 155 of 1986, decided on December 29, 1995, while dealing with the power of competent authority to review its order under the provisions of Requisitioning and Acquisition of Immovable Property Act, 1952 by following the ratio laid down by the Apex Court in Patel Narshi Thakershi and Ors. v. Pradyumansinghji Arjunsinghji, AIR 1970 SC 1273, has held that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication.
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> 13. We have perused the provisions of the Act and we are of the opinion that even by implication it cannot be said that the Commissioner under the Act had the power to review. Rather sub-rule (2) of Rule 32 of Workmen's Compensation Rules, 1924 prohibits the review by the Commissioner. This sub-rule provides as under:--
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> > *"The Commissioner, at the time of signing and dating his judgment, shall pronounce his decision, and thereafter no addition or alteration shall be made to the judgment other than the correction of clerical or arithmetical mistake arising from any accidental slip or omission."*

18. The ratio laid down in the aforesaid judgment was thereafter followed by this Court in **National Insurance Co. Ltd. vs. Khub Ram & Anr., 2015 4 ILR 488**.

19. Earlier to this, a Division Bench of this Court in LPA No. 109 of 2007, titled **Rajinder & Ors. Vs. Gokal Chand & Anr., decided on 2.5.2015,** reiterating the ratio laid down by the Hon'ble Supreme in **Patel Narshi Thakreshi's case (supra)** that the powers of review is not inherent power observed as under:-

> ***"22.*** That apart, the order passed by the Deputy Commissioner is factually wrong because while construing clause-11 of the Scheme, he failed to make a note of the fact that the embargo prescribed for transfer of the land under the Scheme as per notification No. Rev.2-A(3)11/77 dated 11.9.1980 was 20 years as against 15 years. Therefore, once it is concluded that the proforma respondent could not have transferred the land in favour of appellants within the period of 20 years, the Deputy Commissioner had no other option but should have cancelled the land allotted in favour of the appellants and should have thereafter recommended to the government for the resumption of the land.
>
> ***23.*** The order passed by the Deputy Commissioner in the subsequent review petition cannot otherwise be sustained because it is well settled that power of review is not an inherent power. Right to seek review of an order is neither natural nor fundamental right of an aggrieved party. Such power must be conferred by the law. If there is no power of review, the order cannot be reviewed.
>
> ***24.*** The law on the subject has been succinctly dealt with by the Hon'ble Supreme Court in **Kalabharti Advertising** vs. **Hemant Vimalnath Narichania and others (2010) 9 SCC 437** in the following terms:-
>
> > *"12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed is ultra-vires, illegal and without jurisdiction. (vide: Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar & Anr., AIR 1965 SC 1457; and Harbhajan Singh v. Karam Singh & Ors., AIR 1966 SC 641).*
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> > *13. In Patel Narshi Thakershi & Ors. v. Shri Pradyuman Singhji Arjunsinghji, AIR 1970 SC 1273; Maj. Chandra Bhan Singh v. Latafat Ullah Khan & Ors., AIR 1978 SC 1814; Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidhyalaya, Sitapu (U.P.) & Ors., AIR 1987 SC 2186; State of Orissa & Ors. v. Commissioner of Land Records and Settlement, Cuttack & Ors., (1998) 7 SCC 162; and Sunita Jain v. Pawan Kumar Jain & Ors., (2008) 2 SCC 705, this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in absence of any statutory provision for the same is nullity being without jurisdiction.*
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> > *14. Therefore, in view of the above, the law on the point can be summarised to the effect that in absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/ modification/correction is not permissible."*
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> ***25.*** There is yet another reason why the subsequent order dated 20.11.2000 passed by the Deputy Commissioner in the review petition cannot be sustained. The Deputy Commissioner after pronouncing, notifying and communicating the initial order dated 26.6.2000 became *functus officio* and could not thereafter revise/ review/ modify the said order. It is only the higher forum that could have

varied the order. In observing so, we draw support from the following observations of Hon'ble Supreme Court in **State Bank of India and others** vs. **S.N.Goyal (2008) 8 SCC 92,** wherein it has been held as follows:-

> *"25. The learned counsel for respondent contended that the Appointing Authority became functus officio once he passed the order dated 18.1.1995 agreeing with the penalty proposed by the Disciplinary Authority and cannot thereafter revise/review/modify the said order. Reliance was placed on the English decision Re : VGM Holdings Ltd, reported in 1941 (3) All. ER page 417 wherein it was held that once a Judge has made an order which has been passed and entered, he becomes functus officio and cannot thereafter vary the terms of his order and only a higher court, tribunal can vary it. What is significant is that decision does not say that the Judge becomes functus officio when he passes the order, but only when the order passed is 'entered'. The term 'entering judgment' in English Law refers to the procedure in civil courts in which a judgment is formally recorded by court after it has been given.*
>
> *26. It is true that once an Authority exercising quasi judicial power, takes a final decision, it cannot review its decision unless the relevant statute or rules permit such review. But the question is as to at what stage, an Authority becomes functus officio in regard to an order made by him. P. Ramanatha Aiyar's Advance Law Lexicon (3rd Edition, Vol.2 Pages 1946-47) gives the following illustrative definition of the term 'functus officio' : "Thus a Judge, when he has decided a question brought before him, is functus officio, and cannot review his own decision."*
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> *27. Black's Law Dictionary (Sixth Edition Page 673) gives its meaning as follows :*
>
> *"Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore, of no further force or authority".*
>
> *28. We may first refer to the position with reference to civil courts. Order XX of Code of Civil Procedure deals with judgment and decree. Rule 1 explains when a judgment is pronounced. Subrule*
>
> *(1) provides that the Court, after the case has been heard, shall pronounce judgment in an open court either at once, or as soon thereafter as may be practicable, and when the judgment is to be pronounced on some future day, the court shall fix a day for that purpose of which due notice shall be given to the parties or their pleaders. Sub-rule (3) provides that the judgment may be pronounced by dictation in an open court to a shorthand writer (if the Judge is specially empowered in this behalf). The proviso thereto provides that where the judgment is pronounced by dictation in open court, the transcript of the judgment so pronounced shall, after making such corrections as may be necessary, be signed by the Judge, bear the date on which it was pronounced and form a part of the record. Rule 3 provides that the judgment shall be dated and signed by the Judge in open court at the time of pronouncing it and when once signed, shall not afterwards be altered or added to save as provided by section 152 or on review. Thus where a judgment is reserved, mere dictation does not amount to pronouncement, but where the judgment is dictated in open court, that itself amounts to pronouncement. But even after such pronouncement by open court dictation, the Judge can make corrections before signing and dating the judgment. Therefore, a Judge becomes functus officio when he pronounces, signs and dates the judgment (subject to section 152 and power of review). The position is different with*

reference to quasi judicial authorities. While some quasi judicial tribunals fix a day for pronouncement and pronounce their orders on the day fixed, many quasi judicial authorities do not pronounce their orders. Some publish or notify their orders. Some prepare and sign the orders and communicate the same to the party concerned. A quasi judicial authority will become functus officio only when its order is pronounced, or published/notified or communicated (put in the course of transmission) to the party concerned. When an order is made in an office noting in a file but is not pronounced, published or communicated, nothing prevents the Authority from correcting it or altering it for valid reasons. But once the order is pronounced or published or notified or communicated, the Authority will become functus officio. The order dated 18.1.1995 made on an office note, was neither pronounced, nor published/notified nor communicated. Therefore, it cannot be said that the Appointing Authority became functus officio when he signed the note on dated 18.1.1995."

20. Ms. Devyani Sharma, learned counsel for the petitioner vehemently contended that though the application filed before the Tribunal may have been nomenclatured as review but in substance it was for recalling of the award as the same had been obtained by practicing fraud and it is more than settled that every Court/Tribunal has power to recall such order.

21. In order to buttress her aforesaid submissions, she would rely upon the following observations of the Hon'ble Supreme Court in the **United India Insurance Co. Ltd. vs. Rajinder Singh & Ors., AIR 2000, SC 1165**, wherein it was held as under:-

"16. It is unrealistic to expect the appellant company to resist a claim at the first instance on the basis of the fraud because appellant company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the company to file a statutory appeal against the award. Not only because of bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.

17. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No Court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

22. On the strength of the aforesaid judgment , it is vehemently contended by the learned counsel for the petitioner that on 15.6.2004 Shyam Sukh the predecessor-in-interest of the claimants met with an accident and immediately on 16.6.2004 information regarding the accident had already been imparted by the Department to the Commissioner and therefore, it would be 16.6.2004 and not any subsequent date when the claimants may have actually filed the application for compensation in Form-F under Rule 20, (which admittedly had been filed in August, 2004) that would be date to determine institution of proceedings for compensation by claimants for the purpose of determining the 'option' as envisaged under Section 167 of M.V. Act.

23. Whereas, Shri J.S. Guleria, learned counsel for the State i.e. Respondents No. 1 and 2 contended that undoubtedly the respondents had reported the factum of accident to the Commissioner concerned on 16.6.2004 but the claim petition was actually filed by the claimants somewhere in late August, by which time the claimant has already filed claim petition before the Tribunal on 16.8.2004.

24. Therefore, in such circumstances, one must first consider the starting point or *terminus-a-quo* visualised and prescribed under the Act. Can the proceedings be said to have commenced on mere receipt of the information from the employer regarding the factum of accident and consequent notice thereupon to the claimants or is it the date when the claimants actually filed the claim petition in Form-F under Rule 20 of the Workmen's Compensation Rule before the Commissioner under the Act. It is only after this question is answered and this Court comes to the conclusion that it is 16.4.2004, which is the *terminus-a-quo*, that the further question as to whether the claimants had obtained the award by fraud before the Tribunal would alone arise for consideration, as admittedly the claim petition therein had actually been filed earlier to the petition having actually been filed before the Commissioner in Form-F under Rule 20.

25. However, before answering the question, it would be necessary to refer Section 167 of the M.V. Act, which reads thus:-

> "**167. Option regarding claims for compensation in certain cases**- Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."

26. A perusal of the aforesaid Section makes it evidently clear that the same gives an option to claimant for claiming a compensation either before the Commissioner or before the Tribunal, but obviously both the remedies are not available at the same time.

27. The learned counsel for the petitioner would vehemently argue that the proceedings before the Commissioner are deemed to be commenced when he issued notice to the claimants and in response thereto the claimants who were not under any obligation still choose to file the claim petition. Thus, the claim petition relate back and would be deemed to have been filed on 16.6.2004. In support of her contention reliance has been placed upon the following judgments:-

(i) In **United India Insurance Co. Ltd. vs. Bhagat Ram and Anr., 1991 ACJ 288**, this Court was dealing with the case wherein a claim for compensation had been filed before the Tribunal and another claim on the same cause had also been filed before the Commissioner on account of injuries sustained in an accident and the injured stated that he neither put in appearance nor filed any application before the Commissioner and had further stated that he had neither received any amount nor intended to receive any amount under the Workmen's Compensation Act and this Court after taking notice of the fact that there was no evidence that the injured himself had exercised this option by filing an application before the Commissioner, the application before the Tribunal was maintainable. It is apt to reproduce relevant observations, which reads as under:-

> "6. On coming to know of this award, Bhagat Ram filed an application under Section 110-AA of the Motor Vehicles Act for permitting him to pursue the accident claim petition. In his application, he had clearly stated that neither he had filed any application for claiming compensation under the Workmen's Compensation Act, Nurpur, nor he had appeared before him. He further made it clear that neither he received any amount nor he intended to receive any amount under the Workmen's Compensation Act. The United India Insurance Co. Ltd. filed its reply to the application and asserted that the claim petition under the Workmen's Compensation Act was filed by Bhagat Ram and he had the knowledge of its proceedings and the award of the Commissioner.
>
> 12. In the present case, despite their preliminary objection raised in the written statement, the United India Insurance Co. Ltd. did not ask for the issue that the

claim petition was barred under Section 110-AA. Their pleadings in this regard were very vague. Even when Bhagat Ram came in the witness-box, they did not care to cross-examine him at all. Though they filed the award dated 30.3.1988, yet they did not care to bring it on record. They did not lead any evidence to show that it was Bhagat Ram who has filed a claim petition before the Commissioner under the Workmen's Compensation Act, Nurpur and that he had knowledge of its pendency or award dated 30.3.1988. When the application under Section 110-AA of Bhagat Ram was allowed and he was permitted to proceed with his claim petition under the Motor Vehicles Act vide order dated 26.8.1988, the United India Insurance Co. Ltd. was yet to produce its evidence but neither it challenged the order dated 26.8.1988 in a higher court nor did it lead any evidence before the Motor Accidents Claims Tribunal to prove that Bhagat Ram had, in fact, exercised his option for the remedy under the Workmen's Compensation Act by filing the claim petition before the Commissioner under the Workmen's Compensation Act, Nurpur. In these circumstances, there was no reason to disbelieve the specific averment of Bhagat Ram made in his application under Section 110-AA of the Motor Vehicles Act, 1939 and his statement on oath that he did not file any claim petition under the Workmen's Compensation Act.

13.1 have called the record of the Commissioner under the Workmen's Compensation Act, Nurpur and gone through it carefully. The application is dated 15.11.1986. At its end the words 'Bhagat Ram' are written at two places. There is also one power of attorney on record which is dated 17.11.1986 and the words 'Bhagat Ram' are also written on it at the place meant for the signatures of a client. The application was presented before the S.D.M. (C)-cum-Commissioner under the Workmen's Compensation Act on 28.11.1986 not by Bhagat Ram in person but by S.P. Gupta, Advocate, Nurpur. At no stage did Bhagat Ram appear before the Commissioner under the Workmen's Compensation Act, Nurpur. A reply to the claim petition was filed by M/s. Jagat Ram Amrik Chand through its partner, Kulbhushan Sood, who had been attending the proceedings on some dates in person. The reply to the claim petition on behalf of United India Insurance Co. Ltd. was filed through Mr. P.C. Sharma, Advocate, Nurpur. Though issues were framed but no evidence was led as counsel for United India Insurance Co. Ltd., Mr. P.C. Sharma, Advocate, Nurpur, made a statement that compensation might be awarded according to the Schedule under the Workmen's Compensation Act. Both the United India Insurance Co. Ltd. and M/s. Jagat Ram Amrik Chand admitted the status of Bhagat Ram as workman and also his wages at Rs. 600/- per month. Had the United India Insurance Co. Ltd. cared to bring the application and the power of attorney on record of the Motor Accidents Claims Tribunal and proved these documents, Bhagat Ram would have had an opportunity to admit or deny whether these bore his signatures or not. He might have explained the circumstances under which he signed those documents.

14. Therefore, from the record of the Commissioner under the Workmen's Compensation Act, it is proved on record that Bhagat Ram did not select the remedy under the Workmen's Compensation Act and his claim petition under the Motor Vehicles Act was maintainable. I have no hesitation to hold that it is possible that M/s. Jagat Ram Amrik Chand might have got filed the claim petition under the Workmen's Compensation Act by getting the signatures of Bhagat Ram on a blank paper as well as on power of attorney by not disclosing to him the purpose for which his signatures were being obtained. A perusal of the application dated 15.11.1986 clearly shows that the words 'Bhagat Ram' were written first and the application was typed on it later. The words 'Bhagat Ram' are written at the end of the paper on which the application is typed, whereas the

application ends earlier and the place for signatures of the applicant is also little above where the words 'Bhagat Ram' are written."

(ii) In **United India Insurance Co. Ltd. vs. Anipeddi Dhanalakshmi and Ors., 1994 ACJ 98**, the High Court of Andhra Pradesh was confronted with the situation where on account of the death of a motor cyclist in accident, the claimant approached the Commissioner and obtained compensation and had also filed the claim before the Tribunal and, therefore, the question arose whether the claim petition before the Tribunal was maintainable. It was answered in negative by holding that person was not entitled to compensation before the Tribunal and could also not claim difference of compensation granted by the Tribunal minus the amount of compensation granted by the Commissioner.

(iii) In **National Insurance Co. Ltd. vs. Mastan and Anr., 2006 ACJ 528**, the Hon'ble Supreme Court was dealing with the question with regard to choice of forum available under Section 167 and Hon'ble Mr. Justice P.K. Balasubramanyan in a separate Court judgment held that under Section 167 of the M.V. Act, a claimant having opted to proceed under Workmen's Compensation Act cannot take recourse or draw inspiration from any of the provisions of the MACT Act, 1988 other than what is specifically said by Section 167 of the M.V. Act.

It was further held that since the claimant had not chosen to withdraw his claim under the Workmen's Compensation Act before it reached the point of judgment, with a view to approach Motor Accident Claim Tribunal and had pursued his claim before the Commissioner till the award was passed, therefore, he was not entitled to invoke the provisions of the MACT Act. The relevant observations reads thus:-

> "33. On the establishment of claims Tribunal in terms of Section 165 of the Motor Vehicle Act, 1988, the victim of a motor accident has a right to apply for compensation in terms of section 166 of that Act before that Tribunal. On the establishment of the Claims Tribunal, the jurisdiction of the civil Court to entertain a claim for compensation arising out of a motor accident, stands ousted by section 175 of that Act. Until the establishment of the Tribunal, the claim had to be enforced through the civil court as a claim in tort. The exclusiveness of the jurisdiction of the Motor Accidents Claims Tribunal is taken away by section 167 of Motor Vehicles Act in one instance, when the claim could also fall under the Workmen's Compensation Act, 1923. That Section provides that death or bodily injury arising out of a motor accident which may also give rise to a claim for compensation under the Workmen's Compensation Act, can be enforced through the authorities under that Act, the option in that behalf being with the victim or his representative. But section 167 makes it clear that a claim could not be maintained under both the Acts. In other words, a claimant who becomes entitled to claim compensation both under Motor Vehicles Act, 1988 and under the Workmen's Compensation Act, because of a motor vehicle accident has the choice of proceeding under either of the Acts before the concerned forum. By confining the claim to the authority or Tribunal under either of the Acts, the legislature has incorporated the concept of election of remedies, insofar as the claimant is concerned. In other words, he has to elect whether to make his claim under the Motor Vehicles Act, 1988 or under the Workmen's Compensation Act, 1923. The emphasis in the section that a claim cannot be made under both the enactments, is a further reiteration of the doctrine of election incorporated in the scheme for claiming compensation. The principle "where, either of two alternative Tribunals are open to a litigant, each having jurisdiction over the matters in dispute and he resorts for his remedy to one of such Tribunals in preference to the other, he is precluded, as against his opponent, from any subsequent recourse to the latter" [See R. v. Evans, (1854) 3 E&B 363] is fully incorporated in the scheme of section 167 of the Motor Vehicles Act, precluding the claimant

who has invoked Workmen's compensation Act from having resort to the provisions of Motor Vehicles Act, except to the limited extent permitted therein. The claimant having resorted to the Workmen's compensation Act, is controlled by the provisions of that Act subject only to the exception recognized in section 167 of the Motor Vehicles Act.

34. On the language of section 167 of the Motor Vehicles Act and going by the principle of election of remedies, a claimant opting to proceed under the workmen's compensation Act cannot take recourse to or draw inspiration from any of the provisions of the Motor Vehicles Act, 1988, other than what is specifically saved by section 167 of the Act. Section 167 of the Act vies a claimant even under the Workmen's Compensation Act, 1923 the right to invoke the provisions of Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 deals with what is known as 'no fault' liability in case of an accident. Section 140 of Motor Vehicles Act, 1988 imposes a liability on the owner of the vehicle to pay the compensation fixed therein, even if no fault is established against the driver or owner of the vehicle. Sections 141 and 142 deal with particular claims on the basis of no fault liability and section 143 re-emphasises what is emphasized by section 167 of the Act that the provisions of Chapter X of the Motor Vehicles Act, 1988, would apply even if the claim is made under the Workmen's Compensation Act. Section 144 of the Act gives the provisions of Chapter X of the Motor Vehicles Act, 1988.

35. Coming to the facts of the case, the claimant has not chosen to withdraw his claim under the Workmen's Compensation Act before it reached the point of judgment, with a view to approach the Motor Accidents Claims Tribunal. What he has done is to pursue his claim under Workmen's Compensation Act till the award was passed and also to invoke a provision of the Motor Vehicles Act, not made applicable to claims under Workmen's Compensation Act by Section 167 of the Motor Vehicles Act. Claimant-respondent is not entitled to do so. The High Court was in error in holding that he is entitled to do so."

(iv) In **Oriental Insurance Co. Ltd. vs. Sudip Ranjan Deb and others, 2009 ACJ 22**, the Gauhati High Court was dealing with a case where the claimant had exercised its option under Section 167 by approaching the Commissioner and the award passed in his favour and even the appeal against the same had been dismissed and subsequently approached the Tribunal who allowed the compensation by directing the Insurance Company to pay the amount to the claimant after deducting the amount already received by him under Workmen's Compensation Act. The question then arose as to whether the claimant who had claimed and had been paid compensation under the Act could subsequently after the award passed by the Commissioner having attained finality exercise option to abandon his claim application for proceeding under the MACT Act. Obviously, the answer to the said proposition was in negative by holding that the claimant had already exercised his option and the same was not available till at a later stage. It was apt to reproduce the relevant observations, which reads thus:

"[8] Thus, Section 13 of Workmen's Compensation Act recognises the claim of the employer to be indemnified for the compensation paid by him to his injured/dead employee by the tortfeasor, who was liable to pay compensation in respect of the same injury. This takes care of the apprehension of learned Counsel for claimant-respondent that the tortfeasor would escape his liability under both the Acts if the injured is barred from claiming compensation from both his employer and the tortfeasor. Section 13 of Workmen's Compensation Act clearly indicates that there is no statutory scheme whittling down the liability of the tortfeasor arising under the Motor Vehicles Act even when compensation is paid by the employer under the provisions of Workmen 's Compensation Act. By virtue of this provision, the employer who has paid the compensation under the Workmen's Compensation Act, will step into the shoes of the claimant and be entitled to

recover that much amount from the tortfeasor. The tortfeasor cannot, therefore, take the plea that he cannot be held liable for compensation since the injured has already claimed and was paid the compensation by his employer under Workmen's Compensation Act. This is what has been explained by Gujarat High Court in Mahebubanbibi s case,2001 4 GauLR 2950, the case cited by the learned Counsel for claimant-respondent; how this can be of any assistance to his case is incomprehensible. Section 13 of Workmen's Compensation Act only enables the employer to get himself indemnified for the compensation paid by him to the injured employee from a stranger including the tortfeasor and does not confer any right upon the injured employee himself to proceed against the insurance company for recovery of damages. However, it is for the employer to proceed against the tortfeasor in an independent proceeding for recovery of the compensation already paid by him to the injured by invoking Section 13 of Workmen's Compensation Act. Thus, the provision of Section 13 of the Workmen's Compensation Act is apparently engrafted in the statute book to prevent unintended benefit to the tortfeasor of retaining the portion of compensation which was paid by the employer. In my judgment, the foregoing discussion completely dealt with the contention of the learned Counsel for the claimant-respondent on the possibility of the tortfeasor from escaping his liability to pay compensation already received by the employee from his employer.

[9] The next question which falls for consideration is whether the claimant-respondent, who has been paid compensation under the Workmen's Compensation Act in terms of the judgment/award dated 18.3.2004 of the learned Commissioner in W.C. Case No. M.18/WC/20 of 2003, can at this stage exercise the option to abandon his claim petition under the Workmen's Compensation Act and proceed with his claim petition under Section 166 of Motor Vehicles Act? Section 167 of Motor Vehicles Act obviously does not prescribe the period within which the person entitled to compensation should exercise his option to claim compensation under either of the two enactments. It may be noted that the order/award dated 18.3.2004 passed by the learned Commissioner has now attained finality when the appeal against the said order was dismissed by this Court in its order dated 2.6.2004 in R.F.A. No. 1 (SH) of 2004. Therefore, no further proceeding is pending before any Tribunal or court in connection with the claim petition filed by the claimant-respondent under the provisions of Workmen's Compensation Act. It is only with respect to the claim petition filed by the claimant-respondent under the Motor Vehicles Act that an appeal is pending before this Court, namely, this appeal filed by the appellant insurance company herein. The appeal before the High Court is a continuation of the original proceeding. In the instant case, as noted earlier, not even an appeal in respect of the claim petition under Workmen's Compensation Act is pending, though the appeal in respect of the claim petition under Motor Vehicles Act is pending before this Court. In this view of the matter, there is no difficulty in holding that the claimant-respondent has already exhausted the option open to him to elect his claim petition under the Motor Vehicles Act. No more choice is open to him at this stage. If both the claim petitions under the two Acts are still pending for adjudication either at the appellate stage or otherwise, it can somehow be said that the claimant-respondent has the choice to, opt for one of the pending proceedings. This is sufficiently indicated by the Apex Court in Mastan’s case, 2006 ACJ528 (SC), at para 35 of the judgment as under:

“(35) Coming to the facts of the case, the claimant has not chosen to withdraw his claim under the Workmen’s Compensation Act before it reached the point of judgment, with a view to approach the Motor Accidents Claims Tribunal. What he has done is to pursue his claim under Workmen’s Compensation Act till

the award was passed and also to invoke a provision of the Motor Vehicles Act, not made applicable to claims under Workmen's Compensation Act by Section 167 of the Motor Vehicles Act. Claimant-respondent is not entitled to do so. The High Court was in error in holding that he is entitled to do so."

(Emphasis added)

(v) In **Gomti Bai and Ors. vs. Dyshyant Kumar and Ors., 2012 ACT 2069**, a Division Bench of the Chhattisgarh High Court while dealing with the case of election under Section 167 of the M.V. Act, 1988, wherein the claimant had approached the Commissioner and had been awarded compensation which was duly received by the dependents of the deceased workmen. The dependants thereafter filed claim before the Tribunal under Section 167 of the M. V. Act, contended therein that they are entitled to claim compensation because the employer had deposited the compensation amount before the Commission on its own, whereas no application under Section 10 of the Act had been filed by them. The question that arose was whether in such circumstances the claim petition before the Tribunal was maintainable, more particularly, after the claimants had already received the compensation under the Workmen's Compensation Act and the question was answered in negative by applying the doctrine of estoppel. It is apt to reproduce relevant observations, which reads thus:-

"5. Learned counsel for appellant, placing reliance on judgment of Bombay High Court in the matter of **Santabai Parshuram Mule v. Sharda Prasadsingh, 1992 ACJ 270 (Bombay)**, contended that even after receiving the claim under the 1923 Act, the claimants are entitled to move under Section 166 of 1988 Act, because before the Commissioner the employer, of its own, had deposited the amount and no application under Section 10 of 1923 Act was moved by the claimants-appellants. On the other hand, learned counsel for the respondent has supported the impugned order by placing reliance on provision contained under Section 167 of 1988 Act.

8. Dealing with the principle 'doctrine of election' as contained in section 167 of the 1988 Act, the Hon'ble Supreme Court in the matter of National Insurance Co. Ltd. v. Mastan, 2006 ACJ 528, has held thus in paras 21, 22, 23, 24, 26 and 27:

(21) Under the 1988 Act, the driver of the vehicle is liable but he would not be liable in a case arising under the 1923 Act. If the driver of the vehicle has no licence, the insurer would not be liable to indemnify the insured. In a given situation, the Accidents Claims Tribunal, having regard to its rights and liabilities vis-a-vis the third person, may direct the insurance company to meet the liabilities of the insurer, permitting it to recover the same from the insured. The 1923 Act does not envisage such a situation. Role of reference by incorporation has limited application. A limited right to defend a claim petition arising under one statute cannot be held to be applicable in a claim petition arising under a different statute unless there exists express provision therefor. Section 143 of the 1988 Act makes the provisions of the 1923 Act applicable only in a case arising out of no fault liability, as contained in Chapter X of the 1988 Act. The provisions of section 143, therefore, cannot be said to have any application in relation to a claim petition filed under Chapter XI thereof. A fortiori in a claim arising under Chapter XI, the provisions of the 1923 Act will have no application. A party to a lis, having regard to the different provisions of the two Acts, cannot enforce liabilities of the insurer under both the Acts. He has to elect for one.

(22) Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, the person entitled to compensation may without prejudice to

the provisions of Chapter X claim compensation under either of those Acts but not under both. Section 167 contains a non obstante clause providing for such an option notwithstanding anything contained in the 1923 Act.

(23) The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.

(24) In Nagubai Ammal v. B. Shama Rao, 1956 AIR(SC) 593 it was stated:

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto.

(26) Thomas, J. in P.R. Deshpande v. Maruti Balaram Haibatti, 1998 6 SCC 507, stated the law thus:

(8) The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

[See also Devashayam v. P. Savithramma, 2005 7 SCC 653.

(27) Respondent No. 1 having chosen the forum under the 1923 Act for the purpose of obtaining the compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by section 143 thereof.

(Emphasis supplied)

9.In view of the law laid down by the Hon'ble Apex Court in the above referred judgment of National Insurance Co. Ltd. v. Mastan, 2006 ACJ 528 (SC) and applying the said ratio in the facts of the present case wherein the appellant has already received the claim offered by the Commissioner for Workmen's Compensation, this court is of the opinion that the appellants having enforced liabilities of the employer and insurer and having received the benefit/relief under the 1923 Act are precluded/estopped by doctrine of election as envisaged under Section 167 of the 1988 Act to maintain a claim under Section 166 of the Motor Vehicle Act, 1988."

(vi) In **Gulamrasul Rehman Malek vs. Gujarat State Road Transport Corporation, 2015 ACJ 20**, the Gujarat High Court while dealing with the case where the driver had met with an accident due to his own negligence had opted to file claim petition under Motor Vehicle Act and obtained interim award under Section 140 of the M.V. Act on account of no fault liability. He approached the High Court with a prayer that he be permitted to approach the forum constituted under the Employees Compensation Act and the said contention was negated by holding that once the claimant had elected to choose forum he could not turn around and question the award passed by the forum elected by him. It is apt to reproduced the relevant observations, which reads thus:-

“15. Moreover, in the case before us, the appellant got the benefit of "No Fault" Liability under section 140 of the M.V. Act. As pointed out by the Supreme Court in the case of NATIONAL INSURANCE CO. LTD. v. MASTAN , if a claimant by taking aid of Section 167 of the M. V. Act elects to take resort to the provisions of the M. V. Act he is precluded from resorting to the EC Act. The following observations of the Supreme Court are relevant and are quoted below:

> "22. Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. Section 167 contains a non-ob-stante clause providing for such an option notwithstanding anything contained in the 1923 Act.
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> 23. The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.
>
> 24. In Nagubai Ammal v. B. Shama Rao, 1956 AIR(SC) 593, it was stated:
>
> "It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto."
>
> 25. In C. Beepathuma v. Velasari Shankaranara-yana Kadambolithaya, 1965 AIR(SC) 241, it was stated :
>
> "The doctrine of election which has been applied in this case is well-settled and may be stated in the classic words of Maitland-
>
> "That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it."
>
> (see Maitland's lectures on Equity, Lecture 18)
>
> The same principle is stated in White and Tudor's Leading Cases in Equity Vol. 18th Edn. at p. 444 as follows :
>
> "Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."
>
> (See also Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti, 1995 Supp2 SCC 539).
>
> 26. Thomas, J. in P.R. Deshpande v. Maruti Balaram Haibatti, 1998 6 SCC 507 stated that the law, thus :
>
> "The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable

estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. (See also Devasahayam (Dead) by LRs. v. P. Savithramma and Others, 2005 7 SCC 653)

27. The Respondent No. 1 having chosen the forum under the 1923 Act for the purpose of obtaining compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by Section 143 thereof."

16. Thus, I am unable to accept the submission of Mr Hakim and hold that after having received the benefit under Section 140 of the M. V. Act and having elected to proceed under Section 166 of the said Act, the petitioner is precluded from approaching the forum constituted under the provision of the EC Act."

(vii) In **United India Insurance Co. Ltd. vs. Anthony Selvam and another, 2015 ACJ 1936**, High Court of Madras held that the claim in accident arising out of the use of motor vehicle was entitled to claim compensation either under Motor Vehicle or Workmen's Compensation Act, but not under both the Acts as the claimant could not enjoy double benefit and the employees could not be put to double liability. In addition to that it was held that once the driver had filed claim petition before the Commissioner, who had dismissed the claim application on the ground that he was not an employee under the owner he cannot thereafter file claim petition for compensation under the Motor Vehicle Act against the owner and insurance company and the relevant observations reads thus:-

"23. From an analysis of the above said judgments and the reasoning assigned by this court, the principles governing the election provided under Section 167 of the Motor Vehicles Act, 1988 and the corresponding bar can be deduced as follows:

1) In case the accident arises out of the use of the motor vehicle and it results in death or injury, the legal heirs of the deceased or the injured shall be entitled to claim compensation under the provisions of the Motor Vehicles Act, 1988 against the owner, driver and insurer of the offending vehicle on the basis of the tortuous liability which has been made statutory;

2) In case the owner of the offending vehicle happens to be the employer of the deceased or injured, as the case may be, then the legal heirs of the deceased or the injured may make a claim either under the Motor Vehicles Act, 1988 or under the Employees' Compensation Act, 1923;

3) If the claim is made under the Employees' Compensation Act, 1923 and it is allowed by the Commissioner, then the claimants cannot make a claim under the Motor Vehicles Act, 1988;

4) If the claim made under the Employees' Compensation Act is dismissed holding that the deceased or the injured was not a workman under the alleged employer or that the accident did not arise out of and in the course of the employment of the deceased or injured, then the dismissal of the claim under the Employees' Compensation Act, 1923 will not be a bar for making a claim under the Motor Vehicles Act, 1988;

5) In case the claim is made at the first instance under the Motor Vehicles Act, 1988, there is no possibility of the claim being negatived in toto if the accident had resulted in death or permanent disability attracting the no-fault liability clauses found in the Motor Vehicles Act, 1988. In such cases, the claimants cannot make a claim under the

Employees' Compensation Act, 1923 after getting an award in the Motor Accident Claims Tribunal;

6) In case the claim is made under the Motor Vehicles Act, 1988 against the owner of the offending vehicle, who was not the employer of the deceased or injured, as the case may be, and the driver or insurer of the said vehicle, after an award is passed by the Motor Accident Claims Tribunal, a claim against the employer of the deceased or the injured, as the case may be, under the Employees' Compensation Act, 1923, who was not a respondent in the claim will be maintainable, but after ascertaining the amount payable under the Employees' Compensation Act, 1923, the Commissioner shall direct the employer and its insurer to pay only the difference between the amount calculated under the Employees Compensation Act and the amount awarded by the Motor Accident Claims Tribunal under the Motor Vehicles Act, 1988, only if the compensation payable under the Employees' Compensation Act exceeds the amount awarded under the Motor Vehicle Act;

7) In case claim is made under the Employees' Compensation Act against the employer and an award is passed and a claim for compensation is made under the Motor Vehicles Act against the owner of the offending vehicle not being the employer of the deceased or injured and against the driver and insurer of the offending vehicle on the basis of tort, then while determining the compensation under the Motor Vehicles Act, the amount obtained as compensation under the Employees' Compensation Act, 1923 shall be taken into account and that should be deducted. After deducting the same, the balance amount alone shall be awarded as compensation in the MCOP before the Motor Accident Claims Tribunal.

24. The above said principles ensure prevention of the claimants enjoying double benefit and the employers being put to double liability. Applying the above said principles, this court comes to the conclusion that the fact that the first respondent made a claim before the Commissioner for Workmen's Compensation under the Employees' Compensation Act, 1923 in W.C.No.219/2007 on the file of the Commissioner No.2, Deputy Commissioner of Labour-II, Teynampet, Chennai and the same was dismissed on the ground that he was not an employee under the owner of the auto-rickshaw driven by the first respondent at the time of accident, would not be a bar for the maintainability of the claim made by him under the Motor Vehicles Act, 1988 against the second respondent and the appellant herein being the owner and insurer of the other vehicle, which is projected as the offending vehicle, namely lorry bearing Regn. No.TNG 7876. The order of the Commissioner for Workmen's Compensation marked as Ex.P8 will make it clear that the first respondent was not an employee under the owner of the auto-rickshaw involved in the accident and he was only a person who took the auto-rickshaw for hire and he alone was his master, since his liability towards the owner of the vehicle was only to pay particular amount per day as rent for the auto-rickshaw. The same was the reason why the Commissioner for Workmen's Compensation held that he was not an employee under owner of auto-rickshaw and that consequently he was not entitled to maintain a claim under the Employees' Compensation Act, 1923. As the claim made under the Employees' Compensation Act, 1923 was negatived holding that such a claim was not maintainable, the same will not provide a bar for making a claim under the Motor Vehicles Act, 1988 against the different set of persons, namely the owner and insurer of the offending vehicle, namely lorry bearing Regn. No.TNG 7876. Hence first and second points for determination are answered in favour of

the claimant-respondent No.1 and against the insurance company, appellant herein."

28. It would be noticed that none of the judgments relied upon by the learned counsel for the petitioner visualises the factual situations obtaining in the instant case.

29. It is not in dispute that the claimants on their own had never approached the Commissioner for grant of compensation and it is only pursuant to the notice issued to them by the Commissioner after receipt of information of accident from the employer vide letter dated 16.6.2004 that they approached and thereafter in late August filed their application for compensation in Form-F under Rule 20 of the Workmen's Compensation Rule.

30. It is also not in dispute that earlier to that the claimants had consciously elected and opted to approach Tribunal for grant of compensation by filing an application under Section 166 of the Motor Vehicle Act on 24.8.2004.

31. The information imparted to the Commissioner under Workmen's Compensation Act with respect to the accident was in discharge of its duty of the employer under Workmen's Compensation Act.

32. Likewise, the information thereafter imparted by the Commissioner to the claimants with regard to the factum of accident and their entitlement to file a claim petition was further in discharge of its duties and obligations cast / fastened upon him under the provisions of the Act.

33. However, the action of the claimant in approaching the Tribunal with the claim petition was not on account of any duty of obligation being cast upon them by any statutory or non statutory provision but was an election consciously made by them whereby they opted to approach the Tribunal with their claim petition out of their free will and violation. This was a conscious decision on their part and not one of compulsion.

34. The mere fact that the statement of the claimant and also the award passed by the Commissioner was at an earlier point of time would hardly make any difference as the *Terminus-a-quo* in such like situation, as per my humble understanding would be the date on which the claimants consciously elected to choose the forum and in this case the *terminus-a-quo* would be 24.8.2004 when the petitioner consciously elected to approach the Tribunal by filing the claim petition under Section 167 of M.V. Act.

35. Therefore, in such circumstances to contend that the award obtained by the claimants before the Tribunal was on account of fraud or to contend that the State i.e. Respondents No. 1 and 2 themselves have contended before the Commissioner that the award obtained by the claimants before him had been obtained by fraud, would rather not even arise for consideration in the present case.

36. However, at this stage, it needs to be clarified that even the Commissioner had no power to review his earlier order and after having announced his award, he ceased to have any jurisdiction and had become *'functus-officio'* as he has no jurisdictional authority to review his order as the power of review is not inherent power and had otherwise not been conferred upon him by the statute i.e. Workmen's Compensation Act.

37. It is, however, needs to be clarified that there is a distinction between powers of Court to review on merit and the procedural review where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, this judgment or order can be reviewed on merit only if the Court or quasi judicial authority is vested with the power of review by express provision or by necessary implications. Whereas, procedural review belongs to a different categories. In such a review, the Court of quasi judicial authority having jurisdiction to adjudicate proceeds to do so. But in doing so, ascertains whether it had committed a procedural illegality which goes to the route of the matter and invalidate the proceedings itself and consequently the order passed therein (Refer- ***M/s Sangum Tape Co. vs. Hans Raj, 2005 9 SCC***

331 and ***Kapra Mazdoor Ekta Union vs. Birla Cotton Spinning & Weaving Mills Ltd. & Anr. 2005 13 SCC 777***).

38. It needs to be clarified that **accession** review is used in two distinct senses, namely (i) procedural review – it is either inherent or implied in a Court or Tribunal whereby it can set aside a palpably erroneous order passed under any misapprehension and (ii) review on merits – where the error sought to be correct is one of law and is apparent on the face of record. In the case of **Patel Narshi Thakershi's case (supra)**, it was held that no review lies on merits unless statute specifically provides for it. Obviously, when a review is sought due to procedural defect, the inadvertent error committed by the Tribunal must be correct '*exddlojutas'* to prevent the abuse of its process and such power *inheres* in every Court or Tribunal. Section 169 of the M.V. Act, reads thus:-

> "169. Procedure and powers of Claims Tribunal –(1) In holding any inquiry under Section 168, the claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.
>
> (2) The Claims Tribunal shall have all the powers of a Civil court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the code of Criminal Procedure, 1973 (2 of 1974).
>
> (3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry."

39. Applying the test laid down in **Thakreshi's case supra**, a review application before the Tribunal would be maintainable only when it is sought due to procedural defect or inadvertent error committed by the Tribunal to prevent the abuse of its process.

40. Therefore, even if the review filed by the petitioner before the Tribunal is held to be maintainable, the same would have no power or effect on the merits of these cases, as this Court has categorically come to the conclusion that the claimants having consciously elected under Section 167 of the M.V. Act are only entitled then irrespective of it being comparatively less than the one passed by the Commissioner or even the interest therein being awarded at a lesser rate by the Commissioner.

41. Ms. Devyani Sharma, learned Counsel for the petitioner strenuously argued that once it is established on record that the deceased was the employee of the State i.e. Respondents No. 1 and 2, therefore, it is the State who alone should be held responsible and liable to pay the compensation and the same cannot be fastened upon the petitioner only on account of it having insured the vehicle.

42. I am afraid that such contention cannot be accepted. Whereas the claimants had exercised the option under Section 167 of the Motor Vehicle Act and an award passed in their favour whereby the owner of the vehicle is held to be liable then the insurance company being the indemnifier has obviously to pay the award amount. Incidentally, in this case, the opposite party is the State, would such a contention be available if the opposite party was an individual. Obviously, the answer would be in negative. That apart, there can be no gainsaying that the very purpose of insuring the vehicle is to seek indemnity, in case, of unforeseen accident of the present kind.

43. In view of the aforesaid discussion, I find no merit in these petitions and the same are accordingly dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

FAOs (MVA) No. 320 and 321 of 2012.
Date of decision: 18th November, 2016.

FAO No. 320 of 2012.

Oriental Insurance Co. Ltd. …Appellant

Versus

Smt. Savitra Devi and others …Respondents.

FAO No. 321 of 2012.

Oriental Insurance Co. Ltd. …Appellant

Versus

Smt. Maina Devi and others …Respondents.

Motor Vehicles Act, 1988- Section 149- It was for the insurer to plead and prove that driver was not having a valid and effective driving licence and the owner had committed willful breach- no evidence was led to prove that deceased were gratuitous passengers – in these circumstances, the insurer was rightly held liable. (Para-9 to 13)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant(s): Mr. Deepak Bhasin, Advocate.

For the respondent(s): Mr. G.R. Palsara, Advocate, for respondents No. 1 to 4 in FAO No. 320 of 2012 and for respondents No. 1 to 8 in FAO No. 321 of 2012.
Mr. H.S. Rangra, Advocate, for respondents No. 6 and 7 in FAO No. 320 of 2012 and for respondents No. 9 and 10 in FAO No. 321 of 2012.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

Both these appeals are outcome of one accident, hence are taken up together for disposal by this common judgment.

2. FAO No. 320 of 2012 is directed against the judgment and award dated 28.4.2012, in claim Petition No. 101 of 2007 titled Smt. Savitra and others versus Partap Singh and others and FAO No. 321 of 2012, is directed against the award dated 28.4.2012, in claim petition No. 35 of 2008, titled Smt. Maina Devi and others versus Partap Singh and others, for short "the impugned awards", passed by the Motor Accident Claims Tribunal (II), Mandi, H.P. hereinafter referred to as "the Tribunal", for short.

3. Claimants being the victims of a vehicular accident invoked the jurisdiction of the Tribunal for the grant of compensation as per the break-ups given in their respective claim petitions, on account of death of deceased Daya Ram and Naresh Kumar in a motor vehicle accident, involving truck bearing registration No. HP-32-1054 on 1.10.2007 at 5 p.m. at Dohra Nala near Magru Gala on Janjehali road.

4. Parties have led evidence and two separate awards, as referred to above, came to be passed by the Tribunal.

5. Claimants and driver have not questioned the impugned awards on any ground, thus the same have attained the finality, so far as the same relate to them.

6. In both these appeals the insurer has questioned the impugned awards on the grounds taken in the memo of appeals.

7. Learned counsel for the appellant argued that the seating capacity of the vehicle is only 1+3, hence, the liability be restricted only in terms of the seating capacity of the vehicle and risk covered, in terms of the insurance policy. His statement is taken on record.

8. I have gone through the evidence as well as the pleadings. The claimants have proved that the accident was outcome of rash and negligent driving by the driver of the offending vehicle. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

9. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the time of accident and owner has committed willful breach, has failed to discharge the onus in terms of **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

10. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as*

the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

11. At this stage, the learned counsel for the appellant argued that the deceased were gratuitous passengers has not led any evidence before the Tribunal to prove this fact. The Tribunal has rightly made discussion in the impugned awards. Accordingly, the findings returned by the Tribunal on this issue are upheld.

12. I have gone through the impugned awards. The Tribunal has rightly held that the vehicle was insured and the insurer has to satisfy the awards. The learned counsel for the appellant was not in a position to show that the Tribunal has wrongly saddled the insurer with the liability.

13. Having said so, the insurer is held liable to pay compensation as per the terms and conditions contained in the insurance policy.

14. The insurer is directed to deposit the amount alongwith interest as awarded by the Tribunal in both the appeals, within eight weeks from today in the Registry, if not already deposited. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

15. Accordingly, the impugned awards are upheld and the appeals are dismissed.

16. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Limited .....Appellant

Versus

Dila Kumari & others .....Respondents

FAO No.175 of 2012
Date of decision: 18.11.2016

Motor Vehicles Act, 1988- Section 173- The insurer challenged the award on the quantum of compensation – held, that Insurer has to seek the permission to contest the claim petition on all the grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on the ground of adequacy of compensation – it can challenge the award only on the grounds, which are available to it- no permission was sought to

contest the claim petition on all grounds and therefore the appeal by the insurer is not maintainable -otherwise also, the compensation is meager and the same has not been questioned by the claimants- hence, the same is reluctantly upheld. (Para-11 to 18)

Cases referred:
United India Insurance Co. Ltd. Versus Shila Datta & Ors., 2011 AIR SCW 6541
Josphine James versus United India Insurance Co. Ltd. & Anr., 2013 AIR SCW 6633

For the appellant:	Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate.
For the respondents:	Mr.G.R. Palsra, Advocate, for respondents No.1 and 2. Nemo for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 16th January, 2012, passed by the Motor Accident Claim Tribunal (II), Mandi, H.P. (for short, "the Tribunal") in Claim Petition No.90 of 2007, titled Dila Devi & another vs. Ram Singh & others, whereby a sum of Rs.2,80,000/-alongwith interest at the rate of 7.5% per annum came to be awarded as compensation in favour of the claimants and the insurer was saddled with the liability (for short the "impugned award").

2. The claimants, the owner-insured and the driver have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. Brief facts of the case are that on 23.8.2007 at about 2.30 pm at village Julah, the claimants were working in the fields and their son and daughter were playing nearby. Vehicle bearing registration No.HP-33-A-0376, being driven by driver, namely, Jai Parkash rashly and negligently, rolled down the road and the son of the claimants was crushed resulting into his instantaneous death, and their daughter also sustained injuries. Thus, the claimants filed claim petition before the Tribunal for grant of compensation to the tune of Rs.10,00,000/- as per break-ups given in the claim petition.

4. The claim petition was resisted by the respondents and following issues came to be framed by the Tribunal:

> "1. Whether deceased Rewat Singh died due to rash and negligent driving of Canter No.HP-33-A-0376 by respondent No.2 as alleged? OPP
>
> 2. If issue No.1 is proved in affirmative, whether the petitioner is entitled for compensation, if so, to what amount and from whom? OPP
>
> 3. Whether the respondent No.2 was not holding a valid and effective driving licence at the time of accident? OPR-3
>
> 4. Whether the vehicle in question was being plied in contravention of the terms and conditions of the Insurance Policy? OPR-3
>
> 5. Relief."

5. In order to prove their case, the claimants examined Devinder Kumar as PW-2, while one of the claimants, namely, Dila Devi appeared as PW-1. Driver of the offending vehicle stepped into the witness box as RW-2 and one Diwan Chand has been examined as RW-1.

6. Heard learned counsel for the parties and gone through the record. My issue-wise findings are as follows.

Issue No.1

7. The Tribunal after examining the evidence held that the driver had driven the offending vehicle rashly and negligently and caused the accident. There is no challenge to the said findings recorded by the Tribunal. However, I have gone through the impugned award. The Tribunal has rightly made discussion in paragraphs 13 to 19 of the impugned award and held that Jai Parkash had driven the offending vehicle rashly and negligently and caused the accident. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

8. Before issue No.2 is taken up, I deem it proper to deal with issues No.3 and 4 at the first instance.

Issue No.3

9. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident, has failed to discharge the onus. On the contrary, copies of the driving licence have been placed on record as Mark R-1 and R-2, a perusal whereof shows that, at the relevant point of time, the driver of the offending vehicle was having a valid and effective driving licence. Accordingly, findings returned by the Tribunal on issue No.3 are upheld.

Issue No.4

10. Onus to prove this issue was on the insurer. It was for the insurer to plead and prove that the vehicle was being driven in contravention of the terms and conditions contained in the insurance policy. One of the grounds taken by the insurer in the memo of appeal is that the deceased was traveling in the offending vehicle as gratuitous passenger. The positive case of the claimants is that the deceased, at the time of accident, was playing in the fields and all of a sudden, the offending vehicle rolled down the road and fell on the deceased as a result of which the deceased got crushed and lost his life. The insurer has not led any evidence to prove that the deceased was traveling in the offending vehicle as gratuitous passenger. Thus, under no circumstance, it can be said that the deceased was traveling in the offending vehicle as a gratuitous passenger. Accordingly, the findings returned by the Tribunal on issue No.4 are upheld.

Issue No.2.

11. This issue pertains to the quantum of compensation. It is moot question whether the insurer can question the adequacy of compensation.

12. The insurer can seek permission to contest the claim petition on all grounds available to it and in case permission has not been sought and granted, it is precluded from questioning the award on adequacy of compensation or any other ground, which is not otherwise available to it.

13. This question arose before the Apex Court in the case titled as **United India Insurance Co. Ltd. Versus Shila Datta & Ors.,** reported in **2011 AIR SCW 6541,** and the matter was referred to the larger Bench.

14. The question again arose before the Apex Court in the case titled as **Josphine James versus United India Insurance Co. Ltd. & Anr.,** reported in **2013 AIR SCW 6633.** It is apt to reproduce paras 8, 17 and 18 of the judgment herein:

> *"8. Aggrieved by the impugned judgment and award passed by the High Court in MAC Appeal no. 433/2005 and the review petition, the present appeal is filed by the appellant urging certain grounds and assailing the impugned judgment in allowing the appeal of the Insurance Company without following the law laid down by this Court in Nicolletta Rohtagi's case and instead, placing reliance upon the Bhushan Sachdeva's case. Nicolletta Rohtagi's case was exhaustively discussed by a three judge bench in the case of United India Insurance Company Vs. Shila Datta, 2011 10 SCC 509. Though the Court has expressed its reservations against the correctness of the legal position in Nicolletta Rohtagi*

decision on various aspects, the same has been referred to higher bench and has not been overruled as yet. Hence, the ratio of Nicolletta Rohtagi's case will be still applicable in the present case. The appellant claimed that interference by the High Court with the quantum of compensation awarded by the Tribunal in favour of appellant and considerably reducing the same by modifying the judgment of the Tribunal is vitiated in law. Therefore, the impugned judgments and awards are liable to be set aside.

9. to 16. .....

17. The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs. 4,20,000/- from Rs. 6,75,000/- which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three judge Bench of this Court in Nicolletta Rohtagi case (2002) 7 SCC 456 : AIR 2002 SC 3350 : 2002 AIR SCW 3899, and earlier decisions wherein this Court after interpreting Section 170 (b) of the M. V. Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three judge bench decision referred to though the correctness of the aforesaid decision is referred to larger bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.

18. In view of the aforesaid reasons, the Insurance Company is not entitled to file appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the M.V. Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to 4,20,000/- under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs. 5,000/- and applying 14 multiplier, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. Delhi Transport Corporation, 2009 6 SCC 121 instead of applying the principle laid down in Baby Radhika Gupta's case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the M.V. Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under section 149(2) of the M.V. Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."

15. Thus, the insurer can question the adequacy of compensation only if it has sought permission under Section 170 of the Motor Vehicles Act.

16. In the present case, it has to be seen whether the insurer has sought any such permission?

17. I have gone through the record, which does disclose that neither any such application was filed by the insurer nor such permission was granted. Learned counsel appearing on behalf of the insurer frankly conceded that no such permission was sought.

18. The amount of compensation appears to be meager. Unfortunately, the claimants have not questioned the impugned award on the ground of adequacy of compensation. Therefore, the same is reluctantly upheld and the appeal is dismissed.

19. The Registry is directed to release the award amount in favour of the claimants strictly in terms of the impugned award by depositing in their respective bank accounts or through payees account cheque.

20. Send down the record after placing a copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. .....Appellant

Versus

Smt. Bhuvneshwari Devi and others .....Respondents.

FAO (MVA) No. 38 of 2012.
Judgment reserved on: 11.11.2016
Date of decision: 18.11.2016.

Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased had gone with his truck for carrying the cement - this fact was not denied by the respondents- the deceased was travelling in the vehicle as a gratuitous passenger and not as the employee of the owner- the insured had committed the breach of the terms and conditions of the insurance policy and insurer was rightly absolved of its liability – however, rate of interest reduced to 7.5% from 9%. (Para- 8 to 14)

Cases referred:

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others vs National Insurance Company Limited and others, (2012) 11 SCC 738

Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

For the respondents: Ms. Leena Guleria, advocate, vice Mr. G.R. Palsara, Advocate, for respondents No. 1 to 3.
Respondent No. 4 ex parte.
Nemo for respondent No.5.
Mr. O.P. Sharma, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 18.8.2011, passed by the Motor Accident Claims Tribunal-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. hereinafter referred to as "the Tribunal", for short, in Claim Petition No. 197/2005

(04/2003), titled *Smt. Bhuvneshwari Devi and others versus Sh. Virender Singh and others*, whereby compensation to the tune of Rs.3,85,000/- alongwith interest @ 9% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. The claimants, owner, and driver have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. The claimants being the victims of a vehicular accident, have filed claim petition for the grant of compensation to the tune of Rs.10 lacs, as per the break-ups given in the claim petition on account of death of Shri Om Prakash, who died in a motor vehicle accident which took place on 16.9.2002, at Darla-ghat near Ambuja Cement Factory gate due to rash and negligent driving of respondent No.2 Parvin Kumar while driving Truck No. HP-51-4035.

5. The claim petition was resisted by the respondents and following issues came to be framed.

1. *Whether the accident occurred due to rash and negligent driving of respondent No.2? OPP*
2. *Whether the deceased died due to the Motor Vehicle accident of truck No. HP-51-4035? OPP*
3. *Whether the petitioners are entitled for any compensation and to what amount and from whom? OPP*
4. *Whether the deceased Om Prakash died due to his own act and conduct? OPR*
5. *Whether the vehicle was being driven in violation of Insurance Policy and driving licence? OPR*
6. *Whether deceased was gratuitous passenger at the time of accident as alleged? OPR-3.*
7. *Relief.*

6. The claimants have examined five witnesses and one of the claimants, namely, Bhuvneshwari Devi also stepped into the witness box as PW1. Respondents have examined only one witness, namely, Rajesh Pal as RW1.

7. The only question to be determined in this appeal is-whether the Tribunal has rightly saddled the insurer with the liability? The answer is in negative for the following reasons.

8. The claimants in para 24 (ii) of the claim petition have specifically stated as under:

> *"24 (ii) On 16.9.2002, the deceased had gone with his above truck to Ambuja Cement Factory, Darlaghat for the carriage of Ambuja Cement. Another Truck of the same owner bearing No. HP-11-1634 driven by one Hoshiar Singh driver had also gone for the same purpose. After parking the above Trucks, the deceased and Hoshiar Singh were coming from the Factory premises to Darlaghat Bazar and in the meantime at the Gate of the Factory, respondent No.2 after loading his Truck No. HP-51-4035 was coming from Factory premises to Darlaghat Bazar. Respondent No.2 on seeing the deceased and Hoshiar Singh (who were his professionist colleagues) stopped his truck and gave lift to them up to Darlaghat Bazar. Before reaching the Bazar, due to rash and negligent driving of respondent No.2, the vehicle received a big jolt due to which the window of the vehicle opened and deceased fell down on the ground from the Truck and he was crushed by the tyre of the said Truck and he died on the spot. The respondent No.2 after abandoning the deceased on spot of accident, had fled away with his truck."*

9. The owner and the driver have not denied the averments contained in para 24 (ii) of the claim petition, referred to supra, for want of knowledge. Thus, it can be safely said that the deceased was not travelling in the said vehicle as an employee of the employer/owner, was gratuitous passenger. It is also not the case of the claimants that the deceased was an employee or the labourer of the owner/insured of the truck. Thus, the owner has committed breach in terms of Sections 147 and 149 of the Motor Vehicles Act, 1988 for short "the Act" read with the terms and conditions contained in the insurance policy. Having said so, the Tribunal has fallen in an error in saddling the insurer with the liability.

10. The claimants are the third party. Thus, it is the obligation of the insurer to satisfy the award at the first instance and recover the same from the insured/owner.

11. The Tribunal has awarded interest @ 9% per annum. However, interest was to be awarded at rate of 7.5% per annum, for the following reasons.

12. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

13. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

14. Viewed thus, the appeal is allowed and the impugned award is modified by providing that the insurer has to satisfy the award at the first instance and recover the same from the owner/insured. The insurer is at liberty to file application for recovery before the Tribunal.

15. The Registry is directed to release the amount in favour of the claimants, alongwith interest @ 7.5% per annum from the date of filing the claim petition till its realization, forthwith, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification and excess amount, if any, be released in favour of the appellant/insurer, through payees cheque account.

16. Viewed thus, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

17. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Praveen Singh and another .....Petitioners.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No.: 4810 of 2009
Reserved on : 03.11.2016
Date of Decision: 18.11.2016

Constitution of India, 1950- Article 226- Petitioner No.2 was owner in possession of the land, which was acquired for Chamera Hydro Electric Project Stage-I- he was given compensation and was granted employment as per re-settlement and rehabilitation Scheme- some other land was acquired for the reservoir of Chamera-2- name of petitioner No.1, son of petitioner No.2 was sponsored for employment- however, the employment was not provided – held, that rehabilitation and re-settlement schemes are different for Chamera-1 and Chamera-2 project – schemes provide for employment of the family member of the oustee – names of the petitioners are recorded in the parivar register showing them to be the member of the same family – it was not permissible for the respondent No.6 to ignore the entry unilaterally – the land was purchased prior to the notification under Section 4 and the petitioners fulfill the criteria laid down in the scheme – writ petition allowed – respondents directed to provide the benefits as per the scheme. (Para-9 to 28)

For the petitioners: Mr. B.C. Negi, Senior Advocate, with Mr. Pranay Pratap Singh, Advocate.
For the respondents: Mr. Vikram Thakur, Deputy Advocate General, for respondents No. 1 to 4.
Mr. K.D. Shreedhar, Senior Advocate, with Ms. Shreya Chauhan, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition, the petitioners have prayed for the following reliefs:

"(i) Issue a writ of certiorari to quash Annexures P-14, P-15, P-21, P-23, P-25 and P-29.

(ii) Issue a writ of mandamus directing respondents to implement Annexure P-7.

(iii) Issue a writ of certiorari to call for the records pertaining to the case at hand.

(iv) Direct the respondent authorities to pay the cost of the petition.

(v) Such other order, which this Hon'ble Court deems fit and proper, may also be passed in favour of the petitioner, in the interest of justice and fair play."

2. Facts emerging from the pleadings of the parties are as under:

Petitioner No. 2 was owner in possession of land in village Thadi, which was acquired for Chamera Hydroelectric Project Stage-I and was awarded compensation in lieu of his land and house which was acquired for the above project. Besides this, he was also provided employment in Chamera Hydroelectric Project Stage-I against his acquired land and house as per the provisions of the Resettlement and Rehabilitation Scheme for Chamera-1 Project.

3. Petitioner No. 2 was also owner of land measuring 0-5-0 bighas in Mohal Gurad, out of which, land measuring 0-1-15 bighas alongwith a house of petitioner No. 2 was acquired for the reservoir of Chamera Hydroelectric Project Stage-II in Mohal Gurad vide Notification dated 23.07.2001 issued under Section 4 of the Land Acquisition Act and award qua which acquisition was announced on 31.01.2003

4. Respondent-State has framed Resettlement and Rehabilitation Scheme for rehabilitation of persons/families displaced/affected due to construction of Chamera Hydroelectric Project Stage-II. Name of petitioner No. 1, who is son of petitioner No. 2 was sponsored for employment in Chamera Hydroelectric Project Stage-II in lieu of 0-1-15 bighas of land of petitioner No. 2 (father of petitioner No. 1) having been acquired for construction of Chamera Hydroelectric Project Stage-II. This was done by respondent No. 2 vide letter dated 27.07.2004 (Annexure P-7). This was followed by various correspondences made in this regard by respondent No. 2 with the Project authorities.

5. It is an undisputed position that Chamera Hydroelectric Project Stage-I and Chamera Hydroelectric Project Stage-II are different Projects and separate Resettlement and Rehabilitation Schemes were framed and approved by the Government of Himachal Pradesh for resettlement and rehabilitation of displaced/affected persons of both these projects. Incidentally, both these projects belong to same executing agency, i.e. respondent No. 6-National Hydro Electric Power Corporation Ltd.

6. The case of petitioner No. 1 was refused to be considered by respondent No. 6-Corporation under the Resettlement and Rehabilitation Scheme framed and approved by the Government of Himachal Pradesh for rehabilitation of the persons/families displaced/affected due to construction of Chamera Hydroelectric Project Stage-II on the following grounds:-

(a) that petitioner No. 1 as per the records was resident of village Thadi, Tehsil and District Chamba, hence he could not be said to be a displaced person on account of construction of Chamera Hydroelectric Project Stage-II;

(b) that Notification for acquisition of land for Chamera Hydroelectric Project Stage-II was issued on 23.07.2001 and petitioner No. 2 has purchased land in village Gurad immediately before the issuance of said Notification, hence the petitioners could not be considered to be permanent residents or affected persons for the purpose of Resettlement and Rehabilitation Scheme;

(c) that under Resettlement and Rehabilitation Scheme, only one member of the affected family can be granted employment and petitioner No. 2 has already been given employment under Chamera Hydroelectric Project Stage-I; and

(d) that entry in favour of the petitioners in the Parivar register of village Gurad was a fake entry.

7. The factum of the acquisition of land of petitioner No. 2 for Chamera Hydroelectric Project Stage-II is not denied even by respondent-State and they have further stated in their reply that detailed reasons for denial of employment to the petitioner were submitted by respondents No. 6 and 7.

8. I have heard the learned counsel for the parties and also gone through the pleadings placed on record by the respective parties.

9. The Resettlement and Rehabilitation Scheme for the persons who became oustees on account of acquisition of their lands, houses etc. for the construction of Chamera Hydroelectric Project Stage-II in Chamba District (hereinafter referred to as "the R & R Scheme Stage-II) is on record as Annexure P-5. A perusal of the same demonstrates that this Scheme has been framed for the Resettlement and Rehabilitation of oustees of Chamera Hydroelectric Project Stage-II. In other words, it is not as if there was a composite single Resettlement and Rehabilitation Scheme for oustees of Chamera Hydroelectric Project Stage-I and Chamera Hydroelectric Project Stage-II. It has also come in the reply of the respondent-State that Chamera Hydroelectric Project Stage-I and Chamera Hydroelectric Project Stage-II are different projects being executed by the same Corporation and separate Resettlement and Rehabilitation Schemes have been framed and approved by the Government of Himachal Pradesh for both the said projects.

10. Under the definition Clause of R & R Scheme for Chamera Hydroelectric Project Stage-II, oustees or affected family, family, employment and holding have been defined as under:

"(i) 'Oustees' or 'affected family' means a Land Owner who has been depirived of his/her land, house or both on account of acquisition of his/her land for Chamera Hydro Electric Project State-II, Karian and is entitled to compensation in lieu thereof and includes his/her successors in interest.

(ii) 'Family' means husband/wife, who is entered as owner in the Revenue record, their children including step or adopted children and includes his/her parents and those brothers and sisters who are living jointly with him/her as per entries of Panchayat Parivar Register as on the date of Notification of Section-4 of the Land Acquisition Act, 1894.

Provided that only the Panchayat Parivar Register entry, as it stood on the date of Notification of Section-4 of Land Acquisition Act, 1894, shall be taken into account for the purpose of 'Separate Family' for rehabilitation benefit i.e. employment in the Project

(iii) The word 'employment' means employment on regular basis.

(iv) 'Holding' means the existing land holding possessed by the family of an oustee immediately after acquisition of his property."

11. It is further mentioned in the said Scheme that one member of each affected family shall be eligible for employment in the Chamera Hydroelectric Project Stage-II as elaborated therein. It is further provided in the Scheme that no member of affected family shall be eligible for employment if quantum of his acquired land is one biswa or less. The scheme further contemplates that no person shall be eligible for employment in the Project, who is not entered as member of the concerned affected family in the Panchayat Parivar Register.

12. Clause (x) of Part-III of the Scheme which deals with employment reads as under:

"(x) No person or his family member shall be eligible for employment if he become owner of land by way of sale, gift, exchange etc. of land after the date of notification of Section-4 of Land Acquisition Act, 1894"

13. In this background, this Court has to consider as to whether respondents No. 6 is justified in not conferring the benefits under the R & R Scheme for Chamera Hydroelectric Project Stage-II in favour of the petitioners including grant of employment in favour of petitioner No. 1?

14. The petitioners have appended a copy of Parivar Register of Gram Panchayat Gurad, village Gurad-II, Development Block Mehla, as per which, the names of the petitioners are reflected in the Parivar register of Gram Panchayat Gurad much before the Notification under Section 4 of the Land Acquisition Act was issued for acquiring land under Chamera Hydroelectric Project Stage-II. As per respondents No. 6 and 7, entry so recorded in the Parivar register is a fake entry. In justification of this contention of their's, it is averred by respondents No. 6 and 7 that register shows that it was on the basis of an affidavit dated 30.07.1999 that this family was registered in village Gurad from village Thadi. It is further the stand of respondents No. 6 and 7 that register is not conclusive evidence of fact that petitioners are living in village Gurad and as per respondent No. 6, the Parivar register has been manipulated by the petitioners.

15. I am afraid that there is no merit in this contention of respondent No. 6 that there is a fake entry in favour of the petitioners in the Parivar register of Gram Panchayat, Gurad because in my considered view, respondent No. 6 does not has any competence to unilaterally decide as to whether entry of a family in the Parivar register in a Gram Panchayat in the State of Himachal Pradesh is fake or not. It is not as if respondent No. 6 had challenged the entry so made in favour of the petitioners in the Parivar register before the competent authority and they have obtained adjudication on this aspect of the matter from the competent authority.

16. Similarly, the stand of respondent No. 6 that Parivar register is not conclusive evidence of the fact that the petitioners have been living in village can also not be accepted in view of the fact that it is clearly and categorically contemplated in the R & R Scheme for Chamera Hydroelectric Project Stage-II in Part-III of the same which deals with employment that entry in Panchayat Parivar register will confer eligibility for employment in the project and no person shall be eligible for employment in the Project who has not entered as member of the concerned affected family in the Panchayat Parivar register.

17. Clause (viii) of para-III is quoted hereinbelow:-

"(viii) No person shall be eligible for employment in the Project, who is not entered as member of the concerned affected family in the Panchayat Parivar Register."

18. Therefore, in this view of the matter, when there exists an entry in favour of the petitioners in Panchayat Parivar register, respondent No.6 cannot arbitrarily and unilaterally ignore it on the pretext that the same is a fake entry and not a conclusive evidence of the fact that petitioners have been living in village Gurad.

19. The contention of respondent No. 6 that petitioners were not displaced on account of acquisition of their land is also not sustainable because it is not a disputed fact that land of petitioner No. 2 measuring more than 1 biswa has been acquired for the purpose of Chamera Hydroelectric Project Stage-II.

20. A perusal of R & R Scheme for Chamera Hydroelectric Project Stage-II demonstrates that as per this Scheme, persons whose land has been acquired for setting up of Chamera Hydroelectric Project Stage-II are entitled to different benefits depending upon the extent of the land which has been acquired and the effect which acquisition of such land has upon the affected family. It is contemplated in the Scheme that a landless person as defined in the Scheme shall be entitled for houseless grant as contemplated therein. It is further contemplated in the Scheme as to what are the benefits which accrue to persons who are rendered landless or become oustees on account of the acquisition of land for Chamera Hydroelectric Project Stage-II or the persons who have been defined as "eligible persons" under the Scheme.

21. Under Part-II of the Scheme which deals with sanction of rehabilitation grant, providing of employment, rehabilitation grant, infrastructural facility grant and houseless grant, an eligible person has been defined as under:

"Eligible persons means a person who after acquisition holds less than 5 bighas of land as a land owner or as a tenant"

22. Part-III of the Scheme, which deals with employment further provides that one member of each affected family shall be eligible for employment in the Chamera Hydro Electric Project State-II in the mode and manner as prescribed therein.

23. As I have already mentioned above, the Scheme also contemplates that no member of affected family shall be eligible for employment if quantum of his acquired land is one biswa or less and no person shall be eligible for employment in the Project, who is not entered as member of the concerned family in the Panchayat Parivar register and further no person or his family member shall be eligible for employment if he become owner of land by way of sale, gift, exchange etc. after the date of Notification under Section 4 of the Land Acquisition Act, 1894.

24. In the present case, admittedly, land was purchased by petitioner No. 2 which was subsequently acquired for Chamera Hydroelectric Project Stage-II before the issuance of Notification under Section 4 of the Land Acquisition Act, 1894 for the acquisition of land in issue. In this view of the matter, the stand of respondent-Corporation that petitioners are not entitled for the benefits under the R & R Scheme for Stage-II Project because they had purchase land immediately before the issuance of Notification under Section 4 of the Land Acquisition Act is without any merit because there is no bar in the Scheme that the persons who purchased land immediately before the issuance of Notification under Section 4 of the Land Acquisition Act shall not be entitled for the benefits of R & R Scheme for State-II Project.

25. Similarly, as the petitioners fulfill all the eligibility criteria which are laid down in the R & R Scheme for Stage-II Project to be considered for some of the benefits which accrue to an affected family whose land is acquired for Stage-II Project, including employment, the same cannot be denied to the petitioners on the ground that the petitioners have not been displaced on account of acquisition of their land for the Project or that petitioner No. 2 had already been

granted employment in lieu of acquisition of land for State-I Project. There is no bar contemplated in the Scheme that in case of families whose land is acquired for Stage-II Project and whose one member has already been granted employment in Chamera Hydroelectric Project Stage-I in lieu of the acquisition of land of that very family for Stage-I project also, then no member of that family shall be entitled for benenfits including employment under the R & R Scheme for Chamera Hydroelectric Project Stage-II.

26. In these circumstances, respondents cannot deny the benefits of Resettlement and Rehabilitation Scheme formulated by the Government of Himachal Pradesh which are accruable to oustees/ affected families whose land has been acquired for Chamera-II project on the grounds which have been taken by them in their respective replies. If according to respondents a beneficiary of Chamera-I project should not be entitled for benefits of Resettlement and Rehabilitation Scheme for Chamera-II project or any such like subsequent project(s), then such like conditions should be contained in the Resettlement and Rehabilitation Scheme itself and in the absence of any such bar or condition contained or contemplated in the Scheme, the benefits which are accruable to oustees/ affected families whose land has been acquired for Chamera-II project cannot be denied to it on the said grounds.

27. In this view of the matter, in my considered view, the denial of the benefits of the R & R Scheme for Chamera Hydroelectric Project Stage-II to the petitioners by respondent No. 6 and 7 is arbitrary, totally irrational and does violence to the spirit and contents of the R & R Scheme for Chamera Hydroelectric Project Stage-II.

28. Accordingly, the writ petition is allowed, Annexure P-14 dated 18.11.2006, Annexure P-15 dated 02.02.2007, Annexure P-21 dated 23.05.2007, Annexure P-23 dated 15.06.2007, Annexure P-25 dated 04.07.2007, Annexure P-29 dated 18.02.2008 are quashed and set aside and respondents are directed to confer upon the petitioners all benefits including employment as are accruable to them under the Resettlement and Rehabilitation Scheme which was framed by the Government of Himachal Pradesh for the benefits of oustees/affected families of Chamera Hydroelectric Project Stage-II. The writ petition stands disposed of, so also the miscellaneous application(s), if any. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Co. .....Appellant

Versus

Lokeshawar Narah and others .....Respondents

FAO No.172 of 2012
Date of decision: 18.11.2016

Motor Vehicles Act, 1988- Section 149- Driver had two licences at the time of accident- however, it is not the case that driver was not having a valid and effective licence at the time of accident- insurer had not proved that insured had committed willful breach of the terms and conditions of the policy – insurer was rightly saddled with liability – appeal dismissed.

(Para-11 to 15)

Motor Vehicles Act, 1988- Section 166- Deceased was drawing salary of Rs.10,050/- per month- hence, the monthly income of the deceased can be taken as Rs.10,000/- - deceased was bachelor at the time of accident – 50% has to be deducted towards personal expenses and loss of dependency will be Rs.5,000/- per month- deceased was 26 years at the time of accident – Tribunal had wrongly applied multiplier of 14, whereas, multiplier of 16 was applicable- thus, claimants are entitled to Rs.5,000 x 12 x 16= Rs.9,60,000/- under the head loss of dependency- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of

estate and funeral expenses- thus, claimants are entitled to Rs.9,90,000/- along with interest @ 7.5% per annum from the date of filing of claim petition till deposit. (Para-16 to 21)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC217
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120
United India Insurance Co. Ltd. and others vs Patricia Jean Mahajan & others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others vs National Insurance Company Limited & ors, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (IV) HP 1149

For the appellant:	Mr.Ashwani K. Sharma, Senior Advocate, with Mr.Jeevan Kumar, Advocate.
For the respondents:	Mr.Sanjay Sharma, Advocate, for respondents No.1 to 4. Mr.Manoj Thakur, Advocate, for respondents No.5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 14th December, 2011, passed by the Motor Accident Claims Tribunal-II, Solan, H.P., (for short, "the Tribunal") in Claim Petition No.9-S/2 of 2010, titled Lokeshawar Narah and others vs. Surinder Kumar Bansal and others, whereby the claim petition was allowed and compensation to the tune of Rs.11,64,670/-, with interest at the rate of 9% per annum, came to be awarded in favour of the claimants and the insurer/appellant was saddled with the liability, (for short the "impugned award").

2. The claimants, the owner and the driver have not questioned the impugned award on any ground, thus, the same has attained finality so far as it relates to them. Feeling aggrieved, the insurer has challenged the impugned award on the grounds taken in the memo of appeal.

3. Facts of the case, in brief, are that the claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), on the ground that on 31st December, 2009, at about 9.30 p.m., the deceased was walking on left side of the road at Purolator Chowk, NH-22, Parwanoo, suddenly scooter bearing registration No.HP-15-4795, being driven rashly and negligently by Atinder Pal Singh (original respondent No.2), hit the deceased resulting into fatal injuries to the deceased and ultimately, he succumbed to the injuries. Claimants, being the parents, brother and sister of the deceased, filed the claim petition for compensation to the tune of Rs.15.00 lacs as per the break-ups given therein.

4. The claim petition was resisted by the respondent by filing reply and following issues came to be framed:

> *'1. Whether deceased Dipen Narah died in an accident on account of rash and negligent driving of respondent No.2? OPP*
>
> *2. If issue No.1 is proved in affirmative, to what amount and from whom, the petitioners are entitled for compensation? OPP*

3. Whether the petition is not maintainable? OPR

4. Whether the vehicle in question was driven in breach of terms and conditions of policy? OPR-3

5. Relief."

5. Parties have led evidence.

6. During the course of hearing, the learned counsel for the appellant/insurer has made threefold submissions. Firstly, it was submitted that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident; secondly, the owner had committed willful breach of the terms and conditions and; thirdly, the Tribunal has wrongly assessed the compensation while making discussion in paragraphs 23 to 25 of the impugned award.

7. Heard learned counsel for the parties and gone through the record.

Issue No.1.

8. The Tribunal, after scanning the evidence, held that the driver had driven the offending scooter rashly and negligently on the appointed day and had caused the accident, in which the deceased sustained injuries and lost his life. There is no challenge to the said findings recorded by the Tribunal on issue No.1, accordingly the same are upheld.

9. Before Issue No.2 is dealt with, I deem it proper to determine issues No.3 and 4.

Issue No.3

10. It was for the insurer to plead and prove how the claim petition was not maintainable, has not led any evidence. In accident claim cases, the Court has to grant compensation while keeping in view the aim and object of granting compensation, which is social and beneficial one. The Act has gone through a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 have been added. Section 158(6) provides that the Incharge of the Police Station concerned has to submit a report about the traffic accident to the Tribunal having the jurisdiction and that report has to be treated as Claim Petition by the Tribunal in terms of Section 166(4) of the Act. Thus, even filing of claim petition is not mandatory for grant of compensation in terms of the said amendment. Accordingly, it is held that the Tribunal has rightly decided this issue against the insurer.

Issue No.4:

11. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident. According to the learned counsel for the appellant/insurer, the driver, at the time of accident, was having two licences, but it is not the case that the driver was not having a valid and effective driving licence at the time of accident. The Tribunal has made detailed discussion in paragraphs No.13 to 16 of the impugned award. Having said so, it is held that the Tribunal has rightly held that the driver of the offending vehicle was having a valid and effective driving licence at the time of accident.

12. The insurer has also not led any evidence to prove that the owner had committed willful breach of the terms and conditions contained in the insurance policy. It is settled proposition of law that it is the duty of the insurer to plead and prove that the insured had committed willful breach of the terms and conditions of the insurance policy read with the mandate of Sections 147 to 149 of the Act, has not led any evidence and has failed to discharge the onus.

13. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings: but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

14. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

15. Having said so, the findings returned by the Tribunal on issue No.4 are also upheld.

Issue No.2

16. It has been claimed that the deceased was a qualified electric engineer and was working in M/s Federal Mogul Bearing India Limited, Parwanoo. Salary certificate of the deceased has been proved on record as Ext.PW-2/A, which shows that he was drawing salary to the tune of Rs.10,050/- per month. Thus, the monthly income of the deceased can be said to be Rs.10,000/-. The deceased was bachelor at the time of accident, therefore, 50% was to be deducted towards his personal expenses, in view of the judgment of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120.** Therefore, after deducting 50%, monthly loss of source of dependency can be said to be Rs.5,000/-.

17. The deceased was 26 years of age at the time of death. The Tribunal has fallen into an error in applying the multiplier of 14, instead, in view of the law expounded by the Apex Court in **Sarla Verma's case (supra)** and the 2nd Schedule attached with the Motor Vehicles Act, 1988, multiplier of 16 was just and appropriate and is applied accordingly.

18. In view of the above discussion, the claimants are held entitled to compensation to the tune of Rs.5,000/- x 12 x 16 = Rs.9,60,000/- under the head loss of source of dependency. In addition, the claimants are also held entitled to Rs.10,000/- each, i.e. Rs.30,000/- in all, under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'.

19. Thus, the claimants are held entitled to Rs.9,60,000/- + Rs.30,000/- = Rs.9,90,000/-.

20. The Tribunal has also wrongly awarded interest at the rate of 9%, which is on the higher side. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in** ***(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,*** **reported in** ***2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,*** **reported in** ***(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,*** **reported in** ***2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,*** **reported in** ***2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,*** **reported in** ***(2015) 4 Supreme Court Cases 433,*** **and** ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,*** reported in ***(2015) 4 Supreme Court Cases 434,*** and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,*** being the lead case, decided on **19.06.2015**.

21. Accordingly, it is held that the amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit.

22. In view of the above discussion, the impugned award is modified, as indicated above. The Registry is directed to release the amount, alongwith interest, strictly in terms of the impugned award, in favour of the claimants, through their bank accounts after proper verification, and the excess amount, if any, be released in favour of the insurer through payee's account cheque.

23. The impugned award is modified, as indicated above and the appeal stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Company Limited ...Appellant.
Versus
Sh. Mohan Lal and others ...Respondents.

FAO No. 281 of 2012
Decided on: 18.11.2016

Motor Vehicles Act, 1988- Section 163-A- It was contended that claim petition was not maintainable as the claimants had claimed the income of the deceased to be Rs.8,000/- per month- held, that the claim petition under Section 163-A was not maintainable as the income was more than Rs.40,000/- per annum- however, the claim petition can be treated to be filed under Section 166- the deceased was driving the vehicle himself as per the FIR- 50% of the amount has been released to the claimants with interest – therefore, the same ordered not to be recovered from them in the interest of justice- appeal disposed of. (Para-4 to 16)

Cases referred:
Oriental Insurance Company Limited versus Premlata Shukla & others, 2007 AIR SCW 3591
Ningamma and another versus United India Insurance Company Limited, (2009) 13 Supreme Court Cases 710
Surinder Kumar Arora & another versus Dr. Manoj Bisla & others, 2012 AIR SCW 2241

For the appellant: Mr. Pritam Singh Chandel, Advocate.
For the respondents: Mr. Maan Singh, Advocate, for respondents No. 1 and 2.
Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to award, dated 9th May, 2012, made by Motor Accident Claims Tribunal-II (Fast Track Court), Kullu, H.P. (for short "the Tribunal") in MAC No. 01 of 2012, titled as Sh. Mohan Lal and another versus Jhabe Ram and another, whereby compensation to the tune of ₹ 80,500/- with interest @ 6% per annum from the date of filing of petition till its realization came to be awarded in favour of the claimants and insurer was saddled with liability (for short "the impugned award").

2. The claimants and the owner-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has called in question the impugned award on the grounds taken in the memo of the appeal.

4. Learned counsel for the appellant-insurer argued that the claim petition was filed under Section 163-A of the Motor Vehicles Act, 1988 (for short "MV Act") and was not maintainable as the claimants had claimed the income of the deceased to be ₹ 8,000/- per month.

5. The argument of the learned counsel for the appellant-insurer is forceful for the reason that the Division Bench of this Court in a case titled as **Oriental Insurance Company Ltd. versus Sh. Sihnu Ram and others,** being **FAO No. 474 of 2010,** decided on 28th September, 2016, has held that claim petition under Section 163-A of the MV Act can be maintained if the income of the victim of a vehicular accident is less than ₹ 40,000/- per annum. Thus, the claim petition under Section 163-A of the MV Act was not maintainable.

6. But, keeping in view the fact that granting of compensation is a social legislation, this Court can treat the claim petition under Section 166 of the MV Act.

7. At this stage, learned counsel appearing on behalf of the appellant-insurer argued that the deceased was himself driving the offending vehicle rashly and negligently at the time of the accident and the claimants are the parents of the deceased, thus, the claim petition under Section 166 is also not maintainable.

8. Rash and negligent driving is *sine qua non* for maintaining a claim petition seeking compensation in terms of the provisions of Section 166 of the Act.

9. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **Oriental Insurance Company Limited versus Premlata Shukla & others,** reported in **2007 AIR SCW 3591.** It is apt to reproduce para-10 of the judgment herein:-

> "10. *The insurer, however, would be liable to re-imburse the insured to the extent of the damages payable by the owner to the claimants subject of course to the limit of its liability as laid down in the Act or the contract of insurance. Proof of rashness and negligence on the part of the driver of the vehicle, is therefore, sine qua non for maintaining an application under Section 166 of the Act."*

10. The Apex Court in another case titled as **Ningamma and another versus United India Insurance Company Limited,** reported in **(2009) 13 Supreme Court Cases 710,** has laid down the same principle. It is apt to reproduce pars 21, 24 and relevat portion of para 25 of aforesaid judgment herein.

> *"21. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike. We have already extracted Section 163A of the MVA hereinbefore. A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle.*
>
> *22. .....*
>
> *23. .....*
>
> *24. However, the question remains as to whether an application for demand of compensation could have been made by the legal representatives of the deceased as provided in Section 166 of the MVA. The said provision specifically provides that an application for compensation arising out of an accident of the nature specified in Sub-section (1) of Section 165 may be made by the person who has sustained the injury; or by the owner of the property; or where death has resulted from the accident, by all or any of the legal representatives of the deceased; or by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be.*
>
> *25. When an application of the aforesaid nature claiming compensation under the provisions of Section 166 is received, the Tribunal is required to hold an enquiry into the claim and then proceed to make an award which, however, would be subject to the provisions of Section 162, by determining the amount of compensation, which is found to be just. Person or persons who made claim for compensation would thereafter be paid such amount. When such a claim is made by the legal representatives of the deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving....."*

11. It would be profitable to reproduce paras 9 & 10 of the judgment rendered by the Apex Court in **Surinder Kumar Arora & another versus Dr. Manoj Bisla & others,** reported in **2012 AIR SCW 2241,** herein:

> *"9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent No.1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent No.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (AIR 2001 SC 485 : 2001 AIR SCW 85) (supra) would have come to the assistance of the claimants.*
>
> 10. *In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of Oriental Insurance Co. Ltd. (AIR 2007 SC 1609 : 2007 AIR SCW 2362) (supra). In the said decision the Court stated:*
>
> > *".....Therefore, the victim of an accident or his dependents have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."*

12. Applying the test to the instant case, the deceased was himself driving the offending vehicle at the time of the accident as is evident from the perusal of the FIR, Ex. PW-2/A.

13. At this stage, Mr. Maan Singh, learned counsel appearing on behalf of the claimants, stated at the Bar that the claimants have received 50% of the awarded amount with interest, are poor, rustic villagers.

14. Keeping in view the fact that the claimants are the parents of the deceased, have been dragged to the lis due to the traffic accident and are contesting the claim petition from the year 2012 till today, I deem it proper to direct that no recovery be effected from the claimants.

15. The amount, which is still lying deposited before this Court, be released in favour of the appellant-insurer through payee's account cheque.

16. The impugned award is modified and the appeal is disposed of accordingly.

17. Send down the record after placing copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Krishna Devi ....Petitioner.

Versus

State of H.P. .....Respondent.

Cr. Revision No.138 of 2016.
Judgment reserved on: 16.11.2016.
Date of decision: November, 21st , 2016.

Code of Criminal Procedure, 1973- Section 482- Petition has been filed for quashing the charges framed under Sections 302, 212 and 120-B of I.P.C – held, that at the time of framing of charge, the evidence is not to be meticulously judged nor is any weight to be attached to the probable defence of the accused – the Court is to see that there is ground for presuming that accused had committed an offence – the statements of informant and other witnesses show that involvement of the petitioner cannot be ruled out- the Court had meticulously perused the material placed on record and had framed the charge thereafter - petition dismissed.

(Para- 3 to 12)

Cases referred:

State of Bihar versus Ramesh Singh AIR 1977 SC 2018
Union of India versus Prafulla Kumar Samal and another AIR 1979 SC 366
State of Maharashtra versus Priya Sharan Maharaj and others AIR 1997 SC 2041
Keshub Mahindra versus State of M.P. (1996) 6 SCC 129
State of M.P. versus S.B.Johari and others (2000) 2 SCC 57
State of Delhi versus Gyan Devi and others (2000) 8 SCC 239
State of A.P. versus Golconda Linga Swamy and another (2004) 6 SCC 522
Amit Kapoor versus Ramesh Chander and another (2012) 9 SCC 460
State of Tamil Nadu versus Mariya Anton Vijay (2015) 9 SCC 294

For the Petitioner : Mr.Manoj Pathak, Advocate.
For the Respondent : Ms.Meenakshi Sharma & Mr.Rupinder Singh Thakur, Additional Advocate Generals with Mr.J.S.Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Aggrieved by the framing of charges under Sections 302, 212, 120-B of the IPC, the petitioner has filed the instant revision petition praying therein for quashing of the same.

2. The case emanates from the FIR lodged by Balwant Singh on the allegations that he was travelling in Bolero Camper bearing No.HP-06C-0750 (for short 'Jeep') being driven by Raghubir Singh to see a cultural programme during 'Lavi' fair. After programme had finished, Shri Ajay Kumar, son of Shri Rajender Thakur (now deceased) met them at Rampur and accompanied them on their way back to Nogli (Khakhrola). Accused Vijay Kumar happened to meet them and he sought help from the occupants of the Jeep on the pretext that his vehicle bearing No.HP-06A-2195 had skidded and was stuck in the road. Ajay Kumar deceased alighted from the vehicle to help the accused Vijay Kumar, whereas, Balwant Singh and Raghubir Singh went home in the Jeep. When Ajay Kumar did not return back for quite some time, efforts were made to contact him on his phone, however, he did not attend the call. When searched by complainant Balwant Singh and Raghubir Singh, they had found him lying in a pool of blood on the road at that very place where he had been dropped. Police was informed and on the statement of Balwant Singh recorded under Section 154 Cr.P.C., FIR was registered under Section 302 of the IPC as the deceased was last seen in the company of the accused Vijay Kumar.

Before going into the relative merits of the case, the contours and parameters for quashing of charges will have to be delineated.

3. In ***State of Bihar*** *versus* ***Ramesh Singh AIR 1977 SC 2018***, it was held by the Hon'ble Supreme Court that at the time of framing of charges, evidence which the prosecutor proposes to adduce is not to be meticulously judged nor is any weight to be attached to the probable defence of the accused. It is not even obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. At the time of framing of charges, the Court is not to see whether there are sufficient grounds for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion, at this stage, which may lead the

Court to think that there is a ground for presuming that the accused has committed an offence, is sufficient ground for proceeding against the accused. It is apt to reproduce the relevant observations which read thus:-

> "4. *Under section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. 'The Judge has to pass thereafter an order either under section 227 or section 228 of the Code. If "the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-*
>
> …….. …… …… …… ……..
>
> *(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under section 227 or section 228 of the Code. At that stage the Court is not to 'see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the, initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. if the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the, trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But, if, on the other hand, it is so at the initial stage of making an order under section 227 or section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under section 228 and not under section 227."*

4. In ***Union of India*** *versus* ***Prafulla Kumar Samal and another AIR 1979 SC 366***, the Hon'ble Supreme Court laid down the following principles which are required to be borne in mind by the Courts at the time of framing of charges.

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out;

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial;

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Court cannot act merely as a Post-Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

5. In ***State of Maharashtra*** *versus* ***Priya Sharan Maharaj and others AIR 1997 SC 2041***, it was held by the Hon'ble Supreme Court that at the stage of Sections 227 and 228 of the Code, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge, the Court has to consider the material with a view to find out as to whether there is any ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

6. At the stage of framing of charges, all that is required to be established is that a prima facie case is made out by the prosecution. Sufficiency of the evidence resulting into conviction is not to be seen. Charges can be framed if there is some material showing possibility of crime as against certainty. (*Refer:* ***Keshub Mahindra*** *versus* ***State of M.P. (1996) 6 SCC 129, State of M.P.*** *versus* ***S.B.Johari and others (2000) 2 SCC 57, State of Delhi*** *versus* ***Gyan Devi and others (2000) 8 SCC 239*** and ***State of A.P.*** *versus* ***Golconda Linga Swamy and another (2004) 6 SCC 522***.

7. In ***Amit Kapoor*** *versus* ***Ramesh Chander and another (2012) 9 SCC 460,*** the Hon'ble Supreme Court laid down the following principles to be considered for proper exercise of jurisdiction, particularly with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 have been summarized as follows:-

"1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

10. It is neither necessary nor is the court called upon to hold a fullfledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

{Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [AIR 1982 SC 949]; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors. [AIR 1988 SC 709]; Janata Dal v. H.S. Chowdhary & Ors. [AIR 1993 SC 892]; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors. [AIR 1996 SC 309; G. Sagar Suri & Anr. v. State of U.P. & Ors. [AIR 2000 SC 754]; Ajay Mitra v. State of M.P. [AIR 2003 SC 1069]; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [AIR 1988 SC 128]; State of U.P. v. O.P. Sharma [(1996) 7 SCC 705]; Ganesh Narayan Hegde v. s. Bangarappa & Ors. [(1995) 4 SCC 41]; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors. [AIR 2005 SC 9]; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors. [AIR 2000 SC 1869]; Shakson Belthissor v. State of Kerala & Anr. [(2009) 14 SCC 466]; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors. [(2009) 7 SCC 234]; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr. [(2009) 11 SCC 203]; Sheo Nandan Paswan v. State of Bihar & Ors. [AIR 1987 SC 877]; State of Bihar & Anr. v. P.P. Sharma & Anr. [AIR 1991 SC 1260]; Lalmuni Devi (Smt.) v. State of Bihar & Ors. [(2001) 2 SCC 17]; M. Krishnan v. Vijay Singh & Anr. [(2001) 8 SCC 645]; Savita v. State of Rajasthan [(2005) 12 SCC 338]; and S.M. Datta v. State of Gujarat & Anr. [(2001) 7 SCC 659]}.

16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance of the requirements of the offence."

8. Similar reiteration of law can be found in the recent judgment of the Hon'ble Supreme Court in ***State of Tamil Nadu*** *versus* ***Mariya Anton Vijay (2015) 9 SCC 294***.

9. Shri Manoj Pathak, learned counsel for the petitioner, has vehemently argued that the learned Court has failed to appreciate that there is no reliable and cogent evidence to prove the involvement of the petitioner in the alleged offence. Rather, a perusal of the charge-sheet would clearly goes to show that there are no allegations against the petitioner that she had harboured or concealed principal accused Vijay Kumar.

10. Shri J.S.Guleria, learned Assistant Advocate General, on the other hand, has vehemently contended that even strong suspicions, at this stage, can be a sufficient ground to frame the charges and has drawn my attention to the statements of the complainant and other persons associated during the course of investigation.

11. Having gone through the statements of the complainant coupled with those of Medh Ram, Raghubir Singh and Balwant Singh, the involvement of the petitioner, at this stage, cannot be ruled out. However, I need not further delve on this issue, lest it causes prejudice to the case of the petitioner. But, suffice it to say that no ground for quashing of the charge-sheet at the threshold is made out. Moreover, the learned Court below appears to have meticulously perused the material placed on record by the prosecution and only thereafter has framed the

charges that too after coming to the conclusion that a prima facie case has been made out by the prosecution for trial of the petitioner.

12. For all the aforesaid reasons, the present revision petition is devoid of any merit and accordingly the same is dismissed. Pending application, if any, also stands disposed of.

13. However, before parting, it is clarified that any observation made hereinabove shall not be taken as an expression of opinion on merits of the case and the trial Court shall decide the matter uninfluenced by the same.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Sanjay ....Petitioner.
Versus
State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No.1288 of 2016.
Decided on: 21st November, 2016.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Sections 342, 323 and 506 of I.P.C – the accused prayed for pre-arrest bail – held, that considering the nature of the offence, the fact that the petitioner is a permanent resident of the place, he is joining/co-operating in the investigation and is not in a position to flee from justice or to temper with the prosecution evidence, the petition allowed and the petitioner admitted on bail subject to the conditions. (Para-4 to 6)

For the petitioner : Mr. Surender Verma, Advocate.
For the respondent : Mr. Virender Kumar Verma, Addl. AG, Mr. Pushpinder Singh Jaswal, Dy. Advocate General and Mr. Rajat Chauhan, Law Officer.
ASI Sunil Kumar, Police Station, Theog, District Shimla, H.P, present in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present bail application is maintained by the petitioner under Section 438 of the Code of Criminal Procedure for releasing him on bail in case FIR No. 177/2016, dated 13.10.2016, registered at Police Station Theog, District Shimla, H.P. under Sections 342, 323 and 506 of the Indian Penal Code.

2. Police report stands filed. As per the prosecution story, the petitioner has given beatings to the complainant, i.e. Sh. Sunil Kumar, and intentionally caused injuries to the complainant. On the basis of which, FIR No. 177/2016, dated 13.10.2016, under Sections 342, 323 and 506 of the Indian Penal Code, was registered at Police Station Theog, District Shimla, H.P.

3. Learned counsel for the petitioner has argued that the petitioner is innocent and has been falsely implicated in this case. On the other hand learned Additional Advocate General has argued that the petitioner is habitual of doing such type of offences earlier also. He has further argued that if the petitioner is released on bail, he will repeat the same offences and tamper with prosecution evidence and he is likely to flee from justice.

4. In rebuttal, learned counsel appearing on behalf of the petitioner has argued that the petitioner will neither tamper with the prosecution evidence, nor he will do anything to hamper the investigation, in any manner.

5. Heard. Taking into consideration the nature of the offence and the facts that the petitioner is resident of the place, he is joining/cooperating in the investigation and not in a position to flee from justice and also not in a position to tamper with the prosecution evidence, this Court finds that, interest of justice would be met in case the judicial discretion to admit the petitioner on bail is exercised in favour of the petitioner. So, it is ordered that in the event of his arrest in the case, he be released on bail, on his furnishing personal bond in the sum of Rs. 10,000/- (rupees ten thousand only) with one surety in the like amount to the satisfaction of Investigating Officer. The bail is granted subject to the following conditions:

i. That the petitioner will join investigation of case as and when called for by the Investigating Officer in accordance with law.

ii. That the petitioner will not leave India without prior permission of the Court.

iii. That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

6. Accordingly, the petition is disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No. 2317 of 2011 a/w CWP No. 1498 and COPC No. 235 of 2010
Judgment reserved on: 3.10.2016
Date of decision: 21.11.2016

1. CWP No. 2317 of 2011

Shivalik Agro Poly Products Ltd. ..... Petitioner

Versus

Union of India and others. ..... Respondents

2. CWP No. 1498 of 2010

Shivalik Agro Poly Products Ltd. ..... Petitioner

Versus

Union of India & others ..... Respondents

3. COPC No. 235 of 2010

Shivalik Agro Poly Products Ltd. ..... Petitioner

Versus

Anil Kumar Dahiya & Anr. ..... Respondents

Constitution of India, 1950- Article 226- Petitioner is aggrieved by the construction of National Highway passing through its land – it was pleaded that there is continuous threat to the life of the people and the building premises due to the construction – respondent pleaded that some part of the land of the petitioner was utilized believing it to be part of acquired land, which error has been rectified -the damaged boundary wall would be restored – the walls would be constructed as per the requirement- continuous mandamus cannot be issued – no grievance was raised regarding the deficiency in the remedial measures- the fact that remedial measures were not to the liking or to complete satisfaction of the petitioner cannot be ground to initiate contempt proceedings- the petitioner had purchased the land despite the knowledge of the construction of National Highway – petition dismissed. (Para-13 to 29)

Case referred:
Gujarat Maritime Board versus L & T Infrastructure Development Projects Ltd. and Another AIR 2016 SC 4502

For the petitioners:	Mr. Baldev Sharma and Mr. Rakesh Thakur, Advocates.
For the respondents:	Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Ajay Chauhan, Advocate, for respondent No. 1 in CWPs No. 2317 of 2011 and 1498 of 2010.
	Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Charu Bhatnagar, Advocate, for respondent No. 2 in CWPs No. 2317 of 2011 and 1498 of 2010 and for respondent No. 1 in COPC No. 235 of 2010.
	Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for respondents-State.
	Mr. Abhishek Barowalia, Advocate, for respondent No. 4 in CWPs No. 2317 of 2011 and 1498 of 2010.
	Mr. B.C. Negi, Senior Advocate, with Mr. Raj Negi, Advocate, for respondent No. 6 in CWPs No. 2317 of 2011 and 1498 of 2010 and for respondent No. 2 in COPC No. 235 of 2010.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since the basic facts are common in all the petitions, therefore, these were heard together and are being disposed of by common judgment.

CWP No. 1498 of 2010

2. Certain bare minimum facts as pleaded may be noticed. The petitioner is an industrial unit situated at Parwanoo, Himachal Pradesh and is aggrieved by the construction of the national highway, which passes through some of the land of the petitioner.

3. The petitioner has its unit at Sector-3, Parwanoo, under the name and style of Shivalik Agro Poly Products Limited, which is operational for the last about 30 years.

4. Petitioner purchased land comprised in Khasra No. 450 vide sale deed dated 31.7.2007 and thereafter vide sale deed dated 25.7.2008 purchased another piece of land comprised in Khasra No. 449 for the purpose of expansion of its existing unit.

5. After seeking approval from the competent authority, the petitioner raised some construction on both these lands including chemical tanks constructed over Khasra No. 449. It is claimed by the petitioner that in the notifications under Sections 3A & 3D of the National Highways Act, 1956 (for short 'Act'), issued on 16.3.2007, 24.1.2008 and 9.10.2009, its land had not been included, however despite this, the respondents began construction of the national highway adjoining to its land and because of the vibrations emitted from the heavy machinery deployed at the spot, cracks initially appeared in the retaining wall which later on collapsed and thereafter cracks even appeared in some portion of the premises of the petitioner. Petitioner claimed that on account of such construction work, there was continuous threat to the life of the people as well as the building premises of the petitioner.

6. This constrained the petitioner to file CWP No. 1498 of 2010 seeking therein the quashment of notifications issued under Section 3A of the Act dated 16.3.2007, notification under Section 3D, dated 24.1.2008 and notification under Section 3A, dated 9.10.2009 and in addition thereto the direction was also sought against the respondents to refrain from carrying out further damage to the hill on which land and industrial units of the petitioner are situated and to take all remedial measure in accordance with law.

7. When the case initially came up for consideration on 19.4.2010, this Court passed the following orders:

> "There will be direction to the Deputy Commissioner, Solan District, to forthwith conduct a site inspection with notice to 2nd, 5th and 6th respondents and submit a report regarding the state of affairs as alleged in the Writ Petition. This report shall be filed within a week. The petitioner will produce a copy of this order alongwith a copy of the Writ petition before the Deputy Commissioner, Solan on 20.4.2010. Post on 28.4.2010. It is made clear that the construction work shall be done without causing any damage to the adjoining property. Post on 28.4.2010."

8. The Deputy Commissioner submitted his report, however, this Court vide order dated 21.5.2010 issued directions to the Chairman, District Legal Services Authority, Solan to visit the place and submit its report. He accordingly visited the spot and submitted his report. On 1.6.2010, this Court passed the following orders:-

> "Learned counsel appearing for the respondents, in view of the report of the District Legal Services Authority and after getting instruction from the Engineers, submitted that required temporary measure of providing concrete covering duly supported by steel beam and re-enforced with wire mesh above abutment No. 2 is being undertaken. It is also submitted that the work of filling and construction of breast and crate walls will be done on war footing basis so as to finish it in any case before the end of June, 2010. Post on 19.6.2010."

9. The National Highway Authority (Respondent No.2) in his short reply stated that it had bonafidely presumed Khasra No. 450 to be a part of Khasra No. 472 and had been executing the work over the said land and it is only on 8.3.2010 when the land was demarcated by the revenue officials that it became apparent that an area measuring 646 sqm which was earlier believed to be a part of Khasra No. 472 was actually a part of Khasra No. 450. Since the error in not covering part of Khasra No. 450 in acquisition notification occurred due to discrepancy in the demarcation record, therefore, once these facts became apparent, the mistake was sought to be rectified and requisite notification in accordance with the Act of 1956 would be issued.

10. As regards the contention regarding damage to the property of the petitioner, it has been stated that on account of steep slope and stone retaining wall of the petitioner being old, some damage had occurred inspite of the best protection taken at the site during the execution of the work. The boundary wall had been damaged at two places, which had been undertaken to be restored by the respondent at the earliest. As regards the present status of the work, it was stated that excavation work on the site had already been completed, therefore, there will be no occasion for the alleged vibration and the already excavated portion of the foundations shall be filled with earth, compacted in layers to the height varying from 10-12m to give support to the remaining slopes of the strata/hill. In addition to that two walls, breast wall and small retaining wall would be constructed as per the requirement and best engineering solutions/principles. Wherever, rock is available, the same would be covered with the short-crate treatment for retaining the same, which is common and well known treatment of rock support. It was lastly averred that the project is of national importance and timely completion thereof is in nation's interest.

Contempt Pet. No. 235 of 2010

11. It is claimed by the petitioner that respondents on 1.6.2010 had given an undertaking before this Court that they would carry out the work on war footing basis so as to finish it in any case before the end of June, 2010, as is reflected in order itself. However, the progress of the work was slow and tardy and not up to the mark and thereby the respondents had deliberately and willfully disobeyed the undertaking so furnished to the Court, constraining the petitioner to file the COPC No. 235 of 2010.

CWP No. 2317 of 2011

12. As regards CWP No. 2317 of 2011 the same has been filed for seeking quashment of notification dated 21.6.2010 (Annexure P-12) issued under Section 3A and notification dated 7.3.2011 (Annexure P-21) issued under Section 3D of the Act wherein the land of the petitioner was sought to be acquired. These notifications have been assailed on the ground that the same were totally illegal and malafide and issued under colourable exercise of power and the same have been issued without following any procedure as provided and contemplated under the Act.

Discussion

13. It is not in dispute that national highway is operational for the last more than 4 years and, therefore, the most of the issues raised in these petitions have only been rendered academic.

14. In CWP No. 1498 of 2010, as observed above, apart from seeking quashment of the various notifications, petitioner had also sought directions to the respondents for taking remedial measure so as to ensure complete protection of its property. The affidavits filed from time to time by the petitioner as also by the respondents up till the year, 2011, would indicate that sufficient steps have been taken by the respondents to protect the property of the petitioner and even the petitioner appears to have been satisfied with the same because the petitioner did not make any grievance thereafter.

15. The same is the position in CWP No. 2317 of 2011, wherein again the petitioner made no grievance till the passage of nearly 4 ½ years and all of a sudden in this year filed miscellaneous applications wherein it has been prayed that respondents be directed to construct proper RCC retaining wall and also repair the damage, which have occurred due to incomplete remedial measures undertaken by the respondents.

16. The petitioner cannot insist upon this Court to issue writ of continuous mandamus, more particularly, when there is no public interest and that apart, the silence of the petitioner over the last 4 ½ years speaks volumes of its conduct.

17. As noticed above, the National Highway is in operation for the last more than 4 years and the petitioner had made no grievance qua any deficiency in the remedial measures for protection of the so-called damage to the petitioner. The further question that whether certain remedial measures are still required to be taken is a matter which cannot be decided on the basis of affidavits and photographs alone. These facts have to be established by leading clear, cogent and convincing evidence that too before a competent Court of law.

18. It is more than settled that the High Court having regards to the facts of the case, has a discretion to entertain or not to entertain the writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power and this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determinations, then this Court will normally refrain from exercising such discretion.

19. Similar issues came up for consideration before this Court in ***LPA No. 48 of 2011***, titled ***Shri Satija Rajesh N Vs. State of H.P. & Ors***, decided on 26.8.2014, wherein, it was held as under:-

> "31. The writ Court has also brushed aside the affidavit filed by the Chief Executive Officer of writ respondent No. 2-HIMUDA, who has mentioned in the affidavit that the bid of the successful bidders-appellants in LPA No. 1 of 2011 was received on 14th September, 2006. How the writ Court came to the conclusion that the affidavit of the Chief Executive Officer is not correct or it should have been supported by other affidavits. It appears that the writ Court has fallen in error in returning findings on disputes questions of facts.
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> 32. The Apex Court in a case titled as D.L.F. Housing Construction (P) Ltd. versus Delhi Municipal Corpn. and others, reported in AIR 1976 Supreme Court

386, has held that the disputed question of facts cannot be gone through by the writ Court and the writ Court cannot return findings on disputed questions of facts. It is apt to reproduce para 18 of the judgment herein:

> "18. In our opinion, in a case where the basic facts are disputed, and complicated questions of law and fact depending on evidence are involved the writ court is not the proper forum for seeking relief. The right course of the High Court to follow was to dismiss the writ petition on this preliminary ground, without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court, we would dismiss both the findings of the High Court, we would dismiss both the writ petition and the appeal with costs. The appellants may if so advised, seek their remedy by a regular suit."

33. The same principle has been laid down by the Apex Court in Daljit Singh Dalal (dead) through L.Rs. Versus Union of India and others, reported in AIR 1997 Supreme Court 1367 and Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others versus Smt. Sukamani Das and another, reported in AIR 1999 Supreme Court 3412.

34. The Apex Court in a case titled as State of Karnataka & Ors. versus KGSD Canteen Employees Welfare Association & Ors., reported in 2006 AIR SCW 212, has held that High Court should not exercise its powers under Article 226 of the Constitution of India in cases where disputed questions of facts have been raised. It is apt to reproduce paras 37 and 40 of the judgment herein:

> "37. In a case of this nature, where serious disputed questions fact were raised, in our opinion, it was not proper for the High Court to embark thereupon an exercise under Article 226 of the Constitution. The High Court in its judgment relied upon a large number of decisions of this court, inter alia, in Reserve Bank of India (supra) and State Bank of India and others v. State Bank of India Canteen Employees' Union (Bengal circle) and others (AIR 2000 SC 1518) ignoring the fact that all such disputes were adjudicated in an industrial adjudication.
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> 38. .....
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> 39. .....
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> 40. It was, furthermore, reiterated that a disputed question of fact normally not be entertained in a writ proceeding."

35. The same view has been taken by the Apex Court in Orissa Agro Industries Corporation Ltd. and others versus Bharati Industries and others, reported in AIR 2006 Supreme Court 198 and Rajinder Singh versus State of Jammu and Kashmir & Ors., reported in 2008 AIR SCW 5157."

20. The legal position has been reiterated by the Hon'ble Supreme Court in its recent judgment titled as ***Gujarat Maritime Board versus L & T Infrastructure Development Projects Ltd. and Another AIR 2016 SC 4502*** wherein it was held as under:-

> "10. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit "… if the contract had frustrated on account of impossibility…" but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor-bank and the guarantee-appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter, viz., the first respondent. But between the bank and

the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved. Recently, this Court in Joshi Technologies International Inc. v. Union of India and others[1], where one of us (R.F. Nariman, J.) is a member, has surveyed the entire legal position on exercise of writ jurisdiction in contractual matters. The paragraphs which deal with the situation relevant to the case under appeal, read as follows:

"68. The Court thereafter summarised the legal position in the following manner: (ABL International Ltd. Case (2004) 3 SCC 553) "

27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks. [(1998) 8 SCC 1]) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

> 69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances."

21. As regards contempt petition No. 235 of 2010, we from a perusal of order dated 1.6.2010, really do not find any undertaking actually having been furnished by respondent No. 6 so as to initiate the contempt proceedings against the said respondent. The mere fact that the remedial measures undertaken by the respondent No. 6 were not to the liking or complete satisfaction of the petitioner, in itself cannot be a ground to initiate contempt proceedings against respondent No. 6.

22. Now, adverting to CWP No. 2317 of 2011, it would be noticed that the petitioner has assailed the notifications dated 9.10.2009 and 21.6.2010 issued by the respondents under sections 3-A and 3-D of the Act, respectively on the ground that the same is colourable exercise of power and have been issued without following the procedure prescribed under the Act, and therefore, illegal and arbitrary and liable to be quashed mainly that the petitioner was not afforded an opportunity of hearing. It is contended that the petitioner had specifically requested for providing an opportunity of being heard as envisaged under section 3-C of the Act, but to no avail. Even the objections filed by the petitioner were not considered and, thus, the land of the petitioner has been acquired without following due process of law.

23. Respondent No.2 in a short reply has disputed all the contentions and has stated that as per the Act, no permanent construction is allowed within specified limit. The Section 3-A notification intended land acquisition showing intention of the National Highway Authority of India (for short 'NHAI') of four laning of Zirakpur-Parwanoo section on NH-22 and construction of bypass as a part of the project was published on 16.3.2007. The petitioner despite having full knowledge of this development had still purchased the land comprised in Khasra No.450 and executed the sale deed on 31.7.2007 for the reasons best known to it. Khasra No. 472 was part of section 3-A notification, which is a Government land, whereas Khasra No. 450 abuts Khasra No. 472. The alignment plans were available wherein Khasra No. 450 was earlier being considered part of Khasra No. 472, and therefore, was got omitted from incorporation in section 3-A notification. Even after issuance of notification under section 3-D, the petitioner purchased the land comprised in Khasra No. 449 and executed sale deed on 25.7.2008. In fact, the petitioner had full knowledge of forthcoming NH developments over which he purchased the land where no construction was legally permissible. The petitioner did not approach the NHAI seeking permission and rather sought permission for the unit right up to the end of the road boundary, which is contrary to National Highways Act.

24. It is further averred that the fact of issuance of notifications under sections 3-A and 3-D of the Act were well within the knowledge of the petitioner and were suppressed by him before the concerned authorities. According to this respondent, it has followed all the procedures that were envisaged under the Act by issuing notices in the newspaper before the acquisition and thereafter, opportunity was afforded before taking possession and the petitioner has been paid nearly 100 times the compensation, as per the averments contained in para 4 of the reply, which reads thus:

> "4. That it is submitted that the Competent Authority has announced the award for the acquired land measuring 646 sqm. in Khasra No.450, of the petitioner, amounting to Rs. 2196400/-. On perusal of the registered sale deed having account/sub account No.29/55, 56, 57, land No. 450/Purla/444, 445, 446, 447, 5 Nos. area 0-99-00 Hec its ½ share i.e. 0-46-45 Hect. which is registered for Rs. 163068 and by comparing the compensation for the 464 sqm, the compensation amount comes to 96.84 times the value as compared to the registered value of the land. It is brought out that the sale deed registered in 2007 by the petitioner is getting a return, that too from Govt. acquisition for a portion of land nearly 100 times within a span of 4 years. NHAI has received communication for award from competent Authority and further action being taken by NHAI as per the provisions of NH Act, 1956."

25. The petitioner has filed rejoinders wherein, it is averred that the award passed by the Collector appears to be ante dated and has been passed without affording an opportunity of hearing to him, as would be evident from the averments made in para 34 of the rejoinder to the reply of respondent No. 5, which reads thus:

> "34. That the contents of para No. 34 of the reply are wrong and hence denied and that of the writ petition are reiterated. No hearing was afforded to the petitioner by the competent authority as repeatedly requested by the petitioner and as has been lighted in detail in the writ petition as well as in the foregoing paragraphs. The order cannot be said to be speaking and appears to have been passed in an ante-dated manner after the institution of the writ petition. The said apprehension has been created in the mind of the petitioner on account of the fact that firstly the petitioner was not afforded any opportunity of being heard through a legal practitioner as repeatedly requested and secondly, has no copy of the order purported to have been passed on 29.11.2010 to the petitioner before the institution of the writ petition or issuance of notice by this Hon'ble Court. It is wrong and denied that the petitioner was heard by the competent authority on 24.11.2010."

26. It would be evident from the pleadings reproduced hereinabove that the specific claim of the petitioner is that the Collector had antedated the award. Obviously this question is of a complex nature and will require oral evidence for its determination and cannot be gone into by this Court in exercise of its jurisdiction.

27. It is not in dispute that earlier to filing of this petition i.e. CWP No. 2317 of 2011, the petitioner had already filed and had been pursuing CWP No. 1498 of 2010 and was, therefore, fully aware of all the developments that have taken place during interregnum. This would include the notification that was issued by the respondents from time to time under National Highways Act. That apart, the only right, which the petitioner had was a right of hearing and in case the same was denied to it, its remedy was elsewhere and not by way of the instant petition. More particularly, when the petitioner has not even sought the quashment of the award and has only sought for staying the operation of the various notifications issued under Sections 3-A and 3-D of the Act, which obviously cannot be done at this stage as the National Highway Authority of India was not only being constructed but is in operation for the last more than four years, rendering the prayer made in the writ petition redundant. However, in case, the petitioner still has any grievance, it is free to take recourse to such remedy as may be available to it under law.

Conclusion

28. In view of the aforesaid discussion, CWP No. 1498 of 2010 and CWP No. 2317 of 2011 are dismissed and notice issued in COPC No. 235 of 2010 is ordered to be discharged and the contempt petition is accordingly dismissed.

29. With the aforesaid observations, all the petitions are dismissed, so also the pending application(s), leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

LPA No. 445 of 2012 a/w LPA Nos. 99, 100 and 101 of 2015
Judgment reserved on: 7.11.2016
Date of decision: 21.11.2016

LPA No. 445 of 2012

State of Himachal Pradesh & Ors. ...Appellants.

Versus

Amar Chand Thakur & Ors. ...Respondents.

LPA No. 99 of 2015

State of Himachal Pradesh & Ors. ... Appellants.

Versus

Balwant Singh & Ors. ...Respondents

LPA No. 100 of 2015

State of Himachal Pradesh & Ors. ... Appellants.

Versus

Kanta Nanda ...Respondent

LPA No. 101 of 2015

State of Himachal Pradesh & Ors. ... Appellants.

Versus

Mohar Singh ...Respondent

Constitution of India, 1950- Article 226- Petitioners were working in the health and family welfare department as Computers and Junior statistical Assistants- there was parity with the computers and field investigators in economic and statistical department which was disturbed in the year 1994- representations were made and rejected – a writ petition was filed, which was allowed – respondents were directed to restore the parity- held, that there cannot be a strait jacket formula to hold that two posts having same or similar nomenclature should have same pay scale – merely because two posts have same name does not lead to any inference that posts are identical in every manner – this exercise can be carried out by the pay commission – the job profile and recruitment rules for the posts in two departments are different – principle of equal pay for equal work is applicable only when it is shown that the incumbents in the two posts discharge similar duties and responsibilities – the petitioners had failed to prove this fact- the writ petition was wrongly allowed- appeal allowed and judgment of writ Court set aside.

(Para- 15 to 31)

For the Appellants: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for the appellants in LPA No. 445 of 2012 and LPA Nos. 99, 100 and 101 of 2015.

For the Respondents: Mr. Dalip Sharma, Senior Advocate with Mr. Manish Sharma, Advocate, for respondents No. 1 to 8, LRs of respondent No. 9 and respondents No. 10 to 33 in LPA No. 445 of 2012.

Mr. Sunil Awasthi, Advocate, for the respondents in LPA Nos. 99 and 101 of 2015.

Nemo for the respondent in LPA No. 100 of 2015.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common questions of law and facts arise for consideration in all these appeals, the same were taken up together for hearing and are being disposed of by way of common judgment. In order to maintain clarity, facts of LPA No. 445 of 2012 have been taken into consideration. The party shall be referred to as the 'writ petitioners' and 'Department' respectively.

2. Material facts as borne out from the pleadings of the parties are that the writ petitioners were working in the Health and Family Welfare Department as Computers and Junior Statistical Assistants (for short 'Department'). As per the Recruitment and Promotion Rules notified on 7.12.1973 for Health and Family Welfare Department Subordinate Class-III Services, computers/ Computers-cum-clerks were placed in the pay scale of Rs.110-250. These posts were

to be filled up 100% by way of direct recruitment and the essential qualification for the same was Matric/Higher Secondary Part-I.

3. The post of Statistical Assistant appearing against Sl. No. 9 was in the pay scale of Rs. 200-500, whereas the post of Statistical Assistant at Sl. No. 10 was in the pay scale of Rs. 140-300. It was averred that the Computers in Economics and Statistics Department (for short 'E&S Department) were re-designated on 50:50 basis as Field Investigators Grade-I & Grade-II in the pay scale of Rs. 140-399 and Rs. 120-250 respectively w.e.f. 10.12.1974 vide memorandum dated 19.7.1978, whereas in the 'Department', the Computers were in the pay scale of Rs. 110-250 comparable to Field Investigators Grade-I in E&S Department and Junior Statistical Assistants were in the pay scale of Rs.140-300 comparable to Field Investigators Grade-II in E&S Department.

4. When the revision of pay scale took place w.e.f. 1.1.1986, the parity of pay scales of Computers of the 'Department' was again maintained with Field Investigators Grade-II (Rs.950-1800) and that of Junior Statistical Assistants (1200-2100) was maintained with that of Field Investigators Grade-I of E&S Department.

5. However, vide notification dated 8.7.1994, the pay scales of Computers and Junior Statistical Assistants of the 'Department' vis-a-vis Field Investigators Grade-I & Grade II of E&S Department was disturbed by revising the pay scale of Field Investigators Grade-II w.e.f. 1.1.1994 by allowing them three tier pay scales (950-1800 with initial start of Rs.1000, Rs. 1200-2130 and Rs.1500-2700 on 20:40:40 basis). However, the corresponding revision was not given to the Computers/Junior Statistical Assistants of the 'Department' and the Computers were continued in the pay scale of Rs.950-1800.

6. Thereafter, the State vide notification dated 17.10.1995 clubbed and re-designated the post of Field Investigators Grade-II and Field Investigator Grade-I in E&S Department as Investigators w.e.f. 1.1.1994 by again allowing them three tier pay-scale in the ratio of 20:40:40 as already granted vide notification dated 8.7.1994. Subsequently, from 1.1.1996 even the pay scales were revised by allowing them the revised pay scale of Rs. 3120-5160 with initial start of Rs. 3220 and Rs.4400-7000 with five years experience on 50:50 basis in place of 20:40:40 admissible before 1.1.1996, whereas the Computers in the Department were allowed revised pay scale of Rs. 3120-5160 in place of Rs. 950-1800 w.e.f. 1.1.1996 and three tier pay scale allowed to Field Investigators Grade-I and Grade-II was further revised and extended to them w.e.f. 1.1.1986 instead of 1.1.1994.

7. The writ petitioners represented and pursuant to such representations, Director (Health Services) brought to the notice of Principal Secretary (Health) that the pay scales of Statistical Personnel of E&S/Planning Department alongwith other Departments had been revised w.e.f. 1.1.1986 whereas Statistical Personnel of the 'Department' had been left out in that revision even though the pay scales and Recruitment and Promotion Rules of the posts were same in all the Department of the State. It was also pointed out that the appointments were made in various Departments, including present Department through H.P.P.S.C. on the basis of combined test/examinations as well as through Departmental Promotion Committee. However, the representations were rejected constraining the petitioners to approach this court by filing writ petitions wherein they claimed parity with the so-called similarly situated employees working in the E&S Department.

8. The Department filed its reply wherein it raised preliminary submissions to the effect that it was for the Government to decide the pay scales which were admissible to its employees. As regards the 'Department', it was submitted that the post of Computers was upgraded to the level of Investigators Grade-I & Grade-II and the revision of such post(s) has been made on post to post and Department to Department basis on Punjab pattern as such the pay scales of the category of posts of Investigators in the Department have also been revised from time to time, whereas the same pay scale cannot be granted to the post of Computers in the Department in question as their pay scales have been revised. It is the prerogative of the State

Government and the revision to the respective Department has been made on the basis of Punjab Pattern, therefore, petitioners cannot claim parity for grant of pay scale.

9. It was also averred that the nature of job responsibilities of the Statistical Assistants cannot be compared with those of the Computers and therefore there cannot be any parity between the two categories. It was further averred that the equation of post and equation of salary is a complex matter which is best left to expert body.

10. It was further averred that ordinarily pay scales are evolved keeping in mind several factors, e.g.

(i) method of recruitment,

(ii) level at which recruitment is made,

(iii) the hierarchy of service in a given cadre,

(iv) minimum educational / technical qualifications,

(v) avenues of promotion,

(vi) the nature of duties and responsibilities,

(vii) the horizontal and vertical relativities with similar jobs,

(viii) public dealings,

(ix) satisfaction level,

(x) employer's capacity to pay etc.

11. Lastly, It was averred that it is keeping in view the nature and duties of the category of the Computers in the Planning Department and E&S Department that the post of Computers was upgraded to the level of the Field Investigator Grade-I and Grade-II, which subsequently formed a single cadre as Investigators on the basis of the Punjab government. Since, the nature of the duties of the writ petitioners and similarly situated persons was not at all comparable to the duties of the Field Investigators / Investigators of Planning, Economics & Statistics Departments, their pay scales from retrospective effect could not be equated at par with the pay scales provided/granted to the field Investigators Grade-I and Grade-II from a retrospective date i.e. 1.1.1986 over and above the decision of the State Government taken from time to time on Punjab pattern.

12. The learned writ Court allowed the writ petition and directed the respondents to restore the parity in the pay scales of the Computers/Junior Statistical Assistants at par with their counterparts, i.e. field Investigator Grade-II and Field Investigator Grade-I (now re-designated as Investigators) in E&S Department w.e.f. 1.1.1986 with all the consequential benefits, within a period of three months from the date of production of certified copy of this judgment by the petitioner(s), failing which the petitioners will be entitled to interest @9% per annum till the implementation of this judgment.

Aggrieved by the aforesaid order, the 'Department' has filed these Letter Patent Appeals.

13. It is vehemently argued by Shri Anup Rattan, learned Additional Advocate General that the findings arrived at by the learned Writ Court to conclude that the writ petitioners were discharging the same and similar duties, responsibilities and the essential qualification and method of recruitment is highly erroneous and therefore the judgment be set-aside.

14. On the other hand, Shri Dalip Sharma, Sr. Advocate duly assisted by Mr. Manish Sharma, Advocate, contended that findings rendered by the learned Writ Court with respect to there being parity in duties and essential qualification, method of recruitment etc. should not be disturbed as these are well reasoned and prayed for dismissal of the appeal.

We have heard learned counsel for the parties and gone through the record of the case.

15. At the outset it may be observed that this Court after placing reliance upon various judgments of the Hon'ble Supreme Court has categorically held that there cannot be a straight jacket formula to hold two posts having same or similar nomenclature would have to be given the same pay-scale as this exercise is of a complex nature, which requires assessment of the nature and quality of the duties performed and the responsibilities shouldered by the incumbent on different posts. Even though two posts may be referred by the same name, it would not lead to the necessary inference that posts are identical in every manner. These matters are to be dealt with by expert body like Employer Pay Commission and it is not for the service Tribunal or the Writ court to normally venture to substitute its own opinion for the opinion rendered by the expert as they lack necessary expertise to undertake the complex exercise for the equation of post for the pay-scale.

16. References in this regard can conveniently be made to the judgment rendered in CWP No. 873 of 1993, titled **Roshan Lal vs. Hon'ble High Court of Himachal Pradesh**, decided on 27.10.1994, LPA No. 59 of 2009, titled as **H.P.S.E.B. vs. Rajinder Upadhayay**, decided on 11.9.2014, LPA No. 11 of 2014, titled as **Principal Secretary Vs. Partap Thakur**, decided on 22.9.2014, LPA No. 99 of 2010, titled as **H.P. State Electronics Development Corporation Ltd. vs. Vijay Sikka**, decided on 6.10.2015, and LPA No. 81 of 2012, titled as **Kameshwar Gautam vs. HPMC**, decided on 2.12.2015.

17. In addition to the aforesaid, we find that the issue in question now stands succinctly but lucidly considered and expounded by Hon'ble Supreme Court in its recent judgment in a batch of appeals titled **State of Punjab and Ors. Vs. Jagjit Singh & Ors. Civil Appeal No. 213 of 2013, decided on 26.10.2016**, wherein the Hon'ble Supreme Court in paragraphs 7 to 24 of the report has dealt with the cases of employees engaged on regular basis, who were claiming higher wages under the condition equal pay for equal work. It was premised on the ground that the duties and responsibilities rendered by them, were against the same post for which higher pay-scale was being allowed in other government department though their duties and responsibilities were the same as of the other posts with different designation but they were placed in a lower scale.

18. Hon'ble Supreme Court after taking into consideration the entire gamut of law on the subject in a well articulated judgment has laid down by the following principles to be followed in matters relating to 'equal pay for equal work' which reads as under:-

> **(i) The 'onus of proof', of parity in the duties and responsibilities of the subject post with the reference post, under the principle of 'equal pay for equal work', lies on the person who claims it. He who approaches the Court has to establish, that the subject post occupied by him, requires him to discharge equal work of equal value, as the reference post (**see –Orissa University of Agriculture & Technology, 2003 5 SCC 188 Union Territory Administration, Chandigarh v. Manju Mathur, 2011 2 SCC 452, the Steel Authority of India Limited, 2011 11 SCC 122 and the National Aluminum Company Limited case**).**
>
> **(ii) The mere fact that the subject post occupied by the claimant, is in a "different department" vis-a-vis the reference post, does not have any bearing on the determination of a claim, under the principle of 'equal pay for equal work'. Persons discharging identical duties, cannot be treated differently, in the matter of their pay, merely because they belong to different departments of Government (**see – Randhir Singh case, 1982 1 SCC 618 , and the D.S. Nakara case 1983 1 SCC 304**).**

(iii) The principle of 'equal pay for equal work', applies to cases of unequal scales of pay, based on no classification or irrational classification (see – Randhir Singh case**).**

For equal pay, the concerned employees with whom equation is sought, should be performing work, which besides being functionally equal, should be of the same quality and sensitivity (see –Federation of All India Customs and Central Excise Stenographers (Recognized) case 1983 3 SCC 91, the Mewa Ram Kanojia case, 1989 2 SCC 235, the Grih Kalyan Kendra Workers' Union case, 1991 1 SCC 619 and the S.C. Chandra case, 2007 8 SCC 279**).**

(iv) Persons holding the same rank/designation (in different departments), but having dissimilar powers, duties and responsibilities, can be placed in different scales of pay, and cannot claim the benefit of the principle of 'equal pay for equal work' (see – Randhir Singh, 1982 1 SCC 618, State of Haryana v. Haryana Civil Secretariat Personal Staff Association, 2002 6 SCC 72 and the Hukum Chand Gupta, 2012 12 SCC 666**).**

Therefore, the principle would not be automatically invoked, merely because the subject and reference posts have the same nomenclature.

(v) In determining equality of functions and responsibilities, under the principle of 'equal pay for equal work', it is necessary to keep in mind, that the duties of the two posts should be of equal sensitivity, and also, qualitatively similar. Differentiation of pay-scales for posts with difference in degree of responsibility, reliability and confidentiality, would fall within the realm of valid classification, and therefore, pay differentiation would be legitimate and permissible (see –Federation of All India Customs and Central Excise Stenographers (Recognized), 1988 3 SCC 91 and the State Bank of India, 2002 4 SCC 556)**.**

The nature of work of the subject post should be the same and not less onerous than the reference post. Even the volume of work should be the same. And so also, the level of responsibility. If these parameters are not met, parity cannot be claimed under the principle of 'equal pay for equal work' (see - State of U.P. v. J.P. Chaurasia, 1989 1 SCC 121 and the Grih Kalyan Kendra Workers' Union, 1991 1 SCC 619)**.**

(vi) For placement in a regular pay-scale, the claimant has to be a regular appointee. The claimant should have been selected, on the basis of a regular process of recruitment. An employee appointed on a temporary basis, cannot claim to be placed in the regular pay-scale (see –Orissa University of Agriculture & Technology, 2003 5 SCC 188)**.**

(vii) Persons performing the same or similar functions, duties and responsibilities, can also be placed in different pay-scales. Such as - 'selection grade', in the same post. But this difference must emerge out of a legitimate foundation, such as – merit, or seniority, or some other relevant criteria (see - State of U.P. v. J.P. Chaurasia, 1989 1 SCC 121)**.**

(viii) If the qualifications for recruitment to the subject post vis-a-vis the reference post are different, it may be difficult to conclude, that the duties and responsibilities of the posts are qualitatively similar or comparable (see –Mewa Ram Kanojia, 1989 2 SCC 235 and Government of W.B. v. Tarun K. Roy 2004 1 SCC 347)**. In such a cause, the principle of 'equal pay for equal work', cannot be invoked.**

(ix) The reference post, with which parity is claimed, under the principle of 'equal pay for equal work', has to be at the same hierarchy in the service, as the subject post. Pay-scales of posts may be different, if the hierarchy of the

posts in question, and their channels of promotion, are different. Even if the duties and responsibilities are same, parity would not be permissible, as against a superior post, such as a promotional post (see - Union of India v. Pradip Kumar Dey, 2000 8 SCC 580 and the Hukum Chand Gupta, 2012 12 SCC 666).

(x) A comparison between the subject post and the reference post, under the principle of 'equal pay for equal work', cannot be made, where the subject post and the reference post are in different establishments, having a different management. Or even, where the establishments are in different geographical locations, though owned by the same master (see – Harbans Lal, 1989 4 SCC 459). Persons engaged differently, and being paid out of different funds, would not be entitled to pay parity (see - Official Liquidator v. Dayanand, 2008 10 SCC 1)**.**

(xi) Different pay-scales, in certain eventualities, would be permissible even for posts clubbed together at the same hierarchy in the cadre. As for instance, if the duties and responsibilities of one of the posts are more onerous, or are exposed to higher nature of operational work/risk, the principle of 'equal pay for equal work' would not be applicable. And also when, the reference post includes the responsibility to take crucial decisions, and that is not so for the subject post (see – State Bank of India, 2002 4 SCC 556)**.**

(xii) The priority given to different types of posts, under the prevailing policies of the Government, can also be a relevant factor for placing different posts under different pay-scales. Herein also, the principle of 'equal pay for equal work' would not be applicable (see - State of Haryana v. Haryana Civil Secretariat Personal Staff Association, 2002 6 SCC 72)**.**

(xiii) The parity in pay, under the principle of 'equal pay for equal work', cannot be claimed, merely on the ground, that at an earlier point of time, the subject post and the reference post, were placed in the same pay-scale. The principle of 'equal pay for equal work' is applicable only when it is shown, that the incumbents of the subject post and the reference post, discharge similar duties and responsibilities (see - State of West Bengal v. West Bengal Minimum Wages Inspectors Association, 2010 5 SCC 225).

(xiv) For parity in pay-scales, under the principle of 'equal pay for equal work', equation in the nature of duties, is of paramount importance. If the principal nature of duties of one post is teaching, whereas that of the other is nonteaching, the principle would not be applicable. If the dominant nature of duties of one post is of control and management, whereas the subject post has no such duties, the principle would not be applicable. Likewise, if the central nature of duties of one post is of quality control, whereas the subject post has minimal duties of quality control, the principle would not be applicable (see – Union Territory Administration, Chandigarh v. Manju Mathur, 2011 2 SCC 452)**.**

(xv) There can be a valid classification in the matter of pay-scales, between employees even holding posts with the same nomenclature i.e., between those discharging duties at the headquarters, and others working at the institutional/sub-office level (see – Hukum Chand Gupta, 2012 12 SCC 666)**, when the duties are qualitatively dissimilar.**

(xvi) The principle of 'equal pay for equal work' would not be applicable, where a differential higher pay-scale is extended to persons discharging the same duties and holding the same designation, with the objective of

ameliorating stagnation, or on account of lack of promotional avenues (see – Hukum Chand Gupta , 2012 12 SCC 666).

(xvii) Where there is no comparison between one set of employees of one organization, and another set of employees of a different organization, there can be no question of equation of pay-scales, under the principle of 'equal pay for equal work', even if two organizations have a common employer. Likewise, if the management and control of two organizations, is with different entities, which are independent of one another, the principle of 'equal pay for equal work' would not apply (see – S.C. Chandra case 2007 8 SCC 279, and the National Aluminum Company Limited case, 2014 6 SCC 756).

19. Bearing in mind the aforesaid exposition of law, it would be noticed that the petitioners have virtually failed to plead the case of parity and the pleadings if any to this effect are contained only in ground 'J' in CWP No. 2318 of 2011 giving rise to LPA No. 445 of 2012, which read as under:-

"J) That the duties, responsibilities, essential qualifications and method of recruitment was / is also similar in both the departments. It is submitted that the post of Sr. Statistical Assistant in H&FW Department was denied pay parity with Statistical Assistant in E&S Department on the ground that such parity was not permissible in view of Punjab pattern of pay scale"

20. Likewise in CWP No. 12472 of 2008 (LPA No. 99 of 2015) and CWP(T) No. 12509 of 2008 (LPA No. 101 of 2015), the pleadings read as under:-

"(xiv) That the applicant was equally qualified like the Field Investigators Grade-II/Investigator of Economics and Statistic Department and the applicant was well as the Investigators Grade-II/Investigators performed similar and identical nature of duties and enjoyed the same status in all respect as such the respondent State is under legal obligation to bring uniformity in pay scales between the applicant and similarly situated employees, Field Investigators Grade-II/Investigators and different measures cannot be adopted in providing the pay scales by the respondent-State. As such, the applicant is entitled for the pay scale as at par with the pay scale applicable and provided to the Field Investigators Grade-II/Investigators of Economics and Statistic Department."

21. As regards LPA No. 100 of 2015, which was arises out of decision rendered in CWP No. 8905 of 2010, it has been averred:-

"(A) That nature of duties and qualifications of Computers in the Health & Family Welfare Department are the same as in the Planning and Economics & Statistical Departments as confirmed by the respondent No. 3 himself in his letter Annexure P-7. The action of the respondent State to have two different pay scales for the same category of post, having the same nature of duties and responsibilities, especially after having adopted the same pattern for some posts ignoring others in the same cadre in different Departments within the same Government, is discriminator and violative of Articles 14 and 16 of the Constitution of India."

Obviously, these pleadings do not meet the requirement as laid down by the Hon'ble Supreme Court in ***Jagdish Singh's case supra.***

22. Apparently, the only reason spelt out by the learned Writ Court for allowing the petition and granting parity of pay scale to the petitioners was that they are discharging same and similar duties, responsibilities to their counter-parts working in the other departments, as is evidently clear from para 9 of the impugned judgment, which reads thus:-

"9. It is settled law that it is for the employer to grant the pay scales, however, it is equally true that while undertaking this exercise there should not be any arbitrariness or unreasonableness. In the instant case, as noticed above, petitioners are discharging the same and similar duties, responsibilities and the essential qualifications and method of recruitment is the same, but despite that they been denied the higher pay scale granted to their counterparts working in other departments. The employer in both the cases is the State and thus the petitioners cannot be discriminated against. The persons working as Computers comparable to Field Investigators Grade-II form homogenous class and they cannot be discriminated merely on the basis that they happen to work in different department. Respondents have not pointed out why the petitioners have been granted different pay scale vis-à-vis their counterparts in E&S Department in the State. There is no intelligible differentia so as to distinguish the Computers working in the respondent-Department vis-a-vis Field Investigators Grade-II and Grade-I working in other departments of the State for the purpose of pay scales."

23. The learned Writ Court has obviously fallen into error by not taking into consideration that in E&S Department the post of Field Investigators Grade-II and Field Investigator Grade-I were in a single cadre and filled up by placement in the ratio 50:50 of total posts in the pay scale of Rs. 3120-5160 with initial start of Rs. 3220/- (50%) Rs. 4400-7000 (50%) w.e.f. 1.1.1996 respectively. Later on the total number of posts of Field Investigator Grade-II and Field Investigator Grade-I were merged to form a single cadre of Investigators w.e.f. 1.1.1986 by allowing placement in the ratio of 20:40:40 of total posts in the pay scales of Rs. 950-1800 with a start at Rs.1000/-, Rs. 1200-2100 & Rs. 1500-2640 respectively vide notification No. Fin(PR)B(7)-1/99 dated 23rd August, 2002 whereas in the H&FW 'Department', as per R&P Rules of the concerned post. Computer was in the pay scale of Rs. 950-1800 and Junior Statistical Assistant was in the pay scale of Rs.1200-2100.

24. Apart from the above, the learned Writ Court has further erred in not considering that the post and designation of Junior Statistical Assistant does not exist in any department of State Government except Health & Family Welfare Department. Secondly, in the Health & Family Department, the post of Junior Statistical Assistant is filled up 100% by promotion from amongst the Computer failing which by direct recruitment.

25. In addition, job profile of the Investigator in the E&S Department and Department in question are also different. The Investigator of E&S Department have to conduct socio-economic studies/survey (National Sample Survey, GoI), collection of data from various government and semi government departments, preparation of tabulation sheets for posting data, computation of statistical data manually and with the help of calculating machines/computer etc. whereas the Computers/Junior Statistical Assistants in Department simply collect information on various component of Health & Family Welfare Programme at sub centre level, compile data on characteristics of family planning, acceptors and MCH beneficiaries when required from the sterilization and IUD acceptors registers etc. The duties and responsibilities of the Investigators of E&S Department involves collection/preparation of data of all programmes, schemes & information through out the State whereas Computers & Junior Statistical Assistants of the Department are confined to a single department.

26. Shri Dalip Sharma, learned Sr. Counsel for the writ petitioners would still vehemently argue that the petitioners are entitled to claim parity as it has been duly established on record that not only the qualification but even the pay scale of the writ petitioners was same and similar to the other departments of the government, more especially, the E&S Department and it was only by way of notification dated 8.7.1994 that the pay scales of the Computers and Junior Statistical Assistants vis-à-vis Field Investigators Grade-I & Grade-II of E&S Department

were disturbed and thereafter the disparity continued. This disparity was, in fact, even acknowledged by the Directorate Health Services when he brought all these facts to the notice of Principal Secretary (Health).

27. However, the aforesaid submissions of the petitioners cannot be accepted in teeth of the ratio laid down by Hon'ble Supreme Court in ***Jagjit Singh's case supra,*** *w*herein the Hon'ble Supreme Court has categorically held that 'onus of proof' of parity in the duties and responsibilities of the subject post with the reference post, under the principle of 'equal pay & equal work', lies on the person who claims it and it is for him to establish that the subject post occupied by him, requires him to discharge equal work of equal value, as the reference post. For this purpose the employees concerned with whom equation as is sought should be performing work, which besides being functionally equal should be of same quality and sensitivity.

28. Further, in determining equality of functions and responsibilities, it would be necessary to keep in mind that the duties of the two posts should be of equal sensitivity and qualitatively similar. Differentiation of pay-scales for posts with difference in degree of responsibility, reliability and confidentiality, would fall within the realm of valid classification and therefore, pay differentiation would be legitimate and permissible. Therefore, the person holding the same rank/designation but having dissimilarl powers, duties and responsibilities can be placed in different scales of pay, and cannot claim the benefit of the principle of 'equal pay for equal work'.

29. It has been reiterated in ***Jagjit Singh case (supra)*** that parity in pay, under the aforesaid principal of 'equal pay for equal work' cannot be claimed merely on the ground, that an earlier point of time, the subject post and the reference post were placed in the same pay scale. The principle 'equal pay for equal work' is applicable only when it is shown, that the incumbent of the subject post and the reference post discharge similar duties and responsibilities while claiming parity in pay scales under principle of 'equal pay for equal work' equation in the nature of duties is of paramount importance and there is no comparison between one set of employees in one organisation and another set of employees in different organisations, there can be no question of equation of pay scale under this principle.

30. It would be evidently clear from the narration of the factual aspects that the petitioner has failed to discharge the onus of proof, of parity by establishing that the subject post occupied by them requires to discharge equal work of equal value as the reference post. The petitioners were required to prove that they were performing the work, which was functionally equal and of the same quality and sensitivity with the reference and the same fact that an earlier point of time the subject posts and the reference posts were placed in the same pay-scale cannot in itself be a ground to claim 'equal pay for equal work', as this principle is applicable only when it is shown that the incumbent of the said post and the reference post, discharge similar duties and responsibilities.

31. Needless to say that under the principle of 'equal pay for equal work' parity in the duties and responsibilities of the subject post with the reference post lies on the person who claims it and having failed to discharge such onus the claim of the petitioner for 'equal pay and equal work' vis-â-vis the counter-part working in the E&S and other departments is clearly not maintainable.

32. In view of the aforesaid discussion, the learned Writ Court has clearly fallen in error in allowing the writ petition and quashing the decision of the Department. The judgment passed by the learned Writ Court is accordingly set aside and consequently the writ petitions are dismissed, leaving the parties to bear their own costs. Pending application(s), if any, stands disposed of.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Des Raj and another ..Appellants/defendants.
Versus
Krishan Lal and others ..Respondents/plaintiffs.

RSA No. 403 of 2008
Reserved on : 8/11/2016
Date of decision: 22/11/2016

Indian Succession Act, 1925- Section 63- Plaintiffs pleaded that J was the owner of the suit land who died intestate - Will propounded by the defendants is wrong – the defendants pleaded that J had executed a Will in favour of defendants No. 1 and 2 in his sound disposing state of mind – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- held in second appeal that finger print expert had stated that the thumb impression on the Will was different from the admitted thumb impression of the deceased – the Appellate Court had rightly allowed the appeal- appeal dismissed. (Para-7 to 9)

Case referred:
Parukuty Amma Vs. Thankam Amma, 2004(2) Civil Court cases 33

For the appellants: Mr. Anil Kumar Advocate vice Mr. Anup Rattan, Advocate.
For the respondents: Mr. Kishore Pundeer, Advocate vice Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

This appeal stands directed against the impugned judgement of the learned Additional District Judge, Una, Himachal Pradesh, whereby it allowed the appeal preferred before it by the plaintiffs and set aside the judgment and decree, rendered on 7.6.2005 by the trial Court.

2. The facts necessary for rendering a decision in the instant appeal are that suit land was owned and possessed by one Julfi Ram son of Surjan who happened to be the real brother of plaintiffs and defendant No.3. The said Julfi Ram was stated to be unmarried and had died intestate having been succeeded by his four brothers i.e. plaintiffs and defendant No.3. Plaintiffs claim that they had come in possession of the suit land and the defendants No. 1 and 2 had no right, title or interest in the suit land. The defendants No. 1 and 2 were further alleged to have got wrong and an illegal mutation No. 32 sanctioned in their favour on 14.1.1994 without any basis in connivance with the revenue officials. Decree for declaration had been sought by the plaintiffs that they and defendant No.3 are owners in possession of the suit land. The mutation of succession sanctioned on 14.1.1994 in favour of defendants No. 1 and 2 was also challenged being wrong illegal null and void. Consequently, relief of permanent injunction restraining the defendants from interfering in the possession of the plaintiffs or changing the nature of the suit land was also sought.

3. The defendants resisted and contested the suit by taking preliminary objection qua suit being bad for want of enforceable cause of action, locus standi of the plaintiffs to file the suit was denied apart therefrom its being bad for misjoinder of defendant No.3. On merits it was the case of the defendant that the entire estate of late Julfi Ram had been succeeded by defendants No. 1 and 2 on the basis of a valid will having been executed in their favour on 6.1.1993 in a sound disposing mind. As per the defendants since the said Julfi Ram was looked after by the defendants during his life time, as a token of their service the deceased Julfi Ram had executed a valid Will in their favour. As a sequel thereto the mutation was alleged to have been rightly sanctioned on the basis of the said Will.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties at contest:-

1. Whether the plaintiffs and defendants No. 3 are owners in possession of the suit land? OPP.
2. Whether the mutation No. 32 dated 14.1.1994 sanctioned by A.C. 2nd Grade, Una, is wrong, illegal, null and void, as alleged? OPP.
3. Whether the plaintiffs have no cause of action? OPD.
4. Whether the suit is not maintainable, as alleged? OPD.
5. Whether the plaintiffs have no locus-standi to file the suit? OPD.
6. Whether the suit is bad for misjoinder of necessary parties, as alleged? OPD.
7. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction as alleged? If what is correct valuation of suit property? OPD.
8. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs yet the learned First Appellate Court allowed the appeal preferred therefrom before it by the plaintiffs.

6. Now the defendants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 21.08.2008 this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> "1. Whether the Appellate Court has committed illegality by shifting the burden of proof of proving the report of finger print expert on present appellants/defendants?
>
> 2. Whether the impugned judgement and decree of the Appellate Court is a result of mis-apprecitation and mis reading of evidence particularly Ext. DW-2/A?"

Substantial questions of law.

7. Defendants No. 1 and 2 had on anvil of a testamentary disposition executed vis.a.vis them qua his estate by one Julffi Ram staked claim qua the suit property. Their claim for title to the suit property ensuing from theirs holding a valid testamentary disposition of the deceased testator secured approbation from the learned A.C. 2nd Grade, Una concerned, comprised in his thereupon attesting mutation number 32 on 14.1.1994 qua the suit property vis.a.vis the defendants No.1 and 2.

8. The factum of proof of Ext.DW-2/A within the ambit of the statutory mandate of Section 63 of the Indian Evidence Act stood purveyed by the propounders of Will Ext.DW-2/A comprised in theirs affirmatively examining a marginal witness thereto. However, proof in the aforesaid manner as stood adduced by the propounders of Will comprised in Ext.DW-2/A qua thereupon its standing construeable to be proven to be validly and duly executed by the deceased testator visibly holds no vigour tritely with the finger print experts in their apposite reports in sequel to theirs holding comparison of the disputed thumb impressions of the deceased testator occurring on the relevant testamentary disposition comprised in Ext.DW-2/A with his uncontroverted admitted thumb impressions, unveiling an opinion qua the thumb impressions of the deceased testator Julfi Ram borne on Ext.DW-2/A not holding compatibility with his uncontroverted admitted thumb impressions whereupon they recorded a conclusion qua the thumb impressions of the deceased testator borne on Ext.DW-2/A not holding any aura of authenticity. The pronouncements recorded by the finger print expert(s) sweepingly effaces the concert of the defendants, to through a marginal witness to Ex. DW-2/A to prove the factum qua

its valid and due execution within the ambit of the statutory mandate also thereupon the testimony of the marginal witness to Ext.DW-2/A looses its creditworthiness. However, the learned trial Court had dispelled the vigour of the relevant report(s) furnished by the finger print expert(s) on the score of theirs being inadmissible in evidence, inadmissibility whereof stood pronounced by it to spur from omission of their respective authors standing examined in proof thereof. The sinew of the dispelling by the learned trial Court of the sanctity of the apposite opinion(s) recorded by the finger print expert(s) on the relevant material transmitted to them for theirs unveiling their opinion thereon, is magnifingly bereft of any validation. An authoritative pronouncement recorded by the Hon'ble High Court of Kerala in case **Parukuty Amma Vs. Thankam Amma 2004(2) Civil Court cases 33,** relevant paragraph whereof stands extracted hereinafter

> "In this connection, it is to be remembered that there is a different between the opinion of the expert with regard to the handwriting and the opinion of the expert with regard to the thumb impression. There is no forgery possible with regard to the thumb impression whereas an expert in forgery can write exactly like the original handwriting of another person. This distinction is well recognized by the decision of the Supreme Court in Jaspal Singh vs. State of Punjab, AIR 1979 SC 1708. the Supreme Court has stated that the science of identifying thumb impression is an exact science and does not admit of any mistake or doubt. This decision was followed by this Court in various decision including one by a Division Bench in Jamesh @ Chacko Vs. State, 1994(1) KLJ 871, even in a case where the impression was smudged but not to the extent of impossibility of comparison. According to the learned counsel whether it is thumb impression or handwriting they are only relevant facts as contained in Section 45 of the Evidence Act and this Court has to arrive at an opinion after taking into account the report of the expert with the evidence."

wherewithin it stands accentuatedly pronounced qua the solemnity of authenticity of determination by a finger print expert of thumb impressions by his adopting the relevant mode falling within the domain of best besides precise scientific evidence whereupon it concluded of the relevant opinion recorded by the finger print expert (s) being unamenable for its standing discounted. The apt ensual therefrom is qua the report(s) of the finger print expert(s) especially when hereat they emanated from a government agency holding a sacrosanct pedestal of theirs being per se admissible in evidence also reliance being imputable thereupon without insisting upon their author(s) to prove their contents unless the relevant unfoldments occurring therein stand impugned by the defendants. However, the defendants as unraveled by an order of the learned trial Court recorded on 5.4.2004 omitted to at the time of theirs standing tendered therebefore purvey thereat their apposite objections thereto rather they thereat communicated qua it being unamenable for consideration at the stage of theirs standing tendered therebefore rather their impact upon the efficacy of the evidence adduced by the defendants pronouncing upon the valid and due execution of Ext.DW-2/A being open to be determined by the learned trial Court. Consequently, the aforesaid unfoldments make a palpable display of the defendants acquiescing to the recitals occurring in the report(s) of the finger print expert(s) concomitantly also theirs not impugning the validity of the report(s) besides theirs not assailing the opinion(s) recorded therein whereupon obviously when for reasons aforestated unless they stood impugned by the defendants theirs on their mere tendering being readable without their authors proving theirs contents whereas with the defendants not purveying their objections thereto neither they impugning them whereupon hence with the apt condition for theirs being unreadable in evidence unless their respective authors stood examined remaining unsubstantiated rendered them to be readable besides admissible in evidence.

9. For reasons aforesaid this Court concludes with aplomb of the judgement and decree of the learned first Appellate Court standing sequelled by its appraising the entire relevant evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of relevant material on record by the learned appellate Court not suffering from any

perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the relevant material available on record. I find no merit in this appeal, which is accordingly dismissed and the judgment and decree of the learned Appellate Court is maintained and affirmed. Substantial questions of law stands answered against the defendants. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, JUDGE.

Rakesh Kumar s/o Sh. Bansi Lal ...Petitioner/Co-defendant No.1

Versus

Suman Sharma d/o Sh.Bansi Lal & Others ...Non-petitioners/Plaintiffs & co-defendants No.2 to 5

CMPMO No. 330/2015
Order reserved on : 23.9.2016
Date of order: 22.11.2016

Code of Civil Procedure, 1908- Section 151- Order 8 Rule 6-A- A counter- claim was filed by the defendants No. 2 to 5- an application was filed by defendant No. 1 for excluding the counter-claim, which was dismissed – held, that if a counter-claim is directed against the plaintiff, a defendant can seek relief against the co-defendant – the counter-claim filed by the defendants No. 2 to 5 was not solely directed against defendant No. 1 but was also directed against the plaintiff – therefore, the Trial Court had rightly dismissed the application for excluding the counter-claim-petition dismissed.(Para-11 to 14)

Cases referred:

Rohit Singh Vs. State of Bihar, 2006(12) SCC 734

Nirmala Devi & Others Vs. Dhian Singh & Others, 2010(1) Himachal Law Reporter H.P. High Court 434

For petitioner/co-defendant No.1	:	Mr. Ashwani Sharma, Sr.Advocate with Mr. Ishan Thakur, Advocate
For non-petitioners No.1 to 3/Plaintiffs	:	None
For non-petitioners No.4 to 7/co-defendants No.2 to 5	:	Mr. Anup Rattan, Advocate

The following order of the Court was delivered:

P. S. Rana, J. (Oral)

Present petition is filed under Article 227 of Constitution of India against order dated 24.4.2015 passed by learned Civil Judge (Sr. Division) Dehra Distt. Kangra (H.P.) in C.S. No. 174/2012 title Smt. Suman Sharma & Others Vs. Rakesh Kumar & Others whereby learned Trial Court dismissed the application filed by co-defendant No.1 under section 151 CPC for excluding counter claim filed by co-defendants No.2 to 5 from civil suit No. 174 of 2012.

Brief facts of the case:

2. Smt. Suman Sharma & Others plaintiffs filed civil suit for declaration to the effect that plaintiffs are owners in possession of suit land and entitled to remain in possession of suit land in future also being successors-in-interest of deceased Bansi Lal. It is pleaded that alleged Will dated 9.10.2002 executed by deceased Bansi Lal in favour of co-defendant No.1 Rakesh Kumar is false, frivolous, fictitious and is a result of fraud and undue influence and has no effect on the rights of plaintiffs. It is further pleaded that mutation Nos. 391 and 648 sanctioned and attested on 28.4.2007 are also null and void and not binding upon the rights of

plaintiffs. Consequential relief of perpetual and prohibitory injunction sought restraining the defendants from cutting, felling and removing any type of tree from the suit land and from changing the nature of suit land and from alienating the suit land in any manner. Additional relief of rendition of accounts also sought.

3. Per contra written statement filed on behalf of co-defendant No.1 Rakesh Kumar pleaded therein that suit filed by plaintiffs is not maintainable. It is pleaded that suit is time barred. It is further pleaded that plaintiffs have deliberately suppressed material facts from the Court. It is further pleaded that plaintiffs are estopped to file the present suit by their acts, deeds, conduct and acquiescences. It is further pleaded that valuation of suit for purposes of Court fee and jurisdiction not properly mentioned. It is further pleaded that plaint filed by plaintiffs is not verified in accordance with law. It is further pleaded that plaintiffs are daughters and co-defendant No.1 Rakesh Kumar is son of late Sh. Bansi Lal. It is further pleaded that co-defendants No.2 to 5 namely C. L. Sharma, Nand Lal, Suresh Kumari and Rajni Devi are sons and daughters of deceased Smt. Shanti Devi who was daughter of Smt. Shanti Devi first wife of deceased Bansi Lal. It is further pleaded that plaintiffs and co-defendant No.1 were born from Smt. Kamla Devi who is second wife of late Sh. Bansi Lal. It is further pleaded that suit property was acquired by deceased Bansi Lal on the basis of gift deed executed by his uncle Sh. Ajudhia Dass and on the basis of Will executed by his father Sohan Lal. It is further pleaded that suit property became self acquired property of deceased Bansi Lal. It is further pleaded that Sh. Bansi Lal has executed registered Will dated 9.10.2002 in favour of co-defendant No.1 Rakesh Kumar. It is further pleaded that co-defendant No.1 after the death of Sh. Bansi Lal on the basis of testamentary document became absolute owner in possession of suit property. It is further pleaded that mutations Nos. 391 and 648 were sanctioned in accordance with law and on the basis of testamentary document i.e. registered Will dated 9.10.2002. It is further pleaded that plaintiffs pleaded mutually contradictory and destructive pleas in the pleadings. It is further pleaded that plaintiffs were married and they are residing in Punjab. It is further pleaded that co-defendant No.1 used to look after his old aged father. It is further pleaded that in view of testamentary document in favour of co-defendant No.1 plaintiffs have no legal right, title and interest over suit land. Prayer for dismissal of suit sought.

4. Per contra separate written statement filed on behalf of co-defendants No.2 to 5 namely C. L. Sharma, Nand Lal, Suresh Kumari and Rajni Devi pleaded therein that plaintiffs have no cause of action and plaintiffs are etopped from filing the suit by their act and conduct. It is further pleaded that plaintiffs did not approach the Court with clean hands. It is further pleaded that civil suit is collusive between plaintiffs and co-defendant No.1 Rakesh Kumar. It is further pleaded that deceased Bansi Lal died intestate and parties have inherited suit property. It is further pleaded that no Will was executed by deceased Bansi Lal on dated 9.10.2002 in favour of co-defendant No.1 Rakesh Kumar. Prayer for dismissal of suit sought.

5. Co-defendants No.2 to 5 namely C. L. Sharma, Nand Lal, Suresh Kumari and Rajni Devi filed counter claim under Order VIII Rule 6-A CPC in civil suit No. 174 of 2012 for declaration that counter claimants alongwith plaintiffs and co-defendant No.1 are owners in possession of suit land on the basis of legal heirs. It is pleaded that suit property is Hindu ancestral and coparcenery property. It is pleaded that parties have right and interest in the property by birth being coparcener. Additional decree of possession by way of partition of land and rendition of accounts also sought by co-defendants No.2 to 5 in counter claim. Prayer for decree of counter claim sought.

6. Written statement to counter claim filed by plaintiffs pleaded therein that deceased Bansi Lal died intestate. It is further pleaded that deceased Bansi Lal did not execute any Will on dated 9.10.2002 in favour of co-defendant No.1 Rakesh Kumar.

7. Co-defendant No.1 Rakesh Kumar filed application under section 151 CPC for excluding counter claim from civil suit No. 174 of 2012 on the ground that counter claim filed by co-defendants No.2 to 5 in C.S. No.174/2012 is not maintainable against co-defendant No.1. It is pleaded by co-defendant No.1 that property of late Sh. Bansi Lal has been inherited by co-

defendant No.1 by way of registered Will dated 9.10.2002. It is pleaded that co-defendants No.2 to 5 did not seek any relief against plaintiffs in counter claim. It is pleaded that counter claim be excluded from civil suit No. 174 of 2012.

8. Per contra response filed on behalf of co-defendants No.2 to 5 upon application filed under section 151 CPC by co-defendant No.1 pleaded therein that registered Will dated 9.10.2002 is challenged. It is pleaded that co-defendants No.2 to 5 have sought relief against plaintiffs as well as co-defendant No.1 in counter claim for declaration, possession by way of partition and rendition of accounts. It is pleaded that counter claim is maintainable. Prayer for dismissal of application filed under section 151 CPC sought. Learned Trial Court on dated 24.4.2015 dismissed application filed under section 151 CPC by co-defendant No.1 namely Rakesh Kumar for excluding counter claim from civil suit No. 174 of 2012. Feeling aggrieved against the order dated 24.4.2015 present petition filed under Article 227 of Constitution of India by co-defendant No.1 Sh. Rakesh Kumar.

9. Court heard learned Advocate appearing on behalf of petitioner and non-petitioners and Court also perused the entire records carefully.

10. Following points arise for determination in the present petition:

1) Whether petition filed under Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Relief.

Findings upon point No.1 with reasons:

11. Submission of learned Advocate appearing on behalf of co-defendant No.1 namely Rakesh Kumar that counter claim filed by co-defendants No.2 to 5 under Order VIII Rule 6-A CPC against co-defendant No.1 cannot be filed as per law and same be excluded from civil suit No.174/2012 is decided accordingly. Counter claim under Order VIII Rule 6-A CPC was incorporated in Code of Civil Procedure 1908 w.e.f. 1.2.1977 vide amendment in CPC vide Act 104 of 1976. Order VIII Rule 6-A CPC is quoted : (1) Defendant in a suit may in addition to his right of pleadings can file counter claim against the claim of plaintiff either before or after filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired provided that counter claim should not exceed the pecuniary limits of the jurisdiction of court. (2) Counter claim would have the same effect as a cross suit so as to enable the court to pronounce final judgment in the same suit both on the original claim and on the counter claim. (3) Plaintiff would be at liberty to file written statement in answer to the counter claim of the defendant within such period as may be fixed by the court. (4) Counter claim would be treated as plaint and governed by the rules applicable to plaint. It is well settled law that counter claim is not maintainable if directed solely against other co-defendant. It is well settled law that if counter claim is directed against plaintiff then alongwith it co-defendant can seek relief against other co-defendant also. See **2006(12) SCC 734 Rohit Singh Vs. State of Bihar.** See **2010(1) Himachal Law Reporter H.P. High Court 434 Nirmala Devi & Others Vs. Dhian Singh & Others.**

12. Court has carefully perused the counter claim filed by co-defendants No.2 to 5 under Order VIII Rule 6-A CPC in C.S. No.174/2012. Co-defendants No.2 to 5 have sought counter claim for declaration that co-defendants No.2 to 5 alongwith plaintiffs and co-defendant No.1 are owners in possession of suit land in equal shares. Co-defendants No.2 to 5 have also sought additional relief in counter claim qua decree for possession by way of partition of suit land against plaintiffs and co-defendant No.1. Co-defendants No.2 to 5 have also sought additional relief of rendition of accounts against plaintiffs and co-defendant No.1. Co-defendants have impleaded plaintiffs and co-defendant No.1 as party in counter claim.

13. It is held that counter claim filed by co-defendants No.2 to 5 under Order VIII Rule 6-A CPC is not solely directed against co-defendant No.1 but is also directed against plaintiffs. It is held that co-defendants No. 2 to 5 have sought relief against co-defendant No.1 alongwith plaintiffs. It is held that Suman Sharma, Santosh Sharma, Tripta Sharma and Rakesh

Kumar would get adequate opportunity to contest counter claim in accordance with law. In view of the fact that counter claim filed under Order VIII Rule 6-A CPC is not solely filed against co-defendant No.1 namely Rakesh Kumar but is also filed against plaintiffs namely Suman Sharma, Santosh Sharma and Tripta Sharma it is held that in view of ruling cited supra order of learned Trial Court is not illegal. It is held that no interference is warranted. Point No.1 is answered in negative.

Point No.2 (Final Order).

14. In view of findings upon point No.1 present petition filed under Article 227 of Constitution of India is dismissed. Parties are directed to appear before learned Trial Court on 15.12.2016. Observations will not effect merits of the case in any manner. File of learned Trial Court alongwith certified copy of the order be sent back forthwith. CMPMO No. 330/2015 is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Shankar Lal (through LRs) ..Appellant/defendant

Versus

Ramesh Chander (through LRs) and others ..Respondents.

RSA No.556 of 2004
Reserved on : 7.11.2016
Date of decision: 22/11/2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs pleaded that revenue entries were changed in their absence – a sale deed was executed and a mutation was attested on the basis of the wrong entries- plaintiffs sought declaration and injunction – the suit was decreed by the trial Court- an appeal was filed, which was dismissed – held, in second appeal that the plaintiffs are the legal heirs of deceased R, who was the previous owner of the property – succession certificate was also granted in their favour – the plea of adverse possession was not established – the suit was rightly decreed by the Courts- appeal dismissed.(Para-7 to 19)

For the appellant: Mr. J.R.Poswal, Advocate.
For the respondents: Mr. G.D.Verma, Sr. Advocate with Mr. B.C.Verma, Advocate, for respondents No. 1(a) & 1(b) and 2 to 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

Under concurrently recorded impugned renditions of both the learned Courts below the suit of the plaintiffs for declaration besides for relief of permanent prohibitory injunction qua the suit property besides qua the defendants stood decreed. The defendants stand aggrieved by the concurrently recorded renditions of both the learned Courts below wherefrom they for seeking their reversal institute the instant appeal herebefore.

2. The facts necessary for rendering a decision in the instant appeal are that Ram Rakha died on 4th December, 1983 leaving behind the plaintiffs as his heirs. The plaintiffs and Ram Rakha were living at Lalgam in Jammu and Kashmir. The defendant No.2 took undue advantage of the absence of plaintiffs and their predecessor in interest colluded with revenue officials and Ram Swaroop and Karam Chand etc. moved application for mutation of suit land in their favour after the death of Ram Rakha and defendant No.2 succeeded in getting entered and attested the mutation in respect of suit land in her favour vide mutation No.125 on 24.12.1994 behind the back of the plaintiffs. The defendant No.2 sold some part of the land to defendant

No.1 vide sale deed No.1259 dated 3.11.1999. Consequently, the mutation was sanctioned in favour of defendant No.1 on the basis of illegal and wrong sale deed. The matter went to Hon'ble High Court in an appeal. During the pendency of the appeal before the Hon'ble High Court of Himachal Pradesh the plaintiffs moved an application under Order 1 Rule 10 CPC and they became party. The Hon'ble High Court dismissed the suit and set-aside the judgement and decess passed in favour of defendant No.2. After setting aside the decree the defendants again colluded with the revenue officials again executed sale deed. The mudations are stated to be illegal and void as a result of fraud. It is also pleaded that the defendants were known to the whereabouts of the plaintiffs and Ram Rakha was in visiting terms and was in regular touch with defendants. The plaintiffs prayed for a decree that they are absolute owners in possession of the suit land and also alternatively prayed for relief of possession.

3. The defendants contested the suit and rasied preliminary objections about maintainability, locus standi, cause of action and estoppel. On merits it is admitted that Ram Rakha was owner of the suit property and after his death defendant No.2 the next legal heir became the owner in possession of the property. It is pleaded that Ram Rakha slipped away from the house when he was minor about 40 years and was not heard by persons who could hear and knowledge about him. It is pleaded that the suit land is in possession of defendant No.2. The defendant No.1 has taken plea of bonafide purchaser after due inquiry of the title from the record and spot position. The plaintiffs are stated to be neither legal heirs nor having any concern with the property of deceased Ram Rakha.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiffs are the legal heirs of deceased Ram Rakha? OPP.

2. Whether the sale deed No. 1259 dated 3.11.1999 and 529 dated 5.5.2001 are illegal, null and void having no effect on the rights of the plaintiffs?

3. Whether the suit is not maintainable? OPD

4. Whether the plaintiffs are estopped to file the present suit due to their act, conduct and acquiescence? OPD.

5. Whether the plaintiffs are having no locus standi? OPD.

6. Whether the suit of the plaintiffs is barred by limitation? OPD

6-A Whether the defendants have become the owner by way of adverse possession? OPD.

6-B Whether the defendant No.1 is bonafide purchaser for consideration?

7. Relief.

5 On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

6. Now the defendant No.1 has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 14.12.2004, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

"1. Whether the learned First Appellate Court erred in not deciding the applications, filed by the appellant-defendant for leaving additional evidence under Order 41 Rule 27 of the Code of Civil Procedure, which resulted in grave injustice?

2. Whether the learned trial Court had no pecuniary jurisdiction to try the suit?

3. Whether the learned trial Court and the first Appellate Court erred in holding that the suit was within the period of limitation?

4. Whether the findings of the learned trial Court and the first Appellate Court are dehors the evidence on record?

Substantial questions of law.

7. On demise one Ram Rakha, the defendant No.2 who uncontrovertedly is his Class-II heir obtained qua the suit property, comprising the estate of deceased Ram Rakha, mutation No. 125 besides mutation No. 163 wherewithin a pronouncements occur declaring her to be owner of the suit property. The plaintiffs concerted to set-aside the aforesaid mutations recorded qua the suit property. Their claim qua the suit property stood anvilled upon theirs respectively being the widow besides the progeny born from the wedlock of deceased Ram Rakha with one Bhagwanti. Consequently they canvass qua with theirs holding the capacity of theirs being the Class-I heirs of deceased Ram Rakha qua hence theirs on demise of Ram Rakha holding a capacity superior to the capacity of the defendant No.1 to succeed to his estate.

8. For validating the pronouncements concurrently recorded by both the learned Courts below the evidence adduced therebefore is enjoined to hold visible portrayals qua (a) deceased Ram Rakha solemnizing marriage with one Bhagwanti. (b) the plaintiffs other than one Bhagwanti standing begotten from the wedlock which occurred inter se deceased Ram Rakha with Bhagwanti. (c) The identity of Ram Rakha displayed in jamabandi Ext.P-4 standing connected with the predecessor in interest of the plaintiffs. (d) Since defendant No.1 during the pendency of the suit before the Sub Judge 1st Class, Nalagarh acquired title qua the suit land under sale deeds respectively executed in his favour by defendant No.2, his espousal qua his falling within the ambit of an ostensible owner for thereupon the aforesaid sale deeds acquiring validation stands enjoined to be determined by this Court by its making allusion to the relevant evidence. In so far as the factum of the identity of deceased Ram Rakha as displayed in jamabandi Ext.P-4 vis.a.vis. his holding connectivity with his holding the capacity of being the pre deceased husband besides the pre deceased father respectively of the plaintiffs, is concerned, it is emphatically established on record qua his belonging to the Bhramin caste besides his residing at village Lodhimajra, Tehsil Nalagarh. PW-2 testifies qua hers residing at Lodhimajra whereat she developed intimacy with Ram Rakha who was thereat running a shop wherefrom they departed to Amritsar whereat they solemnized marriage besides her testification qua thereafter theirs residing at Siyalkot, Jammu, Ambala, Delhi, Amritsar, Sri Nagal and theirs ultimately settling at Uri in Jammu and Kashmir, holds tenacity in establishing the factum aforesaid significantly when it acquires corroborative vigour from the testifications of other plaintiffs' witnesses.

9. The vigour of evidence qua the aforesaid facet comprised in the testifications of the plaintiffs' witnesses acquires incremental momentum from their relevant testifications occurring in their respective examinations in chief remaining unshred of their efficacy despite theirs standing subjected to an exacting cross-examination by the counsel for the defendants. Also the vigour of their respective testifications qua the relevant fact aforestated attains redoubled sinew from the factum of the defendants not adducing therebefore the relevant best documentary evidence comprised in theirs adducing the photographs of Ram Rakha qua whom reflections occur in jamabandi Ext.P-4 vis.a.vis the photographs of the purported predecessor in interest of the plaintiffs whereupon with a display respectively therein qua dissimilarity occurring inter se both they would succeed in theirs delinking the identity of Ram Rakha displayed in jamabandi Ex. P-4 with the identity of the purported predecessor in interest of the plaintiffs concomitantly thereupon they would achieve success in begetting reversal of the verdicts of both the Courts below. Apart from oral evidence displaying the factum of Ram Rakha solemnizing marriage with Bhagwanti, documentary evidence comprised in Ext.P-10 (Ext.P-10A translated copy) constituting the voters list of the legislative assembly and of the Parliament, for Jammu and Kashmir when holds reflections in tandem with oral evidence also with the voters list constituting a public record within the ambit of Section 35 and Section 74 of the Indian Evidence Act whereupon it enjoys a presumption of truth, the presumption of truth enjoyed by the relevant reflections occurring therewithin acquire conclusivity for want of adduction therebefore by the defendants of cogent evidence for eroding the truth of the relevant manifestation carried therewithin Ext.b-11 comprises a copy of a diploma issued by the Jammu and Kashmir State Medical Faculty in favour

of plaintiff No.5 wherein Ram Rakha stands depicted to be her father. Rakesh Chander stands depicted in Ext.P-12 to be the son of deceased Ram Rakha. Ext.PX pronounces qua plaintiff No.1 being son of Pt. Ram Rakha Awasthi.

10. Statement of accounts comprised in Ext.P-3, P-4, P-5 and P-6 maintained by deceased Ram Rakha with the relevant banking agencies do also vividly depict the identity of the predecessor in interest of the plaintiffs.

11. Grant of succession certificate vis.a.vis. the plaintiffs comprised in Ext.P8 vis.a.vis the estate of deceased Ram Rakha conclusively establishes the relevant factum of the plaintiffs holding the capacity of theirs being construable to be the class-I heirs of deceased Ram Rakha especially when the veracity of the relevant recitals occurring therewithin remain unrepulsed by cogent evidence in rebuttal thereto standing adduced therebefore by the defendants nor when Ext.P-8 stood concerted by the defendants to beget annulment by theirs initiating before the competent Court proceedings for quashing it.

12. Even though all the aforesaid oral besides documentary evidence conclusively sustain an inference qua the plaintiffs respectively standing related to deceased Ram Rakha as his wife besides his offsprings from his wedlock with plaintiff Bhagwanti nonetheless the defendants had strived to contend qua the entering of a wedlock by Ram Rakha with Bhagwanti without prior thereto the latter annulling her previous marriage with one Karam Chand, not holding any validation. However, the aforesaid espousal of the defendants to erode the legality of the marriage entered inter se plaintiff Bhagwanti with deceased Ram Rakha is bereft of any cogent evidence for sustaining it also assuming even if plaintiff Bhagwanti without annulling her previous marriage with Karam Chand had contracted a marriage with Ram Rakha yet with the provisions of Section 16 of the Hindu Marriage Act holding a mandate qua the offsprings born from a void marriage holding the capacity to succeed to the estate of their deceased father renders them to hold the relevant capacity of theirs being construable to be Class-I heirs of deceased Ram Rakha also hence empowers them to on his demise acquire his estate in supersession to the right if any of defendant No.2 uncontrovertedly his class-II heir to succeed to the estate of Ram Rakha. Moreover in making the aforesaid inference strength stands marshaled by the factum, for reasons aforestated qua the identity of Ram Rakha reflected in Jamabandi Ext.P-4 holding connectivity with the identity of the predecessor in interest of the plaintiffs.

13. Be that as it may, the defendant No.2, had on anvil of Ext.P-2 comprising the verdict recorded by the Civil Court on 1.12.1994, verdict whereof of the Civil Court stood affirmed by the learned Appellate Court wherewithin the defendant No.2 stood declared to hold an entitlement to on demise of Ram Rakha who stood impleaded in the suit as defendant No.2 to inherit his estate, had concerted to espouse qua hence the effect of the oral testifications besides the effect of the aforesaid documentary evidence standing blunted also thereupon the concurrently recorded pronouncements rendered by both the Courts below loosing their vigour. The aforesaid espousal is bereft of authenticity in the face of Ext.P-19 holding a verdict recorded by this Court in a second appeal filed hereat by Karam Chand a party to the lis whereon the aforesaid renditions stood concurrently recorded by the learned Courts below wherewithin unfoldments occur qua defendant No.1 on demise of Ram Rakha impleaded as a defendant in the suit, standing entitled to inherit his estate whereupon this Court annulled Ext.P-2 on account qua on occurrence of demise of Ram Rakha defendant No.2 in the suit on 4.12.1983 yet his remaining unsubstituted by his LRs hence rendering the concurrently recorded renditions of both the Courts below to stand pronounced against a dead person whereupon they acquired a vice of nullity. Moreover, the factum of impleadment of aforesaid Ram Rakha in the Civil Suit aforesaid negates the effect of proceedings of Makful Ul Khabri initiated at the instance of Karam Chand before the Assistant Collector 2nd Grade, wherein he had claimed qua Ram Rakha deceased missing since the age of 17-18 years in sequel whereto a notice stood published in Vir Partap on 7th May, 1989, in aftermath whereof the contentious mutation qua the suit property stood attested in favour of Krishana defendant No. 2 herebefore. In addition, the factum of impleadment of Ram Rakha in the civil suit aforesaid begets an inference of one Karam Chand

besides defendant No.2 Krishana hence acquiescing qua his being alive also his not missing rather also when they on occurrence of his demise during the pendency of the suit whereupon they omitted to beget his impleadment by his LRs fillips a derivative qua theirs by machination excluding the participation of the plaintiffs' in the previous civil proceedings hence theirs obtaining a stained decree comprised in Ext.P-2. Further more, the effect qua theirs before the learned trial Court omitting to beget substitution of deceased Ram Rakha by his legal representatives obviously when thereupon the names of his legal representatives would occur besides would stand unfolded, identity whereof when holding dissimilarity with the plaintiffs' herein would stir an inference of deceased Ram Rakha displayed in Ex. P-4 not holding any connectivity with the predecessor-in-interest of the plaintiffs contrarily when they omitted to make the apposite endeavour before the learned trial Court, sustains an inference qua theirs acquiescing qua none other than the plaintiffs holding the capacity of the legal representatives of Ram Rakha also theirs hence acquiescing qua the compatibility of identity vis-à-vis Ram Rakha reflected in Ex. P-4 with the predecessor-in-interest of the plaintiffs.

14. Apparently Ram Rakha predecessor in interest of the plaintiffs stands depicted in Ext.P-14, copy of jamabandi for the year 1991-92 to be owner in possession of the suit land whereupon the plaintiffs on his demise especially when they are his class-I heirs stand hence entitled to succeed to his estate rendering hence mutations conferring title upon the suit land qua defendant No.2 uncontrovertedly his class-II heirs, to hold no vigour. Defendant No.1 who had acquired title to the suit land from defendant No.2 under sale deeds executed in his favour respectively on 3.11.1999 and 5.5.2001 had concerted to validate his acquisitions qua the suit land under the sale deeds aforesaid, by proclaiming his being an ostensible owner of the suit land. However, his proclamation would hold tenacity only when he was able to adduce best evidence in portrayal qua his despite holding an in-depth incisive inquiry his standing disabled to unearth therefrom qua the title of defendant No.2 qua the suit land standing clouded also thereupon he would be construable to be a bonafide purchaser for value of the suit land. However, with defendant No.2 executing the relevant sale deeds during the pendency of the civil suit before the Sub Judge 1st Class, Nalagarh besides his acquiescing qua his holding awareness qua the ongoing litigation qua the suit property, holds loud unveilings qua his despite holding knowledge qua the title of defendant No.2 qua the suit land standing clouded his yet proceeding to execute the apposite sale deeds with defendant No.2 wherefrom it is to be concluded with aplomb qua his not been amenable to be construable to be an ostensible owner nor also he can don the capacity of a bonafide purchaser for value of the suit property. Contrarily when herebefore despite the aforesaid relevant unfoldments upsurging on his relevant inquiry qua the status of the suit property besides the assailable title thereon of defendant No.2 his yet proceeding to execute them with defendant No.2 encumbers him with a disability to validate the relevant acquisition also he stands fastened with a liability to accept the concurrently recorded renditions qua the suit property by both the Courts below.

15. The learned counsel appearing for the defendants' has contended qua the suit of the plaintiffs being barred by limitation, it standing instituted beyond the prescribed period mandated in Article 58 of the Limitation Act. However, the aforesaid submission cannot stand accepted by this Court, as the aforesaid apposite article of the Limitation Act while prescribing the commencement of the relevant period of limitation proclaims qua the relevant commencement for computing therefrom the period of limitation encapsulated therein occurring on an accrual of "right to sue", right to sue whereof holds a connotation qua its spurrings or occurrings arising on actual and threatened invasion(s) qua the settled right of the plaintiff(s) upon the suit property. In sequel when the connotation borne by the apposite statutory parlance 'right to sue' is qua its upsurging on the defendant(s) committing overt act upon the suit property hence theirs explicitly pronouncing theirs casting cloud qua the title of the plaintiff(s) qua the suit land whereupon even if mutations qua the suit property stood attested on 24.12.1994 and 20.11.1999 whereas the suit of the plaintiff stood instituted in the year 2001 would not render it to be construable to stand instituted beyond limitation, as merely on attestation of relevant mutations which palpably are nonest besides stand recorded in deprivation of the vested rights of the plaintiffs qua the suit

property no title hence standing invested upon the suit land qua defendant No.2 rather when the plaintiffs' title to the suit land stood explicitly annulled besides came under a cloud by the proactive overt act of defendant No. 2 executiing sale deeds respectively on 3.11.1999 and 5.5.2001, with defendant No. 1 constituted the latter period to enliven thereat the relevant cause of action or it begot the commencement of the relevant period of limitation for the plaintiffs' instituting a suit. In sequel thereto with the plaintiffs therefrom instituting the suit within the statutorily mandated period of limitation prescribed in the relevant Article of the Limitation Act renders it to be construable to be within limitation.

16. The defendants had raised a plea qua theirs perfecting their title qua the suit property by adverse possession. However, the aforesaid plea stands benumbed by (a) the principle requisite for sustaining their claim comprised in theirs asserting it against a true owner being amiss imperatively when acquisition of the suit property by defendant No.1 from defendant No.2 occurred under sale deeds executed inter se both whereupon obviously with defendant No.1 accepting defendant No.2 to be owner of the suit property, he stood debarred from espousing qua the plaintiffs holding title to the suit property nor also he holds any leverage to contend of his standing capacitated to the rear plea against the plaintiffs. (b) likewise with defendant NO.2 executing the sale deeds aforesaid she thereupon acquiescing qua hers holding title as owner to the suit property concomitantly she also hence stands debarred from proclaiming the plaintiffs to be owners nor also she holds any capacity to rear the aforesaid plea against the plaintiffs conspicuously when she contests their title qua the suit land with defendant No.1. Moreover, with defendant No. 1 concerting to validate the relevant acquisitions qua the suit property under sale deeds executed qua him by defendant No.2 estopes him from contending qua the plaintiffs holding title qua the suit property nor also hence when the relevant ingredient for sustaining his plea stands provenly unsatiated he stands incapacitated to rear it.

17. The learned counsel for the defendants has contended qua the omission of the Appellate Court to pronounce an adjudication on his application constituted therebefore under Order 41 Rule 27 CPC wherein he sought leave of the Appellate Court to through the documents embodied therein deestablish the identity of Ram Rakha besides whereby he concerted to establish qua Ram Rakha borne in jamabandi comprised in Ext.P-4 not being the predecessor in interest of the plaintiffs, has throttled his relevant concert. The effect of the learned Appellate Court court not recording its pronouncement on the aforesaid application would not beget an inference qua the sinew of the aforestated oral besides documentary evidence which existed therebefore holding therewithin vivid articulations in portrayal of Ram Rakha being the predecessor in interest of the plaintiffs, hence standing eroded also by his canvassing therein qua with Ram Rakha being a permanent resident of Nalagarh he stood statutorily barred to purchase property in Jammu and Kashmir whereas with his acquiring property in Jammu and Kashmir renders the identity of the predecessor in interest of the plaintiffs to stand unrelated with one Ram Rakha who made acquisitions in Jammu and Kashmir also hence with one Ram Rakha whose name occurs in Ext.P-4, he would not succeed in benumbing the effect of the aforesaid evidence especially when the relevant acquisitions made by Ram Rakha in Jammu and Kashmir in purported infraction of the law prevailing thereat barring permanent residents other than of Jammu and Kashmir to acquire property therein, would only hold a ground for the acquisitions made thereat by Ram Rakha in purported infraction of the prevailing law thereat standing concerted by the appropriate agency(s) to be set-aside. Consequently it does not give any ground to this Court in pronouncing qua with the learned first Appellate Court omitting to pronounce a verdict upon the application of the defendants' constituted therebefore under Order 41 Rule 27 CPC belittling the tenacity besides the effect of the aforesaid oral as well as documentary evidence tellingly pronouncing upon the similarity of identity of Ram Rakha inter se apposite reflections occurring in the apposite jamabandi vis.a.vis his holding the capacity of the predecessor in interest of the plaintiffs'.

18. The suit of the plaintiffs for declaration apparently is properly valued for the purpose of Court fees also is apparently properly valued qua the apposite relief claimed in the

Civil Suit, therefore, it is held that the learned trial Court had the pecuniary jurisdiction to try the suit.

19. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather they have aptly appreciated the material available on record. I find no merit in this appeal, which is accordingly dismissed and the judgments and decrees of the both the Courts below are maintained and affirmed. Substantial questions of law stands answered against the defendants. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Aruna Bedi .....Appellant/applicant
Versus
Subhash Kapil and others. .....Respondents/non-applicants

CMP(M) No. 273 of 2016
in RSA in 2016
Decided on: 23rd November, 2016

Limitation Act, 1963- Section 5- An application for condonation of delay in filing the appeal was filed pleading that the husband of the applicant was not party to the suit or in the appeal- an amount of Rs.1,40,004/- has been ordered to be recovered from him- held, that the husband of the applicant was not arrayed as a defendant in the suit – the suit was dismissed by the Trial Court- an appeal was preferred and the suit was decreed- the decree was passed against department of I & PH but the department was left free to recover the amount from the husband of the applicant- the explanation furnished by the applicant is plausible – the application allowed and the delay condoned. (Para-4)

For the applicant: Mr. B.L. Soni and Mr. Narender Thakur, Advocates.
For the non-applicants: Mrs. Jyotsna Rewal Dua, Sr. Advocate with Ms. Charu, Advocate for respondent No.1.
Mr. Neeraj K. Sharma, Dy. A.G for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard.

2. The appeal against the judgment and decree passed by learned District Judge, Kullu on 1.4.2009 in Civil Appeal No. 33 of 2007 is barred by a period over six years. The delay as occurred has been sought to be condoned on the grounds inter-alia that Shri J.S. Bedi, the husband of the applicant/appellant was not a party to the suit nor in the appeal in the Court of learned District Judge, Kullu and to the contrary learned lower appellate Court has ordered to recover the decretal amount i.e. Rs. 1,40,004/- from him. Said Shri J.S. Bedi had expired during the pendency of the suit in the trial Court i.e. on 8th October, 2006. Neither he nor the applicant/appellant were aware of the Civil Suit which was filed in the Court of learned Civil Judge (Senior Division), Kullu and also the appeal in the learned lower appellate Court. When the applicant came to know about the filing of the suit and also the appeal in the Court below,

she applied for certified copy of the judgment and decree, under challenge in the month of June, 2015 and thereafter filed the appeal along with this application in this Court.

3. The application, no doubt, has been resisted and contested on behalf of the respondents/non-applicants, however, in rejoinder, the applicant/appellant has further explained the delay as occurred in filing the appeal.

4. Having regard to the submissions made by learned counsel on both sides as well as record available at this stage, admittedly, Shri J.S. Bedi, the deceased husband of applicant was not arrayed as defendant in the suit. The suit was dismissed by the trial Court. The same, however, has been decreed by learned lower appellate Court for the recovery of Rs. 1,27,908/- with pendente-lite interest @ 12% per annum. The future interest @ 7.5% per annum has also been awarded on the decretal amount. The decree though has been passed against the defendant i.e. the Department of Irrigation and Public Health, Division No. 1, Kullu and the State of Himachal Pradesh through Collector Kullu District at Kullu, however, learned lower appellate Court has left it open to the defendant to recover the same from Shri J.S. Bedi. No such direction could have been passed without hearing said Shri J.S. Bedi, who as a matter of fact, had already expired during the pendency of the suit in the trial Court. No doubt, as per stand of the defendant-State, the applicant was informed vide letter dated 20.10.2009, Annexure R-1 about the judgment passed by learned lower appellate court and the recovery of the amount in question from said Shri J.S. Bedi, however, it cannot be said that this letter was delivered to her or that she failed to respond to the same intentionally and deliberately. On the other hand, the plea of the applicant/appellant that she came to know about the recovery of Rs. 1,70,170/- vide office order Annexure RA-1 dated 5.9.2014 qua sanction of gratuity modified further vide another office order Annexure RA-2 dated 28.01.2015 from due and admissible amount seems to be nearer to the factual position. She has further claimed that on coming to know about the recovery of above-said amount, she approached the defendant, however, the necessary details were not supplied to her. When she came to know about the filing of the suit and the judgment and decree passed by learned lower appellate court, she applied for certified copies thereof in the month of June, 2015 and immediately after receipt thereof, filed the appeal in this Court. The explanation as set-forth is not only reasonable but plausible also, because when the husband of the applicant was not a party to the suit, it can reasonably be believed that institution of the suit and the appeal in the learned lower appellate court was not in her knowledge. Otherwise also, that part of the judgment and decree which pertains to a direction qua recovery of decretal amount from Shri J.S. Bedi, the deceased husband of the applicant/appellant is patently illegal. Since said Shri J.S. Bedi had already expired on the day when the trial Court has passed the impugned judgment and decree, no such direction could have been issued without ascertaining as to whether he was alive or not on that day and if alive, without affording an opportunity of being heard to him. Therefore, without impleading the applicant/appellant as party in the appeal and affording her an opportunity of being heard, a direction, penal in nature could have not been issued. The present as such is a fit case where on condonation of delay, the appeal deserves to be entertained and decided on merits. Being so, I allow this application and order to condone the delay as occurred in filing the appeal. The application stands accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Bachittar Singh .....Petitioner.

Vs.

Central Bank of India and others .....Respondents.

CWP No.: 1057 of 2011
Date of Decision: 23.11.2016

Constitution of India, 1950- Article 226- **Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002**- Section 13- Notice was issued under Section 13 of the SRFAESI Act –a writ petition was filed challenging the notice- held, that no representation or reply was filed to the notice – the possession was taken over by the bank and the property was ultimately sold – the remedy under Section 17 lies before Debt Recovery Tribunal – the Writ petition is not maintainable in view of alternative and efficacious remedy available to the petitioner- petition dismissed. (Para- 6 to 14)

Cases referred:

General Manager, Sri Siddeshwara Cooperative Bank Limited and another Vs. Ikbal and others (2013) 10 Supreme Court Cases 83

Punjab National Bank and another Vs. Imperial Gift House and others (2013) 14 Supreme Court Cases 622

Devi Ispat Limited and another Vs. State Bank of India and others (2014) 5 SCC 762

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Ashok Kumar Sood, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. *(Oral)**:***

By way of this writ petition, the petitioner has prayed for the following reliefs:

"(a) That the impugned Annexures P-1 & P-2 may very kindly be quashed and set aside with directions to the respondents to adhere to the recovery from the petitioner after waiving of the interest and as per procedure as is applied to other similarly situated persons, i.e. after adhering to One Time Settlement procedure prescribed and available with the respondents;

(b) That the respondents may very kindly be directed to spell out the terms of the One Time Settlement and petitioner in the process undertakes to deposit half of the same in lumpsum and remaining in instalments;

(c) That the entire record pertaining to the case may also be summoned by this Hon'ble Court for its kind perusal;

(d) That cost of the writ petition may also be awarded in favour of the petitioner;

(e) Any other or further relief as this Hon'ble Court may deed just and proper keeping in view the facts and circumstances of the case may also be passed in favour of the petitioner and against the respondents."

2. Annexure P-1, quashing of which has been sought by way of this writ petition is a notice dated 16.06.2010, which was issued under Section 13(2) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 and Annexure P-2 is advertisement issued by the respondent-Bank for the auction of the land and house of the petitioner to realize the amount which is due to the respondent-Bank from the petitioner.

3. When this case was taken up for arguments on 20.10.2016, the following order was passed:

*"When this case was taken up for arguments today, it was submitted by Mr. Ashok Kumar Sood, learned counsel appearing for the respondents that the present petition was not maintainable as the petitioner had directly approached this Court without exhausting the alternative remedy. Mr. Kishore Pundir, learned vice counsel appearing for the petitioner submits that some time may be granted to him to have necessary instructions in this regard. List on **3rd November, 2016**. In the meanwhile, rejoinder, if any, be also filed to the reply filed by the respondents.*

4. Despite opportunity, neither any rejoinder was filed by the petitioner to the reply so filed by the respondents nor any rejoinder was intended to be filed.

5. I have heard the learned counsel for the parties on the issue of maintainability of the writ petition.

6. It is evident from the averments made in reply to the writ petition that no representation or reply was filed by the petitioner to the notice which was issued under Section 13(2) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 nor he raised any objection against the said notice in any manner. It is further mentioned in the reply by the respondent-Bank that as petitioner failed to raise any objection against the notice as well as taking over possession of the property nor he came forward with the proposal for repayment of the said loan amount, therefore, the Bank was left with no other option but to proceed for sale of the mortgaged property. It was further mentioned in the reply that the proceedings of taking over possession of the property of the petitioner and sale of the property were strictly as per the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002.

7. Be that as it may, the fact of the matter remains that the petitioner has challenged a notice issued under Section 13(2) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 and subsequent advertisement issued by the Bank for sale of the assets of the petitioner to recover its amount. The steps so taken by the Bank are as envisaged under Section 13 of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002.

8. Section 17 of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 provides that any person aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorized officer may make an application alongwith such fee as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken. Advertisement for sale of the property is obviously a measure taken under sub-section (4) of Section 13 of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002. The petitioner rather than pursuing his remedy as was available under the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 has directly approached this Court without any cogent justification being there in the writ petition as to why the alternative remedy available to the petitioner has not been exhausted.

9. On the contrary, para-8 of the writ petition reads as under:

> *"8. That there is no other alternative and efficacious remedy available to the petitioner except to approach this Hon'ble Court for the redressal of his grievances."*

10. In these circumstances, when there was an alternative and efficacious remedy available to the petitioner and no cogent explanation has been given by the petitioner as to why he has not invoked the said alternative remedy, there is merit in the contention of the learned counsel for the respondents that the present writ petition is not maintainable in view of alternative and efficacious remedy being available with the petitioner.

11. In **General Manager, Sri Siddeshwara Cooperative Bank Limited and another** Vs. **Ikbal and others** (2013) 10 Supreme Court Cases 83, Hon'ble Supreme Court has held that against the action of the Bank under Section 13(4) of the SARFAESI Act, the borrower has a remedy of appeal to the Debts Recovery Tribunal (DRT) under Section 17 and the said remedy is an efficacious remedy. It was further held by the Hon'ble Supreme Court that no doubt an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India, but by now it is well settled that where a Statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under

Article 226. It was further held by the Hon'ble Supreme Court that on misplaced considerations, statutory procedures cannot be allowed to be circumvented.

12. A three Judges Bench of the Hon'ble Supreme Court in **Punjab National Bank and another** Vs. **Imperial Gift House and others** (2013) 14 Supreme Court Cases 622 has held:

> "2. *By the impugned order, in effect and substance, the High Court has quashed notice issued by the bank under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, [for short, "the Act"].*
>
> 3. Upon receipt of notice, respondents filed representation under *Section 13(3)(A)* of the Act, which was rejected. Thereafter, before any further action could be taken under *Section 13(4)*of the Act by the Bank, the writ petition was filed before the High Court.
>
> 4. In our view, the High Court was not justified in entertaining the writ petition against the notice issued under *Section 13(2)* of the Act and quashing the proceedings initiated by the bank.
>
> *5. Accordingly, the appeal is allowed, impugned order passed by the High Court is set aside and the writ petition filed before it is dismissed."*

13. In **Devi Ispat Limited and another** Vs. **State Bank of India and others** (2014) 5 Supreme Court Cases 762, the Hon'ble Supreme Court has held that in view of an alternative remedy to make a representation to the Bank being available under the provisions of Section 13 (3-A) of the Act, there is no reason to by-pass the statutory mechanism.

14. Therefore, keeping in view the reliefs prayed for by the petitioner and the provisions of SARFAESI Act as well as law laid down by the Hon'ble Supreme Court as discussed above, in my considered view, the present writ petition is not maintainable in view of efficacious and adequate remedy being available to the petitioner under Section 17 of the SARFAESI Act.

15. Writ petition is accordingly dismissed with liberty to the petitioner to invoke the alternative remedy available to him. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Charan Dass deceased through LRs ...Appellants.

Versus

Subhadra Devi and others ...Respondents.

LPA No. 184 of 2007
Reserved on: 03.11.2016
Decided on: 23.11.2016

Constitution of India, 1950- Article 226- Writ-respondent No. 2 purchased the land vide two sale deeds – mutation was attested in his presence- subsequently an application for the correction of the revenue record was filed pleading that the possession was not correctly recorded – the application was rejected – appeal and revision were dismissed- a second revision was filed, which was allowed- writ court set aside the order passed in the revision petition- held in the appeal that the revisional powers are to be exercised with great care and caution- the revisional authority has to examine the orders on the touch stone of legality and not on the question of facts, unless it is found that orders are perverse and factually incorrect – the revisional Court cannot re-appreciate the evidence and set aside the concurrent findings of the facts, unless the findings are perverse or there has been a non-appreciation or non-consideration of material on record- the revisional power cannot be equated with the power to re-appreciate the evidence-

mutation was attested in the presence of respondent No. 2- he had not questioned the findings – the delay was also not explained, which should have been considered- the remedy was to file a civil suit before the Court – Writ Court had rightly passed the judgment – appeal dismissed.

(Para-17 to 46)

Cases referred:

Gurudassing Nawoosing Panjwani versus State of Maharashtra and others, 2015 AIR SCW 6277
Manick Chandra Nandy versus Debdas Nandy and others, AIR 1986 Supreme Court 446
Masjid Kacha Tank, Nahan versus Tuffail Mohammed, AIR 1991 Supreme Court 455
Yunis Ali (Dead) Thru his L.Rs. versus Khursheed Akram, 2008 AIR SCW 4372
Chandmal versus Firm Ram Chandra and Vishwanath, AIR 1991 Supreme Court 1594
Gurdial Singh and others versus Raj Kumar Aneja and others, AIR 2002 Supreme Court 1003
Hindustan Petroleum Corporation Ltd. versus Dilbahar Singh, 2014 AIR SCW 5018
Narasamma & Ors., 2009 AIR SCW 2653
State of West Bengal and others versus Karan Singh Binayak and others, AIR 2002 Supreme Court 1543
I. Chuba Jamir & Ors. versus State of Nagaland & Ors., 2009 AIR SCW 5162
Banda Development Authority, Banda versus Moti Lal Agarwal and Ors, 2011 AIR SCW 2835
Chennai Metropolitan Water Supply and Sewerage Board and others versus T.T. Murali Babu, 2014 AIR SCW
State of Jammu and Kashmir versus R.K. Zalpuri and others, AIR 2016 Supreme Court 3006
Jagtar Singh and others versus Swaran Singh, 1979 Simla Law Journal (Punjab & Haryana) 89
The Chief Secretary to Government Punjab and others versus Chawli and others, 1980 Punjab Law Journal 10
Dharam Singh and others versus The State of Haryana and others, 1983 Punjab Law Journal 210

For the appellants: Mr. G.D. Verma, Senior Advocate, with Mr. Pawan Gautam, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1, 3, 4 & 2 (i) to 2 (iii).
Mr. Shrawan Dogra, Advocate General, with Mr. J.K. Verma, Deputy Advocate General, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This LPA is directed against judgment and order, dated 10th October, 2007, made by the learned Single Judge in CWP No. 992 of 2003, titled as Smt. Subhadra Devi and ors. versus State of H.P. and another, whereby the writ petition filed by writ petitioners-respondents No. 1 to 4 herein came to be allowed and order, dated 8th October, 2003, made by the Financial Commissioner (Appeals) was quashed (for short "the impugned judgment").

2. The case in hand has a chequered history, is two decades old and the parties are still litigating, is suggestive of the fact that delay has crept-in in taking the lis to its logical conclusion, which has adversely affected the parties.

3. It is beaten law of the land that delay takes away the settings of law. Thus, it is the duty of all concerned to see that the cases are decided as early as possible.

4. The way this case has been dealt with right from the year 1987 till filing of the writ petition is also a glaring example as to how the people are suffering, that too, for trivial issues.

5. It is necessary to notice the brief facts of the case herein.

6. Shri Charan Dass, the predecessor-in-interest of the appellants, i.e. writ respondent No. 2 (since deceased, now represented through his legal heirs/representatives)

purchased the land vide two registered sale deeds, dated 23rd September, 1969. Mutation No. 542 to this effect was attested on 20th April, 1970. At the time of recording the mutation proceedings, the predecessor-in-interest of the appellants- writ respondent No. 2 was present, had not raised any finger qua recording of mutation and was satisfied till 31st January, 1987, when he filed an application before the Settlement Officer, Kangra for correction of the entries in the revenue record.

7. In the said application, it was averred that the predecessor-in-interest of the appellants-writ respondent No. 2 had purchased 3 kanals 1 marla land out of 7 kanals 10 marlas land comprised in khasra No. 732 min vide registered sale deed, dated 23rd September, 1969, from one Shri Chuhru, was given possession towards the path side, but some mischievous elements had got recorded his possession on the other side and had prayed for correction of the entries.

8. The Settlement Officer, Kangra, transferred the said application to Tehsildar (Settlement), Una. The inquiry was conducted by the Settlement Naib Tehsildar, who submitted the report on 8th October, 1987. After perusing the said report, the Tehsildar (Settlement) rejected the application filed by the appellant-writ respondent No. 2.

9. Feeling aggrieved by the said order, the predecessor-in-interest of the appellants-writ respondent No. 2 questioned the same by the medium of appeal before the Settlement Collector, Kangra, who accepted the appeal vide order, dated 22nd January, 1991, and remanded the case to the Tehsildar (Settlement). The Tehsildar (Settlement) heard the parties, inquired into the matter and again rejected the application vide order, dated 31st January, 1992.

10. Dissatisfied with order, dated 31st January, 1992, made by the Tehsildar (Settlement), the predecessor-in-interest of the appellants-writ respondent No. 2 filed appeal before the Settlement Collector, Kangra, who, vide order, dated 18th June, 2003, dismissed the appeal with the observations that the predecessor-in-interest of the appellants-writ respondent No. 2 had to assail the mutation before the competent court of jurisdiction, which he had not done, thus, the correction of entry relating to possession, as sought for, could not be made in the revenue record.

11. The said order of Settlement Collector was then questioned by the predecessor-in-interest of the appellants-writ respondent No. 2 before the Divisional Commissioner, Kangra Division by the medium of revision petition, was dismissed vide order, dated 15th January, 1998. The Divisional Commissioner has given the minute details of the facts of the case and history behind it. It has specifically recorded that though, as per one of the sale deeds, dated 23rd September, 1969, the predecessor-in-interest of the appellants-writ respondent No. 2 had purchased land on the southern side *(Bhumi Zanab Janoob)*, but the spot inspections conducted by the field staff did not prove that he was in possession of the said portion of the land. Further held that mutation No. 542 was attested on 20th April, 1970, since then entries had been recorded in various records including *jamabandies* and *record-of-rights* and after lapse of such a long period, such record cannot be corrected.

12. Though, the Divisional Commissioner has recorded that since the proceedings before him were in the nature of revision, the evidence was not to be evaluated as the only issue to be determined was the legality of the orders of the revenue authorities. He, by a speaking order, has held that the facts and merits of the case in hand were rightly appreciated by the authorities below.

13. The predecessor-in-interest of the appellants-writ respondent No. 2 invoked the jurisdiction of the Financial Commissioner (Appeals) by the medium of second revision, being Revision Petition No. 224 of 1998, who accepted the same vide order, dated 8th October, 2003, and set aside the orders made by all the three revenue authorities.

14. The writ petitioners-respondents No. 1 to 4 herein questioned the said order of the Financial Commissioner (Appeals) by the medium of CWP No. 992 of 2003, was allowed and

the order made by the Financial Commissioner (Appeals) came to be quashed and set aside in terms of the impugned judgment. Hence, this appeal.

15. The following questions arise for determination in this appeal:

(i) Whether the Financial Commissioner (Appeals), while hearing the second revision, was within its limits and competence to upset the concurrent findings of facts recorded by the revenue agencies including the appellate authority and confirmed by the first revisional authority?

(ii) Whether the Financial Commissioner (Appeals) was within its jurisdiction to accept and grant the application, dated 31st January, 1987, which was highly belated?

(iii) Whether the Financial Commissioner (Appeals) was within its rights and power to direct the revenue authorities to change the entries in the revenue record made in terms of the mutation in the year 1970, came to be reflected and recorded in the *record-of-rights*?

16. The answer to all the three questions is in the negative for the following reasons:

17. The Himachal Pradesh Land Revenue Act, 1954 (for short "Act") contains a complete mechanism as to how the entries are to be recorded in the revenue record i.e. *Record-of-Rights, Misal Haqiat, Khasra Girdawari, Jamabandies* etc., and also provides remedies.

18. Section 17 of the Act provides that the Financial Commissioner may call for the record of any case pending or disposed of by any officer subordinate to him. It is apt to reproduce Section 17 of the Act herein:

> *"**17. Power To call for, examine and revise proceedings of Revenue Officers :-** (1) The Financial Commissioner may at any time call for the record of any case pending before or disposed of by any Revenue Officer subordinate to him.*
>
> *(2) A Commissioner or Collector may call for the record of any case pending before, or disposed by, any Revenue Officer under his control.*
>
> *(3) If in any of case in which a Commissioner or Collector, has called for a record, is of the opinion that the proceedings taken or order made should be modified or reversed, he shall report the case with his opinion thereon for the orders of the Financial Commissioner.*
>
> *(4) The Financial Commissioner may in any case called for by himself under sub-section (1) or reported to him or under sub-section (3) pass such orders as he thinks fit:*
>
> *Provided that he shall not under this section pass an order reversing or modifying any proceeding, or order of a subordinate Revenue Officer and effecting any question of right between private persons without giving those persons an opportunity of being heard."*

19. Section 17 of the Act provides that the Financial Commissioner (Appeals) and the Divisional Commissioner have revisional powers. The Financial Commissioner (Appeals) can exercise second revisional jurisdiction. The jurisdiction of the Financial Commissioner (Appeals) in revision against the orders passed by the revenue authorities subordinate to it, is alike Section 115 of the Code of Civil Procedure (for short "CPC").

20. The Apex Court in the case titled as **Gurudassing Nawoosing Panjwani versus State of Maharashtra and others,** reported in **2015 AIR SCW 6277,** held that if revisional powers are exercised by a revenue officer having jurisdiction to do so, further revisional power can be exercised by the superior revenue officer or by the State Government. It is apt to reproduce para 30 of the judgment herein:

> *"30. From perusal of the entire scheme of the Code including Section 257, it is manifest that the revisional powers are not only exercisable by the State*

Government but also by certain other Revenue officers. There is nothing in the Code to suggest that if these revisional powers are exercised by a Revenue officer who has jurisdiction, it cannot be further exercised by a superior Revenue officer or by the State Government. A fair reading of Sections 257 and 259 suggests that if revisional powers are exercised by a Revenue officer having jurisdiction to do so, further revisional power can be exercised by the superior officer or by the State Government."

21. In the instant case, though the Divisional Commissioner had exercised its revisional jurisdiction, but the Financial Commissioner (Appeals) was also within its rights in exercising the powers of second revisional authority, but it had to exercise the revisional powers with great care and caution, has fallen in an error in upsetting the concurrent findings of facts recorded by the revenue courts below.

22. It is beaten law of the land that the revisional authority has only to examine the orders on the touchstone of legality and not on the question of facts unless it is found that the orders are perverse and factually incorrect.

23. In the case titled as **Manick Chandra Nandy versus Debdas Nandy and others,** reported in **AIR 1986 Supreme Court 446,** the Apex Court has discussed the nature, quality and extent of revisional jurisdiction. It is profitable to reproduce para 5 of the judgment herein:

"5. We are constrained to observe that the approach adopted by the High Court in dealing with the two revisional applications was one not warranted by law. The High Court treated these two applications as if they were first appeals and not applications invoking its jurisdiction under section 115 of the Code of Civil Procedure. The nature, quality and extent of appellate jurisdiction being exercised in first appeal and of revisional jurisdiction are very different. The limits of revisional jurisdiction are prescribed and its boundaries defined by section 115 of the Code of Civil Procedure. Under that section revisional jurisdiction is to be exercised by the High Court in a case in which no appeal lies to it from the decision of a subordinate Court if it appears to it that the subordinate Court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction vested in it by law or has acted in the exercise of its jurisdiction illegally or with material irregularity. The exercise of revisional jurisdiction is thus confined to questions of jurisdiction. While in a first appeal the Court is free to decide all questions of law and fact which arise in the case, in the exercise of its revisional jurisdiction the High Court is not entitled to re-examine or re-assess the evidence on record and substitute its own findings on facts for those of the subordinate Court. In the instant case, the Respondents had raised a plea that the Appellant's application under Rule 13 of Order IX was barred by limitation, Now, a plea of limitation concerns the jurisdiction of the Court which tries a proceeding, for a finding on this plea in favour of the party raising it would oust the jurisdiction of the Court. In determining the correctness of the decision reached by the subordinate Court on such a plea. the High Court may at times have to go into a jurisdictional question of law or fact, that is it may have to decide collateral questions upon the ascertainment of which the decision as to jurisdiction depends. For the purpose of ascertaining whether the subordinate Court has decided such a collateral question rightly the High Court cannot however, function as a Court of first appeal so far as the assessment of evidence is concerned and substitute its own findings for those arrived at by the subordinate Court unless any such finding is not in anyway borne out by the evidence on the record or is manifestly contrary to evidence or so palpably wrong that if allowed to stand. would result in grave injustice to a party."

24. The Apex Court in the cases titled as **Masjid Kacha Tank, Nahan versus Tuffail Mohammed,** reported in **AIR 1991 Supreme Court 455,** and **Yunis Ali (Dead) Thru his L.Rs. versus Khursheed Akram,** reported in **2008 AIR SCW 4372,** held that the Courts, while

exercising revisional jurisdiction, cannot re-appreciate the evidence and set aside the concurrent findings of the Courts below by taking a different view of the evidence unless the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record. It is apt to reproduce para 15 of the judgment in **Yunis Ali's case (supra)** herein:

> *"15.It is well-settled position in law that under Section 115 of the Code of Civil Procedure the High Court cannot re- appreciate the evidence and cannot set aside the concurrent findings of the Courts below by taking a different view of the evidence. The High Court is empowered 26 to interfere with the findings of fact if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the courts below. Simply because another view of the evidence may be taken is no ground by the High Court to interfere in its revisional jurisdiction."*

25. The same principle has been laid down by the Apex Court in the cases titled as **Chandmal versus Firm Ram Chandra and Vishwanath,** reported in **AIR 1991 Supreme Court 1594,** and **Gurdial Singh and others versus Raj Kumar Aneja and others,** reported in **AIR 2002 Supreme Court 1003.** It would be profitable to reproduce paras 12, 13 and 16 of the judgment in **Chandmal's case (supra)** herein:

> *"12. There is no dispute regarding the submission made in Para 9 of the additional written statement which is a part of the same written statement filed on behalf of the respondent by one of its partners, Shankarrao Marutirao Sonawane to the effect that one of the partners of the said firm, Ramchandra Madhavrao is occupying the house as a permanent tenant since Samvat 2002. Admittedly, on the basis of this additional Written Statement an additional issue No. 1 was framed at the request of the landlord appellant whether the claim of permanent tenancy of Ramchandra Madhavrao was bona fide. It is evident from the provisions of S. 15(2)(vi) as set out hereinbefore that if the tenant has claimed a right of permanent tenancy.and that such claim was not bona fide, the Controller shall make an order directing the tenant to put the landlord in possession of the house. The Additional Rent Controller as well as the District Judge considered carefully and minutely the evidence adduced on behalf of the tenant-respondent and found that claim of permanent tenancy was not bona fide. Accordingly, the courts below held that the tenant-respondent was liable to be evicted from the suit premises on this ground alone and passed order for eviction from the suit premises. The jurisdiction of the High Court in revision against the order passed on appeal by the District Judge is a limited one and it is almost pari materia with the provisions of S. 115 of the Code of Civil Procedure. The High Court while exercising the revisional jurisdiction can interfere with the order passed on appeal by the appellate authority only on three grounds i.e. (i) where the original or appellate authority exercised a jurisdiction not vested in it by law, or (ii) where the original or appellate authority failed to exercise a jurisdiction so vested, or (iii) where in following the procedure or passing the order, the original or appellate authority acted illegally or with material irregularity. It is evident from the averments made in para 9 of the additional written statement. that one of the partners of the respondent firm, Ramchandra Madhavrao occupied the said premises as a permanent tenant since Samvat 2002. This claim of permanent tenancy was held to be not bona fide by the original Court as well as by the appellate authority on a consideration and appraisement of the evidence adduced on behalf of the tenant-respondent and as such both the courts below passed order of eviction of the tenant-respondent from the suit premises. These are admittedly concurrent findings of fact arrived at by the original and the appellate authority. Moreover, these findings in any view of the matter whatsoever, cannot be held to be either without jurisdiction nor it can amount to a failure to exercise jurisdiction vested with them, nor it can be held to be made by the original or appellate authority illegally or with material irregularity.*

13. The revisional jurisdiction of the High Court under S. 26 of the said Act is confined strictly to the jurisdictional error or illegal exercise of jurisdiction. The finding of the High Court to the effect that it was the duty of the Court in the interest of justice to interfere even with the concurrent finding of facts because on the record, High Court found that there was not a single factor to come to the conclusion that the claim was mala fide or was not bona fide as required by the statute, is entirely baseless and not in accordance with the provisions of S. 26 of the said Act which confers revisional jurisdiction on the High Court. It is pertinent to mention in this connection the decision in J. Pandu v. R. Narsubai, (1987) 1 SCC 573: (AIR 1987 SC 857). It is a case under the A.P. Buildings (Lease, Rent and Eviction) Act, 1960. Sub- sec. (2)(vi) of S. 10 of A.P. Buildings (Lease, Rent and Eviction) Act which is similar to S. 15(2)(vi) of-the Hyderabad Houses (Rent, Eviction and Lease) Control Act, 1954 sets out two grounds of eviction viz. (1) denial of title of the landlord without bona fides, and(2) claim of permanent tenancy rights without bona fides. It was held that "consequently, either denial of title or claim of permanent tenancy without bona fides will itself be enough to attract S. 10(2)(vi). The. order of eviction on this ground, has, therefore, to be sustained. By reason of this conclusion alone the appeal can be dismissed."

14. .....

15. .....

16. In the premises aforesaid, the judgment and order passed in revision by the High Court is contrary to law as the High Court in exercise of its revisional jurisdiction interfered with the concurrent finding of fact arrived at by the original Court as well as the appellate authority. The High Court should not have reversed the same in exercise of its revisional Jurisdiction under S. 26 of the said Act. We, therefore, set aside the judgment and order of the High Court and uphold the orders of the courts below. The respondent is given three months' time to vacate the suit premises on filing the usual undertaking that they will not induct anybody or transfer the same to any other person and they will go on paying the rent of the premises at the usual rate and will deliver vacant and peaceful possession of the suit premises on or before the expiry of the said period to the landlord appellant. In the facts and circumstances of the case, the parties will bear their own costs."

26. In the case titled as **Hindustan Petroleum Corporation Ltd. versus Dilbahar Singh,** reported in **2014 AIR SCW 5018,** the Apex Court has held that the revisional power is not and cannot be equated with the power of re-consideration of all questions of fact as a court of first appeal. It is apt to reproduce paras 25 to 30, 32 and 45 of the judgment herein:

"25. Before we consider the matter further to find out the scope and extent of revisional jurisdiction under the above three Rent Control Acts, a quick observation about the 'appellate jurisdiction' and 'revisional jurisdiction' is necessary. Conceptually, revisional jurisdiction is a part of appellate jurisdiction but it is not vice-versa. Both, appellate jurisdiction and revisional jurisdiction are creatures of statutes. No party to the proceeding has an inherent right of appeal or revision. An appeal is continuation of suit or original proceeding, as the case may be. The power of the appellate court is co-extensive with that of the trial court. Ordinarily, appellate jurisdiction involves re-hearing on facts and law but such jurisdiction may be limited by the statute itself that provides for appellate jurisdiction. On the other hand, revisional jurisdiction, though, is a part of appellate jurisdiction but ordinarily it cannot be equated with that of a full-fledged appeal. In other words, revision is not continuation of suit or of original proceeding. When the aid of revisional court is invoked on the revisional side, it can interfere within the permissible parameters provided in the statute. It goes without saying that if a revision is provided against an order passed by the tribunal/appellate authority,

the decision of the revisional court is the operative decision in law. In our view, as regards the extent of appellate or revisional jurisdiction, much would, however, depend on the language employed by the statute conferring appellate jurisdiction and revisional jurisdiction.

26. With the above general observations, we shall now endeavour to determine the extent, scope, ambit and meaning of the terms "legality or propriety", "regularity, correctness, legality or propriety" and "legality, regularity or propriety" which are used in three Rent Control Acts under consideration.

27. The ordinary meaning of the word 'legality' is lawfulness. It refers to strict adherence to law, prescription, or doctrine; the quality of being legal.

28. The term 'propriety' means fitness; appropriateness, aptitude; suitability; appropriateness to the circumstances or condition conformity with requirement; rules or principle, rightness, correctness, justness, accuracy.

29. The terms 'correctness' and 'propriety' ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance, 'correctness' is compounded of 'legality' and 'propriety' and that which is legal and proper is 'correct'.

30. The expression "regularity" with reference to an order ordinarily relates to the procedure being followed in accord with the principles of natural justice and fair play.

31. .....

32. We are in full agreement with the view expressed in M/s. Sri Raja Lakshmi Dyeing Works and others v. Rangaswamy Chettiar, 1980 4 SCC 259 that where both expressions "appeal" and "revision" are employed in a statute, obviously, the expression "revision" is meant to convey the idea of a much narrower jurisdiction than that conveyed by the expression "appeal". The use of two expressions "appeal" and "revision" when used in one statute conferring appellate power and revisional power, we think, is not without purpose and significance. Ordinarily, appellate jurisdiction involves a re-hearing while it is not so in the case of revisional jurisdiction when the same statute provides the remedy by way of an 'appeal' and so also of a 'revision'. If that were so, the revisional power would become co-extensive with that of the trial Court or the subordinate Tribunal which is never the case. The classic statement in Dattonpant Gopalvarao Devakate v. Vithalrao Maruthirao Janagaval, 1975 2 SCC 246 that revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the Code but, at the same time, it is not wide enough to make the High Court a second Court of first appeal, commends to us and we approve the same. We are of the view that in the garb of revisional jurisdiction under the above three Rent Control Statutes, the High Court is not conferred a status of second Court of first appeal and the High Court should not enlarge the scope of revisional jurisdiction to that extent.

33 to 44. .....

45. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the First Appellate Court/First Appellate Authority because on re- appreciation of the evidence, its view is different from the Court/Authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or

misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to re-appreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."

27. Admittedly, mutation was attested in presence of the predecessor-in-interest of the appellants-writ respondent No. 2. He had never raised any finger and had not questioned the findings made by the revenue agencies that he was not in possession of the land in question, thus, the Financial Commissioner (Appeals) has fallen in an error in upsetting the orders made by the Divisional Commissioner, Assistant Settlement Officer and the Tehsildar (Settlement).

28. The Apex Court in the case titled as **Narasamma & Ors.,** reported in **2009 AIR SCW 2653,** held that the entries in the revenue record reflects as to who was in possession on the date of entry. It is apt to reproduce the relevant portion of para 12 of the judgment herein:

"12. ..... It is true that the entries in the revenue record cannot create any title in respect of the land in dispute but it certainly reflects as to who was in possession of the land in dispute on the date the name of that person had been entered in the revenue record....." *(Emphasis added)*

29. The predecessor-in-interest of the appellants-writ respondent No. 2 had neither explained the delay in the application filed in the year 1987 for correction of the entries in the revenue record nor in the appeal, revision, second revision and the writ petition, thus, was caught by delay.

30. The Apex Court in the case titled as **State of West Bengal and others versus Karan Singh Binayak and others,** reported in **AIR 2002 Supreme Court 1543,** held that rectification of *record-of-rights* sought after a considerable long delay is not proper. It is apt to reproduce paras 17 and 18 of the judgment herein:

"17. The period of 25 years under the lease expired in the year 1976. The notification under the Act was issued on 11th November, 1954. In 1957 record of rights was prepared under Section 44 of the Act according to which the land was held retainable under Section 6(1)(b) of the Act. The possession was handed over to the original owners in 1981 on liquidation of the lessee on an order being passed by the High Court directing official liquidator to disclaim the property which was later transferred to the writ petitioners in terms of the agreements of sale entered in the year 1988 and sale deeds in 1992-93. Meanwhile, in the year 1991 on proceedings being taken under the ULC Act, 6145.90 square meter of the land was held to be excess under the said Act. In June 1993, the plans were sanctioned and construction commenced. It can, thus, be seen that after the preparation of record-of-rights, not only the appellants did not take any steps and slept over the matter but various steps as-above were taken by the respondents in respect of the land in question. The argument that the proceedings under the ULC Act or the preparation of record-of-rights were ultra vires and the acts without jurisdiction and, therefore, those proceedings would not operate as a bar in appellants invoking inherent jurisdiction under Section 151, C. P. C. by virtue of conferment of such power under Section 57A of the Act is wholly misconceived and misplaced. The inherent powers

cannot be used to reopen the settled matters. These powers cannot be resorted to when there are specific provisions in the Act to deal with the situation. It would be an abuse to allow the reopening of the settled matter after nearly four decades in the purported exercise of inherent powers. It has not even been suggested that there was any collusion or fraud on behalf of the writ petitioners or the erstwhile owners. There is no explanation much less satisfactory explanation for total-inaction on the part of the appellants for all these years.

18. Apart from the facts stated above, even when the appellants woke from its slumber, the manner in which they acted has already been noticed and it is apparent therefrom that at athat stage they did not proceed to take action for the correction of the record-of-rights. They did not at that stage invoke Section 57A of the Act. What they did was to issue an order suspending the sanction of the building plan and directed the Chairman of the Municipality to ask the respondents to suspend the construction according to the plain sanctioned by the municipality. In proceedings of the writ petition wherein the said order was challenged, it does not appear that appellants took the stand of the land vesting in it and the further stand that the record-of-right was prepared without jurisdiction or that the proceedings under the ULC Act were void and without jurisdiction. The stand taken by them was that proceedings under the ULC Act were not genuine. The competent authority was called in those proceedings and stood by the documents signed by him. The statements issued under the ULC Act were held to be genuine. The order directing suspension of the plans and stoppage of construction were quashed by a learned single Judge of the High Court. The order of the learned single Judge was upheld in appeal by the Division Bench of the High Court. After the decision of the Division Bench, the appellants started proceedings in question under Section 57A purporting to Act on the basis that 1957 record-of-rights was based on defective, wrongful and irregular record and it was not a bar for revision of records on the basis of new and genuine facts. The notice issued even within less than three weeks of the decision of the Division Bench itself shows that the appellants were aware of the proceedings of the writ petition but did not think it proper to move the High Court and seek a clarification that they could reopen the matter explaining to the High Court the circumstances under which in response to the writ petition they had not taken the stand before the High Court on the basis whereof they were seeking to exercise power under Section 57A after lapse of nearly 38 years. It is evident that they knew about the factum of liquidation of the lessee. Despite that, notice of proceedings under Section 57A was directed to be issued to the mill and not to writ petitioners on whose petition the order of the District Magistrate was set aside by the High Court. Two months later i.e. on 15th May, 1995, the order was passed noticing that nobody had appeared to oppose those proceedings. The appellants purported to take paper possession on 5th September, 1996. There is nothing on the record to suggest that any attempt was made to serve the notice dated 15th March, 1995 or the order dated 15th May, 1995 on the respondents who, it seems, came to know of these proceedings only towards the end of 1996 when proceedings were initiated for breach of Section 144 of the Code of Criminal Procedure. It is difficult to comprehend, the applicability of Section 144, Cr. P. C. to the fact situation. To say the least the appellants have been wholly negligent and having slept over the matter for nearly 40 years, they could not reopen the matter in the manner sought to be done." (Emphasis added)

31. In another case titled as **I. Chuba Jamir & Ors. versus State of Nagaland & Ors.,** reported in **2009 AIR SCW 5162,** the Apex Court has held that the inordinate delay is a very valid and important consideration. It is apt to reproduce para 17 of the judgment herein:

"17. On a careful consideration of the materials on record and the submissions made by Mr. Goswami we are unable to accept the claims of the appellants-writ

petitioners. In our view the inordinate delay of 7 or 8 years by the appellants-writ petitioners in approaching the High Court was a very valid and important consideration. This aspect of the matter was also brought to the notice of the Single Judge but he proceeded with the matter without saying anything on that issue, one way or the other. It was, therefore, perfectly open to the Division Bench to take into consideration the conduct of the appellants-writ petitioners and the consequences, apart from the legality and validity, of the reliefs granted to them by the learned single Judge."

32. The same principle has been laid down by the Apex Court in the case titled as **Banda Development Authority, Banda versus Moti Lal Agarwal and Ors,** reported in **2011 AIR SCW 2835.** It is apt to reproduce paras 15 and 25 of the judgment herein:

"15. In our view, even if the objection of delay and laches had not been raised in the affidavits filed on behalf of the BDA and the State Government, the High Court was duty bound to take cognizance of the long time gap of 9 years between the issue of declaration under Section 6(1) and filing of the writ petition and declined relief to respondent No.1 on the ground that he was guilty of laches because the acquired land had been utilized for implementing the residential scheme and third party rights had been created. The unexplained delay of about six years between the passing of award and filing of writ petition was also sufficient for refusing to entertain the prayer made in the writ petition.

xxx xxx xxx

25. In this case, the acquired land was utilized for implementing Tulsi Nagar Residential Scheme inasmuch as after carrying out necessary development i.e. construction of roads, laying electricity, water and sewer lines etc. the BDA carved out plots, constructed flats for economically weaker sections and lower income group, invited applications for allotment of the plots and flats from general as well as reserved categories and allotted the same to eligible persons. In the process, the BDA not only incurred huge expenditure but also created third party rights. In this scenario, the delay of nine years from the date of publication of the declaration issued under Section 6(1) and almost six years from the date of passing of award should have been treated by the High Court as more than sufficient for denying equitable relief to respondent No.1."

33. The Apex Court in the case titled as **Chennai Metropolitan Water Supply and Sewerage Board and others versus T.T. Murali Babu,** reported in **2014 AIR SCW,** held that the doctrine of delay and laches should not be lightly brushed aside. It is worthwhile to reproduce para 16 of the judgment herein:

"16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the

court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

34. The same principle has been laid down by the Apex Court in the case titled as **State of Jammu and Kashmir versus R.K. Zalpuri and others,** reported in **AIR 2016 Supreme Court 3006,** paras 26 and 27 whereof read as under:

"26. In the case at hand, the employee was dismissed from service in the year 1999, but he chose not to avail any departmental remedy. He woke up from his slumber to knock at the doors of the High Court after a lapse of five years. The staleness of the claim remained stale and it could not have been allowed to rise like a phoenix by the writ court.

27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias" - 'thanks to God'."

35. The Divisional Commissioner has rightly discussed all the aspects of the case. The predecessor-in-interest of the appellants-writ respondent No. 2 was supposed to be vigilant and had to seek the relief within time, if aggrieved, which he had not done and now the entries made in the revenue record cannot be allowed to be changed on mere asking, that too, in the *record-of-rights*.

36. The Financial Commissioner (Appeals) has not held that the inquiry/spot inspection conducted by the field staff relating to the possession was not factually and legally correct. It has also not given any reasons how the first revisional authority, appellate authority and the revenue authority failed to appreciate the facts of the case.

37. The learned Single Judge has discussed all the aspects and we are of the view that the Writ Court has rightly made the impugned judgment. If, at all, the predecessor-in-interest of the appellants-writ respondent No. 2 was aggrieved by any entries made in the *record-of-rights,* the remedy perhaps was to file a suit for declaration in terms of the mandate of Specific Relief Act, which he has not chosen to file.

38. Our this view is fortified by the judgment in the case titled as **Jagtar Singh and others versus Swaran Singh,** reported in **1979 Simla Law Journal (Punjab & Haryana) 89.** It is apt to reproduce para 5 of the judgment herein:

"5. It is settled law that when that Khasra girdawari entries have been incorporated in the latest and subsequent jamabandi, the revenue officers cannot change them in summary proceedings under the provisions of Punjab Land Revenue Act and in such case only course open to an aggrieved party is to seek relief from competent civil court by filing a regular civil suit. This view finds support from the ruling of the Financial Commissioner given in 1970-PLJ-30, Reg., Prehlad Bhagat and another Vs. Karta Ram and another in which it was held that

where entries in khasra girdawari have been incorporated in Jamabandi the Revenue Officers have no right to order corrections of a such entries and these can only be corrected by filing a regular suit. Shri B.S. Sodhi, learned counsel for respondent has not given any satisfactory rebuttal of the above proposition of Law. In view of this the orders passed by the Assistant Collector and the Collector cannot be sustained in eye of law and have to be set aside."

39. The High Court of Punjab and Haryana in the case titled as **The Chief Secretary to Government Punjab and others versus Chawli and others,** reported in **1980 Punjab Law Journal 10,** held that if any person considers himself aggrieved as to any right of which he is in possession by an entry in *record-of-rights* or in an annual record, he may institute a suit for declaration of his right under the Specific Relief Act.

40. In another case titled as **Dharam Singh and others versus The State of Haryana and others,** reported in **1983 Punjab Law Journal 210,** it has been held by the High Court of Punjab and Haryana that an aggrieved party can file a suit under the Specific Relief Act to rectify the entry in the revenue record. Further held that only the legal errors regarding jurisdiction or material irregularity could be rectified by the Financial Commissioner. It is worthwhile to reproduce para 5 of the judgment herein:

"5. From the combined reading of these provisions it is plain that the bar of jurisdiction of Civil Court is subject to other provisions of the Act and under section 45 of the Act, an aggrieved party can file a suit under the Specific Relief Act to rectify the entry in the revenue record. Even the Assistant Collector and the Collector who are the officers for the determination of the fact, had found as a fact that respondent No. 3 did not remain in possession after the death of Maya Ram, his father and the application for correction was dismissed. Only the legal errors regarding the jurisdiction or material irregularity could be rectified by the Financial Commissioner. Be that as it may, since the matter is concluded by the Civil Court, the Financial Commissioner who was performing the duties of a Revenue Officer under the Act, could not sit over the findings of the Civil Court between the parties. The decision of the Civil Court is binding, in my view on the Revenue Officers."

41. The predecessor-in-interest of the appellants-writ respondent No. 2, under the garb of the proceedings right from the year 1987, dragged the respondents No. 1 to 4 herein in the lis without any fault on their part.

42. The predecessor-in-interest of the appellants-writ respondent No. 2 wanted to have rectification in order to record his possession over the portion of land, which was not in his possession and virtually, wanted the change of *misal haqiat, record-of-rights* and *jamabandies,* which cannot be done merely by making application and the remedy was before the Civil Court, as discussed hereinabove.

43. More so, if such a belated application is allowed, that will have an effect of taking away the settings of law, which have attained finality.

44. All the questions are answered accordingly.

45. Viewed thus, the learned Single Judge has rightly made the impugned judgment, needs no interference.

46. Having said so, the appeal merits to be dismissed and is dismissed alongwith all pending applications with costs quantified at ₹ 20,000/- to be deposited with the H.P. High Court Bar Association Welfare Funds within two weeks.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Prem Prakash Gupta .....Petitioner
Versus
State of HP and others .....Respondents.

CWP No. 453 of 2016.
Reserved on 10th November, 2016.
Date of decision: 23rd November, 2016.

Constitution of India, 1950- Article 226 - A lease was granted in favour of the petitioner – the petitioner approached the respondents for renewal of lease – respondents renewed the lease for part of the land – the petitioner failed to get the lease renewed – proceedings were initiated under H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971, which resulted in eviction of petitioner – appeal was dismissed – a writ petition was filed in which a liberty was granted to initiate the fresh proceedings – fresh proceedings resulted in the eviction of the petitioner – an appeal was filed, which was dismissed- matter was remanded to the Appellate Court in the writ petition- writ petitioner contended that arguments were not marshaled and appreciated by the Appellate Court- held, that Appellate Court had properly appreciated the matter – the petitioner had failed to get the lease renewed and he was in unauthorized possession- the writ Court can only interfere if Appellate Court has wrongly appreciated the facts and evidence or the judgment is illegal - the Appellate Court had thrashed all the facts and the judgment cannot be said to be illegal- appeal dismissed. (Para-6 to 21)

Cases referred:
Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd., 2014 AIR SCW 3157
Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr., 2014 AIR SCW 3298

For the petitioner: Mr. Karan Singh Kanwar, Advocate.
For the respondents: M/s Anup Rattan and Romesh Verma, Additional Advocate Generals, with Mr. J.K. Verma, and Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this writ petition, the petitioner mainly has sought the following reliefs, on the grounds taken therein.

"(i) A writ of Certiorari or direction in the nature of writ of certiorari may kindly be issued quashing/setting aside order dated 17.11.2015 (Annexure P-32) passed by respondent No. 3 in Case No. 212/2014 and order dated 5.5.2011 (Annexure P-28) passed by respondent No.4 in Case no. 04/2003-04.

(ii) A writ of Mandamus or direction in the nature of Writ of Mandamus may kindly be issued to the respondents directing the respondents to drop the proceedings of eviction initiated against the petitioner."

2. The petitioner is in third round of litigation before this Court by the medium of this petition for the reasons to be recorded hereinafter.

3. It appears that a lease was granted on 12.11.1965 in favour of petitioner-M/s International Angora Breeding Farm (Memmingen) Bombay India vide Annexure P-1 for 100 acres of land near Mohal, District Kullu, H.P. by the then Governor of Punjab. The lease was for a

period of 30 years, commencing from the date, the lessee executed the agreement or the possession of the land was handed over to him which ever was earlier. The State/respondents in the year 1965, have handed over only 57 acres of land to the petitioner, vide Annexure P2.

4. It is stated that the petitioner had approached the respondents for renewal of the lease and vide communication dated 21.4.1997, it was decided to renew the lease only for 31 bighas 5 biswas of land vide Annexure P13, for a period of 20 years w.e.f. 18.11.1995 to 17.11.2015. The petitioner, feeling dissatisfied again approached the respondents for renewal of the lease and vide communication from The Divisional Forest Officer, Kullu dated 10.9.1998, Annexure P16, it was decided to renew the lease only for ten bighas against the proposal of 31.05 bighas, in favour of the petitioner. Thereafter vide Annexure P19 dated 12.11.2002; the renewal of lease was recommended only for six biswas in favour of the petitioner. However, the petitioner failed to get the lease renewed despite having given sufficient time.

5. Vide Annexure P22, notice under sub-Section (i) of Section 4 of the H.P. Public Premises and Land (Eviction and Rent Recovery), Act, 1971, for short "the Act", was issued to the petitioner, proceedings were initiated and eviction order was made by the Collector Forest Division, Kullu, H.P., against him.

6. The petitioner filed appeal against the said eviction order before the Commissioner, Mandi, Division-respondent No.3 herein, who vide order dated 30.6.2006, dismissed the appeal, constraining the petitioner to file CWP which was registered before this Court as CWP No. 656 of 2006. This Court, vide judgment dated 17.3.2009, quashed the order dated 30.6.2006, and disposed of the writ petition with liberty to the respondents to initiate fresh proceedings in terms of the provisions of the Act, has attained the finality. It is apt to reproduce the said judgment herein.

> *"With the consent of the parties, Annexure P.9, dated 30.11.1994 and Annexure P.11, dated 30.6.2006 are quashed and set aside. However, the liberty is reserved to the respondents to start fresh proceedings against the petitioner under the provision of Himachal Pradesh Public premises (Eviction of Unauthorized Occupants) Act, 1971, from the stage of issuance of notice by specifying the grounds as per Section 4 of the Act.*
>
> *With these observations made here-in-above, the writ petition is disposed of. No costs. Dasti Copy, on usual terms."*

7. Thereafter fresh proceedings were initiated against the petitioner and eviction order was again passed against him on 5.5.2011, by respondent No.4, Annexure P-28. The petitioner filed appeal before respondent No. 3, which met with the same fate, vide order dated 28.10.2013 Annexure P-30.

8. Feeling aggrieved, petitioner filed a writ petition before this Court being CWP No. 1810/2014 and this Court vide judgment and order dated 17.7.2014, Annexure P-30A, remanded the matter to the Divisional Commissioner, Mandi, with direction to the Commissioner to pass appropriate orders, as warranted under law, within four weeks from the date of the said judgment. It is apt to reproduce paras 7 and 8 of the said judgment herein.

> *"7. In the given circumstances, the writ petition is allowed, the impugned order is set aside and case No. 193/2011 is remanded, which shall come up for consideration before the Divisional Commissioner, Mandi on 11th August, 2014.*
>
> *8. The parties are directed to cause appearance before the Divisional Commissioner, Mandi, on 11th August, 2014. It is made clear that if the writ petitioner-appellant fails to appear on the said date, Divisional Commissioner, Mandi shall be at liberty to pass appropriate orders, as warranted under law and if the writ petitioner-appellant appears, the appeal be concluded within four weeks with effect from 11th August, 2014."*

9. The appellate Court, i.e. the Divisional Commissioner Mandi, was directed to hear the petitioner and petitioner was directed to remain present. It was also provided that in case, the petitioner fails to do so, the appellate Court shall be within its power to pass appropriate orders.

10. While going through the impugned order, it appears that the petitioner was present, was heard and thereafter Presiding Officer was transferred and his successor had taken over. Arguments were heard on 24.9.2015 and written arguments were also submitted.

11. The learned counsel for the petitioner frankly stated at the Bar that the learned counsel for the petitioner before the appellate Court had addressed the arguments but the same have not been appreciated and considered. His statement to this effect was also recorded vide order dated 10.11.2016 when arguments were heard in this petition. Thus; it is not the case of the petitioner that he was not heard.

12. The only grievance of the petitioner, as projected and argued, was that the facts, circumstances and arguments were not marshalled out and appreciated by the appellate Court.

13. While going through the order impugned, one comes to an inescapable conclusion that the appellate Court has discussed all the aspects. It is apt to reproduce second last and last paras at pages 149 and 150 of the said order herein.

> *"I have heard the arguments put forth by both the parties. The record placed in file was perused minutely. Perusal of lower Court record it reveals that the land was leased out to the appellant for 30 years on 18.11.1965 and this term expired on 17.11.1995. The appellant before lower Court as well as in this court has failed to produce any document which could show that the lease has been renewed. After the expiry of lease term on 17.11.1995, more than 17 years have elapsed and this period is more than sufficient for any party to get the lease renewed. At this belated stage, the averment with regard to making of application for renewal or any pendency thereof cannot be regarded since the appellant has taken more than 17 years for such action and he has not been successful to get the lease renewed. Since the renewal has not been made and on this score the status of appellant becomes that of an encroacher. The appellant also failed to provide any permission from the Govt. of India, department of Environment and Forest for the extension of the lease. As regards the plea taken by the appellant in the grounds of appeal that he has not been afforded opportunity to defend the case and also that no defence witnesses were allowed to be examined by the petitioner; perusal of lower court record reveals that appellant through his counsel has availed several opportunities and finally on 28.2.2011, his counsels stated without oath and closed the defense witnesses on behalf of respondent (now appellant). This makes the plea of not providing of opportunity, baseless.*
>
> *From the above discussions and keeping in view the guidelines laid down by the Hon'ble Supreme Court order dated 12.12.1996 in CWP No.202/1995, it is clear that the appellant is in an unauthorized possession of Public Premises since 18.11.1995 and the order of lower court warrants no interference. Therefore, the appeal is hereby dismissed being devoid of any substance and the order dated 5.5.2011 passed by the trial Court is hereby upheld. A copy of this order be sent to the lower court while returning its record. Case file of this court be consigned to the Record Room after due completion."*

14. The appellate Court has also discussed the guidelines rendered by the apex Court in CWP No.202/1995, decided on 12.12.1996 and determined the issue that the petitioner was un-authorizidely in possession of the premises.

15. It is also apposite to reproduce Section 2 (g) of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, herein.

> *"2(g) "unauthorised occupation", in relation to any public premises, means the occupation by any person of the public premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever."*

16. In view of the above, the lease had expired, was not renewed. Thus, the case of the petitioner falls within the definition of Section 2 (g) of the aforesaid Act, referred to hereinabove. All the authorities below have followed the mechanism contained in the Act, requires no interference.

17. The writ Court can interfere only where it is shown that the appellate Court has wrongly appreciated the facts and the evidence and the judgment/order is illegal. While going through the impugned order, it appears that the appellate Court has thrashed out all facts and it is well reasoned and legal one, cannot be said to be erroneous, perverse or misuse of powers, in any way.

18. The Apex Court in **Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** has held that question of fact cannot be interfered with by the Writ Court unless the findings are perverse, erroneous and without application of mind. However, such findings can be questioned if it is shown that the Tribunal/Court has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence which has influenced the impugned findings. It is apt to reproduce paras 16, 17 and 18 of the judgment rendered by the Apex Court in **Bhuvnesh Kumar Dwivedi's case (supra)** herein:

> *"16. ..... The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before*

a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.....

17. The judgments mentioned above can be read with the judgment of this court in Harjinder Singh's case (AIR 2010 SC 1116) (supra), the relevant paragraph of which reads as under:

"21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty-bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:

> *"10. … The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State."(State of Mysore v. Workers of Gold Mines, AIR 1958 SC 923 p.928, para 10.)*

18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant." [Emphasis added]

19. Our this view is also fortified by the judgment rendered by the Apex Court in **Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr.,** reported in **2014 AIR SCW 3298.** It is apt to reproduce para 9 of the judgment herein:

"9. We find the judgment and award of the labour court well-reasoned and based on facts and evidence on record. The High Court has erred in its exercise of power under Article 227 of the Constitution of India to annul the findings of the labour court in its Award as it is well settled law that the High Court cannot exercise its power under Article 227 of the Constitution as an appellate court or re-appreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court. The Labour Court in the present case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the appellant. The High Court had no reason to interfere with the same as the Award of the labour court was based on sound and cogent reasoning, which has served the ends of justice.

> *It is relevant to mention that in the case of Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil, (2010) 8 SCC 329, with regard to the limitations of the High Court to exercise its jurisdiction under Article 227, it was held in para 49 that-*

"The power of interference under Art.227 is to be kept to a minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court."

It was also held that-

"High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Art. 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it."

Thus it is clear, that the High Court has to exercise its power under Article 227 of the Constitution judiciously and to further the ends of justice.

In the case of Harjinder Singh v. Punjab StateWarehousing Corporation, (2010) 3 SCC 192, this Court held that,

"20. ..... In view of the above discussion, we hold that the learned Single Judge of the High Court committed serious jurisdictional error and unjustifiably interfered with the award of reinstatement passed by the Labour Court with compensation of Rs.87,582 by entertaining a wholly unfounded plea that the appellant was appointed in violation of Articles 14 and 16 of the Constitution and the Regulation."

20. This Court in series of writ petitions and LPAs has laid down the similar principles of law.

21. It is apt to record herein that the petitioner used all weapons in his armoury, in order to defeat the eviction orders passed by the authorities and remained in unauthorized possession of the premises.

22. Having said so, no interference is required. The writ petition is accordingly dismissed alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Rahul Pandey .....Petitioner

Versus

State of Himachal Pradesh and others .....Respondents

CWP No. 3595 of 2015
Reserved on: November 16, 2016
Decided on: November 23, 2016

Constitution of India, 1950- Article 226- Online item rates/bids were invited from contractor for the various works- the petitioner uploaded his bid before due date – he was found to be the lowest bidder but he was not called for negotiation- held, that the financial bid of the petitioner was opened and he was declared lowest bidder – he should have been called for negotiation before calling the second lowest bidder – however, the bid was rejected on the technical ground and the Court cannot substitute its wisdom for technical opinion of the members of the committee – petition dismissed. (Para- 8 to 17)

Cases referred:

State of Jharkhand v. M/s. CWE-SOMA Consortium, 2016 AIR SCW 3366

Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd. , 2016 AIR SCW 3385
Central Coalfields Limited v. SLL-SML (Joint Venture Consortium), 2016 AIR SCW 3814

For the petitioner	Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate, for the petitioner.
For the respondents:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Varun Chandel, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

By way of instant writ petition filed under Article 226 of the Constitution of India, the petitioner has prayed for the following main relief:

> "That the respondents may very kindly be directed to award the work i.e. "Providing LWSS to PC Habitation UP Mahal Athah, Barthara-H, UP Mahal Bhabia in GP Manu, Tehsil Chopal, Distt. Shimla (SH: - Development of site i.e. Cutting on earth work for civil structure, c/o Raw Water Tank c/o 1 No. F/Bed, C/o 2 Nos. Sump well, c/o 2 Nos. Pump House Cum Attendant Qtr Stone Masonry, C/o 1 No. Main Storage Tank, Prov. Laying, jointing & Testing of MSERW Pipes, laying joining and testing of GMS Tubes for r/main and supply & Erection of pumping machinery with allied accessories)", to the petitioner being the lowest bidder, in the interest of law and justice."

2. Key facts, as emerge from the record are that respondent No.5 i.e. Executive Engineer, Irrigation and Public Health Division Nerwa, District Shimla, invited online item rates/ bids on or before 21.4.2015 from contractors registered with the Irrigation and Public Health Department under appropriate class. As per Notice Inviting e-Tender, contractors, who had experience in construction of work as defined in the tender notice, were competent to apply vide aforesaid e-tender. Respondent-Department invited application for following work:

Sr. No.	**Description of work:**	**Estt. Cost**	**E/Money**	**Time**	**Cost of form**
1	Providing LWSS to PC Habitation UP-Mahal Athah, Barthara-II, UP-Mahal Bhabia in GP Manu, Tehsil Chopal, Distt. Shimla (SH: - Development of site i.e. Cutting on earth work for civil structure, C/O Raw Water Tank C/o 1 No. F/Bed, C/o 2 Nos. Sumpwell, C/O 2 Nos Pump House Cum Attendant Qtr Stone Masonary, C/o 1 No. Main Storage Tank, Prov. Laying, jointing & testing of MSERW Pipes, laying joining andt testing of GMS Tubes for R/main and supply & Errection of pumping machinery with allied accessories)	38,70,682	65560/-	6 months	400/-

3. It is undisputed before us, after perusing pleadings available on record that the present petitioner being eligible, as per schedule of tender, uploaded his bid before the stipulated date i.e. 21.4.2015, strictly as per the terms and conditions of Notice Inviting e-Tender, wherein contractors/firms were required to submit their offers in two separate envelopes as below:

> "Contractors/firms shall submit their offer in two separate envelopes as below:
>
> Envelope No. 1
>
> i. Proof of Cost of Tenders form
>
> ii Proof of Earnest Money
>
> Iii Eligibility criteria proof.
>
> Iv Qualifying criteria i/c all other documents i.e. Proof of registration in proper class, registration with sales tax, clearance of sales tax & income tax required as per the conditions of Tender Notice.
>
> Envelop No. 2
>
> Financial Bid.
>
> Second envelope containing Financial bid will be opened only of those firms whose documents in first envelops is found in order. And conditions/ document as verified from the original documents to be submitted separately by the firms to the Executive Engineer, IPH Division, Nerwa as per scheduled date and time."

4. Perusal of aforesaid terms and conditions contained in tender document suggests that second envelope containing financial bid was only to be opened of those firms, whose documents in first envelope were found to be in order. However, conditions contained in tender document also suggest that tender was to be opened of those contractors only, who qualify eligibility criteria. As per petitioner, after comparison of rates having been quoted by him in tender, he was found lowest bidder (L-1) and was legitimately expecting that work would be awarded in his favour. But perusal of Annexure P-2 suggests that the Superintending Engineer, I&PH Circle, Rohru, vide communication dated 18.6.2015 informed the Chief Engineer, South Zone, I&PH Department Shimla that tender in question was scrutinized by the Circle Level Negotiation Committee during its meeting held on 10.6.2015, when it was observed that the petitioner has obtained the authorization to quote pumping machinery from M/s Hydraulic Engineering Company, Hospital Road, Solan, which is authorized dealer of KSB Pumps. Petitioner quoted KSB pumps for 1st stage and reciprocating pump WASP make for 2nd stage, which was contradictory in respect of authorization obtained by him. Contents of letter suggest that since the pump quoted for the first stage by the petitioner were not found technically suitable since it had 49% efficiency at duty point and works upto +3% on duty head, Committee decided that technical suitability of other firms may also be scrutinized. Accordingly, offer of second lowest contractor namely Ramesh Kumar was discussed and it was decided to seek approval of the higher authority in favour of second lowest firm, after negotiations. Pursuant to issuance of letter dated 18.6.2015 by Superintending Engineer, I&PH Circle, Rohru, wherein decision of Committee to accord approval in favour of second lowest firm, after negotiation was conveyed, petitioner requested the Chief Engineer, South Zone vide Annexure P-3 to call him for negotiations being the lowest bidder. Vide Annexure P-3, petitioner also clarified that for stage 1, he had quoted 'KSB' make pump set Model WKFI 40/16 with 60 HP motor which was suitable to give 3.02 LPS discharge at head-506.51 Meter, however, if the department felt that 75 HP is required with this particular pumpset, he could supply the same on already quoted rates. Similarly, petitioner claimed that life of centrifugal pumps was much higher and hassle free as compared to other pumps and if any booster pump was required, petitioner would supply an additional 3.0 HP monoblock pump in their quoted rates for better range and efficiency. Since, no heed was paid to aforesaid communication (Annexure P-3), sent by the petitioner, he approached this Court by way of instant writ petition on 11.8.2015, praying therein for the reliefs as have been reproduced herein above.

5. Mr. Sanjeev Bhushan, Senior Advocate duly assisted by Ms. Abhilasha Kaundal, Advocate, vehemently argued that decision of the respondents in not granting work pursuant to the tender notice advertised by it to the petitioner, who was admittedly lowest bidder, is totally arbitrary, discriminatory and colourable exercise of power. While referring to the documents placed on record by the respective parties, Mr. Bhushan, strenuously argued that there is no dispute that the petitioner, being lowest bidder (L-1), was entitled to be awarded work pursuant to Notice Inviting Tender in the present case. He specifically invited attention of this Court to the terms and conditions contained in Notice Inviting Tender, wherein it was specifically stated that the second envelope containing financial bid would only be opened of those firms, whose documents in the first stage were found to be in order. He stated that since petitioner was found eligible by the respondents after perusing documents contained in first envelope, financial bid submitted by him was opened, wherein he was found to be the lowest bidder. Mr. Bhushan forcefully contended that once financial bid of petitioner was opened, there was no occasion whatsoever, for the respondent authorities to reject his case on the ground of eligibility.

6. Mr. Anup Rattan, learned Additional Advocate General while inviting attention of this Court to supplementary affidavit filed by the Superintending Engineer, Irrigation and Public Health, Circle Rohru, in compliance to order dated 7.10.2015 passed by this Court, whereby direction was given to the respondents to determine the issue within four weeks, stated that a meeting of Tender Committee was held on 3.11.2015, wherein technical suitability of second lowest contractor was discussed and it was found that he has offered reciprocating pump for 1st and 2nd stages for which he has also obtained the valid authorization from authorized dealer of reciprocating pumps. He further stated that since contractor, who was second lowest bidder, failed to reduce the quoted rates, Circle Level Negotiation Committee, decided that tender be recalled. While concluding his arguments, Mr. Anup Rattan forcefully contended that since decision has already been taken to recall the tender in question, present petition deserves to be dismissed having become infructuous.

7. We have heard the learned counsel for the parties and gone through the record carefully.

8. Undisputedly, petitioner, who had applied in terms of Notice Inviting Tender, was lowest bidder (L-1) but he was not called for negotiations by the respondents as far as rates quoted by him in the tender are concerned. True it is that as per terms and conditions contained in Notice Inviting Tender, financial bid of the contractors could only be opened in case documents submitted by them in the first envelope were found to be in order. It is admitted case of the parties that the financial bid of the petitioner was opened and he was declared lowest bidder in L-1 category, and in that capacity, respondents ought to have called him for negotiations at the first instance, before calling second lowest bidder i.e. Ramesh Kumar. But as is evident from Annexure P-2, communication dated 18.6.2015, pumps quoted for the first stage by the petitioner were not found technically suitable by the Circle Level Negotiation Committee in its meeting held on 10.6.2015. Committee, after perusing documents submitted by the petitioner observed that L-1 contractor has obtained authorization to quote pumping machinery from M/s Hydraulic Engineering Company, Hospital Road Solan, which was authorized dealer of KSB Pumps and petitioner has quoted KSB Pumps for 1st stage and reciprocating pump WASP make for 2nd stage, which was contradictory in respect of authorization obtained by the firm. Since technical bid contained in envelope-I was not found suitable by Circle Level Negotiation Committee, proposal was sent to the Chief Engineer, SZ, I&PH, by Superintending Engineer, I&PH Circle Rohru, seeking approval of higher authority to have negotiations with second lowest firm. Similarly, perusal of Annexure P-4, annexed to rejoinder by the petitioner, suggests that tender in question was scrutinized by Circle Level Negotiation Committee on 10.6.2015, wherein following observations were made:

> "In this context, the S.E. IPH Circle, Rohru has submitted that the tender was submitted by E.E. Nerwa which was scrutinized by the circle level Committee during its meeting held on 10-6-2015 wherein **it was observed that Shri Rahul Pandy L-1 Contractor has**

obtained the authorization to quote puping machinery from M/S Hydraulic Engineering Comp.Solan who is authorized dealer of KSB Pumps & L-1 Sh. Rahul Pandy quoted KSB pumps for 1st stage and reciprocating pump WASP make for 2nd stage which is contradictory in respect of authorization obtained by the firm.

However, pump quoted for 1st stage is not technically suitable as it has 49% efficiency at duty pointed work up to +3% on duty head. The suitable otor is 70 HP rating whereas he has quoted 60HP. Keeping In view of the above, the committee decided that technical suitability of the other fir ay also be scrutinized. The offer of second lowest fro Sh. Ramesh Kumar has been discussed and it is observed that he has sought the authorization from M/S Sai Aqua Machines & Builders, Solan who is the authorized distributor of WASP Pump, Kirloskar, KSB Pump Ltd.. Sh. Ramesh Kumar L-2 Contractor has quoted the WASP pump for both stages and both these pumps are technically suitable with 100% efficiency works up to (+) 10% of duty point and required rating of motor is 30 HP & the rates quoted by both the contractors are as under:-

The rates quoted by L-1 for Civil Work	**=Rs.36,48,520/-**
The rates quoted by L-1 for P/Machinery	**=Rs.19,57,100/-**
Total :-	**=Rs.56,05,620/-**
The rates quoted by L-2 for Civil Work	**=Rs.43,66,045/-**
The rates quoted by L-2 for P/Machinery	**=Rs.14,70,300/-**
Total :-	**=Rs.58,36,345/-**

9. After carefully perusing the Notice Inviting Tender, this Court is in agreement with the submission having been made by Mr. Bhushan that at the first instance, information contained in envelope-I was to be examined/ scrutinized by the Department before opening financial bid. But in the present case, while scrutinizing the tender of the petitioner, Executive Engineer, Nerwa pointed out certain discrepancies in tender document submitted by the petitioner and accordingly, recommended that second lowest bidder may be invited for negotiations. Though, in normal circumstance, respondents ought to have scrutinized documents contained in envelope-I, at the first instance, so that suitability /eligibility of the petitioner could be adjudged before opening of financial bid but aforesaid omission on the part of the respondents can not be a ground to nullify subsequent action of the respondents wherein they specifically, on the recommendations of the Committee, invited second lowest bidder for negotiations. Since, the tender submitted by the petitioner was not found in conformity with the parameters laid down in the Notice Inviting Tender, respondents were well within their right to have negotiations with second lowest bidder, who as per record was admittedly eligible in all respects.

10. Though this Court has no hesitation to conclude that the respondents while carrying out scrutiny of documents received by them pursuant to the Notice Inviting Tender miserably failed to adhere to the terms and conditions of Notice Inviting Tender, wherein admittedly before opening financial bid, technical competence/ eligibility of contractors was to be examined in light of documents contained in envelope-I but at the same time, this Court can not substitute its wisdom for technical opinion having been rendered by the members of Circle Level Negotiation Committee, who are admittedly technical persons. Moreover, members of the Committee comprising of technical persons are expected to know more about the standard of particular item required by the department for completion of work in question.

11. Apart from above, it clearly emerges from the reply filed by the respondents to the writ petition that the power of approval/scrutiny lies with the Superintending Engineer beyond the amount of Rs. 10.00 Lakh for non selected Executive Engineer and Rs. 30.00 Lakh for selected Executive Engineer. Relevant para of the reply is reproduced herein below:

"para No.4

> The contents of para 4 admitted to the extent that petitioner was eligible to submit his tender bid as per his registration subject to fulfillment of tender conditions . It is emphathetically denied that the petitioner was found completely eligible after opening the tender bids. It is respectfully submitted that though the tender were invited by respondent No. 5 but on behalf of the Governor of H.P. and under rules the power of approval/scrutinizing the tender lies with the Superintending Engineer beyond the amount of Rs..10.00 lakhs for non selected Executive Engineer and Rs. 30.00 lakh for selected Executive Engineers. Since the tenders in the present case was to the tune of more than Rs. 30.00 lakhs as such the tender were to be approved/ scrutinized in the office of Superintending Engineer i.e. Respondent No. 4 by a duly appointed technical committee . Therefore, respondent No. 5 opened the tender and forwarded, without technical scrutiny, to Superintending Engineer for further scrutinized and approval by circle level technical committee. It is admitted that the in opening of tender the petitioner was financially lowest ."

12. Hence, by no stretch of imagination, court can assume the role of technical expert, who in their wisdom have not found the pump quoted by the petitioner suitable and efficient as per the requirement of the project/ work. Moreover, as per latest supplementary affidavit filed by the Superintending Engineer, I&PH, a decision has been already taken to recall the tender, as a result of which relief prayed for in the present petition by the petitioner can not be granted at this stage. Since respondents have already taken a conscious decision to recall the tender, this Court sees no occasion to grant relief No.1, whereby prayer has been made to award work in question.

13. It is well settled by now that respondents can withdraw /recall tender at any time, if it is convinced that same is not in accordance with the requirements as indicated in Notice Inviting Tender. Though, in the present case, petitioner claimed himself to be lowest bidder on account of his financial bid but there is no document suggestive of the fact that pursuant to opening of his financial bid, he was successful lowest bidder, as such no right has accrued in his favour which would entitle him to claim the relief as prayed for in the petition.

14. The Apex Court in **State of Jharkhand v. M/s. CWE-SOMA Consortium** reported in 2016 AIR SCW 3366, has held that:

> 13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-
>
> > "Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof." Clause 32.1 of SBD: "…the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action." In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.
>
> 14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only

one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness.

15. The Apex Court in **Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd.** reported in 2016 AIR SCW 3385, has laid down same principle.

16. The Apex Court in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium),** reported in 2016 AIR SCW 3814, has further held that:

> 44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.
>
> 55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.
>
> 56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."

17. Applying the test to the instant case, the writ petition merits to be dismissed and is accordingly dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Surinder Kumar son of Shri Shesh Ram ....Petitioner

Versus

State of H.P. and another ....Non-petitioners

Cr.MMO No. 65 of 2016
Order Reserved on 18th November 2016
Date of Order 23rd November 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 279, 337 and 338 of I.P.C – present petition was filed for quashing the FIR and consequent proceedings – held, that the fact whether injured had sustained injuries on account of her own fault or at the time of getting down the bus is a complicated issue of fact which cannot be determined during these proceedings – no findings can be given regarding the affidavit executed by the injured- the permission to compound the offence cannot be granted as the offence punishable under Section 279 of I.P.C is against the public at large- petition dismissed. (Para-5 to 10)

Cases referred:

State of Orissa vs. Debendra Nath Padhi, AIR 2005 SC 359
Ishwar Singh vs. State of M.P, AIR 2008 SCW 7865
Mohan Singh vs. State (FB) Rajasthan, 1993 Cr.L.J. 3193

Narinder Singh and others vs. State of Punjab and another, JT 2014(4) SC 573

For Petitioner:	Mr. Sanjay Jaswal, Advocate.
For Non-petitioner No.1:	Mr. R.K. Sharma Deputy Advocate General.
For Non-petitioner No.2:	Mr.Diwakar Dev Sharma, Advocate

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. for quashing of FIR No.225 of 2014 dated 13.12.2014 registered against the petitioner under Sections 279, 337 and 338 IPC at P.S. Indora District Kangra H.P. and for quashing criminal proceedings pending before learned Judicial Magistrate Indora District Kangra H.P.

Brief facts of the case

2. On 12.12.2014 complainant/injured namely Shobha Devi aged 49 years was travelling in HRTC bus No. HP-38-6066. When injured was in process of boarding down from bus at Indora District Kangra H.P. bus stand at 11.30 AM then accused started bus and Shobha Devi injured sustained injuries due to rash and negligent driving of vehicle upon public road. After investigation criminal case filed in Court of Judicial Magistrate 1st Class Indora against accused under Sections 279, 337 and 338 IPC. Learned Judicial Magistrate 1st Class listed the case for consideration upon charge. Criminal case is pending before learned Judicial Magistrate 1st Class Indora as of today.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of non-petitioner No.1 and learned Advocate appearing on behalf of non-petitioner No.2 and also perused the entire record carefully.

4. Following points arises for determination in this petition:-

1. Whether petition filed under Section 482 Cr.P.C. is liable to be accepted as per grounds mentioned in petition?
2. Final Order.

Findings upon Point No.1 with reasons

5. Submission of learned Advocate appearing on behalf of petitioner that injured had sustained injuries on account of her own fault while injured was boarding down from bus at Indora bus stand and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Fact whether injured had sustained injuries on account of her own fault or not at the time of boarding down from bus is complicated issue of facts and no judicial findings relating to complicated issue of facts can be given at this stage unless opportunity is granted to prosecution and accused to prove their case in accordance with law before learned Trial Court.

6. Submission of learned Advocate appearing on behalf of petitioner that injured has given affidavit dated 14.12.2015 and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that no findings relating to affidavit filed by Shobha Devi injured can be given at this stage. Evidentiary value of affidavit filed by Shobha Devi will be perused by learned Trial Court during trial of case. It is well settled law that document filed by accused cannot be considered by Court at the initial stage of criminal case. ***See AIR 2005 SC 359 State of Orissa vs. Debendra Nath Padhi.*** Documents filed by accused can be considered by criminal Court when criminal case is listed for accused evidence as per Code of Criminal Procedure 1973

7. Submission of learned Advocate appearing on behalf of petitioner that injured and accused want to compound the offence in order to keep harmony inter se parties and on this

ground FIR registered under Sections 279, 337 and 338 IPC be compounded is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that offence under Section 279 IPC is non-compoundable offence and it is held that offence under Section 279 IPC is offence against public at large because offence under Section 279 IPC relates to rash or negligent driving upon public road. The word 'public has been specifically mentioned under Section 279 IPC. It is well settled law that when word 'public' is mentioned in criminal offence then criminal offence is committed against public at large.

8. It is well settled law that order of compounding criminal offence which are non-compoundable under statutory provision of Code of Criminal Procedure 1973 is improper. It is also well settled law that it is against public policy to compound a non-compoundable criminal offence. ***See AIR 2008 SCW 7865 Ishwar Singh vs. State of M.P. See 1993 Cr.L.J. 3193 Mohan Singh vs. State (FB) Rajasthan.***In view of the fact that offence under Section 279 IPC is offence against the public at large and in view of fact that offence under Section 279 IPC is non-compoundable offence it is not expedient in the ends of justice to allow the petition.

9. It is well settled law that criminal proceedings of following criminal cases should not be quashed. (1) Murder criminal case (2) Rape criminal case (3) Dacoity criminal case (4) Prevention of Corruption Act criminal case (5) Criminal offence under Section 307 IPC (6) Criminal offences against public at large. It is well settled law that following criminal offences should be allowed to be compounded (1) Commercial transaction criminal cases (2) Matrimonial dispute criminal cases and (3) Family dispute criminal cases. ***See JT 2014(4) SC 573 Narinder Singh and others vs. State of Punjab and another.*** It is held that criminal offence under Section 279 of Indian Penal Code 1860 is not criminal offence against private parties simplicitor but is criminal offence against public at large. In view of above stated facts and case law cited supra point No. 1 is answered in negative.

Point No. 2 (Final Order)

10. In view of findings upon point No. 1 above petition filed under Section 482 Cr.P.C. is dismissed. Parties are directed to appear before learned Trial Court on ***15.12.2016.*** Observations will not effect merits of case in any manner and will be strictly confine for disposal of present petition. File of learned Trial Court along with certify copy of order be sent back forthwith. Cr.MMO No. 65 of 2016 is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Shri Khem Chand .....Appellant.

Vs.

Shri Gopal Singh .....Respondent.

RSA No.: 391 of 2006
Reserved on: 03.11.2016
Date of Decision: 24.11.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit that the entry showing D to be gairmaurusi are incorrect – no Will was executed by D – permissive possession of D came to an end on her death – defendant pleaded that D was a tenant who became the owner on the commencement of H.P. Tenancy and Land Reforms Act- she had executed a Will – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that The Appellate Court had held that J appeared to have died in the year 1976 as mutation of inheritance was sanctioned on 11.3.1976 - the Will was executed when proprietary rights were not conferred upon D – Appellate Court had drawn the conclusion on the basis of presumption/conjecture and surmises without any ground of appeal- appeal allowed – the case remanded to the Appellate Court for a fresh decision. (Para-11 to 17)

For the appellant: Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.
For the respondent: Mr. Ashwani Pathak, Senior Advocate, with Mr. Sandeep Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Solan in Civil Appeal No. 77-S/13 of 2004 dated 23.05.2006, vide which, learned appellate Court while dismissing the appeal filed by the plaintiff affirmed the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Kasauli, District Solan in Civil Suit No. 332/1 of 1999/1994 dated 10.09.2004, whereby the learned trial Court had dismissed the suit for declaration and injunction filed by the plaintiff.

2. Brief facts necessary for the adjudication of the present case are that appellant/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for declaration and injunction on the grounds that land comprised in Khata No. 5 min, Khatauni No. 8, Khasra No. 129, measuring 5 bighas was recorded in the name of plaintiff as owner and defendant had been shown in possession of the said land as per entries in copy of jamabandi for the year 1992-93 for Mauza Chainthu, Pargna Nali Dharti, Tehsil Kasauli. As per the plaintiff, suit land was in possession of Smt. Durgi, who died in the year 1986 and the revenue entries showing Smt. Durgi to be tenant in possession of the suit land were wrong and illegal. Smt. Durgi was real sister of mother of Shri Harnam Singh and she and her husband were economically not well off and due to this reason, Smt. Chawali, who was Bhabi and close relative of Harnam Singh had given suit land for use and possession to late Shri Hem Ram and after the death of Hem Ram to Smt. Durgi. It was further the case of the plaintiff that possession of Smt. Durgi was permissive but in the revenue record, she was shown as *Gair Marusi* and revenue entries showing Smt. Durgi or Sh. Hem Ram as *Gair Marusi* were wrong, illegal and void. As per the plaintiff, neither Sh. Hem Ram nor Smt. Durgi were ever inducted as tenants over the suit land nor they had any right, title or interest to possess the suit land in any manner. It was further the case of the plaintiff that after the death of Smt. Durgi, defendant in connivance with revenue staff succeeded in manipulating revenue entries in his favour and in the column of possession entry as *"Gopal Singh Putar Sohandu Ram Putar Paras Ram Sakan Deh Gair Marusi Baruai Vasiyat"* was incorporated. As per the plaintiff, said revenue entry was manipulated and incorporated behind the back of late Smt. Chawali, the predecessor-in-interest of the plaintiff. It was further the case of the plaintiff that Durgi was old, weak, village simpleton and indecisive lady, who had never executed any Will in favour of the defendant. As per the plaintiff, the Will was a result of fraud, misrepresentation and manipulation and in fact Durgi was not having any right, title and interest in the suit land except to possess the same under permission and as such, Durgi could not have had executed any Will qua the suit land. It was further the case of the plaintiff that after the death of Durgi, Smt. Chawali became owner in possession of the suit land and permissive possession of Durgi came to an end. It was further the case of the plaintiff that after the death of Durgi, defendant started interfering with the ownership and possession of late Smt. Chawali over the suit land, who requested the defendant not to do so. After the death of Smt. Chawali, defendant again started interfering with the possession of the plaintiff over the suit land on the basis of wrong revenue entries existing in favour of the defendant, whereas plaintiff was owner in possession of the suit land and defendant who was stranger to the suit land has no right, title or interest over the suit land in any manner whatsoever. On these basis, plaintiff prayed for a decree in his favour to the effect that he was owner in possession of the suit land and revenue entries in favour of the defendant qua the suit land were wrong and illegal and that defendant had no right, title or interest over the same. Plaintiff also prayed that defendant be restrained from interfering with the ownership and possession of the plaintiff over the suit land in any manner whatsoever and in the alternative, decree for possession on the basis of title was prayed for.

3. In the written statement filed by the defendant, the case as was set up by the plaintiff was denied. As per the defendant, the predecessor-in-interest of defendant late Smt. Durgi was a tenant qua the suit land and she was inducted as tenant over Khasra No. 129, measuring 5 bighas on a Chaukauta of Rs. 3/- per annum and she was inducted as such by Jhathu, son of Shibu. It was further the case of the defendant that after the death of Jhathu, Smt. Chawli, his widow succeeded vide mutation No. 128 and mutation of ownership could not be attested by operation of Himachal Pradesh Tenancy and Land Reforms Act as Smt. Chawali happened to be a widow, but the confirmation of proprietary rights were automatic by virtue of H.P. Tenancy and Land Reforms Act and revenue records with regard to tenancy were in accordance with the physical possession of the defendant. It was further the case of the defendant that he succeeded to the suit property by way of Will of Smt. Durgi registered with Sub Registrar dated 17.08.1986 and the same was in the knowledge of the plaintiff. It was further the case of the defendant that Durgi of her free will and senses had executed a valid Will in favour of the defendant and the contention of the plaintiff with regard to execution of Will was wrong and hence denied. It was further the case of the defendant that Chawali was not succeeded by any one including the plaintiff and Chawali had never executed any Will in favour of defendant nor there was any question of execution of any Will as she had never intended to Will her property and in case plaintiff had obtained any Will in his favour, the same was result of fraud and misrepresentation on the part of his father. On these bases, the suit of the plaintiff was contested by the defendant.

4. On the basis of pleadings of the parties, learned trial Court framed the following issues:

"1. Whether the plaintiff is owner in possession of the suit land and revenue entries showing possession of the defendant is wrong and liable to be corrected and the plaintiff is entitled to the injunction as prayed? OPP

2. Whether the defendant is causing interference in possession of the plaintiff? OPP

3. Whether the suit is not maintainable? OPD

4. Whether the plaintiff is estopped from filing the suit, as alleged? OPD

5. Whether the suit is barred by limitation? OPD

6. Whether the plaintiff has no cause of action? OPD

7. Relief.

5. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*Yes.*
Relief:	*Suit of the plaintiff is dismissed as per the operative portion of the judgment.*

6. While dismissing the suit so filed by the plaintiff, it was held by the learned trial Court that it stood proved on record that predecessor-in-interest of the defendant Hem Raj was recorded as tenant on *Chokata,* i.e. *Batai* and he was succeeded by Durgi, who had legally become owner in possession qua the suit land during her life time and as such, she was competent to execute Will in favour of Gopal Singh. Learned trial Court further held that proprietary rights were not challenged and revenue record suggested ownership and possession of defendant apart from admissions made by plaintiff's witnesses PW-2 and PW-3, who admitted the

Will executed in favour of defendant and possession of defendant over the suit land. Learned trial Court further held that *Girdwari* was conducted twice in the year, which bears the official presumption and plaintiff never questioned the same. It was further held by the learned trial Court that Sub-section (4) of Section 104 of the H.P. Tenancy and Land Reforms Act provided that whenever dispute arose whether a person cultivating the land of a land owner was a tenant or not, the burden of proving that such a person was not a tenant of the land was on the land owner. It further held that there was no evidence available on record that possession of the suit land was delivered to the plaintiff. Learned trial Court further held that there was no evidence on record regarding interference being caused by defendant over the alleged possession of the plaintiff. It was held by the learned trial Court that there was rather evidence on record regarding defendant being owner in possession over the suit land and also confirmation of proprietary rights in his favour and in the absence of possession of plaintiff, it could not be alleged that defendant was interfering as claimed by the plaintiff. It was further held by the learned trial Court that since plaintiff was out of possession, hence he could not assert regarding alleged interference. Learned trial Court further held that suit of the plaintiff was not maintainable as tenancy dispute could only be entertained under the provisions of H.P. Tenancy and Land Reforms Act, which was a complete Code in itself. On these bases, the suit so filed by the plaintiff was dismissed by the learned trial Court.

7. Feeling aggrieved by the judgment and decree so passed by the learned trial Court, the plaintiff filed an appeal. Learned appellate Court vide its judgment dated 23.05.2006 dismissed the appeal so filed by the plaintiff and affirmed the judgment and decree passed by the learned trial Court. In its judgment, learned appellate Court in para-6 of the same reproduced the grounds on which the judgment and decree passed by the learned trial Court was challenged before it. Thereafter, it was held by the learned appellate Court that the claim of the plaintiff that the land was given to Durgi Devi and her husband in view of their economic position and their possession was permissive deserved outright rejection as it was somewhere in the year 1958-59 that husband of Durgi came to be recorded as non-occupancy tenant over the suit land and land remained in his continuous possession and after his death, his wife Durgi Devi came in possession of the same and after her death, land came in possession of the defendant. Learned appellate Court held that at no point of time, possession of land had gone back to Chawali after the death of Durgi Devi as was claimed by the plaintiff. It was further held by the learned appellate Court that long standing entries in the revenue record belied the claim of the plaintiff to be owner in possession of the suit land. Learned appellate Court further held that no doubt plaintiff was recorded as owner of the suit land after the death of Chawali on the basis of Will, but after conferment of proprietary rights upon the defendant rightly or wrongly, he ceased to be owner of the suit land. In the same breath, it was held by the learned appellate Court that it was true that Durgi Devi under law could not have made any Will of the land of which she was tenant, but Durgi had become entitled to acquire proprietary rights over the land in the year 1974 during the life time of Jhathu, husband of Chawali, though for the reasons best known, no such mutation was sanctioned in favour of Durgi Devi and she continued to be recorded as non-occupancy tenant. Learned appellate Court held that in reality she should have become owner of the suit land as no steps for the resumption of the land has been taken by Jhathu as provided under Section 104 of the Act. It was held by the learned appellate Court that Will executed by Durgi Devi could not be said to be against the provisions of law as she at that time was certainly owner of the suit land and name of Chawali had been wrongly shown in the column of ownership after the death of Jhathu in 1976. On these bases, learned appellate Court dismissed the appeal so filed by the plaintiff.

8. Feeling aggrieved by the judgments and decrees so passed by both the learned Courts below, the plaintiff has filed this appeal.

9. This appeal was admitted by this Court on 16.11.2006 on the following substantial questions of law:

"Whether the finding of the first Appellate Court that Durgi acquired proprietary rights in respect of the suit land, being a tenant, during the life time of Chawali, who (Chawali) was herself a widow and had inherited the suit property from her husband late Jhathu, is illegal?

10. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

11. A perusal of the judgment passed by the learned appellate Court demonstrates that learned appellate Court returned the finding that Jhathu husband of Chawali appears to have died in the year 1976 as mutation of inheritance in favour of Chawali was sanctioned on 11.03.1976. On these bases, it was held by the learned appellate Court that by virtue of the provisions of Section 104 of the H.P. Tenancy and Reforms Act, Durgi Devi had become entitled to acquire proprietary rights of land in the year 1974 during the life time of Jhathu. However, a perusal of the judgment so passed by the learned trial Court demonstrates that it is not substantiated therein as to from where this conclusion was arrived at by the learned appellate Court that Jhathu died in the year 1976. Incidentally, in the present case, defendant was conferred proprietary rights of the suit land vide mutation dated 30.09.2000. In my considered view, if Durgi Devi had become owner of the suit land by operation of the provisions of H.P. Tenancy and Land Reforms Act, then obviously on the strength of the Will executed by her allegedly in favour of the defendant, the defendant should have had become owner of the said property on the strength of the Will so executed in his favour and there was no occasion for conferring proprietary rights of the suit land upon him vide mutation dated 30.09.2000. But, it is an undisputed fact that when the alleged Will was executed by Durgi Devi in favour of the defendant, she had not been conferred upon proprietary rights or in other words, she was not owner of the suit land. Even learned appellate Court held that Durgi Devi under law could not have made Will of the land of which she was tenant. Incidentally, the findings so returned by the learned appellate Court have not been assailed by the defendant. However, whereas on one hand, it was held by the learned appellate Court that Durgi Devi could not have made Will of the land of which she was tenant, learned appellate Court on the other hand ventured to thereafter return findings to the effect that as H.P. Tenancy and Land Reforms Act, 1972 became effective law w.e.f. 21.02.1971 after its publication in *Rajpatra* dated 21.02.1974 and after receiving assent of the President of India on 02.02.1971 and as Jhathu, husband of Chawali appeared to have died in the year 1976 as mutation of inheritance in favour of Chawali was sanctioned on 11.03.1976, therefore, by virtue of the provisions of Section 104 of the H.P. Tenancy and Land Reforms Act, Durgi Devi had become entitled for acquiring proprietary rights of the land in the year 1974 during the lifetime of Jhathu and though no mutation had been sanctioned in this regard in her favour, but Durgi Devi continued to be recorded as non-occupancy tenant, whereas in reality, she should have become owner of the land as no steps for resumption of the land has been taken by Jhathu, therefore, in this view of the matter, the Will executed by Durgi Devi could not be said to be executed against the provisions of law as she at that time was certainly owner of the suit land and name of Chawali had been wrongly shown in the column of ownership after the death of Jhathu in the year 1976

12. I am afraid that the findings so returned by the learned appellate Court cannot be upheld. This is for the reason that the findings so returned by the learned appellate Court are not substantiated from the records of the case, but rather based on conjectures and surmises. From what material on record learned appellate Court drew the above inferences is not apparent or evident from the findings so returned by the learned appellate Court.

13. Further, though the learned appellate Court in its judgment has taken note of the grounds of appeal on which the judgment and decree passed by the learned trial Court were assailed before it by the plaintiff, however, none of these grounds have been dealt with by the learned appellate Court and in fact it went on to adjudicate upon the matter as if it was trying an original suit. The reasonings given by the learned trial Court while dismissing the suit filed by the

plaintiff have also not been discussed vis-à-vis the grounds of appeal taken by the plaintiff before the learned 1st appellate Court to assail the findings so returned by the learned trial Court.

14. In my considered view, findings of fact by a Court of law cannot be based on presumptions/conjectures and surmises. It has to be on the basis of material adduced on record by the parties that the Court has to give definite findings on fact.

15. It is well settled law that the first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage and anything less than this is unjust to him. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court and first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on question of fact and law. It is settled law that while reversing a finding of fact, the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate court had discharged the duty expected of it. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons on all the issues involved in the case alongwith the contentions put forth and pressed by the parties for decision by the appellate Court.

16. In view of the above salutary principles, I am of the considered view that the learned appellate Court has failed to discharge the obligation placed on it as first appellate Court by deciding the appeal on presumptions rather than returning its findings by coming close quarters with the reasoning assigned by the learned trial Court and thereafter assigning its own reasons for arriving at a different finding. Substantial question of law is answered accordingly.

17. In view of the discussion held above, the appeal is allowed and judgment and decree dated 23.05.2006 passed by the Court of learned District Judge, Solan in Civil Appeal No. 77-S/13 of 2004 are set aside. The case is remanded back to learned appellate Court with a direction to decide the appeal afresh on merits. Parties through their counsel are directed to put in appearance before the learned appellate Court on ***19.12.2016.*** Keeping in view the fact that case pertains to the year 1994, this Court hopes and trusts that learned appellate Court shall adjudicate upon the appeal as expeditiously as possible and preferably within a period of ***six months***. No order as to costs. Miscellaneous application(s), if any, also stands disposed of. Registry is directed to return back the records of the case to learned appellate Court forthwith.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sarwan Singh and others .....Petitioners.

Versus

Mohar Singh .....Respondent.

Civil Revision No.168 of 2016.
Reserved on : 11.11.2016.
Date of decision: November,24th, 2016.

Code of Civil Procedure, 1908- Section 115- A civil suit for recovery of Rs.25,000/- was decreed by the Trial Court- decree was modified in appeal and the petitioners were held entitled to Rs. 10,000/- - it was contended that no second appeal is maintainable under law – held, that where the second appeal is barred by the statute, the provisions under Article 227 of the Constitution of India cannot be used to circumvent the bar of filing an appeal – however, where the judgment is totally perverse or illegal, jurisdiction under Article 227 can be exercised – the revision lies against the order and not against the decree – however, keeping in view the conflicting judgments of the High Court on the point, matter referred to a larger bench. (Para-7 to 35)

Cases referred:
K.Chockalingam versus K.R. Ramasamy Iyer and Jenbagam 2004 (4) LW 586
Shaik Abdul Haq versus Aiswarya Nilaya Chit Fund Pvt Limited 2005 (4) Bank Cas 70
Jaswinder Singh versus Parshotam Lal Sanghi, Advocate 2005 (141) Punjab Law Reporter 368
Masina Sriramulu versus Pasagadagula Pydaiah 2011 (8) RCR (Civ) 1565
Microll India versus Jai Durga Trading Company 2012 (165) Pun LR 368
Manickam Moopan versus Lakshmi 2012 (2) LW 683
Uttam Chand & Anr. versus Gulab Chand Narendra Kumar & Ors. 2013 (2) Raj LW 1298
Liaqat Ali versus State of U.P. 2014 Law Suit (All) 1130
Surya Dev Rai versus Ram Chander Rai and others (2003) 6 SCC 675
Radhey Shyam and another versus Chhabi Nath and others (2015) 5 SCC 423
Nagarpalika Thakurdwara versus Khalil Ahmed & Ors. JT 2016 (9) SC 425

For the Petitioners : Mr.Dinesh Kumar Sharma, Advocate.
For the Respondent : Mr.N.S.Chandel, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The sole question that falls for adjudication in this case is whether the judgment and decree passed by the first appellate Court can be assailed by filing civil revision under Section 115 of the Code of Civil Procedure or under Article 227 of the Constitution of India when the second appeal against the same is specifically barred under Section 102 of the Code of Civil Procedure (for short 'Code').

2. The facts are not in dispute. The petitioners filed a suit for recovery of damages of Rs. 25,000/- which was decreed by the learned trial Court, however, in appeal, the judgment and decree passed by the learned trial Court was partly modified and the petitioners were held entitled to damages of Rs. 10,000/-.

3. Learned counsel for the respondent has raised preliminary objection regarding the very maintainability of this petition in view of bar imposed by Section 102 of the Code which reads thus:-

> *"[**102**. **No second appeal in certain cases**:- No second appeal shall lie from any degree, when the subject matter of the original suit is for recovery of money not exceeding twenty-five thousand rupees.]"*

4. Evidently, as the subject-matter of the original suit was for recovery of money which did not exceed Rs. 25,000/-, no further appeal was maintainable in view of the bar imposed by Section 102 of the Code, the petitioners assailed the judgment and decree by invoking the revisional jurisdiction of this Court by filing instant petition under Section 115 of the Code.

5. During the course of arguments, the learned counsel for the petitioners requested that in case this Court comes to the conclusion that the petition under Section 115 of the Code is not maintainable, then the same be converted and treated as one having been filed under Article 227 of the Constitution of India and it is this prayer that has necessitated this Court to determine the question as framed above.

6. Before proceeding further, certain precedents on the issue may be noticed.

7. In ***K.Chockalingam*** *versus* ***K.R. Ramasamy Iyer and Jenbagam 2004 (4) LW 586***, the Hon'ble High Court of Madras held that though the petition under Section 115 of the Code would be barred in such cases, however, the petition under Article 227 of the Constitution is maintainable. It is apt to reproduce the following relevant observations which read thus:-

"8. The learned counsel for the revision petitioner submits, that the revision as such, is well maintainable under Section 115 C.P.C., if not, at least under Article 227 of the Constitution of India, for which there is no objection from the other side. In this view, the C.R.P. could be decided on merits. The learned counsel for the revision petitioner further submits, that the dismissal of the suit by the first appellate Court, allowing the appeal in entirety, is erroneous and at least the plaintiff is entitled to a decree, against the first defendant, who had acknowledged the debt, periodically, the further fact being, the suit is filed within three years from the last date of acknowledgment.

13. This revision is filed only under Section 115 C.P.C. The suit is one for the recovery of less than a sum of Rs.25,000/- After the suit was decreed, an appeal has been preferred, which was allowed nullifying the lower courts decree and judgment. Section 102 of Code of Civil Procedure Code says, no second appeal shall lie from any decree, when the subject matter of the original suit is for recovery of money,not exceeding Rs.25,000/-. In view of this provision, a second appeal is barred and that is why, a revision is filed under Section 115 C.P.C., which is not maintainable, according to the learned counsel for the respondents. When there is a specific bar for filing the second appeal, when the suit is for recovery of money, not exceeding Rs.25,000/-, it should be held, a revision is also not maintainable under Section 115 C.P.C. Section 115 C.P.C. empowers the High Court, to call for the record of any case which has been decided by any Court subordinate to such High Court in which no appeal lies thereto. From the wordings deployed in the above Section, it is clear, the High Court is empowered to entertain a revision, when no appeal is provided or where no appeal lies. In other words, if the code provides, an appeal provision, from the decree and judgment of the subordinate court, then ordinarily invoking Section 115 C.P.C. is not possible. In this case, against the decree and judgment passed by the District Munsif Court, in O.S.No.147/97, an appeal provision is provided, and an appeal has been preferred also. Then, considering the pecuniary jurisdiction of the suit, the second appeal is prohibited or barred. In this view, it cannot be said, no appeal is provided against the decree and judgment, thereby to invoke Section 115 C.P.C. under the guise of revisional power. If the cases of this nature are allowed to be entertained under Section 115 C.P.C., it would amount to eclipsing Section 102 C.P.C., which aims the curtailment of Second appeal, in the sense, prolonged litigation. Where the subject matter is less than Rs.25,000/-, the High Court invoking Section 115 C.P.C., if maintains the revision, it would amount to second appeal under the label of Civil Revision Petition, thereby allowing the parties, to file second appeal, indirectly, ignoring Section 102, thereby defeating the intention of the legislature, which should not be allowed. In this view of the matter, I am of the considered opinion, the revision petition under Section 115 is not maintainable.

14. The learned counsel for the petitioner realising this difficulty alone, as aforementioned, has filed a memo for the conversion of Cr.P.C. under Section 227 Cr.P.C. which is permissible. In Sadhana Lodh v. National Insurance Co. Ltd. , the Hon'ble Supreme Court has held, when alternative remedy is available, interference under Article 226/227 of the Constitution of India, is not permissible. It is observed:

> *"Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 C.P.C. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred*

by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution."

15. In this view, it is held, where a remedy for filing a revision petition under Section 115 is barred in such cases, petition under Article 227 of the Constitution of India, is maintainable. In this view, this petition could be treated, as one filed under Article 227 of the Constitution of India, and not under Section 115 C.P.C. Then, the remaining question is, whether under the power conferred upon this Court under Article 227, the orders passed by the lower court can be set aside.

16. The only question arises in this revision is whether the suit is barred by limitation or not. Under the Limitation Act, irrespective of the defence raised, on the basis of the limitation, it is the bounden duty of the court to find out, whether the suit is in time or not. Thus, a duty is cast upon the court, to go into the question of limitation and decide the same according to law. As aforementioned, even as per the endorsement, as fairly conceded by the learned counsel for the respondents, except limitation, no other dispute. Since the first appellate Court has failed in its duty, and committed in my considered view, a flagrant violation, defeating the right of the plaintiff, to grant a decree against the first defendant, the same has to be set right under Article 227 of the Constitution of India, for which there cannot be any grievance, from the respondents. In this view of the matter, the decree and judgment passed by the appellate Court is liable to be set aside and there shall be a decree as prayed for, against the first defendant alone. To the above said extent, the revision is to be allowed.

In the result, the revision is allowed to the above said extent, setting aside the decree and judgment of the appellate Court, in A.S.No.64/2001 and there shall be a decree as prayed for, against the first defendant alone, with costs, restricted to the trial Court alone, dismissing the suit against the second defendant, without costs."

8. In ***Shaik Abdul Haq*** *versus* ***Aiswarya Nilaya Chit Fund Pvt Limited 2005 (4) Bank Cas 70***, the Hon'ble High Court of Andhra Pradesh held that in view of the express language engrafted in the Code, neither civil revision nor a petition under Article 227 of the Constitution is maintainable and it was observed as under:-

"*8. The suit claim, which is the subject-matter of the appeal before the lower Appellate Court and the present civil revision petition, remains to be less than Rs.25,000/-precisely Rs.13,237/-.*

9. It may be noted that Section 102 of the Code of Civil Procedure provides that no second appeal would lay if the value of the subject-matter is less than Rs. 25,000/.

10. The first contention of the learned Counsel for the 1st defendant is that though Section 102 of the Code of Civil Procedure explicitly prohibits filing of a second appeal if the value of the subject-matter is less than Rs.25,000/-, the judgment and decree of the first Appellate Court can be canvassed by any party to the suit under Article 227 of the Constitution of India.

11. The second contention of the learned Counsel for the first defendant that having regard to the fact that in terms of the amendment made to Section 115 of the Code of Civil Procedure by Act 46 of 1999, the High Court can entertain the revision petition against the judgment and decree of the first Appellate Court, exercising its jurisdiction under Article 227 of the Constitution of India. Thus contending he relies on the decisions of the Apex Court in Yeshwant Sakhalkar v. Hirabat Kamat Mhamai, and Babhutmal v. Laxmibai, .

12. The third contention of the learned Counsel appearing on behalf of the 1st defendant that basing on the calculation memo filed by the plaintiff, the suit was decreed in part and the other evidence was not properly appreciated by the lower

Appellate Court. Therefore, this Court can invoke the supervisory jurisdiction under Article 227 of the Constitution of India and interfere with the impugned judgment and decree.

13. In other words, according to the learned Counsel for the 1st defendant since the lower Appellate Court did not exercise its jurisdiction properly, though a second appeal is explicitly barred under Section 102 of the Code of Civil Procedure, a revision petition under Article 227 of the Constitution of India is maintainable.

14. The learned Counsel appearing on behalf of the first plaintiff submits that the present civil revision petition is not maintainable inasmuch as, this Court while exercising supervisory jurisdiction cannot reappreciate the evidence or correct the errors in drawing inferences like as is permissible to be done be the Appellate Court and hence the present revision petition under Article 227 of the Constitution of India is liable to be dismissed. To buttress his submissions, he placed strong reliance upon the judgment of the Apex Court in Ranjeet Singh v. Ravi Prakash, 2004 AIR SCW 4221.

15. In Yeshwant Sakhalkar v. Hirabat Kamat Mhamai (supra), the Apex Court observed as thus:

> *The question as to whether the application of Article 227 of the Constitution of India could be maintainable or not has been answered by this Court in Surya Dev Rai v. Ram Chander Rai wherein it was held: (SCC pp.694-96, Para 38)*
>
> *38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:*
>
> *(1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Article 226 and 227 of the Constitution.*
>
> *(2) Interlocutory orders, passed by the Courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.*
>
> *(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate Court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.*
>
> *(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the Subordinate Courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which does not have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction.*
>
> *(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the*

face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby;

(6) A patent error is an error which is self-evidence, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn progress of reasoning. Where two inferences are reasonably possible and the subordinate Court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court indicates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate Court and, the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a large stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a Court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English Courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate Courts but cannot substitute its own decision in pace thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate Court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate Court as the Court should have made in the facts and circumstances of the case."

16. It is also pertinent to notice the observations made by the Apex Court, at Paragraphs Nos. 7 and 8, in Babhutmal v. Laxmibai (supra), which run thus:

The special civil application preferred by the appellant was admittedly an application under Article 227 and it is, therefore, material only to consider the scope and ambit of the jurisdiction of the High Court under that article. Did the High Court have jurisdiction in an application under Article 227 to disturb the findings of fact reached by the District Court? It well settled by the decision of this Court in Waryam Singh v. Amarnath, that the:

".....power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in Dalmia Jain Airways Ltd. v. Sukumar Mukherjee, (S.B.) to be exercised most sparingly and only in appropriate cases in order to

keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors."

This statement of law was quoted with approval in a subsequent decision of this Court in Nagrendra Nath Bora v. The Commr. of Hills Division, and it was pointed out by Sinha, J., as he then was, speaking on behalf of the Court in that case:

> *"It is thus, clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the power under Article 226 of the Constitution. Under Article 226 the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the Tribunal functions within the limits of its authority."*

It would, therefore, be seen that the High Court cannot, while exercising jurisdiction under Article 227, interfere with findings of fact recorded by the subordinate Court or Tribunal. Its function is limited to seeing that the subordinate Court or Tribunal functions within the limits of its authority. It cannot correct mere errors of fact by examining the evidence and reappreciating it. What Morris, L. J., said in Rex v. Northumberland Compensation Appeal Tribunal, 1952 (1) All.ER 122, in regard to the scope and ambit of certiorari jurisdiction must apply equally in relation to exercise of jurisdiction under Article 227. That jurisdiction cannot be exercised:

> *"as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issues raised in the proceedings."*

If an error of fact, even though apparent on the face of the record, cannot be corrected by means of a writ certiorari it should follow a fortiori that it is not subject to correction by the High Court in the exercise of its jurisdiction under Article 227. The power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a Superior Court can do in exercise of appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a Court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate Court or Tribunal final on facts.

8. Here, when we turn to the judgment of the High Court, we find that the High Court has clearly misconceived the scope and extent of its power under Article 227 and overstepped the limits of its jurisdiction under that Article. It has proceeded to reappreciate the evidence for the purpose of correcting errors of fact supposed to have been committed by the District Court. That was clearly impermissible to the High Court in the exercise of its jurisdiction under Article 227. The District Court was the final Court of fact and there being no appeal provided against the findings of fact reached by the District Court, it was not open to the High Court to question the propriety or reasonableness of the conclusions drawn from the evidence by the District Court. The High Court could not convert itself into a Court of appeal and examine the correctness of the findings of fact arrived at by the District Court. The limited power of interference which the High Court possessed under the Article 227 was to see that the District Court functions within the limits of its authority and so far as that was concerned, there was no complaint against the District Court that it

> *transgressed the limits of its authority. It is true that the High Court claimed to interfere with the findings of fact reached by the District Court on the ground that the District Court had misread a part of the evidence and ignored another part of it but that was clearly outside the jurisdiction of the High Court to do under Article 227.*

17. From a perusal of the judgments Yeshwant Sakhalkar v. Hirabat Kamat Mhamai and Babhutmal v. Laxmi Bhai (supra), relied upon by the learned Counsel appearing on behalf of the plaintiff, the consistent view of the Apex Court conspicuously appears to be - - firstly that when the Trial Court passes as interlocutory order, notwithstanding, an embargo under Section 115 of the Code of Civil Procedure, if patent error, which is self evident, is found under the following circumstances:

> *Firstly; against the interlocutory orders, passed by the Courts subordinate to the High Court, against which a remedy of revision is excluded by the Code of Civil Procedure Amendment Act 46 of 1999 are nevertheless are open to be challenged before the High Court, which has supervisory jurisdiction.*
>
> *Secondly; the object of exercising supervisory jurisdiction under Article 227 of the Constitution of India is to keep the subordinate Courts within the bounds of their jurisdiction or in cases where subordinate Courts refuse to exercise their jurisdiction or assume jurisdiction where there is no jurisdiction at all; and*
>
> *Thirdly; where a patent error is self-evident, which can be perceived or demonstrated without going into any lengthy or complicated argument or a long-drawn process of reasoning, the same can be interfered with under Article 227 of the Constitution of India and most importantly the High Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution will not convert itself into a Court of appeal and indulge in reappreciation or evaluation of evidence on record or to correct the errors, if any, in drawing inferences.*

18. The above observations of the Apex Court, noted herein, are only few in the context of the present case among many guidelines carved out by the Apex Court.

19. Sri. V.L.N.G.K. Murthy, Amicus Curiae, appointed to assist this Court, relies on the judgment of the Apex Court in Surya Dev Rai v. Ram Chander Rai and Ors., 2003 (5) ALD 36 (SC) = 2003 (5) Supreme 390.

20. The Apex Court in Yeshwant Sakhalkar v. Hirabat Kamat Mhamai (supra), referred to the observations made by it in Surya Dev Rai v. Ram Chander Rai and Ors., Since the said observations were already extracted, the same need not be extracted once again.

21. In Ranjeet Singh v. Ravi Prakash, 2004 AIR SCW 4221, the Apex Court observed as under:

> *..... A perusal of the judgment of the High Court shows that the High Court has clearly exceeded its jurisdiction in setting aside the judgment of the Appellate Court. Though not specifically stated, the phraseology employed by the High Court in its judgment, goes to show that the High Court has exercised its certiorari jurisdiction for correcting the judgment of the Appellate Court. In Surya Devi Rai v. Ram Chander Rai and Ors., this Court has ruled that to be amenable to correction in certiorari jurisdiction, the error committed by the Court or authority on whose judgment the High Court was exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated*

arguments or by indulging into a long drawn process of reasoning, cannot possibly be an error available for correction by writ of cerliorari. If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or the other, cannot be called a patent error. As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution also, it has been held in Surya Dev Rai (supra) that the jurisdiction was not available to be exercised for indulging into re-appreciation or evaluation of evidence or correcting the errors in drawing inferences like a Court of appeal. The High Court has itself recorded in its judgment that "considering the evidence on record carefully" it was inclined not to sustain the judgment of the Appellate Court. On its own showing, the High Court has acted like an Appellate Court which was not permissible for it do under Article 226 or Article 227 of the Constitution."

22. In the instant case, it is to be seen that the value of the subject-matter of appeal, after passing of partial decree by the lower Appellate Court, is less than Rs.25,000/-. Therefore, the present civil revision petition is attracted by Section 102 of the Code of Civil Procedure, which created a clear bar postulating that no second appeal would lay from any decree, when the subject-matter of the original suit is for recovery of money not exceeding twenty five thousand rupees. The Legislature enacted Section 102 CPC with the clear and obvious object of reducing the scope of the litigation and to give quietus to the same.

23. Furthermore, if the present civil revision petition is entertained under Article 227 of the Constitution of India, it amounts to exercising the appellate jurisdiction, which was prohibited by the Apex Court by way of guidelines in the judgments referred to supra.

24. That apart, the judgment under challenge is not an interlocutory order. Further, the judgment under challenge, as already noticed, is final and rendered by the lower Appellate Court.

25. For the foregoing reasons, without going into the merits of the case, and in view of the specific and unambiguous language contained in Section 102 of the Civil Procedure Code, I have to hold that the remedy available to the petitioner is to file a second appeal, if so advised, and the present civil revision petition filed under Article 227 of the Constitution of India is not maintainable. Therefore, this civil revision is liable to be dismissed."

9. In ***Jaswinder Singh*** *versus* ***Parshotam Lal Sanghi, Advocate 2005 (141) Punjab Law Reporter 368***, a learned Single Judge of the Punjab & Haryana High Court though entertained a petition under Section 115 of the Code, but dismissed the same on merits by observing as under:-

"*4. After hearing the learned counsel, I am of the considered view that this petition is liable to be dismissed because the jurisdiction of this Court under Section 102 of the Code of Civil Procedure 1908 (for brevity of Code) to entertain a second appeal is barred when the subject matter of the original suit is for recovery of money not exceeding Rs.24,000/-. It is for this reason that the defendant-petitioner has invoked 115 of the Code. The power of this Court for reversing the findings under Section 115 of the Code is confined only to jurisdictional error. It is required to be shown that the subordinate court has exercised jurisdiction not vested in it by law or it has failed to exercise jurisdiction so vested or has acted in the exercise of jurisdiction illegally or with material irregularity. A valid inference under Section 114 of the Evidence Act 1872 has been drawn by the learned Lower Appellate Court when the defendant-appellant failed to produce the record showing that no amount of the sale proceeds of share has been credited to his account namely the City Investment Centre which is owned by him. For that purpose, the learned lower*

appellate Court has rightly placed reliance on a judgment of the Supreme Court in the case of Biltu Ram v. Jainanadan Prasad, C.A. No. 941 of 1965, dated 15.4.1965 wherein it has been held that and adverse inference is justified even though no onus on a party to prove the document has been placed. Best evidence concerning the controversy before the courts must always be produced as has been observed by the Supreme Court in the case of Muntgesan Pillai v. Gnana Sambandha Pandora Sambandi, A.I.R. 1917 P.C. 6 and Ors. as well as Mt. Bilas Kunwar v. Desraj Ranjit Singh and Ors., A.I.R. 1951 Privy Council 96. Those who withhold the best evidence from the court expose themselves to the danger of being subjected to an adverse inference against them. The aforementioned view has also been taken in the case of Gopal; Krishanji Ketekar v. Mohd, Hazi Latif and Ors., which has been followed in the case of City Bank N.A. v. Standard Chartered Bank, . In the case of Gopal Krishanji Ketekar the Supreme Court has clarified as to how an inference under Section 114 of the Evidence Act, 1872 would arise. The following observations are apposite to refer:-

> *"Even if the burden of proof docs not lie on a party the court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly to furnish to the courts the best material of its decision. With regard to third parties, this may be right enough-they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition."*

5. There is no material irregularity or jurisdictional error in exercise of power by the lower appellate Court under Section 96 of the Code. As a matter of fact, the first appellate Court is the final court of fact and this court cannot admit a revision petition or an appeal unless it raises a substantive question of law. No revision would be admissible unless a jurisdictional error is found. No such jurisdictional error is shown warranting admission of the petition. Therefore, there is no merit in this petition and same is liable to be dismissed."

10. In ***CMPMO No. 439 of 2010, titled as Subhadra Devi*** *versus* ***Kishori Lal***, decided on 14.12.2010, a learned Single Judge of this Court (Justice Deepak Gupta as his Lordship then was) held that the provisions of Sections 100 and 102 of the Code cannot be circumvented by filing a petition under Article 227 of the Constitution of India and it is apt to reproduce the following relevant observations which read as under:-

> *"3. Under Section 100, CPC, a second appeal lies to the High Court only on a substantial question of law. Section 102, Code of Civil Procedure specifically provides that no second appeal is maintainable in a suit, value whereof is less than Rs.25,000/-. The provisions of Section 100 and 102, Code of Civil Procedure cannot be circumvented by filing a petition under Article 227 of the Constitution of India. An appeal is the creation of a statute and the legislature in its wisdom has decided that a second appeal will not lie in a suit valuation of which is less than 25,000/-. There is no occasion to entertain a CMPMO unless it is shown that there is some illegality involved or there is some perversity in the finding of the learned Trial Court. In the present case, I have gone through the judgments of both the*

courts below. I find that both the judgments are based on appreciation of evidence and, therefore do not call for any interference in this petition."

11. Yet, again in ***CMPMO No.235 of 2006 titled as Mohan Lal*** *versus* ***Bahader Singh***, decided on 16.12.2010, the same learned Judge (Justice Deepak Gupta as his Lordship then was) reiterated that the provisions of Article 227 of the Constitution cannot be used as a means to circumvent the bar to filing of an appeal envisaged under Sections 100 and 102 of the Code. However, it was observed that the Court would be failing in its duty if it does not exercise its supervisory jurisdiction under Article 227 of the Constitution of India when the judgment and order challenged is totally illegal or perverse, as would be evident from the following observations:-

"2.Under Section 100, CPC, a second appeal lies to the High Court only on a substantial question of law. Section 102, Code of Civil Procedure specifically provides that no second appeal is maintainable in a suit, valuation of which is Rs.25,000/- or less. This Court has repeatedly held that the provisions of Article 227 of the Constitution of India cannot be used as a means to circumvent the bar to filing of an appeal. An appeal is only a creation of the statute and if the statute prohibits the filing of an appeal, the provisions of Article 227 of the Constitution of India cannot be invoked in normal course.

3. Having held so, this Court would be failing in its duty if it does not exercise its supervisory jurisdiction under Article 227 of the Constitution of India where the judgment or order challenged is totally illegal or perverse."

12. In ***Masina Sriramulu*** *versus* ***Pasagadagula Pydaiah 2011 (8) RCR (Civ) 1565***, the Hon'ble Andhra Pradesh High Court was dealing with a case where value of the suit was merely Rs. 11,500/- and while dealing with the question regarding maintainability of the petition and despite the bar under Section 102 of the Code held the revision to be maintainable by according the following reasons:-

"*5. Section 115 Code of Civil Procedure has a long legislative history. It would appear that the Code of Civil Procedure, 1859 did not contain any provision relating to the revisional jurisdiction. When High Courts were constituted at the 3 Presidency Towns under the Charter Act, 1861, the 3 High Courts were conferred the power of superintendence over Courts subordinate thereto. The revisional jurisdiction of the 3 High Courts was confined to (a) failure to exercise jurisdiction and (b) exercising of jurisdiction, which did not vest in the subordinate Court, subjecting those questions alone to the revisional jurisdiction of the High Court. Subsequently, another clause relating to the exercise of the jurisdiction illegally or with material irregularity by the subordinate Court was included within the revisional jurisdiction by Amendment Act, 1879. When the Code of Civil Procedure, 1882 was enacted, Section 622 provided for the revisional jurisdiction which verbatim was incorporated as Section 115 of the present Code of Civil Procedure, 1908.*

6. In 1976, when extensive amendments were brought to the Code of Civil Procedure, Section 115 Code of Civil Procedure was amended bringing out an explanation and a proviso to Sub-section (1) to the original Section 115 Code of Civil Procedure. The substantial amendments undertaken by the Amendment Acts of 1999 and 2002 drastically amended the Court of Civil Procedure. So far as Section 115 is concerned, Section 12 of the Code of Civil Procedure (Amendment) Act, 1999 incorporated amendments to Section 115 Code of Civil Procedure. The proviso brought in through the amendment in 1976 was redrafted. A new Sub-section 3 of Section 115 Code of Civil Procedure was added by way of a clarification.

7. The impugned judgment in the present case was passed on 27.07.2006 in A.S. No. 59 of 2004. The amendments have come into force with effect from 01.07.2002.

Hence, Section 115 Code of Civil Procedure as it stands today is liable to be considered to determine whether the revision is maintainable or not.

8. The learned Counsel for the first Defendant inter alia urged that Section 115 Code of Civil Procedure would apply to the orders in interlocutory applications only and that no revision would lie from a judgment in an appeal suit.

9. The learned Counsel for the first Defendant placed reliance upon Section 115(1) proviso, which is to the effect that the High Court shall not vary or reverse any order except where the order impugned would have finally disposed of the suit or other proceedings if the order was made in favour of the revision Petitioner. The learned Counsel for the first Defendant inter alia contended that the purport of the proviso is that the revision can be against any order in a suit or proceeding and not an order disposing of the very suit itself. He also pointed out that when a suit is disposed of, it is not an order, but is a decree and that when the proviso conspicuously did not refer to a decree, Section 115 Code of Civil Procedure cannot be invoked questioning any decree whether in a suit or an appeal.

10. In proceedings other than suits, issues are not settled. The controversies between rival claims are usually framed at the time of disposal of the matter. Even otherwise, when the controversies are crystallized before both sides let in evidence, they are referred to usually as points for consideration and not issues. The learned Counsel for the Plaintiff drew my attention to reference of an issue in Section 115(1) proviso Code of Civil Procedure. For the purpose of clarity, I may extract the proviso to Section 115(1) Code of Civil Procedure. Proviso to Section 115(1) reads:

> *Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings ?.*
>
> *Referring to the word 'issue' in the proviso, it is contended that a revision arises even from the decree in a suit. I am afraid that the whole proviso and indeed the whole section shall be read as a whole and not piecemeal. Picking out a stray word 'an issue' from the proviso, it cannot be contended that a revision is maintainable from the final orders or from the orders in a suit or an appeal.*

11. A reading of the proviso points out that the Court shall examine hypothetically whether the impugned order finally disposes of the suit or proceeding. If the answer to this question is in the positive, a revision would lie and otherwise not.

12. In the present case, the Plaintiff made a monitory claim. The trial Court granted a decree for part of the monitory claim made by the Plaintiff. The appellate Court reversed the same. I may put two situations hypothetically. The order under impugnment is the judgment of the appellate Court. It was passed in favour of the first Defendant. Did it finally dispose of the suit laid by the Plaintiff? Indeed, by the judgment of the appellate Court, the suit filed by the Plaintiff was dismissed. Thus, the judgment of the appellate Court finally disposed of the suit. The other hypothetical situation is to consider as to what would happen had the appellate Court passed judgment/order in favour of the Plaintiff who laid the revision. In other words, the appellate Court must have dismissed the appeal confirming the judgment of the trial Court granting a money decree in favour of the Plaintiff. Again the judgment of the appellate Court would have finally disposed of the suit laid by the Plaintiff. Viewed either in the angle of the Plaintiff or in the angle of the first Defendant, the situation satisfies the proviso of Section 115(1) Code of Civil Procedure.

13. In view of the language deployed in the proviso that the order must have been passed in the course of a suit or other proceeding, there is no bar for a revision from the judgment passed by the appellate Court. The other embargo is provided by the beginning of Section 115(1) that where no appeal lies from the impugned order/judgment, the party can resort to revision. In view of Section 102 Code of Civil Procedure, admittedly no second appeal would lie. This part of the condition imposed by Section 115(1) Code of Civil Procedure is satisfied in the present case. So far as the other condition imposed by the proviso incorporated by 1976 amendment and modified by 1999 amendment is concerned, viz., where the impugned order finally disposed of the suit and would have disposed of the suit finally even if the order were in favour of the Plaintiff, the revision is maintainable. I, therefore, answer this question raised by Sri Ravi Kumar, learned Counsel for the first Defendant-first Respondent that this revision prima facie is maintainable in view of Section 115(1) Code of Civil Procedure including the proviso thereto.

14. The next question is whether the order of the appellate Court deserves to be revised. This question is a mixed question of fact and law. The law regarding the interference by the High Court under Section 115 Code of Civil Procedure is that the High Court is entitled to interfere with the order of a subordinate Court in the event of fulfillment of one of the three conditions mentioned in Section 115(1) Code of Civil Procedure only, viz., the Court exercised the jurisdiction not vested in it by law or b) the Court failed to exercise the jurisdiction which is vested in it or c) the Court acted illegally or with material irregularity in exercise of the jurisdiction vested in it. One of the old cases in respect of powers under Section 115 Code of Civil Procedure is Balakrishna Udayar v. Vasudeva Iyar,1947 AIR(PC) 71 It was reiterated with approval by the Prevy Council in N.S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board, 1949 AIR(PC) 156. The Privy Council considered that the revisional powers are exercisable when the subordinate Courts irregularly exercise or did not exercise or illegally assumed powers to exercise jurisdiction and that a revision cannot be directed against the conclusions of law and fact in which the question of jurisdiction is not involved.

15. One of the leading authorities on the powers under Section 115 Code of Civil Procedure is Major S.S. Khanna v. Brigadier F.J. Dillon, 1964 AIR(SC) 497. In that case, Shah.J as then he was held:

> *The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e., there is a case decided by a subordinate Court in which no appeal lies to the High Court, the second sets out the circumstances in which the jurisdiction may be exercised.*

16. It was clarified that if there was no question of jurisdiction, the decision could not be corrected by the High Court in the exercise of the revisional powers, since a Court has jurisdiction to decide wrongly as well as rightly.

17. Way back in Keshardo Chaneria v. Radha Kissan, 1953 AIR(SC) 23, it was observed that the judges of the subordinate Courts have perfect jurisdiction to decide the case and that even if they decided the case wrongly it could not be said that the subordinate Courts exercised the jurisdiction illegally or with material irregularity. The Himachal Pradesh High Court clarified in Ramdas v. Subhash Bakshi, 1977 AIR (HP) 18 that the revisional jurisdiction is residual jurisdiction conferred so as to ensure that errors of grave nature should be corrected when they are brought to the notice of the Court.

18. I may briefly note the march of law relating to the revisional powers of the High Court at this stage.

19. In Amir Hassan Khan v. Sheo Baksh Singh,1885 11 ILR 6 the judicial committee of the Privy Council observed that where the Court has jurisdiction to

determine a question, it could not be held that the Court had acted illegally or with material irregularity in exercise of its jurisdiction by giving an erroneous decision. In Malkarjun v. Narahari,1900 27 IA 216 the Privy Council held that a Court had jurisdiction to decide wrongly as well as rightly and that if the case was wrongly decided, the wronged party could take the course prescribed by law for setting the matters right and that the jurisdiction of the High Court under Section 115 Code of Civil Procedure could not be invoked in such an event. The Privy Council's next two leading decisions are Balakrishna Udayar (supra) and N.S. Venkatagiri Iyyangar (supra), both of which were already referred to.

20. After independence, one of the first cases arising before the Supreme Court relating to the powers under Section 115 Code of Civil Procedure is Keshardeo's case (supra). In Pandurang v. Maruthi Hari, 1966 AIR(SC) 153, it was observed that it was not competent for the High Court to correct errors of fact, however patent they be under Section 115 Code of Civil Procedure and that even errors of law could not be rectified unless such errors have been in connection with the jurisdiction of the Court to try the dispute. It was clarified by Gajendragadkar, J. as he then was, in that case that an erroneous decision on a question of law reached by the subordinate Court which had no relation to questions of jurisdiction of the Court could not be corrected by the High Court under Section 115 Code of Civil Procedure. As already pointed out, the leading authority, however, is the decision in Major S.S. Khanna's case (supra).

21. In Baldevdas Shivlal v. Filmistan Ditributors (India) (P) Ltd, 1970 AIR(SC) 406, the Supreme Court explained the ambit and scope of Section 115 Code of Civil Procedure that the exercise of the power under Section 115 Code of Civil Procedure was broadly subject to three important conditions viz., i) that the decision must be of a Court subordinate to the High Court, ii) that there must be a case which has been decided by the subordinate Court, and iii) that the subordinate Court must appear to have exercised jurisdiction not vested in it by law or has failed to exercise the jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity.

22. In Managing Director (MIG) Hindustan Aeronautics Ltd. v. Ajit Prasad, AIR 73 SC 76, it was held that the High Court had no jurisdiction under Section 115 Code of Civil Procedure to interfere with the order passed by the first appellate Court whether the order of the first appellate Court is right or wrong and whether the order might be in accordance with law or not in accordance with law as long as the first appellate Court has jurisdiction to make such an order.

23. I may point out that all these decisions were passed prior to the amendment of 1999 or the amendment of 1976.

24. With reference to the powers under Section 115 Code of Civil Procedure and under Article 227 of the Indian Constitution, the Supreme Court observed in Anndai Ammal v. Sadasivan Pillai, 1987 AIR(SC) 203 that the procedure under Section 115 Code of Civil Procedure and Article 227 of the Indian Constitution are different and are not interchangeable.

25. I may, however, point out that in Hukumchand Amolikchand Longde v. Madhava Balaji Potdar,1983 AIR(SC) 504 the Supreme Court held that once a revision under Section 115 Code of Civil Procedure was admitted, it had to be disposed of on 'merits. In Masjid Kacha Tank, Nahan v. Tuff ail Mohammed,1991 AIR(SC) 445 even though there were concurrent findings from the trial Court and the appellate Court, the Supreme Court considered that the High Court in its revisional jurisdiction would be entitled to interfere with the findings of fact if the findings are perverse or there had been a non-appreciation or non-consideration of material evidence on record by the trial Court or the appellate Court. In Vinod

Kumar Arora v. Smt. Surjit Kaur, 1987 AIR(SC) 2179, the Supreme Court held that the High Court would be justified in interfering with the orders of a subordinate Court by exercise of the revisional jurisdiction where the decision of the order under impugnment was based on conjectures and surmises and that the Court which passed the impugned order lost sight of relevant evidence. Thus, although the view of the Privy Council and the Supreme Court by and large is that the scope of a revision is very limited and that a revision can be entertained only when there is incorrect exercise of the jurisdiction conferred upon the Court, the Supreme Court also expressed the view that where the order sought to be revised is perverse and is without any basis whatsoever, such an order deserves to be revised. This view of the Supreme Court indeed is in tune with the famous maxim Ubi jus ibi remedium. The revision Petitioner herein is prevented from moving a second appeal as the amount involved is less than Rs. 25,000/-. I am afraid that the Plaintiff, who is the revision Petitioner, nevertheless, cannot be shut off if the order passed by the appellate Court is wholly unjust. It is not as though the Plaintiff has no remedy even though his rightful claim is rejected. At any rate, the learned Counsel for the Plaintiff contended that the order of the appellate Court was perverse and needed to be rectified through the revision."

13. In ***Microll India*** *versus* ***Jai Durga Trading Company 2012 (165) Pun LR 368***, the Hon'ble Punjab and Haryana High Court held that the bar created under Section 102 CPC could not be bypassed by bringing the revision petition as this course was not permissible and it was observed as under:-

"5. Learned counsel for the petitioner has submitted that when filing of appeal in this matter has been barred by provisions of section 102 CPC, the remedy would be available by way of revision under Civil Revision No. 5704 of 2011 Article 227 of the Constitution of India. He has cited before me a decision of Hon'ble Supreme Court of India in Surya Dev Rai v. Ram Chander Rai and others (2003)6 Supreme Court Cases 675 to support his submission in this regard. Other decisions cited by learned counsel for the petitioner in this regard are Radhey Shyam and another v. Chhabi Nath and others 2009(2) RCR (Civil) 442, Johan Ram v. Steel Authority of India Ltd. 2005 AIR (Chhatisgarh) 17 and Mariamma Roy v. Indian Bank and others 2008(4) RCR (Civil) 910.

8. Learned counsel for the respondent has submitted, on the other hand, that after the provisions of section 102 CPC, barred the appeal in this matter, the judgment and decree passed by First Appellate Court could not be challenged by way of revision petition under section 115 CPC. In this regard, he has cited before me a decision of this court in Jaswinder Singh v. Parshotam Lal Sanghi and another 2005(3) RCR (Civil) 650 where in similar situation, revision under section 115 CPC was held not maintainable. He has also cited before me a decision of Hon'ble Rajasthan High Court in Municipal Council, Sawai Madhopur and others v. Civil Judge (SD) Sawai Modhopur and others 2004(1) LJR 301 where the suit for recovery of Rs.15,360/- was dismissed by the trial court but the appeal was allowed by the appellate court. Since the second appeal was barred, it was held that the provisions of Article 227 of the Constitution of India cannot be used to bypass the provisions of Code of Civil Procedure.

10. In Surya Dev Rai's case (supra) , the suit has been for permanent injunction. The plaintiff filed an application therein for ad- interim injunction under Order 39 Rules 1 and 2 CPC. His prayer was rejected by the trial court as also by the First Appellate Court. The plaintiff, who could not avail the remedy under section 115 CPC after its amendment filed a petition under Article 226 of the Constitution of India. The High Court dismissed the petition for the reason that the same was not maintainable as the plaintiff was seeking interim injunction against the private respondents. The decision of the High Court was reversed holding that the power

of the High Court under Articles 226 and 227 of the Constitution of India is always in addition to the revisional jurisdiction conferred on it. The curtailment of revisional Civil Revision No. 5704 of 2011 jurisdiction of the High Court under section 115 CPC by Amendment Act 46 of 1999 has been held not to take away and could not have taken away the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court.

11. The facts of the case in hand are entirely different. The second appeal in this case is barred by the provisions of section 102 CPC. That bar created by section 102 CPC is sought to be bypassed by bringing a revision petition, which is not permissible. There was no such provision of second appeal in case of application under Order 39 Rules 1 and 2 CPC, which was taken away by any provision of CPC or by curtailment of revisional jurisdiction by the High Court under section 115 CPC. So the facts of the case before me are not similar to the facts of the case in Surya Dev Rai's case (supra) and, therefore, the decision in that case is not applicable to the present case. Similarly the other cases are also on different facts and none of them deal with the point involved in this case. Therefore, they are not applicable to the facts of this case. The point in controversy is directly dealt with by this court in Jaswinder Singh's case (supra) and Hon'ble Rajasthan High Court in Municipal Council, Sawai Madhopur and others' case (supra) and in view of the same, I hold that the petition does not lie ."

14. In ***Manickam Moopan*** *versus* ***Lakshmi 2012 (2) LW 683***, a learned Single Judge of the Madras High Court chose to follow the ratio of the earlier judgment rendered by the same Court in ***K.Chockalingam*** (supra) and observed as under:-

"*4. In the circumstances, Janab Mohamad Ihram Saibu, learned counsel for the respondent submitted that when an appeal was not maintainable in view of the pecuniary limit mentioned in Section 102 C.P.C., on that account an appeal cannot be dismissed, however, the court can grant leave to convert it as a revision.*

5. On this aspect, the learned counsel for the appellant cited the following decisions:

(i) N.BANSIDHAR Vs. DWARAKALAL [AIR 1974 KARNATAK 117].

(ii) JIWAN DASS Vs. NARAIN DASS [AIR 1981 DELHI 291].

(iii) R.S.PILLAI Vs. M.L.PERATCHI @ SELVI & OTHERS [2000 (IV) CTC 543 (DB)]

6. The learned counsel for the appellant also filed a memo that the appeals may be converted as revision petitions.

7. Since Mr.Muthukrishnan is the root cause for filing this memo, he cannot now say otherwise.

8. Now, the question arises whether in the circumstances, these Second Appeals could be converted as revisions or not?

9. As per Section 102 C.P.C. no second appeal shall lie from any decree, when the subject matter of the original suit is for recovery of money not exceeding twenty five thousand rupees.

10. So, Section 102 C.P.C. prescribes a monetary limit of Rs.25,000/- to file Second Appeal. Thus to file a second appeal, the subject matter of the suit should be above Rs.25,000/-. Admittedly, the subject matter of the suit in these appeals are below Rs.25,000/-. So, Section 102 C.P.C. is a bar to maintain these second appeals.

11. A revision is provided under Section 115 C.P.C.

12. BAN SIDHAR Vs. DWARAKALAL [AIR 1974 KARNATAKA 117] deals with a plea for conversion of a revision as an appeal and also deals with return of that

petition for presentation before proper court. That is not the situation before us. It is not applicable to the facts of our case.

13. JIWAN DASS Vs. NARAIN DASS [AIR 1981 DELHI 291] is near us. The Delhi High Court held as under:

> *"It is now a settled law that the label placed on a cause is not conclusive and does not ordinarily affect the jurisdiction of the court to allow the label to be corrected by treating an appeal on a revision or a revision as an appeal. Provided of course the cause of justice so demands. In cases where no appeal lies but an appeal has been wrongly preferred, the Court has the wide discretion to treat it as a revision where the conditions laid down under Section 115 C.P.C. are satisfied."*

14. In R.S.PILLAI Vs. PERATCHI @ SELVI & OTHERS [2000 (IV) CTC 543] in view of the peculiar facts and circumstances of the case, a Division Bench of this Court in the interest of justice converted an appeal as a revision.

15. In K.CHOCKALINGAM vs. K.R.RAMASAMY IYER AND ANOTHER [2004 (4) L.W.586] exactly similar question as before us arose. A memo was filed seeking the leave of the court to convert the second appeal as a revision. There a controversy arose whether under such circumstances, the revision could be filed under Section 115 C.P.C. or under Article 227 of the Constitution of India.

16. It is profitable here to note the following portions of the judgment in K.CHOCKALINGAM vs. K.R.RAMASAMY IYER AND ANOTHER [2004 (4) L.W.586]:

> *"13. This revision is filed only under Section 115 C.P.C. The suit is one for the recovery of less than a sum of Rs.25,000/-. After the suit was decreed, an appeal has been preferred, which was allowed nullifying the lower courts decree and judgment. Section 102 of Code of Civil Procedure Code says, no second appeal shall lie from any decree. When the subject matter of the original suit is for recovery of money, not exceeding Rs.25,000/-. In view of this provision, a second appeal is barred and that is why, a revision is filed under Section 115 C.P.C., which is not maintainable, according to the learned counsel for the respondents. When there is a specific bar for filing the second appeal, when the suit is for recovery of money, not exceeding Rs.25,000/-, it should be held, a revision is also not maintainable under Section 115 C.P.C. Section 115 C.P.C. empowers the High Court, to call for the record of any case which has been decided by any Court Subordinate to such High Court in which no appeal lies thereto. From the wordings deployed in the above Section, it is clear, the High Court is empowered to entertain a revision, when no appeal is provided or where no appeal lies. In other words, if the code provides, an appeal provision, from the decree and judgment of the subordinate court, then ordinarily invoking Section 115 C.P.C. is not possible. In this case, against the decree and judgment passed by the District Munsif Court, in O.S.No.147/97 an appeal provision is provided, and an appeal has been preferred also. Then, considering the pecuniary jurisdiction of the suit, the second appeal is prohibited or barred. In this view, it cannot be said, no appeal is provided against the decree and judgment, thereby to invoke Section 115 C.P.C. under the guise of revisional power. If the cases of this nature are allowed to be entertained under Section 115 C.P.C., it would amount to eclipsing Section 102 C.P.C., which aims the curtailment of Second appeal, in the sense, prolonged litigation. Where the subject matter is less than Rs.25,000/-, the High Court invoking Section 115 C.P.C., if maintains the revision, it would amount to second appeal under the label of Civil Revision Petition, thereby allowing the parties, to file second*

appeal, indirectly, ignoring Section 102, thereby defeating the intention of the legislature, which should not be allowed. In this view of the matter, I am of the considered opinion, the revision petition under Section 115 is not maintainable.

14.The learned counsel for the petitioner realising this difficulty alone, as aforementioned, has filed a memo for the conversion of Cr.P.C. under Section 227 Cr.P.C. which is permissible. In Sadhana Lodh v. National Insurance Co. Ltd., (2003 (3) SCC 524=2003-1-L.W.815), the Hon'ble Supreme Court has held, when alternative remedy is available, interference under Article 226/227 of the Constitution of India, is not permissible. It is observed:

> *"Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 C.P.C. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution."*

15. In this view, it is held, where a remedy for filing a revision petition under Section 115 is barred in such cases, petition under article 227 of the Constitution of India, is maintainable. In this view, this petition could be treated, as one filed under Article 227 of the Constitution of India, and not under Section 115 C.P.C.,"

17. In the circumstances, in view of the above position of law explained and described in K.CHOCKALINGAM vs. K.R.RAMASAMY IYER AND ANOTHER [2004 (4) L.W.586], I am preferred to follow CHOCKALINGAM (supra).

18. Thus, the leave now sought for could be granted to convert the second appeal as a Civil Revision Petition under Article 227 of the Constitution of India."

15. In ***Uttam Chand & Anr.*** *versus* ***Gulab Chand Narendra Kumar & Ors. 2013 (2) Raj LW 1298***, the Hon'ble Rajasthan High Court in a suit filed for recovery of Rs. 10,000/- held that the second appeal is prohibited or specifically barred under Section 102 of the Code, then it cannot be said that no appeal is provided against the judgment thereby invoking jurisdiction under Section 115 of CPC because if cases of this nature are allowed to be entertained, it would amount to eclipsing Section 102 CPC which specifically aims at ending the litigation in view of the pecuniary quantum involved in the cause and revision petition under Section 115 of Code to be not maintainable. It was held:-

> *"3. Learned counsel for the petitioner submits that if error of law is committed by both the Courts below and under Sec. 102 restriction is imposed upon filing second appeal in terms that no second appeal shall lie from any decree, when subject-matter of the original suit is for recovery of money not exceeding Rs. 25,000/-, therefore, the only course is left with the petitioner to challenge the judgment and decree passed by the trial Court and affirmed by the appellate Court by way of filing revision petition because illegality and perversity can be seen while exercising jurisdiction under Sec. 115, C.P.C. Therefore, this revision petition is maintainable.*
>
> *4. In support of his argument, learned counsel for the petitioner invited my attention towards judgment reported in, SUNDERLAL v. PARAMSUKHDAS, 1968 AIR(SC) 366 and submits that if no appeal lay, then, revision would be competent and High Court was right in entertaining the revision if the appellate Court below*

appears to have exceeded the jurisdiction vested in it or it acted with material irregularity in exercise of its jurisdiction. Learned counsel for the petitioner further invited my attention towards, Sadhna Lodh vs. National Insurance Co. Ltd., 2003 3 SCC 524 and submits that this revision petition is maintainable.

5. After hearing learned counsel for the petitioner. I have perused the pleadings of this case.

This revision petition has been filed under Sec. 115, C.P.C. against the judgment and decree passed by the trial Court and affirmed by the first appellate Court for recovery of Rs.10,000/-, Section 102, C.P.C., provides that no second appeal lies from any decree, when the subject-matter of the original suit is for recovery of money not exceeding Rs.25,000/-; meaning thereby, although second appeal is permissible but the legislature with open eyes put a restriction under Sec. 102, C.P.C. so that matter should come to an end, therefore, it is specifically provided that notwithstanding there being appeal provision under Sec. 100, C.P.C., when the subject-matter of the original suit is for recovery of money not exceeding Rs.10,000/-, then, such second appeal shall not lie. In the opinion of this Court, the legislature in its wisdom has curtailed the right of filing second appeal by way of putting above restriction on the point of pecuniary limit of the cause. Therefore, even if any substantial question of law is involved, no second appeal shall lie against the judgment and decree if the initial suit was filed for recovery of money less than Rs. 25,000/-, If it is the intention of the legislature, then, of course, it can be said that petitioner cannot invoke jurisdiction of this Court under Sec. 115, C.P.C. because such invocation of the revisional jurisdiction will render the specific provision of Sec. 102 to nullity which is not permissible. Under Sec. 115, C.P.C. the legality and propriety as well as perversity can be seen, so also, while exercising jurisdiction of second appeal the appeal can be admitted upon substantial question of law. Both are peri meteria, therefore, a revision petition tiled under Sec. 115, C.P.C. is not maintainable.

Here, in this case, recovery of suit was filed by the petitioner for Rs.10.000/- and second appeal is prohibited or specifically barred under Sec. 102, C.P.C. Therefore, it cannot be said that no appeal is provided against the judgment thereby to invoke jurisdiction under Sec. 115, C.P.C. because if cases of this nature are allowed to be entertained it would amount to eclipsing Sec. 102, C.P.C. which specifically aims at ending the litigation in view of the pecuniary quantum involved in the cause. In this view of the matter, this revision petition under Sec. 115, C.P.C. is not maintainable.

Consequently, this revision petition is hereby dismissed as not maintainable."

16. In ***Liaqat Ali*** *versus* ***State of U.P. 2014 Law Suit (All) 1130***, the Hon'ble Allahabad High Court declined to convert a petition under Article 226 of the Constitution of India by observing that what was forbidden by law could not be permitted by invoking extraordinary remedy and that too in a petty matter involving dispute of not more than Rs. 25,000/-. The relevant observations read thus:-

"2. Petitioner filed a suit for recovery of Rs.22,685.72. The suit was dismissed vide judgment and order dated 31.8.2010. The appeal was also dismissed on 17.5.2013. The petitioner thereafter preferred second appeal and the same was dismissed as not maintainable in view of Section 102 C.P.C. Thus, the petition has invoked writ jurisdiction of this Court.

3. The right to appeal is a statutory right. Once the said right has been availed and the matter becomes conclusive between the parties, as no further appeal is provided, the same cannot be permitted to be re-opened by invoking writ jurisdiction.

4. The purpose of writ jurisdiction is to provide a remedy where there is none to undo injustice, but where the statutory remedy provided is availed and is exhausted the recourse to writ jurisdiction is limited and discretionary.

5. It is well settled that in exercise of extra ordinary jurisdiction the courts should not enter into academic issues or in realm of affairs which are petty and for correcting errors in the judgments unless it results in grave injustice.

6. It is a cardinal principle of law that there must be an end to litigation. Therefore, where a judgment of the court below has been subjected to scrutiny in appeal there may not be any further judicial review of the same. If it is so permitted, it would mean that a party has unlimited right to keep agitating the matter until and unless it is decided in his favour. This cannot be the intention of law.

7. In Mahendra Singh Vs. Haqimuddin, 2008 10 ADJ 182 in similar situation, where the second appeal was not found to be maintainable in view of Section 102 C.P.C., I have refused permission to convert it into a petition under Article 227 of the Constitution for the reason that what is forbidden in law cannot be permitted by invoking extra ordinary remedy and that too in a petty matter involving dispute of not more than Rs.25,000/-.

8. In view of the aforesaid facts and circumstances, in order to set at rest the controversy and to end the litigation between the parties, I refrain myself from exercising the writ jurisdiction under Article 226 of the Constitution of India."

17. In ***Civil Revision No.3330 of 2014 titled as Rajesh*** *versus* ***Bharat Lal Bhargava***, decided on 11.02.2016, the Hon'ble Punjab and Haryana High Court after taking into consideration the judgment rendered by the Hon'ble Madras High Court in ***K. Chockalingam*** (supra) and taking into consideration the amended provisions of Section 102 CPC held that mere filing of revision petition in lieu of filing second appeal does not make out a case for maintainability of the matter before the High Court and likewise filing of a petition under Article 227 of the Constitution is just to frustrate the very object of such a legislation and the same was not permissible. It is apt to reproduce paras 2 to 5 which read thus:-

"2. Relevant facts of the case that respondent/plaintiff had filed suit for recovery of Rs.18,897/- and the Court of learned Civil Judge (Junior Division), Rewari decreed the said suit. Present petitioner filed first appeal against the said judgment & decree and the same was dismissed by the Court below on 28.1.2014. Learned counsel for the petitioner submitted that the said findings of both the Courts below are erroneous and are liable to be set aside.

3. Learned counsel for the respondent raised objection that as per Section 102 CPC, present petition, being second appeal in a suit for recovery of an amount not exceeding Rs.25,000/-, is not maintainable.

4. While arguing on this point, learned counsel for the petitioner submitted that present case is a petition under Article 227 of the Constitution of India and not the second appeal and the same is not maintainable. In support of his arguments, learned counsel for the petitioner placed reliance upon the view taken by co-ordinate Bench of this Court in case Om Parkash v. Sardha Ram (Civil Revision No.2793 of 2012, decided on 31.8.2012). On the same point, reliance was placed upon the judgment from Madras High Court in case K.Chockalingam v. K.R.Ramasamy Iyes and Jenbagam, 2004 4 LW 586 (Madras).

5. This Court has considered the submissions made by learned counsel for the parties and also gone through the view taken by the coordinate Bench of this Court

in Om Parkash's case and also by the Madras High Court in K.Chockalingam's case and of the view that as per amended provisions of Section 102 CPC, there is a complete bar for second appeal in a suit for recovery of amount involving less than Rs.25,000/-. Merely filing of revision petition in lieu of filing of second appeal does not make out a case for maintainability of the matter before this Court. The very object of incorporating such an amendment in the Code of Civil Procedure is to bring an end to litigation involving petty matter and there being no dispute that the matter in controversy is based on a suit for recovery of money not exceeding Rs.25,000/- and legislature has already enacted the provisions while being conscious that there should be no second appeal in such like suits for recovery of money not exceeding Rs.25,000/-. Filing of petition under Article 227 of the Constitution is just to frustrate the very object of such a legislation which is not permissible."

18. Similar issue came up for consideration before a Co-ordinate Bench of this Court (Justice Dharam Chand Chaudhary, Judge) in ***Civil Revision No. 58 of 2009 titled as Managing Director H.P. State Cooperative Marketing & Consumer Federation Ltd(Him Fed), District Shimla*** *versus* ***Sh. Rajinder Singh and Civil Revision No.59 of 2009 titled as Managing Director H.P. State Cooperative Marketing & Consumer Federation Ltd(Him Fed), District Shimla*** *versus* ***Sh.Sita Ram***, decided on 30.03.2016, wherein it was held that this Court in exercise of its revisional jurisdiction can look into the correctness, legality or propriety of any decision or order impugned and it was held as under:-

"9. The defendant has assailed the judgment and decree passed by both Courts below in this petition as in view of the provisions contained under Section 102 of the Code of Civil Procedure, no second appeal lies from any decree, when the subject matter of the original suit for recovery of money not exceeds to Rs.25, 0000/-.

10. The legality and validity of the impugned judgment and decree has been questioned on the grounds inter-alia that both the Courts have erroneously ignored the provisions contained under Sections 76 of the H.P. Co-operative Societies Act and resumed the jurisdiction not vested with them while decreeing the suit. The legal objections were raised and demonstrated but the decree has been passed in complete departure to the objections so raised and, as such, has vitiated the findings recorded by the Courts below. Since a specific issue was framed for maintainability of the suit on the basis of the pleadings of the parties, the same otherwise should have been decided being legal in nature.

11. Mr. K.D.Sood, learned Senior Advocate has strenuously contended that the findings recorded by both the Courts below are vitiated on account of the failure of both Courts below to decide issue No.2 qua maintainability of the suit after taking into consideration the pleadings of the parties and also relevant provisions of law. It has therefore been urged that the suit could not have been decreed.

12. On the other hand, Mr. Y.P.Sood ,learned counsel has contended that there being no iota of evidence to show that the transaction i.e. supply of 18 bags of apple to defendant society is touching its constitution, management or the business is not proved. Both the Courts below have rightly answered the controversy on issue No.2 against the defendant.

13. According to Mr. Sood, learned counsel, the defendant had merely collected the apple crop of the food growers of Rohru area in its collection centre Hanstari for and on behalf of the State Government and as such neither was conducting any business nor the dispute in the present lis touches the constitution, management or the business of the defendant society.

14. For the sake of convenience Section 76 of the Act is being reproduced as follows:-

> ***Notice necessary in suits***:- *No suit shall be instituted against a society or any of its officers in respect of any act touching the constitution, management or the business of the society, until the expiration of two months after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.*
>
> *Notwithstanding anything contained in section 72 a suit cannot be instituted against a society or any of its officers (concerning the constitution, management or business of the society) unless two months period has expired after notice in writing has been delivered to the Registrar, stating the cause of action. The object is to save the societies from unnecessary involvement in litigation and further to apprise the Registrar of the prospective disputes in which the society would be a party.*
>
> *15. Now coming to the given facts and circumstances, as per own case of the plaintiff, he has supplied his 18 bags of apple under Market Intervention Scheme for sale at Hanstari in the collection centre of defendant society. Therefore, it is amply clear that the apple bags were supplied to the defendant society in the discharge of its business activity under the market intervention scheme. In preliminary objection, the defendant society has raised a specific objection qua maintainability of the suit for want of service of notice under Section 76 of the Act, and issue was also framed in this regard. The controversy under issue No.2 is legal in nature and the same should have been answered after taking into consideration the pleadings of the parties and in view of the own case of the plaintiff, as discussed supra. No other and further evidence was required to be adduced to substantiate the same. In replication there is denial simplicitor without any explanation as to how the suit was maintainable without service of notice under Section 76 of the Act. Therefore, the only inescapable conclusion would be that both the Courts below have failed to decide issue No.2 in accordance with law which has vitiated the findings as recorded and as such, the judgment and decree being perverse deserves to be quashed and set-aside. Otherwise also on merits, there seems to be no quarrel between the parties on both sides.*
>
> *16. In the exercise of revisional jurisdiction, this Court can look into the question as to the correctness, legality or propriety of any decision or order impugned."*

19. From what has been observed above, it would be noticed that the law on the subject is not at all consistent. As regards this Court, the learned Single Judge in ***Subhadra Devi, Mohan Lal's cases (supra)*** has clearly held that Article 227 of the Constitution cannot be used as a means to circumvent the bar to filing of an appeal envisaged under Section 102 of the Code and once this is a creation of the statute and if the statue prohibits filing of an appeal, the provisions of Article 227 of the Constitution of India cannot be invoked in normal course. However, another learned Single Judge in ***Managing Director's case (supra)*** has held that this Court in exercise of its revisional jurisdiction under Section 115 of the Code can look into the correctness, legality and propriety of any decision or order impugned.

20. It would be noticed that in majority of the cases, the Courts for invoking jurisdiction under Article 227 have relied upon a decision rendered by Hon'ble two Judges' Bench in ***Surya Dev Rai*** *versus* ***Ram Chander Rai and others (2003) 6 SCC 675*** which admittedly has been partly over-ruled and diluted by the Hon'ble three Judges' Bench in ***Radhey Shyam and another*** *versus* ***Chhabi Nath and others (2015) 5 SCC 423*** wherein it has been held that all the Courts in the jurisdiction of a High Court are subordinate and subject to its control and supervision under Article 227 of Constitution. Therefore, control of working of the subordinate Courts in dealing with their judicial orders is exercised by statutory appeal and revisional powers

and power of superintendence under Article 227 and not by way of writ petition under Article 226 while the appellate or revisional jurisdiction is regulated by powers under Article 227 of the Constitution. It was further held that despite curtailment of revisional jurisdiction under Section 115 CPC, the jurisdiction of the High Court under Article 227 remains unaffected and has not resulted in expanding High Court's powers of superintendence.

21. Lastly, it was held that judicial orders of the Civil Court were not amenable to writ jurisdiction under Article 226 and challenge to judicial orders would lie by way of statutory appeal or revision or under Article 227. There can be no gainsaying that though the powers of superintendence under Article 227 are wide enough, yet they are only supervisory in nature. The powers under this Article cannot, therefore, be exercised to interfere with an order, if the order made by the subordinate Court or Tribunal is within bounds, or in conformity with law. However, the powers of superintendence can be invoked to remove a patent perversity in an order of the Court subordinate to the High Court or where there has been a gross or manifest failure of justice or the basic principles of natural justice have been flouted. Yet, still the High Court cannot interfere with mere error of law or fact because another view than the one taken by the subordinate Court too is possible.

22. The main object of Article 227 is to keep strict and judicial control by the High Court on the administration of justice within its territory and to ensure that the wheels of justice do not come to a halt and the foundation of justice remain pure and pristine in order to maintain public confidence in the functioning of the Courts subordinate to the High Court.

23. Thus, this Court has no difficulty in concurring with the view expressed by a Co-ordinate Bench of this Court in ***Subhadra Devi, Mohan Lal's cases*** (supra) whereby it has been held that the provisions under Article 227 of the Constitution of India cannot be used as a means to circumvent the bar to filing of an appeal, yet the powers under Article 227 of the Constitution of India can always be exercised where the judgment or order challenged is totally illegal or perverse. However, while exercising such powers under Article 227 of the Constitution, the High Court shall have to bear in mind the principles as laid down in ***Surya Dev Rai and Chhabi Nath cases*** (supra). However, this Court expresses its inability to concur with the ratio as laid down by a Co-ordinate Bench of this Court in ***Managing Director's case*** (supra) wherein it was observed that in exercise of revisional jurisdiction, this Court can look into the question as to the correctness, legality or propriety of any decision or order impugned.

24. A second appeal is not maintainable in the present case in view of Section 102 of the Code which has already been quoted above. Section 102 was substituted by the Code of Civil Procedure (Amendment) Act 1999 (Act 46 of 1999) wherein the amendment sought to be introduced was as follows:-

> *"102. No second appeal in certain cases:- No second appeal shall lie from any decree, when the amount or value of the subject matter of the original suit does not exceed twenty-five thousand rupees."*

25. Subsequently, by the Code of Civil Procedure (Amendment) Act 2002 (Act 22 of 2002) which came into force on 01.07.2002, the amendment proposed to be effected by Act 46 of 1999 was substituted with the present Section 102. As per the amendment of Act 1999, irrespective of the nature of the suit, no Second Appeal would lie against the decision in a suit where the value of the subject matter is below Rs. 25,000/-. By the amendment introduced by Act 22 of 2002, the bar under Section 102 is limited to suits where the subject matter is for recovery of money not exceeding twenty five thousand rupees. It was pursuant to the Law Commission 145th report that the amendment was carried out in Section 102 of the Code in order to ensure that trivial matters or petty claims where the money spent on litigation is far excess of the stakes involved do not enter the Courts which besides wasting the valuable time and energy of the parties, but also of the Court.

26. This was so observed by the Hon'ble Supreme Court in ***Nagarpalika Thakurdwara*** *versus* ***Khalil Ahmed & Ors. JT 2016 (9) SC 425,*** the relevant observations read thus:-

> *"14. The purpose behind enactment of Section 102 of the CPC is to reduce the quantum of litigation so that courts may not have to waste time where the stakes are very meagre and not of much consequence. In the instant case, though apparently the amount which was sought to be recovered was Rs.11,006.07, looking at the prayer made in the plaint, the consequences of the final outcome of the litigation would be far-reaching."*

27. A Second Appeal is maintainable only on a substantial question of law as provided under Section 100 of the Code of Civil Procedure. A Revision under Section 115 of the Code of Civil Procedure lies where the subordinate court appears to have exercised jurisdiction not vested in it by law; or to have failed to exercise jurisdiction so vested; or to have acted in the exercise of its jurisdiction illegally or with material irregularity. The question is whether the High Court would be entitled to entertain a Civil Revision Petition, in a case where a Second Appeal is barred under section 102 of the Code of Civil Procedure, on any ground which is less rigorous than that provided in Section 100 of the Code of Civil Procedure.

28. Even in matters where the valuation exceed Rs. 25,000/-, a second appeal could be entertained only on a substantial question of law. When Section 102 provides that no second appeal would lie in respect of a suit where the subject matter is for recovery of money not exceeding Rs. 25,000/-, it cannot be assumed the Parliament thought it fit to take such category of cases out of the rigour of Section 100 and to provide a less rigorous remedy in such cases. If so, it is to be taken that a revision under Section 115 cannot be entertained on a ground which is less rigorous than that provided in Section 100 of the Code of Civil Procedure.

29. The purpose of substituting Section 102 C.P.C. was to restrict entertaining Second Appeals in cases where the subject matter of the suit is for recovery of money not exceeding Rs. 25,000/-. The purpose sought to be achieved cannot be defeated by entertaining a revision under section 115 of the Code of Civil Procedure on a less rigorous test than that provided in Section 100 C.P.C.

30. Section 115 of CPC reads thus:-

> "***115. Revision.-[****(1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—*
>
> *(a) to have exercised a jurisdiction not vested in it by law, or*
>
> *(b) to have failed to exercise a jurisdiction so vested, or*
>
> *(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,*
>
> *the High Court may make such order in the case as it thinks fit:—*
>
> *[PROVIDED that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]*
>
> *(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.*
>
> *(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.]*

[Explanation .- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.]"

31. In addition to the aforesaid, it would be noticed that Section 115 of the Code does not refer to a decree and further provides that revision can be invoked where no appeal lies against the impugned order/judgment. There is a marked difference as regards an order or judgment against which no appeal lies and the judgment or order against which an appeal is prohibited or restricted by the Code.

32. Under Section 115 CPC, the legality and propriety as well as perversity can be seen, so also, while exercising jurisdiction of second appeal, appeal can be admitted only on substantial questions of law. The scope of both these provisions is quite similar and, therefore, the petitioners cannot invoke jurisdiction of this Court under Section 115 CPC because such invocation of revisional jurisdiction will render the specific provision of Section 102 of the Code to be otiose which is not permissible.

33. Accordingly, with all humility at my command, I regret my inability to concur with the view expressed by a Co-ordinate Bench of this Court in ***Managing Director's case*** (supra). In view of this difference, it is necessary for me to refer the matter to a larger Bench. Even otherwise, the issue is of great importance and the views expressed by the different High Courts on the question are otherwise not consistent and it is desirable that an authoritative pronouncement be made by a larger Bench.

34. At this stage, I may observe that though I have concurred with the exposition of law as propounded by a Co-ordinate Bench of this Court in ***Subhadra Devi, Mohan Lal's cases*** (supra), however, since the matter is being referred to a larger Bench, it may also consider the desirability of going into the question of maintainability of the petition under Article 227 of the Constitution in cases where the second appeal against the judgment and decree is specifically barred under Section 102 of the Code.

35. In view of the conflict in decision, the Registry is directed to place the papers before Hon'ble the Chief Justice for constituting a larger Bench.

****

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Babu Ram ...Revisionist.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Revision No.: 149 of 2011.
Date of Decision: 25.11.2016

Code of Criminal Procedure, 1973- Section 482- The revisionist was convicted for the commission of offences punishable under Sections 447, 427, 504 and 506 of I.P.C – an application has been filed for seeking composition of the offence in view of the compromise between the parties – since, the matter has been compromised, therefore, permission granted and the accused acquitted. (Para-3 to 5)

Cases referred:

Ramji Lal and another Vs. State of Haryana, 1983(1) SCC 368
Mohd. Rafi vs. State of U.P., *1998(2) R.C.R.(Criminal 455*
M.D.Balan Mian and another vs. State of Bihar and another *2001 AIR (SCW) 5190*
Khursheed and another vs. State of U.P in Appeal (Crl.) No. 1302 of 200
Dasan vs. State of Kerala and another *2014(2) ECrC 384*.

For the petitioner: Mr. N.K.Thakur, Sr. Advocate withMr. Jagdish Thakur, Advocate.
For the respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The learned Judicial Magistrate 1st Class, Court No.1, Sundernagar, District Mandi, pronounced an order of conviction upon the revisionist herein qua commission of offences punishable under Sections 447, 427, 504 and 506 IPC. In an appeal preferred therefrom by the accused before the learned Additional Sessions Judge, Mandi, sequelled the latter affirming the pronouncement recorded upon the accused by the Judicial Magistrate 1st Class, Court No.1, Sundernagar, District Mandi. The accused/convict standing aggrieved by the concurrently recorded renditions of both the Courts below proceeded to assail them by preferring a Revision herebefore.

2. During the pendency of the revision before this Court the learned counsel for the accused/convict revisionist herein, has instituted an application under Section 482 read with Section 320 Cr.P.C. whereby he seeks permission of this Court for compounding the offences committed by him under Sections 447, 427, 504 and 506 IPC and has also tendered a compromise deed bearing Ext.A-1 executed inter se the petitioner/accused and the legal heir of the complainant. The learned counsel for the revisionist submits that since the complainant in the instant case has since died yet with the provisions engrafted in Section 320 4(b) of the Cr.P.C bestowing upon his legal heir(s) whom he states at the bar to be his widow qua hers thereupon holding the statutory competence to compound the relevant offences. The relevant provisions of Section 320 4(b) of the Cr.P.C stand extracted hereinafter:-

> "4(b). When the person who would otherwise be competent to compound an offence under this Section is dead, the legal representative, as defined in the Code of Civil Procedure 1908 (5 of 1908) of such person may, with the consent of the Court compound such offence."

The statement at the bar of the counsel for the revisionist stands accepted especially when it falls within the ambit of Section 320 4(b) of the Cr.P.C.

3. The statements on oath of the legal heir of the complainant Smt. Geeta Devi besides also of the accused stand duly reduced into writing and also stand signatured/thumb marked by each of them wherein they communicate qua Ext.A-1 holding their respective signatures/thumb marking, signatures/thumb marks whereof stand testified by them to exist respectively therein in blue circles at Marks-A and B.

4. The offences qua which a concurrent order of conviction stood pronounced upon the accused/convict is compoundable yet the accused/convict and the legal heir of the complainant while endeavouring to seek composition of the offences whereupon an order of conviction stood concurrently pronounced upon the accused/convict, are enjoined to obtain the permission of this Court.

5. Be that as it may, this Court would proceed to accord the apposite permission to them only when satiation stands begotten qua the relevant principles encapsulated in the pronouncement of the Hon'ble Apex Court reported in Ramji Lal and another Vs. State of Haryana, 1983(1) SCC 368, Mohd. Rafi vs. State of U.P., *1998(2) R.C.R.(Criminal 455,* M.D.Balan Mian and another vs. State of Bihar and another *2001 AIR (SCW) 5190,* Khursheed and another vs. State of U.P in Appeal (Crl.) No. 1302 of 2007, Dasan vs. State of Kerala and another *2014(2) ECrC 384*. The aforestated pronouncements of the Hon'ble Apex Court empower Courts of law to proceed to permit the accused/convict and the informant/complainant to enter into a compromise also empower the Court concerned to grant the apposite permission to them for

compounding the offence(s) only on vivid display occurring qua its facilitating restoration of harmony in society besides its promoting goodwill and amity amongst them.

6. Since the accused/convict and the LR of the complainant in their respective statements recorded on oath reduced into writing and respectively signatured/thumb marked by them echo therein qua their apposite conjoint endeavour intending to promote goodwill and peace amongst them necessarily hence the aforesaid principle encapsulated in the aforereferred judgements of the Hon'ble Apex Court for thereupon this Court holding a facilitation to permit them to compound the offences whereupon the accused stood concurrently convicted by both the Courts below stands visibly satiated.

7. Consequently, this Court accepts their joint proposal to compound the offences committed by the accused/convict. In sequel thereto the revision petition is allowed. The conviction and sentence concurrently imposed upon the accused/convict by both the Courts below is set aside. The accused/convict is acquitted. Bail bonds are cancelled.

****

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Dharam Prakash .....Appellant/Petitioner.

Versus

Neela Devi .....Respondent.

FAO No. 357 of 2016.
Reserved on : 17.11.2016.
Decided on: 25th November, 2016.

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized in the year 1997 – the wife used to leave her matrimonial home and reside in her parental home – the wife is totally incapacitated from performing sexual intercourse due to structural defect – the petition was dismissed by the Trial Court- held in appeal that husband admitted that wife had resided with him for 8 years – the version that the husband found the medical prescription slip was also not established – the petition was rightly dismissed by the Trial Court- appeal dismissed.(Para-7 to 11)

For the Appellant: Mr. Anupinder Rohal, Advocate.
For the Respondent : Ms. Monika Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered by the learned District Judge (Forest), Shimla, H.P. on 30.04.2016 in H.M.A. Petition No. 22-S/3 of 2013/12, whereby, the petition aforesaid constituted therebefore by the petitioner/appellant herein stood dismissed.

2. The brief facts of the case are that the marriage inter se the contesting parties hereat stood solemnized in the year 1997 at Village Sandoa, PO Dharogra, Tehsil Suni, District Shimla, H.P. After the solemnization of the marriage, the parties to the petition lived as husband and wife at village Sandoa for some time, but the respondent used to leave the house of the petitioner very frequently and preferred to reside in the house of her parents. The marriage could not be consummated owing to the impotency of the respondent and no child has born from the marriage between the parties. The respondent is total incapacitated for accomplishing the act of sexual intercourse and the cause of impotency of the respondent is malformation and structural defect of her vagina. The respondent was impotent at the time of the marriage till the

institution of the present proceedings. There has been no unnecessary or improper delay in filing the petition. The mother of the petitioner died on 5.8.2011 and the petitioner came to know the fact of the impotency of the respondent recently in the first week of this month when he was doing work of cleaning etc., in his house and found a medical prescription slip of the respondent from the trunk of his mother and thereafter consulted the Doctors and obtained the opinion of the Doctor and thus filed the present petition. Hence, there is no unnecessary and improper delay in filing the present petition.

3. The petition for divorce instituted by the petitioner/appellant herein before the learned District Judge concerned stood contested by the respondent herein by hers instituting reply thereto wherein she controverted all the allegations constituted against her in the apposite petition by the appellant herein.

4. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the marriage between the parties has not been consummated owing to the imptency of the respondent?...OPP
2. Whether this petition is not maintainable? OPR
3. Whether the petition is barred by limitation? OPR
4. Whether the petitioner is estopped from filing the present petition on account of his own act, deed, conduct, acquiescence etc.?....OPR
5. Whether the petitioner has concealed the material facts? OPR
6. Relief.

5. The trite factum whereupon an adjudication stands enjoined to be pronounced is qua the petitioner by adducing cogent evidence hence succeeding in proving the relevant issue qua the respondent herein suffering from a congenital sexual deformity whereupon he stood precluded to successfully consummate his marriage with the respondent herein. In other words, evidence emphatically pronouncing upon the sexual incapacity of the respondent to hold coitus with the petitioner stands enjoined to be unearthed from the material as exists here-before. Uncontrovertedly, the marital spouses entered into wedlock in the year 1997. The petitioner/appellant herein avers besides testifies qua since thereat up to now on account of the purported apposite sexual incapacity of the respondent herein both not holding coitus. However, he canvasses qua on the dissuasive advice of his parents, his not in quick promptitude of his detecting the apposite physical deformity of the respondent herein instituting on ground aforesaid, a petition for dissolution of his marital ties with the respondent herein. The effect of the aforesaid imprompt institution of the apposite petition by the petitioner on the ground of the respondent herein not holding the befitting sexual capacity to hold coitus with him, would stand pronounced hereafter. Hereat the veracity of the relevant allegations testified by the petitioner in his examination-in-chief vis-a-vis the respondent herein, is enjoined to be tested. The veracity of the relevant allegations testified by the petitioner/appellant herein in his examination-in-chief stand eroded of their truth arising from the factum of his in his cross-examination acquiescing qua the respondent herein living with him upto eight years since theirs solemnizing marriage yet theirs living in separate rooms. Also with his acquiescing to the suggestion put to him in his cross-examination by the counsel appearing for the respondent qua the latter not standing encumbered with any physical defect rather she being fully potent besides his acquiescing to the relevant suggestion put to him in his cross-examination by the learned counsel for the respondent while holding him to cross-examination qua the reason for no child standing begotten from their wedlock arising from his omission to hold coitus with the respondent herein, ultimately, his acquiescing qua the respondent being a female omnibusly, blunts the vigour of his testification held in his examination-in-chief wherein he imputes qua the respondent qua hers suffering from a sexual deformity, whereupon, their wedlock did not beget consummation.

6. Be that as it may, the petitioner has testified qua on occurrence of demise of his mother on 5.8.2011, whereat when he while cleaning the house, he discovered a prescription slip from the trunk of his mother, whereafter, he consulted the doctor who purveyed an opinion qua

the respondent herein being unfit to hold coitus with him, whereupon, he canvasses qua his thereupon holding the apposite evidence for seeking annulment of his marital ties with the respondent herein. However, the testification of the petitioner qua his discovering the medical prescription slip on 5.8.2011, whereafter, he proceeded to consult the doctor concerned, who purveyed to him an opinion qua the unbefitting sexual capacity of the respondent herein to hold coitus with him appears to be sheer invention besides a concoction of the petitioner/appellant herein, inference whereof spurs from the factum of his echoing in his cross-examination qua his not visiting the doctor whereupon it is to be concomitantly concluded qua obviously his hence not consulting the doctor qua the manifestations occurring in the relevant purported prescription slip. The vice of falsity qua the factum aforesaid when construed in coagulation with the effect of the aforesaid acquiescence(s) made by him in his cross-examination, holding loud unveilings qua his conceding to the factum of the respondent herein not standing entailed with any physical deformity for hence hers standing precluded to perform coitus with him negates in its entirety, the entire assay of the petitioner herein comprised in his examination-in-chief wherein he in discharge of the onus qua the relevant trite issue, has testified in consonance therewith. Also the effect of his omitting to examine the doctor concerned, who purportedly purveyed him an opinion qua the manifestations held in the medical prescription slip, pronouncing upon her unbefitting sexual capacity, constrains an inference of it not holding any tenacity nor any probative sinew for thereupon this Court standing prodded to accord the relief as stands canvassed in the apposite petition.

7. Be that as it may, with the petitioner testifying in his examination-in-chief qua his detecting the relevant defect in the respondent herein in quick succession to their marriage standing solemnized, yet his on dissuasive advise of his parents his omitting to thereat institute a petition for dissolution of their marital ties when is in rife conflict with his testifying qua on his on 5.8.2011 discovering the medical prescription slip holding disclosures therein qua the respondent herein standing entailed with a physical deformity whereupon she stood purportedly forbidden to hold coitus with him factum whereof for reasons stated herein-above standing concluded to be seeped in an entrenched vice of falsity besides when it imperatively stands reared as a stratagem to purportedly explain the omission on the part of the petitioner/appellant herein to in quick promptitude of his promptly discovering the relevant defect in the respondent herein attracts qua the relevant delay besides qua the relevant omission, the statutory bar held in Section 23 of the Hindu Marriage Act (hereinafter referred to as 'the Act'), the relevant provisions whereof read as under:

> "23. (a) xxx xxx
>
> (b) xxx xxx
>
> (bb) xxx xxx
>
> (c) xxx xxx
>
> (d) there has not been any unnecessary or improper delay in instituting the proceeding; and
>
> (e) there is no other legal ground why relief should not be granted then and in such a case, but not otherwise, the court shall decree such relief accordingly."

Clause (d) to Section 23 of the Act inhibits Courts of law seized with a Hindu Marriage Petition its grant the apposite relief canvassed therein on evident upsurgings holding unravelments qua unnecessary or improper delay standing begotten in the initiation of the relevant proceedings before the Court concerned. Reiteratedly, with there is a visible apparent delay since 1997 whereat the relevant defect in the respondent herein stood evidently for reasons aforestated detected by the appellant herein upto the stage of institution of the instant petition, corollary whereof is qua the statutory bar constituted in clause (d) of Section 23 of the Act standing squarely attracted qua the petitioner/appellant herein whereupon it warrants its dismissal.

8. The learned counsel appearing for the petitioner herein has canvassed qua the disaffirmative order pronounced by the learned trial Court on his application instituted

therebefore under Section 151 of the CPC read with Section 122 and 114 of the Indian Evidence Act with a prayer held herein for constitution of a medical board for ascertaining the factum of the gender of the respondent herein besides for ascertaining the ability of respondent herein to perform coitus with the appellant herein, suffering from an inherent fallibility significantly when it would have clinched the relevant trite issue. However, the order refusing grant of the apposite relief aforesaid as stood canvassed therein by the petitioner is not imbued with any legal fallacy, inference whereof sprouts from the factum of his anvilling his relief on prescription slip mark 'X', prescription slip whereof for reasons aforestated stands seeped in an entrenched vice of falsity, reiteratedly it visibly stands stained with a vice of fictitiousness, inference of fictitiousness gripping it, is erectable for want of the appellant herein/petitioner examining its authour despite his purportedly canvassing qua his visiting him whereupon he unfolded to him qua the relevant physical defect gripping the respondent herein also when for reasons aforestated the petitioner acquiesces to the feminity of the respondent herein rather his conceding qua the reason of no child standing begotten from their wedlock standing anchored upon his not accessing his wife, the respondent herein. Crucially also when this Court has herein-above pronounced qua the statutory bar encapsulated in clause (d) of Section 23 of the Act standing squarely attracted vis-a-vis the appellant herein, the endeavour of the appellant herein/petitioner to through the aforesaid application to assert an affirmative relief thereon appears to be belated besides a premeditated assay on his part. Also assuming if he held any tenacity in getting an affirmative pronouncement thereon, tenacity thereof gets eroded in the trite factum of his acquiescing qua the respondent's espousal qua his in quick spontaneity of their entering into a wedlock his despite thereat discovering the relevant defect yet his on the purported persuasive dissuasive advice of his parents not thereat instituting the apposite petition for dissolution of his marital ties with the respondent herein ground whereof meted by him loses its veracity by his **belatedly** relying upon an engineered Ext.PX whereupon hence as aforestated the statutory bar constituted in clause (d) of Section 23 of the Act stands squarely attracted qua him also thereupon it appears qua the defect, if any, which may grip the respondent herein being not congenital.

9. For the foregoing reasons, this Court finds no merit in the instant appeal, which is accordingly dismissed. Consequently, the judgment and decree impugned before this Court is maintained and affirmed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Jagmohan Singh and another ...Appellants.

Versus

Meera Devi and others ...Respondents.

FAO No. 344 of 2012
Decided on: 25.11.2016

Motor Vehicles Act, 1988- Section 149- Offending vehicle was a JCB, which was being driven by the driver in a rash and negligent manner – JCB falls within the definition of motor vehicle – the unladen weight of JCB was 7460 kg. and falls within the definition of light motor vehicle – there is no requirement of PSV endorsement – JCB falls within the definition of non-transport vehicle – insurer had failed to plead and prove that there was violation of the terms and conditions of the policy – the insurance is admitted – therefore, insurer was wrongly absolved of the liability – appeal allowed and insurer saddled with liability. (Para-5 to 22)

Cases referred:

National Insurance Co. Ltd. versus Sharda Devi and others, I L R 2016 (I) HP 354

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791
National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906
Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

For the appellants: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Nemo for respondents No. 1 to 4.
Mr. R.G. Thakur, Advocate, for respondent No. 5.
Mr. Deepak Bhasin, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 19th May, 2012, made by the Motor Accident Claims Tribunal-II Shimla, H.P., Camp at Rohru (for short "the Tribunal") in M.A.C. No. 35-R/2 of 2008, titled as Meera Devi and others versus Sanjeev Kumar and others, whereby compensation to the tune of ₹ 6,45,000/- with interest @ 7.5% per annum from the date of the petition till its realization alongwith costs of litigation assessed at ₹ 5,000/- came to be awarded in favour of the claimants, respondents No. 1 to 3 in the claim petition, i.e. the contractor, owner-insured and driver of the offending vehicle, were saddled with liability and insurer came to be exonerated (for short "the impugned award").

2. The claimants, contractor and the insurer of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellants/owner-insured and driver of the offending vehicle have called in question the impugned award on the grounds taken in the memo of the appeal.

4. The only question to be determined in this appeal is – whether the Tribunal has rightly exonerated the insurer from its liability? The answer is in the negative for the following reasons:

5. Admittedly, the offending vehicle was a JCB, bearing registration No. HP-16A-0365 which was being driven by its driver, namely Shri Sanjeev Kumar, rashly and negligently, at the time of the accident, i.e. on 25th October, 2007, at Shilapani-Mundidhar road, due to which deceased-Visheshar Singh sustained injuries and succumbed to the injuries.

6. This Court in **FAO (MVA) No. 247 of 2009,** titled as **National Insurance Co. Ltd. versus Sharda Devi and others,** decided on 8th January, 2016, while relying upon the various judgments rendered by the Apex Court and other High Courts, has held that JCB is a motor vehicle.

7. As per the registration certificate, Ext. RW-1/A, the unladen weight of the offending vehicle, i.e. JCB, is 7460 kilograms, thus, falls within the definition of 'light motor vehicle' in terms of Section 2 (21) of the Motor Vehicles Act, 1988, for short 'MV Act'.

8. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that*

Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-

> *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
>
> *.....*
>
> *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*

In the given circumstances of the case PSV endorsement was not required at all."

9. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. .....*
>
> *21. .....*

22. .....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

10. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

11. The Apex Court in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** has held that PSV endorsement is not required.

12. The same principle has been laid down by this Court in a series of cases.

13. I deem it proper to record herein that in the year 2000, an amendment has taken place in the Central Motor Vehicles Rules, 1989 (for short "MV Rules") and sub-clause (ca) came to be inserted in Rule 2 of the MV Rules. It is apt to reproduce Rule 2 (ca) of the MV Rules herein:

> *"2. .....*
>
> *(ca) "construction equipment vehicle" means rubber tyred, (including pneumatic tyred), rubber padded or steel drum wheel mounted, self-propelled, excavator, loader, backhoe, compactor roller, dumper, motor grader, mobile crane, dozer, fork lift truck, self-loading concrete mixer or any other construction equipment vehicle or combination thereof designed for off-highway operations in mining, industrial undertaking, irrigation and general construction but modified and manufactured with "on or off" or "on and off" highway capabilities.*
>
> *Explanation. - A construction equipment vehicle shall be a non-transport vehicle the driving on the road of which is incidental to the main off-highway function and for a short duration at a speed not exceeding 50 kms per hour, but such vehicle does not include other purely off-highway construction equipment vehicle designed and adopted for use in any enclosed premises, factory or mine other than road network, not equipped to travel on public roads on their own power."*

14. From the perusal of the said provision of law, one comes to an inescapable conclusion that the construction equipment vehicles have been declared as non-transport vehicles.

15. Having said so, the offending vehicle, i.e. JCB, being a construction equipment vehicle, is a non-transport vehicle.

16. Viewed thus, the Tribunal has fallen in an error in holding that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time.

17. Even otherwise, it was for the insurer to plead and prove that the offending vehicle was being driven in violation of the terms and conditions of the insurance policy and the owner-insured has committed a willful breach, has not led any evidence, thus, has failed to discharge the onus.

18. Accordingly, it is held that the driver of the offending vehicle was having a valid and effective driving licence to drive the same at the relevant point of time and the owner-insured has not committed any breach, not to speak of willful breach.

19. The factum of insurance is admitted. Thus, the insurer is saddled with liability.

20. Having said so, the impugned award is modified by holding that the insurer has to satisfy the impugned award.

21. The insurer is directed to deposit the awarded amount within eight weeks from today before the Registry. On deposit, the Registry is directed to release the same in favour of the claimants strictly in terms of conditions contained in the impugned award through payees account cheque or by depositing the same in their respective accounts.

22. The statutory amount deposited by the appellants be paid to the claimants through payees account cheque or by depositing the same in their respective accounts after proper identification.

23. The appeal is disposed of accordingly.

24. Send down the record after placing copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Manoj Kumar .....Appellant
Versus
Sh. Ghanshayam Thakur and others .....Respondents.

FAO (MVA) No. 278 of 2010.
Date of decision: 25th November, 2016.

Motor Vehicles Act, 1988- Section 166- Compensation of Rs. 87,200/- was awarded along with interest @ 7.5% per annum- a sum of Rs. 1 lac awarded in lump sum in addition to the amount already awarded by the Tribunal with the right to recovery. (Para-3 to 4)

For the appellant: Ms. Leena Guleria, Advocate.
For the respondents: Mr. R.L. Chaudhary, Advocate, for respondent No.1.
Nemo for respondent No.2.
Mr. J.S. Bagga, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 25.6.2010, passed by the Motor Accident Claims Tribunal-II, Mandi, H.P. hereinafter referred to as "the Tribunal", for short, in Claim Petition No.91 of 2001, titled *Sh. Manoj Kumar versus Sh. Ganshyam Thakur and others,* whereby compensation to the tune of Rs.87,200/- alongwith interest @ 7.5% per annum came to be awarded in favour of the claimant and insurer was directed to satisfy the award at the first instance with right of recovery from the owner-insured, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Owner, driver and insurer have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. On the last date of hearing, learned counsel for respondent No. 3 was asked to seek instructions to pay a lump sum amount of Rs. 1 lacs in addition to the amount already awarded by the Tribunal in terms of paras 23 and 24 of the impugned award. He has sought instructions and stated that the insurance company has not agreed to the said proposal. However, in the facts and circumstances of the case, I deem it proper to award Rs.1 lac, in lump sum, in addition to the amount already awarded by the Tribunal to be paid by the insurer with right of recovery in terms of the impugned award. The insurer is at liberty to move application before the Tribunal for recovery of the entire amount.

4. Let the entire amount alongwith interest, @ 7.5% per annum, as awarded by the Tribunal, be deposited by the insurer within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

5. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No. 400 and 423 of 2012.
Date of decision: 25th November, 2016.

FAO No. 400 of 2012.

Sh. Rajinder Singh .....Appellant
Versus
Kirpal Singh and others .....Respondents.

FAO No. 423 of 2012.

Kirpal Singh and another .....Appellants

Versus

Rajinder Singh and another .....Respondents.

Motor Vehicles Act, 1988- Section 149- MACT held that licence was not in the name of respondent No. 2 but renewal was in his name- therefore, respondent No. 2 did not have a valid driving licence- the owner had committed willful breach of the terms and conditions of the policy – insurer was absolved of the liability – held, that it is not the case of the insurer that owner knew the driving licence was not issued in the name of respondent No. 2 and despite this fact he had engaged respondent No. 2 as driver – the vehicle was being plied with all the requisite documents- the insurer directed to satisfy the award. (Para-7 to 14)

Motor Vehicles Act, 1988- Section 166- Claimant had suffered 100% disability – he remained admitted in the hospital from the date of accident till discharge – he had spent Rs. 2,28,176/- on medical treatment which is awarded to him- Rs. 2 lac was awarded for future treatment- Rs. 1 lac was awarded for loss of expectation and Rs. 20,000/- awarded for attendant charges- Rs. 15,000/- awarded on account of travelling allowances- the income of the claimant was assessed as Rs. 3200/- per month- injured was 29 years of age at the time of accident and multiplier of 16 is applicable- thus, claimant is entitled to Rs. 3200 x 12 x 16= Rs. 6,14,400/- - Rs. 15,000/- were rightly awarded on account of boarding and lodging at Chandigarh- Rs. 10,000/- awarded on account of physiotherapist – Rs. 50,000/- awarded on account of mental shock – Rs. 1 lac awarded under the head pain and suffering and Rs. 1 lac awarded under the head loss of amenities of life – thus, total compensation of Rs. 14,52,576/- awarded. (Para 15 to 24)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC 217
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252

For the appellant(s):	Mr. Jagat Singh Shyam, Advocate, for the appellant in FAO No. 400 of 2012 and Mr. Ajay Sharma, Advocate, for the appellants in FAO No. 423 of 2012
For the respondent(s):	Mr.Ajay Sharma, Advocate, for respondents No. 1 and 2 in FAO No. 400 of 2012. Mr. S.D. Gill, Advocate, for respondent No. 3 in FAO No. 400 of 2012 and for respondent No. 2 in FAO No. 423 of 2012. Mr. Jagat Singh Shyam, Advocate, for respondent No.1 in FAO No. 423 of 2012.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

These appeals are directed against the judgment and award dated 3.7.2012, passed by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P. hereinafter

referred to as "the Tribunal", for short, in MACT No.44-S/2 of 2008, titled *Shri Rajinder Singh versus Kripal Singh and others,* whereby compensation to the tune of Rs.9,14,400/- alongwith interest @ 6% per annum came to be awarded in favour of the claimant and insured-owner was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Both these appeals are outcome of a common award thus; I deem it proper to determine both these appeals by this common judgment.

3. Owner Kripal Singh, by the medium of FAO No. 423 of 2012 has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling him with the liability and claimant Rajinder Singh, by the medium of FAO No. 400 of 2012, has questioned the impugned award on the ground of adequacy of compensation, on the grounds taken in their memo of appeals.

4. Claimant being the victim of a vehicular accident, filed claim petition before the tribunal for the grant of compensation to the tune of Rs. 30 lacs, as per the break-ups given in the claim petition on account of the injuries with permanent disability suffered by him in a motor accident which took place on 19.6.2007 due to rash and negligent driving of driver , namely Sat Pal, while driving vehicle No. HP-36-A-0218. The claim petition was resisted by the respondents and following issues came to be framed.

1. *Whether the petitioner sustained the injuries due to the rash and negligent driving of vehicle No. HP-36-A-0218 by the respondent No. 2 as alleged? OPP.*
2. *If issue No. 1 is proved in affirmative, whether the petitioner is entitled to the compensation as claimed. If so, its quantum and from whom? OPP*
3. *Whether the petitioner has a cause of action? OPP.*
4. *Whether the petition is not maintainable in the present form? OPR*
5. *Whether the respondent No. 2 was not holding and possessing a valid and effective driving licence to drive the vehicle as alleged. If so, its effect? OPR-3.*
6. *Whether the vehicle was being plied without fitness certificate and route permit etc. If so, its effect? OPR-3.*
7. *Whether the petitioner was a gratuitous passenger? OPR-3.*
8. *Whether the petitioner is estopped from filing the present petition by his act and conduct? OPR-3.*
9. *Whether the petition is bad for non-joinder and mis-joinder of the parties? OPR-3.*
10. *Relief.*

5. The Tribunal, after scanning the evidence oral as well as documentary, decided issue No. 1 in favour of the claimant and against the driver and owner. Driver has not questioned the said findings, are accordingly upheld.

6. The only dispute in these appeals is with respect to issues No. 5 and 6 and partly on issue No. 2.

Issue No.5.

7. The Tribunal in para 15 of the impugned award has held that the insurer has proved that the licence Ex.RW1/A was not in the name of respondent No. 2 but renewal was in his name and accordingly, held that respondent No. 2 was not having a valid and effective driving licence and that the owner has committed willful breach. It is apt to reproduce para 15 of the impugned award herein.

> *"15.In this case, the insurance company has successfully proved that no licence Ext. RW1/A with original number from RLA Dehradun has been issued in the name of respondent No.2. The insurance company through its investigator also inquired about the insurance of the licence and it was found that the licence though validly*

renewed, but the original licence never exists in the name of respondent No.2 The Tribunal is also satisfied that the driver was not having valid driving licence at the time of accident. Hence, issue No. 5 is decided in favour of respondent No. 3 and against respondent No. 1 and 2." [emphasis added]

8. The findings recorded by the Tribunal are factually incorrect for the reasons to be recorded hereinafter.

9. Driving licence Ext. RW1/A is on the record which does disclose that the renewal was made in the name of respondent No.2. It is not the case of the insurer that the owner was knowing that the driving licence was not issued in the name of respondent No. 2 and despite that he had engaged respondent No.2 as driver. In order to seek exoneration and discharge, the insurer has to plead and prove that the insurer has committed willful breach in terms of the judgment delivered by the apex Court in **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

10. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself

as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

11. There is not an iota of evidence to the effect that the owner has committed willful breach. Having said so, the findings recorded by the Tribunal on issue No. 5 are set aside and it is held that the renewal was made in the name of respondent No.2 thus, it cannot be said that he was not having a valid and effective driving licence and that the owner has committed willful breach.

Issue No.6.

12. It was for the insurer to plead and prove that the vehicle was being plied without any route permit and fitness certificate, has not led any evidence, thus failed to discharge the onus. However, I have gone through the findings recorded and the documents placed on record which do disclose that the vehicle was being plied with all requisite documents/certificates. Accordingly, findings returned by the Tribunal on issue No. 6 are set aside.

Issues No. 3,4 and 7 to 9.

13. It was for the insurer to discharge the onus, has failed to discharge. Thus, the findings returned by the Tribunal on these issues are upheld.

14. The factum of insurance is not dispute, Thus, the insurer has to satisfy the award.

FAO No. 400 of 2012.

Issue No.2.

15. The question is-whether the Tribunal has rightly assessed the compensation. The answer is in negative for the following reasons.

16. The appellant became victim of vehicular accident, has suffered 100% disability which is not in dispute. Tribunal has rightly given the details in para 18 of the impugned award how the victim has suffered the disability. But the Tribunal has not awarded compensation for treatment during which he remained admitted in the hospital. Admittedly, the injured was admitted in the hospital right from the date of accident till discharge and has placed on record medical bills Mark 1 to Mark 133 and Ext. P1 to P33 but Tribunal has not awarded any compensation under this head. The Total amount on medical treatment comes to **Rs.2,28,176/-.** The Tribunal has rightly awarded Rs.**2,00,000/-,** for future treatment, **Rs.1,00,000/-** for loss of expectation and Rs.20,000/- for attendant charges. Tribunal has also rightly awarded Rs.15,000/- on account of travelling expenses.

17. The Tribunal has assessed the income of the inured as Rs.3200/- per month. The injured was 29 years of age at the time accident and the multiplier applicable is "16" in view of the 2nd Schedule attached to the Act, read with ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma***

Kumari and others versus Madan Mohan and another, reported in ***2013 AIR SCW 3120***. Thus, the claimant is entitled to compensation to the tune of Rs.3200x12x16= **Rs.6,14,400/-.** The Tribunal has rightly assessed the income of the injured but wrongly concluded it to the tune of Rs.5,04,400/-. The Tribunal has rightly awarded **Rs.15,000/-** on account of boarding and lodging at Chandigarh **Rs.10,000/-** on account of physiotherapist charges and **Rs.50,000/-** on account of mental shock for physical sufferings but has fallen in an error in not awarding compensation under the head pain and sufferings and loss of amenities of life.

18. It is beaten law of land that the compensation is to be awarded in an injury case under pecuniary and non-pecuniary heads by making guess work.

19. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

20. This Court has also laid down the same principle in a series of cases.

21. The Apex Court in its latest decision in **Jakir Hussein vs. Sabir and others, (2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the said decision hereunder:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> ....
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

22. Thus, Rs.1,00,000/- is awarded under the head "pain and sufferings" and Rs.1,00,000/- is awarded under the head "loss of amenities of life".

23. Thus, in all the claimant is held entitled to compensation to the tune of Rs.6,14,400/-+Rs.2,28,176/- +Rs.2,00,000/- +Rs.1,00,000/-, +Rs.20,000/- +Rs.15,000/- +Rs.15,000/- +Rs.10,000/- +Rs.50,000/- + Rs.1,00,000/- + Rs.1,00,000/- =**Rs. 14,52,576/-.**

24. Accordingly, the appeals are allowed, compensation is enhanced and impugned award is modified, as indicated hereinabove.

25. The insurer is directed to deposit the amount within eight weeks from today in the Registry alongwith interest @ 7.5%, payable for all heads, except for future income, from the date of the claim petition and under the head 'loss of earning/future income', it is payable from the date of impugned award.

26. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

27. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Raksha Devi ...Appellant

Versus

Sh. Pradeep Kumar & others ....Respondents

FAO No. 301 of 2011
Decided on : 25.11.2016

Motor Vehicles Act, 1988- Section 166- The claim petition was dismissed on the ground that claimant had failed to prove that driver was driving the vehicle in a rash and negligent manner- held, that it was specifically pleaded in the claim petition that the accident was outcome of rash and negligent driving of the driver – FIR was also registered against him- therefore, there was prima facie evidence regarding rashness and negligence – the claimant has to prima facie prove that accident was the outcome of rashness and negligence of the driver- MACT had not returned any findings on issues No. 2 to 4 - the award set aside with the direction to return findings on issues No. 2 to 4. (Para- 7 to 16)

Cases referred:

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646
Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

For the Appellant :	Ms. Jyotsna Rewal Dua, Senior Advocate with Ms. Charu Bhatnagar, Advocate.
For the Respondents:	Mr. Deepak Kaushal, Advocate, for respondents No. 1 & 2. Mr. P.S. Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the judgment and award, dated 3rd May, 2011, made by the Motor Accident Claims Tribunal-I, Sirmour, District Sirmour at Nahan, H.P. (for short 'the Tribunal') in MAC Petition No. 20-MAC/2 of 2008, titled as **Smt. Raksha Devi** versus **Shri Pardeep Kumar & others**, whereby the claim petition came to be dismissed (for short 'the impugned award').

2. The claimant, being victim of the motor-vehicular accident, had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs. 5,00,000/-, as per the break-ups given in the claim petition.

3. The respondents resisted and contested the claim petition by filing replies.

4. Following issues came to be framed by the Tribunal:

"1. Whether Parmod Kumar died due to rash or negligent driving of Pick-up van No. HP-18-B-0220 by respondent No. 2 Mukesh Kumar alias Happy on 28-6-2007, as alleged? ....OPP

2. In case issue No. 1 is proved in affirmative, whether the petitioner is entitled to receive compensation, if so to what amount and from whom?....OPP

3. Whether the risk of the deceased was not covered in the Insurance Policy, as alleged? OPR-3

4. Whether the vehicle in question was being plied in violation of the terms and conditions of the Insurance Policy, as alleged? OPR-3

5. Relief."

5. The claimant examined Santosh Kumari (PW-1) and Dr. Anil Aggarwal (PW-2). She herself stepped into the witness box as PW-3. Respondents examined Vikas Gupta (RW-1) and driver stepped into the witness box as RW-2.

6. The Tribunal after scanning the evidence, oral as well as documentary, held that the claimant has failed to prove that driver, namely, Mukesh Kumar had driven the offending vehicle, rashly and negligently, at the relevant point of time. The said findings are not tenable for the following reasons.

7. The claimant has specifically pleaded in the claim petition that the accident was outcome of the rash and negligent driving of the driver. FIR (Ext. PW-1/A) under Sections, 279 & 337 of the Indian Penal Code was lodged in Police Station Nahan, which stands proved. Thus, there is *prima-facie* proof on the record to hold that the accident was outcome of the rash and negligent driving of the driver.

8. It is a beaten law of the land that strict proof is not required, but the claimant has to prove *prima-facie* that the accident is outcome of rash and negligent driving of the driver.

9. My this view is fortified by the judgment of the Apex Court in the case titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354.** It is apt to reproduce relevant portion of para 3 of the judgment herein:

"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from

the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard." (Emphasis Added)

10. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the Motor Vehicles Act, 1988, for short 'the MV Act' is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."

11. It would also be profitable to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

"12. .....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

12. The Apex Court in a case titled **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646** has laid down the same principle and held that strict proof and strict links are not required.

13. The same principle has been laid down by this Court in a series of cases.

14. A Single Judge of this Court in FAO No. 127 of 1999, titled as **Bimla Devi and others versus Himachal Road Transport Corporation and others**, decided on 22.08.2005, held that the claimants have to prove the case by leading cogent evidence and applied the mandate of CPC read with the Evidence Act, was questioned before the Apex Court by the medium of Civil Appeal No. 2538 of 2009, titled as **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and the Apex Court set aside the said judgment and held that strict proof is not required. It is apt to reproduce paras 2 and 12 to 15 of the judgment herein:

> *"2. This appeal is directed against a judgment and order dated 22.8.2005 passed by the High Court of Himachal Pradesh, Shimla in FAO No. 127 of 1999 whereby and whereunder an appeal preferred against a judgment and award dated 28.10.1998 passed by the Motor Accident Claims Tribunal-II [MACT (I), Nahan] in MAC Petition No. 21-NL/2 of 1997, was set aside.*
>
> *xxx xxx xxx*
>
> *12. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimants predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post mortem report vis-a-vis the averments made in a claim petition.*
>
> *13. The deceased was a Constable. Death took place near a police station. The post mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.*
>
> *14. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos. 2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored. Some discrepancies in the evidences of the claimant s witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos. 2 and 3.*
>
> *15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."*

15. Having said so, I am of the considered view that the claimant has *prima facie* proved that the driver of the offending vehicle had driven the same, rashly and negligently, at the relevant point of time and had caused the accident. Accordingly, the findings returned by the Tribunal on Issue No. 1 are set aside and the said issue is decided in favour of the claimant and against the respondents.

Issues No. 2 to 4.

16 The Tribunal has not returned findings on Issues No. 2 to 4. Thus, I deem it proper to remand this case, with the direction to the Tribunal to return findings on Issues No. 2 to 4, within four weeks w.e.f. 01.12.2016.

17. Parties are directed to cause appearance before the Tribunal on **01.12.2016.**

18. The impugned award is set aside and the appeal is allowed, as indicated above.

19. Registry to send the record of the case alongwith a copy of this judgment forthwith so as to reach the Tribunal below well before the date fixed.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Cr. Appeal No. 460 of 2007 alongwith Cr. Appeal No. 461 of 2007
Decided on : 25/11/2016

Cr. Appeal No. 460 of 2007

State of H.P. .....Appellant.

Versus

Sanjeev Kumar .....Respondent.

Cr. Appeal No. 461 of 2007

State of H.P. .....Appellant.

Versus

Ram Kumar .....Respondent.

Punjab Excise Act, 1914- Section 61(i)(a)- Accused were found in possession of 6 bags containing 4 boxes each and one box containing two boxes of country liquor each, box was containing 50 pouches each of 180 ml. liquor- accused were tried and convicted by the trial Court- an appeal was preferred, which was allowed and the accused were acquitted- held in appeal that the prosecution version was proved by the official witnesses – report of CTL proved that pouches were containing country liquor in them – simply because independent witnesses had not supported the prosecution version is not sufficient to record acquittal especially when he had admitted his signatures on the seizure memo - he was estopped from denying his signatures in view of bar contained in Sections 91 and 92 of Indian Evidence Act – Appellate Court had wrongly acquitted the accused- appeal allowed- judgment of Appellate Court set aside and that of the Trial Court restored. (Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Rajneesh Lal, Advocate Mr. C.S.Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

Both these appeals stand directed by the State of Himachal Pradesh against the impugned judgement(s) recorded by the learned Additional Sessions Judge, Fast Track Court, Solan, District Solan, whereby he recorded a verdict of acquittal upon the accused respondents.

2. The brief facts of the case are that on 12.11.1999 around 9.00 a.m at Panch Parmeshwar Mandir I.O. PW-2 S.I. Virender Kumar was present alongwith other police officials including PW-8 H.C.Ravinder Lal when he received the secret information that one maruti van No. HP-02-4951 was carrying liquor coming from Chandigarh to Shimla. It is alleged that vehicle was not having front number plate and when the vehicle was seen by I.O. it was signaled to stop but it was not stopped and said maruti van was chased by police Naka party in taxi No. HP-01-078. But aforesaid van drove away towards bye pass road. It is alleged that when the aforesaid van allegedly carrying liquor reached near HRTC workshop bifurcation then a bus No. HP-14-3696 was coming out of workshop but due to rash driving of accused Ram Kumar driver of van struck against the bus. It is also alleged that then accused Sanjiv Kumar, who was sitting in van, tried to run away, but was over powered by police party and accused Ram Kumar was apprehended by police inside the car. It is also alleged that van was searched in presence of PW-5 Darshan Singh, Karam Chand, Kapil Sahani and in the back seat of the vehicle and dickey, 7 gunny bags were found, out of which six bags were found carrying 4 boxes each and one bag was found containing 2 boxes of country liquor and each box was containing 50 pouches each of 180 ml. liquor. It is also alleged that then I.O. took out 26 pouches out of which 26 nips were taken as sample and case property was sealed in presence of witnesses at the spot vide memo Ext.PW-2/B. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 61(i)(a) of the Punjab Excise Act to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

7. On an appraisal of the evidence on record, the learned trial Court recorded findings of conviction against the accused whereas the learned Appellate Court returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. At the place depicted in site plan Ext.PW-8/A occurred the relevant seizure of liquor carried in vehicle bearing No. HP-02-4951, whereon the accused were aboard. The prosecution in proof of its case depended upon the testimonies of official witnesses who therewithin rendered a version qua the prosecution case unbereft of any inter se contradictions occurring in their respective examinations in chief vis.a.vis. their respective cross-examinations besides theirs testimonies remained unblemished significantly when they deposed in harmony vis.a.vis. their respective testifications. The uneroded testifications of official witnesses though hence held probative vigour yet the learned Appellate Court on anvil of the testification of PW-5 a witness to recovery memo Ext.PW-2/B who reneged from his previous statement recorded in writing proceeded to pronounce an order of acquittal upon the accused respondent. The reports

of the CTL concerned comprised in Ext.PW-8/B to Ext.PW-8/F unveil a disclosure qua the 26 nips as stood extracted from 26 pouches held respectively in each of the 26 cartons borne in the relevant vehicle, nips whereof on standing received thereat whereupon their examination unraveling qua their holding liquor therewithin. The reports of the CTL concerned comprised in the afore referred exhibits formidably proclaim qua 26 nips extracted from amongst one of the bottles of liquor held in each of the cartons borne in the relevant vehicle wherefrom the relevant seizure occurred holding liquor wherefrom the learned Additional Sessions Judge stood enjoined to in conjunction with the untainted testimonies of the prosecution witnesses to draw a conclusion of the prosecution succeeding in proving its charge against the accused. However, as aforestated the learned Additional Sessions Judge had merely on anvil of one of the witnesses to seizure memo Ext.PW-2/B reneging from his previous statement recorded in writing proceeded to record a verdict of acquittal in favour of the accused. The aforesaid reason, which stands assigned by the learned Additional Sessions Judge for recording a verdict of acquittal upon the accused is per se ridden with a gross inherent fallacy of his remaining unbereft of the trite factum of PW-5 while standing cross-examined by the learned APP in sequel to his standing declared hostile his admitting the factum of PW-2/B wherewithin occur the apposite recitals qua the relevant charge holding his signatures whereupon the inevitable sequel is qua the existence thereon of his signatures not standing bereft of any aura of authenticity. In sequel to PW-5 conceding qua his signatures borne on Ext.PW-2/B belonging to him thereupon the mandate of Section 91 and 92 of the Indian Evidence Act whereupon he on admitting the occurrence of his signatures thereon hence stood statutorily estopped to renege from the recitals borne thereon aroused attraction, thereupon the effect of his orally deposing in variance or in detraction to the recitals which occur thereon gets statutorily belittled rather when he naturally emphatically proves the recitals comprised in the apposite memo(s), it was neither appropriate nor tenable for the learned Additional Sessions Judge to conclude qua the recorded recitals borne on Ext.PW-2/B holding no evidentiary clout nor it was legally apt for him to outweigh the creditworthiness of the testimonies of the official witnesses qua the credible effectuation of recovery of liquor under recovery memo Ext.PW-2/B whereas the factum of the uncontroverted occurrence thereon of signatures of PW-5 wherewithin the apposite recitals are held enjoined imputation of credence thereon dehors his reneging from his previous statement recorded in writing. Reiteratedly, the ensuing sequel thereof is of with the statutory estoppel constituted in Section 91 and 92 of the Indian Evidence Act barring PW-5 to resile from the contents of Ext.PW-2/B especially when he admits the occurrence of his signatures thereon renders unworthwhile besides insignificant the factum of his orally deposing in variance of the recorded recitals occurring therein contrarily per se an inference stands enhanced qua dehors his reneging from his previous statement recorded in writing, a deduction standing capitalized qua thereupon his proving the genesis of the prosecution case.

10. The learned counsel for the accused respondent has contended with vigour qua with PW-5 in his cross-examination acquiescing to the factum of the relevant vehicle striking a bus whereupon it was incumbent upon the Investigating Officer concerned to lodge an apposite report with the police station concerned whereas his omitting to do so erodes the genesis of the occurrence depicted in F.I.R. borne on Ext.PW1/A. However, the aforesaid submission warrants its standing rejected outrightly as the prosecution was enjoined to only prove the factum of the relevant seizure displayed in Ext.PW-2/B standing efficaciously proven. Consequently with this Court recording an inference qua the contents of Ext.PW-2/B standing efficaciously proven dehors PW-5 resiling from his previous statement recorded in writing rendered unnecessary the omission if any of the Investigating Officer in reporting the factum of the relevant vehicle striking a bus.

11. Also the learned counsel for the accused has contended qua with the deposition of PW-6 a purported witness to Ext.PW-2/B not lending probative vigour significantly when evidently he uncontrovertedly was not present at the time contemporaneous to the relevant seizure standing made from the relevant vehicle by the Investigating Officer concerned rather his standing added as a witness subsequent to the completion of the relevant proceedings. However,

even if PW-6 stood added as an independent witness to the relevant seizure memo after completion of the relevant proceedings yet when for reasons aforestated the deposition of one of the witnesses to Ext.PW-2/B solitarily holds formidable sinew thereupon the factum of subsequent addition of PW-6 as a witness to Ext.PW-2/B does not either erode the testification of PW-5 nor hence the relevant recitals borne therewithin loose their efficacy.

12. The learned counsel for the accused has contended with vigour qua the Investigating Officer concerned not collecting samples from each of the liquor bottles carried in all the cartons borne on the relevant vehicle nor his dispatching for examination to the CTL concerned samples collected from each of the liquor bottles carried in all the cartons borne on the relevant vehicle, whereas the CTL affirmatively opining only qua the samples of liquor extracted from 26 pouches from amongst the entire cache of liquor carried in all the cartons borne on the relevant vehicle entails a sequel of the prosecution succeeding in proving only the opinion recorded by the CTL, contrarily he contends qua the prosecution not succeeding in proving the factum qua all the bottles carried in all the cartons borne in the relevant vehicle holding therewithin liquor. However, the aforesaid submission warrants its standing discountenanced. A thorough circumspect reading of the evidence on record unravels qua both the accused respondents in their defence embodied in their respective statements recorded under Section 313 Cr.P.C. not unravelling therein the factum of except 26 bottles carried in each of the cartons amongst others carried thereon wherefrom amongst 26 samples stood collected by the Investigating Officer qua the other bottles carried in all the cartons borne in the relevant vehicle not holding liquor therewithin also they while holding the prosecution witnesses to cross-examination omitted to qua the facet aforesaid purvey apposite suggestions to them. The effect of the aforesaid omissions is qua both the accused acquiescing to the factum of all the bottles held in all the cartons borne in the relevant vehicle holding liquor dehors the factum of the Investigating Officer concerned extracting from amongst them 26 samples from only 26 pouches/bottles of liquor.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned Additional Sessions Judge has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record. In sequel thereto, I find merit in these appeals, which are accordingly allowed and the judgement of acquittal rendered by the learned Additional Sessions Judge, Solan is quashed and set-aside. Accordingly, the accused are held guilty for theirs committing offences punishable under Sections 16(i)(a) of the Punjab Excise Act as applicable to the State of Himachal Pradesh. The judgement of conviction & sentence pronounced by the learned Chief Judicial Magistrate, Solan, is affirmed and upheld. In aftermath, the pronouncement recorded by the learned Chief Judicial Magistrate in Case No. 130/3 of 2000 be forthwith put to execution.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Co. Ltd. .....Appellant

Versus

Smt. Sita Devi and others .....Respondents

FAO (MVA) No. 118 of 2012.
Date of decision: 25th November, 2016.

Motor Vehicles Act, 1988- Section 149- Insurer was directed to satisfy the award with the right to recovery- held, that insurer has to satisfy the award with the right to recovery from the owner/insured – appeal dismissed. (Para-4 to 6)

For the appellant: Mr. Lalit K. Sharma, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 10.1.2012, passed by the Motor Accident Claims Tribunal, Kullu, H.P. hereinafter referred to as "the Tribunal", for short, in Claim Petition No.11 of 2011, titled *Smt. Sita Devi and others versus Shri Amar Nath and others,* whereby compensation to the tune of Rs.10,82,400/- alongwith interest @ 9% per annum came to be awarded in favour of the claimants and insurer was directed to satisfy the award at the first instance with right of recovery from the owner-insured, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Owner, driver and claimants have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them. The factum of insurance is also not in dispute.

3. I have gone through the impugned award.

4. I wonder why the insurer has questioned the impugned award as the insurer was to satisfy the award at the first instance with right of recovery from the owner-insured. Owner-insured has not chosen to question the impugned award, has attained the finality.

5. Having said so, there is no force in the appeal, the same is accordingly dismissed and the impugned award is upheld.

6. Insurer is directed to deposit the amount alongwith interest, as awarded by the Tribunal, within eight weeks from today in the Registry, if not deposited. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

7. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Company Ltd. ....Appellant
Versus
Sh. Lal Chand & others ....Respondents

FAO No. 115 of 2012
Decided on : 25.11.2016

Motor Vehicles Act, 1988- Section 168- A claim petition was filed, which was allowed subject to the production of disability certificate, which was not produced – claimant filed an execution petition, which was also dismissed – he filed a fresh claim petition, which was allowed – held, that second claim petition is not maintainable in view of bar of res-judicata – however with the consent of the parties compensation of Rs. 2 lacs awarded in favour of the claimant. (Para-3 to 7)

For the Appellant : Mr. Ashwani K. Sharma, Senior Advocate with Mr. Jeewan Kumar, Advocate.
For the Respondents: Mr. Tek Chand Sharma, Advocate, for respondent No. 1.
Mr. B.C. Verma, Advocate, for respondent No. 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Learned Counsel for the appellant-insurer argued that Claim Petition No. 133-S/2 of 2001/2003 was filed by the claimant in the year 2001 before the Motor Accident Claims Tribunal, Shimla (for short 'the Tribunal') whereby compensation to the tune of Rs. 1,25,000/- came to be awarded in his favour, subject to the production of disability certificate by the claimant, which he failed to do so. Then, the claimant filed an execution petition**,** which was also dismissed. Thereafter, the claimant filed fresh claim petition i.e. M.A.C. Petition No. 31-S/2 of 2009, whereby compensation to the tune of Rs. 2,55,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition was granted in favour of the claimant. The said claim petition has given birth to the instant appeal. In view of the above, learned Counsel for the appellant-insurer argued that the claimant is caught by the Principles of Res judicata. He also stated that the amount of compensation has not been paid to the claimant.

2. Perused.

3. The second claim petition is not maintainable in view of the doctrine of Res judicata. However, grant of compensation is a social legislation and for the benefit of claimants-sufferers and in order to save them from social evils, compensation is to be awarded in their favour.

4. In the given circumstances, with the consent of the learned Counsel for the parties, I deem it proper to award compensation to the tune of Rs. 2,00,000/- in lump sum, in favour of the claimant.

5. The impugned award is modified, as indicated above.

6. Learned Counsel for the appellant-insurer stated at the Bar that the award amount stands deposited before the Registry.

7. Registry is directed to release the amount of Rs. 2,00,000/- in favour of the claimant through payees' account cheque or by depositing the same in his account.

8. The excess amount, if any, and interest accrued, be refunded in favour of the appellant-insurer through payees' account cheque.

9. Accordingly, the appeal is disposed of.

10. Send down the record after placing a copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Kamla Devi …Appellant.

Versus

Union of India and others. …Respondents.

RSA No. 557/2006
Reserved on : 23.11.2016
Decided on: 28.11. 2016

Hindu Marriage Act, 1955- Section 5- Plaintiff filed a civil suit pleading that she was entitled to family pension being the legally wedded wife of the deceased- deceased had taken customary divorce from his first wife and had performed the Gandharav marriage and had thereafter solemnized Brahm marriage – the defendants denied the marriage between the plaintiff and the deceased – the suit was dismissed by the Trial Court – an appeal was preferred, which was dismissed – held in second appeal that it was admitted that the deceased had a spouse living at

the time of marriage with the plaintiff – any marriage performed during the subsistence of valid marriage is void and will not confer any right upon the second wife – custom was neither pleaded nor proved – hence, the plea of customary divorce is not acceptable - nomination will not alter the succession- appeal dismissed. (Para-7 to 28)

Cases referred:

Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav and another, (1988) 1 SCC 530
Bakulabai and another vs. Gangaram and another 1988 (1) SCC 537
Rameshwari Devi vs State of Bihar and others, 2000 (2) SCC 431
Laxmibai (Dead) through LRs and another vs. Bhagwantbua (dead) through LRs, (2013) 4 SCC 97
Rameshchandra Rampratapji Daga vs. Rameshwari Rameshchandra Daga, (2005) 2 SCC 33
G.L. Bhatia vs Union of India, 1999 (5) SCC 237
Sarbati Devi and another vs. Smt. Usha Devi, (1984) 1 SCC 424
Neena and others vs Smt. Sunehru Devi and others, 2015 (6) ILR (HP) 20
Vishin N. Khanchandani and another vs. Vidya Lachmandas Khanchandani and another (2000) 6 SCC 724
Ram Chander Talwar and another vs. Devender Kumar Talwar and others (2010) 10 SCC 671

For the Appellant: Mr. Adarsh K. Vashishta, Advocate.
For the Respondents: Mr. Ashok Sharma, ASGI with Ms. Sukarma Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

The plaintiff is the appellant, who aggrieved by the judgments and decrees passed by both the learned courts below, has filed the instant appeal.

2. The plaintiff has filed a suit claiming therein that she was entitled to family pension being legally wedded wife of deceased Havaldar Sohan Singh. It is averred that since the first wife of deceased Sohan Singh did not bear any male child, she persuaded her husband to take ***Fargati*** (customary divorce), and thereafter, the plaintiff solemnized ***Gandharav*** marriage on 16.1.1974 as per the will of his first wife. The first wife of Sohan Singh died on 6.11.1989 and after ***Sudhikaran***, the plaintiff solemnized ***Brahm*** marriage on 15.2.1990 and the necessary ***Bhoj*** was given to the ***Biradri*** as per the prevailing customs. Out of the wedlock three children were born. The plaintiff being legally wedded wife of Sohan Singh made protracted correspondence with the defendants to release family pension in her favour, but to no avail. Hence, the suit.

3. The defendants filed written statement wherein preliminary objections regarding maintainability, valuation, cause of action, locus standi etc. were taken. On merit, it was averred that deceased Sohan Singh had retired on 4.2.1970 and was getting pension. As per record, he had married one Parwati Devi in the year 1936 and she was the only wife of deceased Sohan Singh. Defendants denied the factum of marriage between the plaintiff and deceased Sohan Singh and on such basis denied her entitlement for family pension.

4. The learned trial court on 20.8.2002 framed the following issues:

1. Whether the plaintiff is legally wedded wife of deceased Hav. Sohan Singh, as alleged?OPP
2. Whether the marriage of the plaintiff with Hav. Sohan Singh was solemnized during the life time of his previous wife Parwati Devi? If so, its effect? OPD
3. Whether the plaintiff is entitled to the relief of declaration, as prayed for?OPD

4. Whether the order No.G4/V/Misc/AMC/2001 dated 15th Feb. 2001 passed by CCDA (P) Allahabad is illegal, as alleged? OPP
5. Whether the plaintiff is entitled to the relief of mandatory injunction, as prayed for? OPP
6. Whether the suit in the present form is not maintainable, as alleged? OPD
7. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction, as alleged? OPD
8. Whether the suit is bad for non-joinder and mis-joinder of necessary parties, as alleged? OPD
9. Whether no proper notice under section 80 C.P.C. has been served on the defendants, as alleged? OPD
10. Whether the plaintiff has no locus standi to file the present suit, as alleged? OPD
11. Whether the plaintiff has no cause of action to file the present suit, as alleged? OPD
12. Relief.

5. After recording the evidence and evaluating the same, the suit was dismissed and the appeal preferred against the judgment and decree also met with the same fate constraining the plaintiff to file the instant appeal.

6. The appeal came to be heard on 30.10.2007 and the following substantial questions of law were framed:

1. Whether the married couple can have a divorce as per the customs in the Birdari?
2. Whether the plaintiff not able to prove the relationship of legally wedded wife of Sohan Singh?
3. Whether the learned courts below have misread and misappreciated the oral and documentary evidence ion record and findings recorded are perverse and liable to be set aside?
4. Whether the findings are based on mere conjectures and surmises and are liable to be set aside?

Substantial Questions of Law No. 1 to 4:

7. Since all the substantial questions of law are intrinsically interlinked and interconnected, therefore, they are taken up together for consideration and are being disposed of by a common reasoning.

8. At the outset, it may be observed that the very premise on which the suit of the plaintiff proceeds is that Sohan Singh was already having a living spouse at the time when he allegedly performed ***Gandharav*** marriage with the plaintiff.

9. Admittedly, on the date of performance of so-called ***Gandharav*** marriage, the Hindu Marriage Act, 1955 (for short 'Act') had already come into force on 18.5.1955. The Act codified all the laws relating to marriage amongst the Hindus and has over riding effect, as would be evident from section 4, which reads thus:

> **"4. Overriding effect of Act:**
>
> Save as otherwise expressly provided in this Act.-
>
> (a) Any text rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) Any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act."

10. Now, what would be the status of the marriage of Hindu male with Hindu female when he has already a living spouse, has been taken care of in section 5, which clearly provides that a marriage may be solemnized between any two Hindus, if neither already has spouse living at the time of marriage. Section 5 reads thus:

5. Conditions for a Hindu marriage:

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-.

(i) Neither party has a spouse living at the time of the marriage,

[(ii) at the time of the marriage, neither party-

(a) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) Has been subject to recurrent attacks of insanity

(iii) The bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage;

(iv) The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) The parties are not Sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

11. Section 11 provides for void marriage and reads thus as follows:

11. Void marriages.

Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [1][against the other party], be so declared by a decree of nullity if it contrivances any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

12. Thus, as per the scheme of the Act, marriage between two Hindus solemnized, one of whom had a living spouse at the time of marriage, after the commencement of the Act would be void and nullity in the eyes of law. Meaning thereby that second wife would have no right of claiming herself to be a legally wedded wife.

13. Once the marriage is nullity, the same would also not be protected under Pension Rules. Therefore, the wife, as referred to under Pension Rules, would only include the first wife and the second wife would only be included in case the marriage is permissible under the personal law. But in the cases of Hindu, second wife has no right whatsoever as the law prohibits second marriage if the spouse is alive.

14. In ***Yamunabai Anantrao Adhav*** vs. ***Anantrao Shivram Adhav and another***, (1988) 1 SCC 530, the Hon'ble Supreme Court held that the marriage of a woman in accordance with the Hindu rites with a man having living spouse is a complete nullity in the eyes of law and she is not entitled to the benefit of section 125 of the Code of Criminal Procedure.

15. In ***Bakulabai and another*** vs. ***Gangaram and another*** 1988 (1) SCC 537, the Hon'ble Supreme Court held that marriage of a Hindu woman with a Hindu male having living spouse solemnized after coming into force of the Hindu Marriage Act, 1955 is null and void and

the woman is, therefore, not entitled to maintenance under section 125 of the Code of Criminal Procedure.

16. In ***Rameshwari Devi*** vs ***State of Bihar and others***, 2000 (2) SCC 431, the Hon'ble Supreme Court held that where the Government servant being a Hindu having two living wives died, the second marriage was void under the Hindu law and hence the second wife did not have the status of widow and would not be entitled to family pension. The children from the second wife would equally share the benefit of gratuity and family pension as per law.

17. It is vehemently contended by Mr. Adarsh Vashishta that as there was a customary divorce between the first wife and deceased Sohan Singh, therefore, it was the plaintiff only who was the legally wedded wife and therefore entitled to family pension.

18. There is no gainsaying that before a customary divorce is acted upon, the same must be pleaded and thereafter proved in accordance with law.

19. What is custom and how it is required to be proved had been subject matter of decision of the Hon'ble Supreme Court in ***Laxmibai (Dead) through LRs and another*** vs. ***Bhagwantbua (dead) through LRs***, (2013) 4 SCC 97, wherein it was held as under:

> 12. Custom is an established practice at variance with the general law. A custom varying general law may be a general, local, tribal or family custom. A general custom includes a custom common to any considerable class of persons. A custom which is applicable to a locality, tribe, sect or a family is called a special custom.
>
> Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it.
>
> Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence.
>
> [13] In Dr. Surajmani Stella Kujur v. Durga Charan Hansdah, 2001 AIR(SC) 938, this Court held that custom, being in derogation of a general rule, is required to be construed strictly. A party relying upon a custom, is obliged to establish it by way of clear and unambiguous evidence. (Vide: Salekh Chand (Dead) thr. Lrs. v. Satya Gupta & Ors., 2008 13 SCC 119.
>
> [14] A custom must be proved to be ancient, certain and reasonable. The evidence adduced on behalf of the party concerned must prove the alleged custom and the proof must not be unsatisfactory and conflicting. A custom cannot be extended by analogy or logical process and it also cannot be established by a priori method. Nothing that the Courts can take judicial notice of needs to be proved. When a custom has been judicially recognised by the Court, it passes into the law of the land and proof of it becomes unnecessary under Section 57(1) of the Evidence Act, 1872. Material customs must be proved properly and satisfactorily, until the time that such custom has, by way of frequent proof in the Court become so notorious, that the Courts take judicial notice of it. (See also:Effuah Amissah v. Effuah Krabah, 1936 AIR(PC) 147; T. Saraswati Ammal v. Jagadambal & Anr., 1953 AIR(SC) 201; Ujagar Singh v. Mst. Jeo, 1959 AIR(SC) 1041; and Siromani v. Hemkumar & Ors., 1968 AIR(SC) 1299).
>
> [15] In Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya, 1872 14 MooIndApp 570, it was held: "It is essential that special usage, which modifies the ordinary law of succession is ancient and invariable; and it is further

essential that such special usage is established to be so, by way of clear and unambiguous evidence. It is only by means of such evidence, that courts can be assured of their existence, and itis also essential that they possess the conditions of antiquity and certainty on the basis of which alone, their legal title to recognition depends."

[16] In Salekh Chand , this Court held as under:

"Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them.

All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy."

[17] In Bhimashya & Ors. v. Smt. Janabi @ Janawwa, 2006 13 SCC 627,this Court held:

"A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

xx xx xx xx

Custom is authoritative, it stands in the place of law, and regulates the conduct of men in the most important concerns of life; fashion is arbitrary and capricious, it decides in matters of trifling import; manners are rational, they are the expressions of moral feelings. Customs have more force in a simple state of society. Both practice and custom are general or particular but the former is absolute, the latter relative; a practice may be adopted by a number of persons without reference to each other; but a custom is always followed either by limitation or prescription; the practice of gaming has always been followed by the vicious part of society, but it is to be hoped for the honour of man that it will never become a custom."

20. Adverting to the pleadings as also the evidence led, it would be noticed that neither so-called custom has been pleaded nor proved in accordance with law.

21. In ***Rameshchandra Rampratapji Daga*** vs. ***Rameshwari Rameshchandra Daga***, (2005) 2 SCC 33, the Hon'ble Supreme Court held that the customary divorce of *choor chithhi* has to be established in accordance with law and it was observed as under:

[12] So far as the appeal preferred by the wife is concerned, on reconsideration of the evidence on record, we find no ground to take a view different from the one taken by the High Court and upset the conclusion that the second marriage was null and void. The wife did not deny the fact that her marriage was arranged with Girdhari Lai Lakhotia in the year 1973 and after marriage she lived with the members of the family of her previous husband. It is also an admitted fact that she instituted proceedings for obtaining decree of divorce being Divorce Petition No. 76 of 1978 in the Family Court at Amravati. It is also not denied that no decree of divorce was obtained from the Court and she only obtained a registered document of chhor chithhi from her previous husband on 15-5-1979. Existence of such customary divorce in Vaish community of Maheshwaris has not been established. A Hindu marriage can be dissolved in

accordance with the provisions of the Act by obtaining a decree of divorce from the Court. In the absence of any decree of dissolution of marriage from the Court, it has to be held that in law first marriage of the wife subsisted when she went through the second marriage on 11-7-1981 with the present husband. The appeal preferred by the wife, therefore, against grant of decree of declaration of her second marriage as void, has to be rejected whatever may be the circumstances which existed and the hardships that the wife had to undergo, as alleged, at the hands of her second husband.

22. Mr. Adarsh Vashishta, learned counsel for the appellant, would then argue that once the appellant is admittedly, nominee of the deceased, then the respondents had no jurisdiction or authority to deny her the family pension. Even this contention is equally without merit as it is more than settled that if the nomination is made contrary to the statutory provisions, it would be inoperative.

23. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***G.L. Bhatia*** vs ***Union of India***, 1999 (5) SCC 237, wherein the husband of the deceased employee claimed family pension while nomination was not in his favour. The authorities had rejected the claim of the husband for the reason that he was staying separately from the wife and thus was not entitled to family pension. The Hon'ble Supreme Court held that the husband was entitled to family pension, where the rights of the parties are governed by statutory provisions and the individual nomination contrary to the statute will not operate.

24. Earlier to this, the Hon'ble Supreme Court in ***Smt. Sarbati Devi and another vs. Smt. Usha Devi, (1984) 1 SCC 424*** held that mere nomination made in the insurance policy does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the policy on the death of the assured. The nomination only indicates the hand which is authorized to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.

25. This Court in ***Smt. Neena and others*** **vs Smt.** ***Sunehru Devi and others,*** 2015 (6) ILR (HP) 20 has elaborately discussed the various pronouncements of the Hon'ble Supreme Court, including the one rendered in *Sarbati Devi's* case (supra), and it was observed as under:

> "11. Insofar as the legal status of nominee is concerned, the same is no longer *res integra*. The Hon'ble Supreme Court for the first time clarified the issue in case ***Smt. Sarbati Devi and another vs. Smt. Usha Devi, (1984) 1 SCC 424*** and held that in context of Section 39 of the Life Insurance Act, 1938 (in short LIC Act), a mere nomination under Section 39 of the Act did not confer "beneficial interest" in the nominee qua the amount payable under the policy on the death of the assured. The nomination was indicative only of the authority or the person who was to receive the amount, pursuant to which the insurer would get a valid discharge of its liability under the policy. This however, would not belie the claim of the heirs of the asssured made in accordance with law of succession. It is apt to reproduce para 4 of the judgment which reads thus:
>
> > *"4. At the out set it should be mentioned that except the decision of the Allahabad High Court in Kesari Devi v. Dharma Devi, AIR 1962 All 355, on which reliance was placed by the High Court in dismissing the appeal before it and the two decisions of the Delhi High Court in S. Fauza Singh v. Kuldip Singh & Ors., AIR 1978 Del 276 and Mrs. Uma Sehgal & Anr. v. Dwarka Dass Sehgal & Ors AIR 1982 Del 36 in all other decisions cited before us the view taken is that the nominee under section 39 of the Act is nothing more than an agent to receive the money due under a life insurance policy in the circumstances similar to those in the present case and that the money remains the property of the assured during his lifetime and on his death forms part of his estate subject to the law of succession*

applicable to him. The cases which have taken the above view are Ramballav DhanJhania v. Gangadhar Nathmall AIR 1956 Cal 275, Life Insurance Corporation of India v. United Bank of India Ltd. & Anr., AIR 1970 Cal 513, D. Mohanavelu Muldaliar & Anr. v. Indian Insurance and Banking Corporation Ltd. Salem & Anr.,AIR 1957 Mad 115, Sarojini Amma v. Neelakanta Pillai AIR 1961 Ker 126, Atmaram Mohanlal Panchal v. Gunavantiben & Ors.,AIR 1977 Guj 134, Malli Dei vs. Kanchan Prava Dei, AIR 1973 Ori 83 and Lakshmi Amma v. Sagnna Bhagath & Ors.,ILR 1973 Kant 827 Since there is a conflict of judicial opinion on the question involved in this case it is necessary to examine the above cases at some length. The law in force in England on the above question is summarised in Halsbury's Laws of England (Fourth Edition), Vol. 25, Para 579 thus :

"579. Position of third party. - The policy money payable on the death of the assured may be expressed to be payable to a third party and the third party is then prima facie merely the agent for the time being of the legal owner and has his authority to receive the policy money and to give a good discharge; but he generally has no right to sue the insurers in his own name. The question has been raised whether the third party's authority to receive the policy money is terminated by the death of the assured; it seems, however, that unless and until they are otherwise directed by the assured's personal representatives the insurers may pay the money to the third party and get a good discharge from him."

12. In ***Vishin N. Khanchandani and another vs. Vidya Lachmandas Khanchandani and another (2000) 6 SCC 724,*** the legal position was reiterated and it was held:

"10.....The nomination only indicated the hand which was authorized to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy. The policy holder continued to have interest in the policy during his lifetime and the nominee acquired no sort of interest in the policy during the lifetime of the policy holder. On the death of the policy holder, the amount payable under the policy became part of his estate which was governed by the law of succession applicable to him. Such succession may be testamentary or intestate. Section 39 did not operate as a third kind of succession which could be styled as a statutory testament. A nominee could not be treated as being equivalent to an heir or legatee. The amount of interest under the policy could, therefore, be claimed by the heirs of the assured in accordance with law of succession governing them."

13. In ***Ram Chander Talwar and another vs. Devender Kumar Talwar and others (2010) 10 SCC 671,*** it was held that nomination merely gives right of depositor to receive money lying in the account, but it does not make nominee owner of money lying in the account and it was held as under:

"3. *Mr. Swetank Shantanu, counsel appearing for the appellants, strenuously argued that by virtue of sub-section 2 of section 45 ZA, the nominee of the depositor, after the death of the depositor acquires all his/her rights to the express exclusion of all other persons and, therefore, the respondent can not lay any claim to the money in the account or in regard to the articles that might be lying in the bank locker held by their deceased mother. The submission is quite fallacious and is based on a complete misconception of the provision of the Act.*

4. Sub-section 2 of the 45-ZA, reads as follows:-

"45-ZA xxx xxx xxx xxx

(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in

respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount to deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner." (emphasis added)

5. Section 45-ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of section 45-ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed.

6. We find that the High Court has rightly rejected the appellant's claim relying upon the decision of this Court in V.N. Khanchandani & Anr. v. V.L. Khanchandani & Anr., (2000) 6 SCC 724. The provision under Section 6(1) of the Government Saving Certificate Act, 1959 is materially and substantially the same as the provision of Section 45-ZA(2) of the Banking Regulation Act, 1949, and the decision in V.N. Khanchandani applies with full force to the facts of this case."

14. In view of the aforesaid exposition of law, it is absolutely clear that a mere nomination in itself does not confer any 'beneficial interest' in the nominee and the retiral benefits of the deceased would become part of his estate and would be governed by the law of succession. Since the plaintiff is admittedly class-I heir, her entitlement would be 1/4th share, whereas the defendants No. 3 to 5 who alone otherwise were the nominees would be entitled to the remaining 3/4th share, that too, not on account of their being the nominees, but because of their being the class-I heirs of the deceased. This is exactly what has been held by the learned lower Appellate Court while reversing the judgment and decree passed by the learned trial Court."

26. The net result of the aforesaid discussion is that the appellant has failed to plead and thereafter prove the custom regarding marriage and divorce, therefore, no fault can be found with the findings as rendered by the learned courts below, who have correctly appreciated not only the pleadings but evidence also.

27. Having said so, all the substantial questions of law are answered accordingly.

28. In view of aforesaid discussion, there is no merit in the appeal and the same is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Sh.Kuldeep son of late Sh. Ram Lal ...Petitioner/Co-accused.

Vs.

State of HP and others. ...Non-petitioners.

Cr.MMO No. 113 of 2014.
Order reserved on: 21.11.2016.
Date of Order: November 28, 2016

Code of Criminal Procedure, 1973- Section 482- Present petition has been filed for quashing the FIR registered for the commission of offences punishable under Sections 336, 337, 427 read with Section 34 of I.P.C- held, that the complicated questions of facts cannot be determined in the proceedings relating to quashing of FIR – the document and the evidence show that there are sufficient grounds to proceed for the commission of offences punishable under Sections 336, 337, 427 read with Section 34 of I.P.C- petition dismissed. (Para-6 to 13)

Cases referred:

Supdt. & Remembrance of Legal Affairs West Bengal Vs. Anil Kumar, AIR 1980 SC 52
State of Bihar Vs. Ramesh Singh, AIR 1977 SC 2018
State of Delhi Vs. Gyan Devi, AIR 2001 SC 40
State of M.P. Vs. S.B. Johari and others AIR 2000 SC 665
Mohd Akbar Dar Vs. State of J&K, AIR 1981 SC 1548
Yash Pal Mittal Vs. State of Punjab, AIR 1977 SC 2433
C.B.I Vs. K.M.Sharan, 2008 (4) SCC 471
State of Delhi Vs. Gyandevi, 2008 (8) SCC 329
Ajay Kumar Parmar Vs. State of Rajasthan, AIR 2013 SC 633

For the petitioner: Mr. B.S.Attri, Advocate.
For non-petitioners: Mr. M.L.Chauhan, Addl. Advocate General and Mr. R.K. Sharma, Deputy Advocate General.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973 for quashing FIR No.9 of 2012 dated 24.5.2012 registered under sections 336,337, 427 read with section 34 IPC and for quashing consequential criminal proceedings pending before learned Chief Judicial Magistrate Kinnaur at Reckong Peo District Kinnaur HP.

BRIEF FACTS OF THE CASE:

2. It is alleged that on 24.5.2012 at about 1.30 PM at place Thophan within jurisdiction of police station Pooh accused persons being contractor and labour in furtherance of common intention of each others acted rashly and negligently and endangered human life and personal safety of others. It is alleged that accused persons committed blasting operation on Thopan Jangi road and caused hurt to Dara Singh, Amreek Singh and Raj Kumar by way of their negligent act. It is further alleged that accused persons also committed mischief by way of causing wrongful loss and damage to vehicle No. HP-06-2161 and totally damaged the vehicle by way of blasting operation.

3. Investigation conducted and criminal case filed against accused persons before learned Chief Judicial Magistrate Kinnaur at Reckong Peo. Learned Chief Judicial Magistrate summoned accused persons under Sections 336, 337 and 427 IPC read with section 34 IPC. Learned Trial Court after hearing learned Public Prosecutor and learned Advocate appearing on behalf of accused persons framed charge against accused persons under section 336, 337, 427 read with section 34 IPC on dated 8.10.2014. Thereafter learned Chief Judicial Magistrate Kinnaur at Reckong Peo listed the case for prosecution evidence. Thereafter present petition filed by co-accused Kuldeep under section 482 code of criminal procedure.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of non-petitioners and also perused entire record carefully.

5. Following points arises for determination in present petition:

1. Whether petition filed under Section 482 Cr.PC is liable to be accepted as mentioned in memorandum of grounds of petition?

2. Final order.

Findings upon point No.1 with reasons.

6. Submission of learned Advocate appearing on behalf of petitioner that tender of blasting operation was given to M/s Amit Singla by Chief Engineer Deepak Project vide order dated 23.4.2010 and project operation was not allotted to accused person and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that judicial finding relating to allotment of project by Chief Engineer Deepak Project to M/s Amit Singla cannot be given at this stage of case being complicated issue of fact and judicial finding would be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case in the trial of case. It is held that it is not expedient in the ends of justice to give judicial finding at this stage of case relating to complicated issue of fact.

7. Submission of learned Advocate appearing on behalf of petitioner that there was no nexus between petitioner and execution of blasting work and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that judicial finding relating to the fact whether there was no nexus between petitioner and execution of blasting work cannot be given at this stage of case being complicated fact unless opportunity is granted to both parties to lead evidence in support of their case. It is held that judicial finding relating to complicated issue of fact will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case in the trial of case.

8. Submission of learned Advocate appearing on behalf of petitioner that investigating officer with malafide intention exonerated contractor Mr. Amit Singla and his general attorney Sh Ashok Kumar Kataria and entire investigation is illegal, unwarranted and based upon malafide intention just to fasten entire liability upon petitioner and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that judicial finding relating to the fact that investigation was conducted by investigating officer with malafide intention just to exonerate original contractor Mr. Amit Singla and his general attorney Sh Ashok Kumar Kataria can not be given at this stage of case being complicated issue of fact. It is held that judicial finding relating to complicated issues of facts will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case during trial of case.

9. Submission of learned Advocate appearing on behalf of petitioner that petitioner has been falsely implicated in present case which has caused grave miscarriage of justice to petitioner and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Judicial finding relating to the fact that petitioner has been implicated falsely in present case cannot be given at this stage of case unless opportunity is granted to both parties to adduce evidence in support of their case during trial of case.

10. Submission of learned Advocate appearing on behalf of petitioner that there is no material on record which prima facie established that petitioner was connected with alleged offence and oral statement of witnesses namely Dara Singh, Shiv Kumar, Vinod Kumar, Sanjay Sharma, Ashok Kumar, Ravinder Negi, Amrik Singh, Arjun Singh and Sharab Negi were incorrectly recorded by investigating officer in order to exonerate Sh Amit Singla real contractor and Sh Ashok Kataria general attorney of Sh Amit Singla and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Judicial finding to the fact that investigating officer did not record the statement correctly cannot be given at this stage of case. Judicial finding would be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case during trial of case.

11. Submission of learned Advocate appearing on behalf of petitioner that after perusal of entire FIR and after perusal of report submitted under section 173 Cr.PC at their face value there are no grounds for proceeding against co-accused Kuldeep and on this ground

petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused statements of Dara Singh, Arjun Singh, Nemi, Shiv Kumar, Amrik Singh, Vinod Kumar, Ravinder Negi, Sanjay Sharma, Narayan Prasad, S.G.Narender, Vijay, Ashok Kumar, Lucky, ASI Jeet Ram, ASI Bhim Singh, ASI Kamal Dev, SHO Bihari Lal and M.C. police post and court has also perused documentaries evidence placed on record such as site plan, seizure memo, medical certificates of Raj Kumar, Ashok Singh and Dara Singh carefully. After perusal of statements of above stated prosecution witnesses placed on record and after perusal of above stated documentaries evidence placed on record it is held that there are sufficient grounds to proceed against petitioner under sections 336,337, 427 read with section 34 IPC.

12. It is well settled law that at the stage of framing of charge meticulous consideration of evidence and other material is not required. See AIR 1980 SC 52 Supdt. & Remembrance of Legal Affairs West Bengal Vs. Anil Kumar. See AIR 1977 SC 2018 State of Bihar Vs. Ramesh Singh. See AIR 2001 SC 40 State of Delhi Vs. Gyan Devi. See AIR 2000 SC 665 State of M.P. Vs. S.B. Johari and others. See AIR 1981 SC 1548 Mohd Akbar Dar Vs. State of J&K. See AIR 1977 SC 2433 Yash Pal Mittal Vs. State of Punjab. It is held that it is the duty of learned Trial Court to appreciate oral testimonies and documents annexed with report during trial of criminal case. It is well settled law that controversial facts should not be decided by High Court before trial of criminal case. See 2008 (4) SCC 471 C.B.I Vs. K.M.Sharan. See 2008 (8) SCC 329 State of Delhi Vs. Gyandevi . See AIR 2013 SC 633 Ajay Kumar Parmar Vs. State of Rajasthan. In view of above stated facts and case law cited supra point No.1 is answered in negative.

Point No.2 (Final order).

13. In view of findings upon point No.1 petition filed under section 482 Cr.PC is dismissed. Parties are directed to appear before learned Trial Court on 19.12.2016. Observations will not effect merits of the case in any manner. File of learned Trial Court along with certify copy of order be sent back forthwith. Cr.MMO No. 113 of 2014 is disposed of. All pending application(s) if any also disposed of.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Rishi Kumar Kapila ..Appellant/defendant.

Versus

Surinder Kumar Sharda (since died) through his LRs and another .. Respondents/plaintiff.

RFA No.342 of 2004.
Reserved on : 21/11/2016
Date of decision: 28/11/2016

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 118- An agreement for sale was executed between plaintiff and defendant No.1 through defendant No.2 – plaintiff is a non-agriculturist and cannot purchase the land without prior permission of the State Government – defendants promised to get the permission but failed to do so- plaintiff sought the refund of the earnest money, but the money was not refunded – hence, the suit was filed – the suit was decreed by the trial Court – held in appeal that it is not disputed that sale deed was not executed – plaintiff is a non-agriculturist and permission under Section 118 of the Act was not granted in favour of the plaintiff- the vendor had failed to provide the documents for getting the permission under Section 118 of the Act- the suit was rightly decreed by the trial Court- appeal dismissed.(Para-6 to 10)

For the appellant: Mr. Ramakant Sharma, Sr. Advocate with Mr. Vasant Paul Thakur, Advocate.

For the respondent 1(a): Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

This appeal stands directed against the impugned judgement and decree of the learned Additional District Judge, Presiding Officer, Fast Track Court, Solan, District Solan, Himachal Pradesh, whereby it decreed the suit of the plaintiff.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiff agreed to purchase suit land. An agreement to sell was entered into between the plaintiff on one side and defendant No.1 on the other side. The agreement was executed through defendant No.2 the attorney of defendant No.1. The plaintiff is a non agriculturist and in view of the bar created under Section 118 of the H.P.Tenancy and Land Reforms Act could not purchase land without prior permission of the State Government. It is alleged that defendants had promised that they would get such permission in favour of the plaintiff. Despite such assurance the defendants did not take any steps to obtain permission. The plaintiff then requested the defendants to execute and provide the necessary documents so that permission could be obtained by him but the defendants did not provide such documents. Notice dated 27.12.2000 was issued by him through his counsel. The notice was replied to by the defendants on 8.1.2001 through their counsel Rajeev Garg. The counsel for the plaintiff again sent a notice to the defendants through their counsel to supply him the documents required for the purpose of obtaining the permission. But again no documents were furnished. As per terms of the agreement of sale the sale was to be effected on or before 31.3.2001 . Due to acts of the defendants the agreement was frustrated and the plaintiff got a legal notice dated 19.3.2001 sent to the defendants. The defendants sent reply on 21.3.2001 intimating the plaintiff that they were ready to extend the period of three months but such offer was not acceptable to the plaintiff. The contract has thus been frustrated due to negligence of the defendants. Even otherwise the defendants misguided and misrepresented the facts to the plaintiff. The plaintiff therefore is entitled to refund of earnest money. The plaintiff requested the defendants to refund the amount but they did not. Hence this suit.

3. The defendants filed written statement and thereby resisted and contested the suit of the plaintiff by taking preliminary objection qua maintainability, locus standi, want of cause of action and estoppel etc. On merits it was admitted that the land was agreed to be sold and that earnest money of Rs.3,15,000/- was received. It was also denied that the defendants were under any obligation to supply the plaintiff the documents. However, they were ready to assist him and were ready to furnish the documents but the plaintiff himself failed to turn up and to collect the same. The defendants had even offered to extend the time for execution and registration of sale deed for a period of three months but the offer was not accepted by the plaintiff intentionally. The defendants prayed for dismissal of the suit as plaintiff himself was responsible for not getting the sanction and as per the terms of the agreement the earnest money was liable to be forfeited.

4. On the pleadings of the parties, the following issues inter-se the parties at contest were struck:-

1. Whether the plaintiff is entitled for recovery of Rs.3,15,000/- and interest as alleged? OPP.

2. Whether the present suit is not maintainable, as alleged? OPD.

3. Whether the plaintiff is etopped by his acts, conduct and acquiescence, to file the present suit as alleged? OPD.

4. Whether present suit is without cause of action, as alleged? OPD.

5. Whether plaintiff has no locus standi to file the present suit, as alleged? OPD.

6. Relief.

5. The learned trial Court on an appraisal of evidence, adduced by the parties at contest decreed the suit of the plaintiff. Now the defendant No.1 has therefrom instituted the instant Regular First Appeal before this Court, whereby he assails the findings recorded in its impugned judgment and decree by the learned trial Court.

6. The factum of execution of Ext.PW-1/B inter se the litigating parties hereat remains uncontroverted. In paragraph 3 of Ext.PW-1/B, which stands extracted hereinafter

> "That the sale deed shall be executed on or before 31.3.2001 in case the purchaser fails to perform his part of contract the amount of earnest money shall stand forfeited and in case seller backout from his promise he shall be liable to pay double the amount of earnest money."

a peremptory mandate stood cast upon the parties thereto to execute a sale deed qua the suit property on or before 31.3.2001 also it holds embodiments qua the failure or refusal of the vendee to perform his part of the obligation constituted therein entailing the sequel of the apposite tender of a sum of Rs.3,15,000/- as earnest money to the vendor standing forfeited vis-à-vis the vendor also it holds unfoldments qua on the vendor reneging from his promise recorded therein his being amenable to pay the double of the earnest money to the vendee.

7. Uncontestedly, the sale deed remained unexecuted on or before 31.3.2001. Since 31.3.2001 stood constituted in Ext.PW-1/B to be precisely delineated date whereon it was mandated to be executed inter se the vendor and the vendee, it is imperative to adjudicate whether its non execution ensued on the vendee or the vendor evidently refusing to perform their part of the obligation(s) constituted upon them in Ext.PW-1/B whereupon the ensuing sequel qua the consequence(s) thereof spelt in paragraph 3 would sprout.

8. Be that as it may, the vendee is a non agriculturist whereupon he stood enjoined to preceeding the execution of a valid registered deed of conveyance qua the suit property with the vendor obtain the apposite statutory permission under Section 118 of the H.P. Tenancy and Land Reforms Act from the appropriate Government. The aforesaid permission stood unobtained whereupon the deadline delineated in Ex. PW-1/B for execution qua the suit property a registered deed of conveyance lapsed whereupon the sequelling effect of its non execution cast in paragraph 3 of Ext.PW-1/B erupts. Hereat the respective unreadiness or unwillingness of the vendor or the vendee to perform their respective contractual obligation(s) is enjoined to be determined. The vendee though stands enjoined with a contractual obligation(s) to obtain the requisite permission from the appropriate Government for the relevant purpose yet the vendee is to facilitate the vendor in accomplishing his obtaining the relevant permission for the relevant purpose from the appropriate Government. Evidence in personification qua the vendor rendering the apt facilitation(s) to the vendee for his obtaining the relevant permission from the appropriate Government stood embedded upon his promptly purveying the relevant documents to the vendee especially when evident absence of transmission thereof by him to the vendee would preclude the latter to obtain the relevant permission. Consequently it is to be determined whether the vendor(s) efficaciously facilitated the vendee to obtain the requisite permission from the appropriate Government comprised in his on the apposite requisitions/elicitations standing made upon him by the vendee his begetting prompt compliance therewith. Contrarily if evidently the vendor omitted to promptly transmit the relevant documents to the vendee for his holding the requisite facilitation besides empowerment to obtain the requisite permission, the imminent sequel thereof would be qua the vendor showing palpable unreadiness or unwillingness to perform his part of the obligation constituted in Clause 3 of Ex.PW-1/B whereupon he would stand encumbered with the concomitant contractual sequel.

9. Be that as it may, Ext.PW-1/B stood executed on 29th November, 2000. Under Ext.PW-1/C the counsel for the plaintiff issued a notice to the defendants calling upon them to provide the documents recited in paragraph 4 thereof. In response thereto under Ext.PW-1/D issued on 8.1.2001 the counsel for the defendants intimated qua the readiness and willingness of the defendants to purvey them the requisitioned documents also it contains a recital calling upon

the plaintiff to collect the documents from the office of Rajeev Garg, Advocate, on any working day between 9 a.m to 10 a.m or between 5 a.m to 8 p.m. However, as apparent on a reading of Ext.PW-1/E the relevant documents remained uncollected by the plaintiff from the office of Mr. Rajeev Garg, Advocate. Also, it is apparent on a reading of Ext.PW-1/G qua the defendants upto 19.3.2001 whereat Ext.PW-1/G stood issued upon the defendant(s) theirs thereupto not complying with the request of the plaintiff to purvey him the relevant documents for facilitating him to obtain the relevant permission from the Government. Through Ext.PW-1/L the defendants endeavour to contend qua with the recitals borne on Ext.PW-1/D remaining uncomplied with by the plaintiff whereon they contend qua hence with the plaintiff omitting to obtain the requisite affirmative facilitation from the defendant(s) for empowering him to obtain the relevant permission from the appropriate Government wherefrom they espouse qua his evidently showing unreadiness or unwillingness in obtaining it whereupon they canvass qua the sequel of clause 3 of Ext.PW-1/B encumbering the plaintiff. Hereat the veracity of the portrayals existing in Ext.PW-1/D wherewithin recitals occur qua the counsel for the defendant(s) through the counsel for the plaintiff requesting the latter to collect the relevant documents from the office of Mr. Rajeev Garg, Advocte, is enjoined to be determined. Initially, Mr. Rajeev Garg counsel for the defendants remained unexamined for unveiling an inference therefrom whether the plaintiff had complied with the request encapsulated therein. Consequently, for his non examination an inference stands erect qua the defendants standing disabled to contend qua the plaintiff not visiting his office for the relevant purpose enunciated in Ext.PW-1/D also it warrants the erection of a deduction qua the factum of his holding the relevant documents for their onward transmission to the plaintiff being wholly contrived or engineered. It is enigmatic qua though Mr. Rajeev Garg under Ext.PW-1/D thereunder requested the counsel for the plaintiff to beseech the plaintiff to visit his office for the relevant purpose yet he remained unexamined whereas on his examination, he would have purveyed the best evidence qua the factum whether the plaintiff visiting or not visiting his office also it is enigmatic that despite the counsel for the plaintiff since his making the initial request on 27.12.2000 upon the defendant(s) for the relevant purpose, request whereof stood succeeded by a subsequent request made on 25.2.2001 and on 19.3.2001 wherewithin recitals occur beseeching the defendant(s) to directly dispatch the relevant documents to the plaintiff at his residence, yet the defendants omitted to beget strict compliance therewith rather their counsel enigmatically insisted qua the relevant collection being made by the plaintiff from him. The omission of the defendants to directly transmit the relevant documents to the plaintiff triggers an inference qua theirs contriving the factum of the relevant documents standing held by Mr. Rajeev Garg especially when Mr. Garg remained unexamined whereupon alone the efficacy of the aforesaid inference would stand blunted. With PW-1 in his cross-examination acquiescing to the suggestion put to him in his cross examination by the learned counsel for the defendants while holding him to cross-examination qua his alongwith his father never visiting the office of Rajeev Garg fillips an inference qua the request purveyed by the counsel for the defendants comprised in Ext.PW-1/D qua the plaintiff visiting his office for collecting the relevant documents from him remaining unacceded. However, even if the aforesaid request remained unacceded, it would not relieve the defendants to directly transmit the relevant documents to the plaintiff without insisting upon him to visit the chambers of Mr. Rajeev Garg especially when under Ext.PW-1/E of 25.2.2001 a request was made upon Mr. Rajeev Garg, Advocate, to make a direct transmission of the relevant documents to the plaintiff at his address at Chandigarh. Also if under Ext.PW-1/D of 08/01/2001 the relevant request made thereunder remained uncomplied with by the plaintiff yet with evidently the plaintiff not visiting the chambers of Mr. Rajeev Garg since 08.01.2001 upto 25.2.2001, did enjoin the defendants to since thereat hence affirmatively facilitate the plaintiff to obtain the relevant permission from the Government, conspicuously with a hiatus occurring since 8.1.2001 upto the date of issuance of Ext.PW-1/E on 25.2.2001 whereat the relevant documents remained unsupplied by the defendants to the plaintiff nor also even if the plaintiff did not visit the office of Mr. Rajeev Garg at Solan they were yet enjoined to directly transmit the relevant documents to the plaintiff especially when they were aware of his address. Consequently, theirs omitting to directly dispatch the relevant documents at the residential address of the plaintiff renders theirs insisting upon the

plaintiff to comply with the mandate of Ext.PW-1/D to beget an inference of the defendants tacitly by deploying a stratagem besides a ploy of the relevant documents being available with Rajeev Garg, Advocate, concerting to consummate Clause 3 of Ext.PW-1/B qua them. In aftermath, obviously they are to be construed to be engineering the frustration of Ext.PW-1/B hence they are to be construed to be evincing unreadiness and unwillingness to perform their part of the contractual obligation rather theirs concerting to given the deadline fixed for the execution of sale deed avail the benefit of Clause 3 thereof. Also theirs in the garb of the consequences of failure of its execution occurring on 31.3.2001 spurring a consequence of theirs holding a right to secure the forfeiture of earnest money theirs hence engineering to secure the relevant benefit. Their concert has to be disapprobated as tenably done by the learned Court below.

10. Accordingly, I find no merit in the appeal, which is accordingly dismissed and the impugned judgement of the learned Additional District Judge, (Presiding Officer) Fast Track Court, Solan, is upheld. Decree sheet be prepared accordingly. Pending application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J.

Sh. Bhag Singh s/o Sh. Mahantu Ram .....Petitioner

Versus

Smt. Lalita Devi w/o Sh. Bhag Singh and another .....Non-petitioners

Cr.MMO No. 144/2014
Order reserved on : 03.11.2016
Date of order: 29.11.2016

Code of Criminal Procedure, 1973- Section 125- L and her son filed petition seeking maintenance pleading that husband of L started harassing and abusing her – he also demanded Rs. 30,000/- as dowry - L and her son were turned out of the house- the Trial Court granted maintenance of Rs. 1200/- per month to each of the petitioner- a revision was filed, which was dismissed- held, that husband did not appear in the witness box and an adverse inference has to be drawn – L specifically stated that income of the husband is Rs. 12,000/- per month- no evidence was led in rebuttal – the maintenance of Rs. 1200/- per month each cannot be said to be excessive – evidence of the petitioner proved the ill-treatment and that wife is unable to maintain herself - petition dismissed.(Para-11 to 15)

Cases referred:

Vidyadhar Vs. Mankikrao & Another, AIR 1999 Apex Court 1441

Ishwarbhai C. Patel alias Bachu Bhai Patel Vs. Harihar Behera and another, AIR 1994 Apex Court 1341

Rajathi Vs. C.Ganesan, AIR 1999 (6) SCC 326

Bimal Vs. Sukumar Anna Patil and another, 1981 Criminal Law Journal 210

Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit, AIR 1989 SC 3348

For petitioner : Mr. N. S. Chandel, Advocate

For non-petitioners : Mr. Arun Sehgal, Advocate

The following order of the Court was delivered:

P. S. Rana, J. (Oral)

Present petition is filed under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure against order dated 24.10.2013 passed by learned

Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.) whereby learned Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.) affirmed the order of learned Trial Court passed under section 125 Code of Criminal Procedure 1973.

Brief facts of case:

2. Smt. Lalita Devi and her minor son namely Punit alias Akshu aged 2 years filed maintenance allowance petition under section 125 Code of Criminal Procedure 1973 pleaded therein that Smt. Lalita Devi is legally wedded wife of Sh. Bhag Singh. It is pleaded that marriage was solemnized on dated 06.03.2006 as per Hindu rites and customs. It is further pleaded that minor Punit alias Akshu was born out of the wedlock on dated 11.01.2007. It is further pleaded that relations inter se parties remained cordial for one year and thereafter Sh. Bhag Singh started ill-treating Smt. Lalita Devi and also beaten Smt. Lalita Devi and also abused her. It is further pleaded that relatives of Sh. Bhag Singh also beaten Smt. Lalita Devi. It is further pleaded that Sh. Bhag Singh also demanded Rs.30,000/- as dowry and when Smt. Lalita Devi told that she was not able to fulfill his demand then Sh. Bhag Singh started maltreating and beating Smt. Lalita Devi. It is further pleaded that on 16.07.2008 Sh. Bhag Singh refused to maintain Smt. Lalita Devi and her minor son and thrown out Smt. Lalita Devi and her minor son from matrimonial house. It is further pleaded that Sh. Bhag Singh did not provide any food and clothes to Smt. Lalita Devi and her minor son Punit alias Akshu. It is further pleaded that relatives of Smt. Lalita Devi requested Sh. Bhag Singh to provide food and clothing to Smt. Lalita Devi and her minor son but Sh. Bhag Singh abused the relatives of Smt. Lalita Devi. It is further pleaded that matter was compromised at the intervention of Gram Panchayat. It is further pleaded that on dated 14.01.2008 Sh. Bhag Singh again beaten Smt. Lalita Devi and matter was reported in police station. It is further pleaded that matter was again compromised before the police officials but again Smt. Lalita Devi was forced to leave her matrimonial house on dated 16.08.2008. It is further pleaded that Smt. Lalita Devi and her minor son have no sufficient source of income to maintain themselves. It is further pleaded that Sh. Bhag Singh is posted as Postman in post office and earning Rs.12,000/- per month from all sources. Maintenance allowance to the tune of Rs.5,000/- per month sought.

3. Per contra response filed on behalf of Sh. Bhag Singh pleaded therein that present application is not maintainable. It is denied that Smt. Lalita Devi has left her matrimonial house alongwith her minor son voluntarily without any reasonable cause. It is pleaded that Sh. Bhag Singh did not demand any dowry as alleged. It is pleaded that Smt. Lalita Devi left her matrimonial house without consent of Sh. Bhag Singh. It is further pleaded that Sh. Bhag Singh requested Smt. Lalita Devi to go to her matrimonial house but Smt. Lalita Devi refused to live in her matrimonial house. It is further pleaded that Smt. Lalita Devi and her minor son are not entitled for any maintenance allowance. Prayer for dismissal of maintenance petition sought. Smt. Lalita Devi filed rejoinder and reasserted the allegations mentioned in maintenance petition.

4. Learned Trial Court granted maintenance allowance to the tune of Rs.1200/- per month to each of the petitioner w.e.f. 31.01.2012. Feeling aggrieved against the order of learned Trial Court Sh. Bhag Singh filed revision petition under section 397 Cr.PC before learned Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.). Learned Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.) dismissed the revision petition and affirmed the order of learned Trial Court. Feeling aggrieved against the order of learned Additional Sessions Judge Ghumarwin Distt. Bilaspur (H.P.) Sh. Bhag Singh filed present petition under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure.

5. Court heard learned Advocates appearing on behalf of parties and Court also perused the entire records carefully.

6. Following points arises for determination in the present petition:

1) Whether petition filed under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Final Order.

Findings upon point No.1 with reasons:

7. PW-1 Smt. Lalita Devi has stated that Sh.Bhag Singh is her husband. She has stated that marriage was solemnized inter se parties on 06.03.2006 as per Hindu rites and customs. She has stated that minor Punit alias Akshu was born on 11.01.2007. She has stated that she was kept properly for one year and thereafter Sh. Bhag Singh started abusing her and also started beating her. She has stated that relatives of Sh. Bhag Singh also abused her. She has stated that on dated 16.07.2008 she was beaten by Sh. Bhag Singh and her sister. She has further stated that Sh. Bhag Singh refused to give maintenance allowance to her and her minor son. She has further stated that matter was also reported in Panchayat and matter was also reported in police. She has further stated that there is no source of income to maintain herself and her minor son. She has further stated that Sh. Bhag Singh is posted in post and telegraph department. She has further stated that monthly income of Sh. Bhag Singh is Rs.12,000/-. She has further stated that Rs.5,000/- per month as maintenance allowance be granted to her and her minor son. She has denied suggestion that Sh. Bhag Singh did not beat her. She has denied suggestion that Sh. Bhag Singh did not refuse to maintain her and her minor son.

8. PW-2 Smt. Suman Kumari has stated that parties are known to her. She has stated that she is Pradhan of Gram Panchayat. She has stated that in Panchayat brother of Sh. Bhag Singh became angry and started abusing. She has further stated that Sh. Bhag Singh also telephoned her husband and used abusive language. She has further stated that Smt. Lalita Devi and her minor son have no source of income to maintain themselves. She has denied suggestion that she is deposing falsely.

9. PW-3 Sh. Jai Singh has stated that he is posted as Chowkidar in Panchayat. He has stated that parties are known to him. He has stated that quarrel took place inter se parties after one year of marriage. He has stated that it came to his knowledge that Sh. Bhag Singh used to beat his wife after consuming liquor. He has stated that Smt. Lalita Devi is residing in her parents house. He has stated that Smt. Lalita Devi has no source of income to maintain herself and her minor son. He has stated that Smt. Lalita Devi was also beaten in his presence.

10. Sh. Bhag Singh petitioner did not appear in witness box for the purpose of cross-examination and did not adduce any rebuttal evidence.

11. Submission of learned Advocate appearing on behalf of petitioner that Smt. Lalita Devi left her matrimonial house at her own without consent of petitioner and on this ground present petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Sh. Bhag Singh petitioner did not appear in witness box for the purpose of cross-examination. Hence adverse inference under Section 114(g) of Indian Evidence Act 1872 is drawn against petitioner. Plea of petitioner that Smt. Lalita Devi has left her matrimonial house without any reasonable cause is defeated on the concept of ipse dixit (An assertion made without proof). See AIR 1999 Apex Court 1441 ***Vidyadhar*** Vs. ***Mankikrao & Another.*** Also see AIR 1994 Apex Court 1341 **Ishwarbhai C. Patel alias Bachu Bhai Patel** Vs. **Harihar Behera and another.**

12. Submission of learned Advocate appearing on behalf of petitioner that principle of natural justice violated by learned Additional Sessions Judge in the present case and reasonable opportunity was not granted to Sh. Bhag Singh to lead evidence in the present case is rejected being devoid of any force for reasons hereinafter mentioned. Learned Trial Court listed the case for evidence of Sh.Bhag Singh on 7.5.2011. On 7.5.2011 Sh.Bhag Singh did not produce any evidence. Thereafter learned Trial Court listed the case for evidence of Sh.Bhag Singh on 1.7.2011, 9.8.2011 and 26.11.2011. On 26.11.2011 Sh.Bhag Singh did not appear in the Court and he was proceeded ex-parte by learned Trial Court. It is held that sufficient opportunities were granted by learned Trial Court to Sh.Bhag Singh to lead evidence in rebuttal. It is held that despite sufficient opportunities granted by learned Trial Court Sh. Bhag Singh did not lead any rebuttal evidence.

13. Submission of learned Advocate appearing on behalf of petitioner that learned Trial Court did not consider actual income of petitioner and on this ground present petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that Sh. Bhag Singh is posted in post and telegraph department. Smt. Lalita Devi has specifically stated when she appeared in witness box that monthly income of Sh. Bhag Singh is Rs.12,000/- per month. Sh. Bhag Singh did not adduce rebuttal evidence. Even Sh. Bhag Singh did not appear in witness box for the purpose of cross-examination in the present case. Testimony of Smt. Lalita Devi relating to income of Sh. Bhag Singh remains unrebutted on record. Hence it is held that learned Trial Court did not commit any illegality by way of assessing income of Sh. Bhag Singh in the present case.

14. Submission of learned Advocate appearing on behalf of petitioner that willful neglect on the part of husband is not proved in the present case and on this ground present petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. As per testimonies of PW-1 Smt. Lalita Devi, PW-2 Smt. Suman Kumari Pradhan Gram Panchayat and PW-3 Sh. Jai Singh it is proved on record that Sh. Bhag Singh beaten Smt. Lalita Devi in her matrimonial house and also used abusive language. Testimonies of PW-1, PW-2 and PW-3 are trustworthy, reliable and inspire confidence of the Court. There is no reason to disbelieve the testimonies of PW-1, PW-2 and PW-3. There is no evidence on record in order to prove that PW-2 and PW-3 have hostile animus against Sh. Bhag Singh at any point of time. Sh. Bhag Singh petitioner did not appear in witness box personally for the purpose of cross-examination despite opportunities granted by learned Trial Court and Sh. Bhag Singh did not lead any rebuttal evidence. Testimonies of PW-1 Smt. Lalita Devi, PW-2 Smt. Suman Kumari PW-3 Sh. Jai Singh remain unrebutted on record. It is well settled law that statement of wife that she is unable to maintain herself unless rebutted would be enough to grant maintenance allowance. It is well settled law that onus is upon husband to prove otherwise. It is also well settled law that maintenance cannot be denied to wife on the ground that she is able bodied person. It is also well settled law that minor son is legally entitled for maintenance from his father. **See AIR 1999 (6) SCC 326 Rajathi Vs. C.Ganesan. See 1981 Criminal Law Journal 210 Bimal Vs. Sukumar Anna Patil and another.** Object of section 125 Code of Criminal Procedure 1973 is to protect women and children from vagrancy and destitution. See **AIR 1989 SC 3348 Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit.** In view of the above stated facts and case law cited supra point No.1 is answered in negative.

Point No.2 (Final Order).

15. In view of findings upon point No.1 present petition filed under Article 227 of Constitution of India read with section 482 Code of Criminal Procedure is dismissed. File(s) of learned Trial Court and learned Additional Sessions Judge alongwith certified copy of the order be sent back forthwith. Cr.MMO No. 144/2014 is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh. ....Appellant.

Versus

Firoj Khan and another ....Respondents.

Cr. Appeal No 258 of 2013.
Reserved on: 01.11.2016.
Decided on: 29.11.2016.

Indian Penal Code, 1860- Section 498-A and 307- The marriage between the deceased and accused No. 1 was solemnized in the year 2007 –accused used to harass her for not bringing

sufficient dowry – accused No. 1 pushed her in the well – the accused were tried and acquitted by the Trial Court- held in appeal that the testimonies of prosecution witnesses are contradicting each other – PW-1 to PW-4 are closely related to each other - the Trial Court had recorded the finding of the acquittal after taking into consideration all the facts- the view taken by the Trial Court was a reasonable view- appeal dismissed. (Para-7 to 19)

Cases referred:

Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94

State of Himachal Pradesh Vs. Kahan Chand, 2016 (1) Drugs Cases (Narcotics) 576

For the appellant : Mr. V.S. Chauhan, Addl. A.G. with Mr. Vikram Thakur Dy. A.G.

For the respondents : Mr. Manoj Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the appellant/State has challenged the judgment passed by the Court of learned Additional Sessions Judge, Sirmaur at Nahan, in Sessions Trial No. 44-N/7 of 2007, dated 22.02.2013, vide which, learned Trial Court has acquitted the respondents (hereinafter referred to as 'accused') of commission of offences punishable under Sections 498-A and 307 of Indian Penal Code (hereinafter referred to as 'IPC).

2. The case of the prosecution was that Smt. Praveena Begum was married to accused No. 1 Firoj Khan on 25.03.2007. From the date of marriage, accused No. 2, mother in law of Praveena Begum used to harass her on the ground that she had not brought car, gold rings whereas accused No. 1 tortured her for not bringing cash, motorcycle and sufficient dowry. It was further the case of the prosecution that Praveena Begum was mentally harassed by accused and she narrated these facts to her mother Smt. Mukhtiyari. It was further the case of the prosecution that on 25.04.2007, when PW1 Praveena Begum was sleeping with accused No. 1 in their house situated at village Sainwala, then at about 12:30 a.m., accused No. 1 woke her and asked her to accompany him to a place near the well on the pretext that treatment of witchcraft had to be done. As accused No. 1 used to act as Exorcist, he took her to a place near the well of village Sainwala where he forced her to sit over the wall of the well and poured water 2-3 times on her. Thereafter, accused No. 1 pushed her (Praveena Begum), as a result, she fell down in the well and raised hue and cry. On hearing her cries, many people reached the spot and pulled her out of the well. PW1 Praveena Begum suffered injuries on her head, face, abdomen and other parts of the body. Thereafter she was taken to Vohra Hospital and first aid was given to her. On 26.04.2006, her parents were informed about the incident and thereafter, on 27.04.2007, report was lodged at police station Poanta Sahib. On the basis of said report, FIR was lodged and investigation was carried out. During the course of investigation, site plan was prepared and photographs of the well were also taken. Medical examination report of Praveena Begum was collected which disclosed injuries on her person. Statements of other witnesses were also recorded under Section 161 of the Code of Criminal Procedure (for short 'Cr.P.C'). After the completion of investigation, challan was filed in the Court and as a prima-facie case was found against the accused, accordingly, accused No. 1 was charged for commission of offences punishable under Sections 498-A and 307 of IPC and accused No. 2 was charged for offence punishable under Section 498-A of IPC, to which they pleaded not guilty and claimed trial.

3. On the basis of evidence produced on record by the prosecution, learned trial Court concluded that in its opinion, prosecution had not been able to establish charges against the accused beyond reasonable doubt that accused No. 1 and 2 had subjected PW1 Praveena Begum to cruelty with a view to make unlawful demand of dowry or accused No. 1 had attempted to murder her. Accordingly, learned trial Court acquitted the accused.

4. Mr. V.S. Chauhan, learned Additional Advocate General argued that the judgment passed by the learned trial Court vide which it acquitted the accused was not sustainable in law as the learned trial Court erred in not appreciating that the prosecution had proved its case against the accused beyond reasonable doubt. He argued that the reasoning of the learned trial Court was manifestly untenable and it was wrongly held by the learned trial Court that testimony of PW1, PW2 and PW4 did not inspire confidence. It was further argued by Mr. Chuahan that learned trial Court erred in coming to the conclusion that no demand of dowry was made by the accused and, in fact, statements of PW2 Gulsher Ali and PW4 Akhtar Ali were not appreciated by the learned trial Court in the correct perspective. Mr. Chauhan further argued that guilt of the accused was duly proved by PW1 and it was duly corroborated by the statements of PW2 and PW4 and despite this, learned trial Court erred in acquitting the accused without appreciating that prosecution, on the basis of evidence led on record, had proved the guilt of the accused beyond reasonable doubt. On these bases, it was urged by Mr. Chauhan that the findings of acquittal returned in favour of accused by the learned trial Court be quashed and set aside and they (accused) be convicted for the offence with which they have been charged.

5. Mr. Manoj Thakur, learned counsel for the accused, on the other hand, argued that there was no merit in the present appeal as learned trial Court had rightly acquitted the accused for the offences for which they were charged as the prosecution has miserably failed to prove its case against the accused. It was further argued by Mr. Thakur that from the evidence produced on record prosecution was not able to prove the guilt of the accused. He further argued that there were contradictions and inconsistencies in the statements of PW1, PW2 and PW4 which categorically belied the veracity of the case of the prosecution. It was further argued by Mr. Thakur that the statement of PW1 that as to how the incident took place and how she came out of the well was totally in contradiction to the testimony of PW4. As per him, even the version of PW4 was self contradictory as well as totally contrary to the deposition of PW1. He further argued that there was no material placed on record by the prosecution from which it could be inferred that accused had either demanded dowry from the complainant (PW1) or she was subjected to any cruelty by them. On these bases, it was urged by Mr. Thakur that as the judgment of learned trial Court was based on correct appreciation of material placed on record it did not warrant any interference.

6. We have heard the learned Additional Advocate General as well as learned counsel appearing for the respondents/accused. We have also gone through the records of the case as well as the judgment passed by the learned trial Court.

7. Praveen Begum, who entered the witness box as PW1, stated that she was married to accused Firoj Khan on 25.03.2007. It has come in her deposition that her mother-in-law started harassing her for not bringing dowry after 3-4 days of the marriage. She further deposed that accused used to demand golden ornaments as well as motorcycle from her. She also deposed that she had disclosed the factum of dowry being demanded by the accused to her parents. She also deposed that her mother had assured her that she would take up the matter with her (complainant's) in-laws. This witness further stated that on 25.04.2007, during night, when she was sleeping in her room, her husband came to her and asked her to accompany him to the well for the treatment of witchcraft. She stated that she refused to accompany him but accused No. 1 took her to the village well. She disclosed that thereafter accused No. 1 compelled her to sit over the wall of the well and thereafter poured water 2-3 times on her and pushed her, as a result of which, she fell into the well. She further stated that she made efforts to save herself and came out of the well with the help of wooden stairs. She also deposed that she had suffered injuries on various parts of body and that accused No. 1 ran away after pushing her into the well. She also deposed that when she came out of the well, nobody was there and she raised hue and cry and thereafter she became unconscious. She further stated that when she gained her conscious, she was in her in-law's house. She also stated that accused No. 2 threatened her not to disclose this fact to anyone else. PW1 further stated that with the help of a neighbour, she got in contact with her parents in the morning and through her parents reached her in-law's house. She stated that when her parents reached her in-law's house, both the accused had gone away.

She also stated that her father also brought the Pradhan of the area who called upon the accused to enter into a compromise with her but they (accused) refused to do so. She further stated that on 26.04.2007, they reported the matter at police station Poanta Sahib and she was taken to hospital at Poanta Sahib where she was medically examined. In her cross examination, this witness deposed that as she fell unconscious immediately after coming out of the well, she could not tell as to who brought her from the well to home. She further stated that as soon as she reached the house of her husband, she gained consciousness. She also stated that on the same night, brother of her husband had taken her to Vohra Hospital at Poanta Sahib and she was brought back to her husband's house after treatment on the same night. It has further come in her cross examination that it was in the morning, at around 7:00 a.m. when she asked one of her neighbour to inform her parents about the incident. She stated that she did not remember as to when her parents came to her husband's house.

8. Gulsher Ali, father of complainant, entered the witness box as PW2 and he stated that at the time of marriage of his daughter (complainant) with accused No. 1, he had given dowry as per his capacity. He also stated that PW1 had informed him about the demand of dowry which was being raised by the accused and he had expressed his helplessness in this regard. This witness also deposed that on 26.04.2007, they came to know that in the night of 25.04.2007, accused No. 1 had attempted to kill PW1 by pushing her in the well. He also stated that he went to the house of accused and took PW1 to police station Poanta Sahib where the matter was reported. In his cross examination, he stated that on 26.04.2007, Anwar Ali had not come to him nor he had informed him about the incident. He also stated that his daughter came to his house only once after the marriage and she had disclosed the demands of dowry only once. He also stated that at time of marriage of PW1 with accused No. 1, no demand of dowry was raised. He also stated that he and his wife went to the house of accused No. 1 on 26.04.2007 at around 5:00 p.m. He also stated that after he reached the house of accused, he did not talk with anyone but he caught hold of arm of his daughter and took her to police station Poanta Sahib.

9. PW4 Akhtar Ali deposed that PW1 was his niece and was married with accused No. 1 in the year 2007. He further deposed that in the night of 25.04.2007, at around 12:30 a.m. when he was at his home, he heard cries of "bachao-bachao" from the side of well which was near to his house. He further stated that he and other villagers ran towards the spot and saw that PW1 was making efforts to come out of the well. She had caught hold of a wooden plank. He further stated that they assisted her to get out of the well and that though she was saved but she had sustained many injuries. He further deposed that thereafter PW1 disclosed that accused No. 1 allured her to accompany him to the well on the pretext of her treatment from witchcraft and thereafter accused No. 1 poured water 2-3 times on her and thereafter, pushed her in the well. In the cross examination, this witness deposed that his house was at a distance of about 50 metres from the house of accused. He deposed that Praveena never came to his house after her marriage. He further stated that when they went to well, they saw that Praveena had caught hold of a wooden plank which was on the lower point of the well. He further stated that there was water in the well which was at a distance of 35 feet from the mouth of the well. He further stated that when they reached the spot on hearing the cries, accused, his parents and brother were already present there. He also stated that except his family members no other person of the village was present on the spot. He further stated that after pulling PW1 from the well, he (PW4) took her (PW1) to Vohra Hospital Poanta Sahib and thereafter he took PW1 from hospital to house of accused. This witness stated that after pulling Parveena from the well they asked Parveena as to how she fell in the well but she did not tell anything and remain silent. He further stated that he pulled PW1 out of well with the help of a rope which he had brought from his house. He deposed that he took PW1 to Vohra hospital on his motorcycle. He also stated that he did not disclose the incident to the parent of PW1 or the fact that she was pushed into the well by accused No. 1 and he had saved her by pulling her out of the well. He further stated that it was around 4:00 p.m. that Parveena told him that PW1 had pushed her in the well and thereafter he informed her (complainant's) parents. He further stated that parents of PW1 came to house of the accused in his absence as he had gone to the school and when he returned from the school, he found many

people gathered in the house of Pradhan of Gram Panchayat and accused Firoj Khan was refuting that he had pushed PW1 in the well. Investigating Officer Gurbakash Singh entered the witness box as PW9 and corroborated the case of the prosecution. In his cross examination, he stated that there were no stairs in the well with the help of which one could get out of same.

10. These are the main witnesses on whose testimony prosecution had relied upon to prove the guilt of the accused.

11. A perusal of the statements of PW1, PW2 and PW4 demonstrates that there are lot of inconsistencies and contradictions in their version. Both PW2 and PW4 are closely related to PW1 and because they are interested witnesses, their testimony is required to be appreciated with caution. In her statement made in the Court, it was stated by complainant that her harassment by the accused on the pretext of dowry commenced about 3-4 days after her marriage with accused No 1. It was further mentioned by the complainant in her statement that on 25.04.2007, accused No. 1 had asked her to proceed towards the well for treatment by witchcraft and she initially refused but thereafter she was taken to the said well and was forced to sit on the wall of the well and water was poured on her 2-3 times and thereafter she was pushed into the well. It has also come in her deposition that after she was pushed into the well, she saved herself by getting hold of a plank and further that she came out of well with the help of wooden stairs. She further deposed that she suffered injuries on account of this and that accused No. 1 had in fact ran away after pushing her in the well and when she came out of the well, no one was there and she raised hue and cry and became unconscious. It has further come in her deposition that she gained consciousness in the house of her in-laws. This version as given by the complainant is totally contrary to the deposition of PW4 Akhtar Ali. As per PW4 Akhtar Ali, on hearing the hues and cries of the complainant, he alongwith other villagers reached the spot and saw that the complainant was making efforts to get out of the well and as per this witness, they pulled out the complainant from the well and thereafter, complainant disclosed to him the mode and manner in which she was allured to come to well by accused No. 1 and the factum of accused No. 1 pushing her into the well.

12. Besides this, PW1 deposed in her statement in the Court that after she gained consciousness in the house of her in-laws, she was threatened not to disclose the incident to any one by accused No. 2 and in the morning she conveyed the occurrence of the incident to her parents with the help of one neighbour. Now, in her entire deposition, PW1 has not disclosed as to who was this neighbour, whose assistance was taken by her to inform her parents about her being pushed in to the well by her husband. In her cross examination, she stated that she informed her parents through the said neighbour at around 7:00 a.m. in the morning. However, a perusal of the statement of PW4 Akhtar Ali demonstrates that in his cross examination he has stated that after the occurrence of the incident, at around 4:00 p.m. Praveena i.e. complainant told him that Firoj Khan pushed her into the well and thereafter he forwarded this information to her parents. Another major contradiction in the testimony of PW1 and PW4 is that as per PW1 when she came out of the well, no one was present there and after raising hue and cry, she became unconscious and gained conscious in the house of her in-laws. However, PW4 deposed that complainant disclosed to him that she was pushed into the well by accused No. 1 and thereafter, he took her to Vohra Hospital from where she was taken to house of her in-laws. These major contradictions and inconsistencies in the testimony of PW1 and PW4 create grave suspicion over the veracity of the version of prosecution story. No cogent explanation has come forth from the prosecution as to why there were these major contradictions and inconsistencies in the statement of complainant (PW1) and PW4. Incidentally, a perusal of statement of complainant made in the Court demonstrates that same is inconsistent with the contents of complaint/FIR etc. which was initially registered with the police. Ext. PW1/A which is the copy of rapat rojnamcha demonstrates that it is recorded in the same that on 25.04.2007 when she was sleeping, her husband took her to the well and he started beating her there and thereafter under the guise of witchcraft he pushed her into the well. However, in her statement as recorded in the court, there is no mention in the same that she was given beatings by accused No. 1 after reaching at the well. Not only this, there is not even a whisper about demand of dowry etc. in the

rapat rojnamcha, however, in the FIR which was thereafter registered on 27.04.2007, copy of which is on record as Ext. PW1/B, the factum of demand of dowry from the complainant by the accused has been introduced. Strangely, in the FIR, there is no mention that when the complainant was taken to the well by the accused on the night of 25.04.2007, she was beaten near the well by accused No. 1. Though PW1 in the Court stated that after accused No. 1 took her to the well he poured water on her 2-3 times before pushing her in the well, however, these facts are not so recorded either in rojnamcha Ext. PW1/A or FIR Ext. PW1/B. Whereas it has come in the testimony of PW4 that after the complainant was rescued from the well he took her to the Vohra hospital, however, PW1, the complainant has stated that she was taken to the said hospital by the brother of the accused.

13. Now incidentally, though it has come in the statement of PW4 Akhtar Ali that on the fateful night he alongwith other villagers rescued the complainant from the well, however, no independent witness has been examined by the prosecution to corroborate this version of PW4. It is a matter of record that PW4 is closely related to complainant and further it is also a matter of record that there is no consistency in the statement of PW1 and PW4 so as to believe the case of prosecution.

14. Another relevant point to be taken into consideration is that though complainant has stated that she saved herself by holding a wooden plank after she was pushed into the well and came out of the well with the help of wooden stairs, however, it has come in the statement of PW9, the Investigating Officer that there did not exist any stair case in the well.

15. Even the statement of PW2, father of the complainant, does not inspire confidence and seems not to be reliable. He has denied that the factum of PW4 having informed him about the alleged incident of the complainant being pushed into the well by accused No. 1 whereas PW4 has deposed that this information was conveyed to the parents of the complainant by him.

16. Therefore, in our considered view, on the basis of evidence produced on record by the prosecution both documentary as well as ocular, it cannot be said that prosecution was able to prove its case against the accused beyond reasonable doubt.

17. Besides this, learned trial Court after taking into consideration all aspects of the matter has returned the findings of acquittal in favour of accused. It has been held by Hon'ble Supreme Court in ***Mohammed Ankoos and Others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2010) 1 Supreme Court Cases 94***

> *"12. This Court has, time and again, dealt with the scope of exercise of power by the Appellate Court against judgment of acquittal under Sections 378 and 386, Cr.P.C. It has been repeatedly held that if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal. This Court has laid down that Appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State Of Uttar Pradesh1 shall suffice wherein this Court considered a long line of cases and held thus : (SCC p.477, paras 69 -70)*
>
> *"69. The following principles emerge from the cases above:*
>
> *1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.*
>
> *2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when (2008) 10 SCC 450 he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

18. In ***State of Himachal Pradesh Vs. Kahan Chand, 2016 (1) Drugs Cases (Narcotics) 576***, a Coordinate Bench of this Court has held as under

"19. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in Mohamed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged."

19. We have also gone through the judgment so passed by the learned trial Court and, in our considered view, the findings so returned by the learned trial Court are neither perverse nor it can be said that the findings so returned by the learned trial Court are not borne out from the records of the case and the same do not call for any interference.

20. Accordingly, while concurring with the findings of acquittal returned by the learned trial Court, we dismiss the present appeal being devoid of any merit, so also pending miscellaneous application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Vikesh Kumar ....Petitioner

Versus

State of Himachal Pradesh and others ....Respondents

CWP No. 356 of 2016.
Date of decision: 29.11.2016

Constitution of India, 1950- Article 226- Petitioner applied for fair price shop – however, the shop was allotted to respondent No. 4- the allotment was challenged – held, that the petitioner had not annexed any documents with the application while the respondent No. 4 had annexed the requisite documents – a person has to approach the Court with clean hands – a person making false statement or suppressing material facts is not entitled to any relief- the petition dismissed with the cost of Rs. 25,000/-. (Para- 2 to 14)

For the Petitioner : Mr. Ravinder Singh Jaswal, Advocate.

For the Respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondent s No. 1 to 3.
Mr. Dheeraj K. Vashisht, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge *(Oral)*

The brief facts as pleaded in the petition are that the respondent-department had invited applications for allotment of fair price shop for three wards of Gram Panchayat Dhagoli namely Gyari, Mangyari and Jhanjhvani. It is averred that the petitioner being fully eligible, applied for the fair price shop, Mangyari and alongwith the application submitted all the requisite documents for the grant of fair price shop i.e. 10th, +2 certificates, medical certificate and also BPL card/certificate. Whereas, the respondent No.4 in whose favour the fair price shop has now been allotted, had though submitted an application, but the same was without any supporting documents and it is on these basis that the petitioner has filed the instant petition claiming therein the following substantive reliefs:

> *"(i) That the impugned Annexure P-5 i.e. allotment of Fair Price Shop in favour of respondent No.4 may kindly be quashed and set-aside.*
>
> *(ii) That the respondent department may further be directed to sanction the Fair Price Shop in the name of the petitioner being his eligibility for the same in accordance with law and after following procedure and permit him to open the Fair Price Shop."*

2. Respondents No. 1 to 3 have filed the reply wherein it was specifically averred that three applications uptil 9.10.2015 were received for the allotment of fair price shop in question and were accordingly placed before the Public Distribution Committee in the meeting held on 23.11.2015. It was found that the petitioner had not enclosed any document with the application so as to enable the Committee to ascertain his merit and left with no option the Committee evaluated the two other applicants and thereafter recommended the name of respondent No.4, who was the first in merit.

3. When the matter came up before this Court on 28.11.2016, learned counsel for the petitioner was specifically confronted with the reply of the respondents wherein it had been alleged that the petitioner had not annexed any documents alongwith his application and also to

seek instructions in this regard. However, he would insist and maintain that he had full instructions to inform this Court that the petitioner in fact had submitted all the documents as mentioned in para-4 of the petition i.e. 10th, +2 certificates, Medical Certificate and BPL card alongwith his application. Not only this, he would further maintain that it was the respondent No.4, who though has been allotted the shop had in fact not submitted any documents with his application.

4. We accordingly adjourned the case for 29.11.2016 and the respondents were directed to make available the records.

5. Today, the respondents have produced the reords and we have gone through the same and find that though the application of the petitioner is available therein, but there is no document accompanying the same. Whereas, on the other hand, the application of respondent No.4 is also available on record and is accompanied by the following documents:

(i) Matriculation Certificate;

(ii) Unemployment Certificate;

(iii) BPL certificate; and

(iv) Permanent Resident Certificate.

6. Thus, on the basis of the record, it is proved that the averments made by the petitioner in the writ petition are false to his very knowledge.

7. It is settled law that one has to approach the Court with clean hands, clean mind, clean heart and clean objective. A prerogative remedy is not a matter of course. While exercising extraordinary power, writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material facts or attempts to mislead the Court, the Court may dismiss the application on that ground alone and may refuse to enter into the merits of the case.

8. In order to sustain and maintain the sanctity and solemnity of the proceedings in law Courts, it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the Court, when a Court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take the consequences that follow on account of its own making.

9. The Court proceedings are not a game of chess. At no cost can the stream of justice be permitted to be polluted by unscrupulous litigants. The writ Court while exercising the writ jurisdiction exercises equitable jurisdiction. The estoppel stems from equitable doctrine and it requires that he who seeks equity must do equity. Not only this, a person who seeks equity, must act in a fair and equitable manner. The equitable jurisdiction cannot be exercised in case of a person who himself has acted unfairly. Even compassion cannot be shown in such cases. The compassion cannot be allowed to bend the arms of justice in a case where an individual(s) has tried to acquire any right by unscrupulous or forcible methods.

10. Equally, the judicial process should never become an instrument of oppression or abuse or a means in the process of the Court to subvert justice. The legal maxim "*Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem*", means that it is a law of nature that one should not be enriched by the loss or injury to another.

11. The law on the subject is well settled and on the basis of various pronouncements of the Hon'ble Supreme court, the following principles can conveniently be culled out:

"1. A writ remedy is an equitable one. While exercising extraordinary power a Writ Court certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court.

2. Litigant before the Writ Court must come with clean hands, clean heart, clean mind and clean objective. He should disclose all facts without suppressing anything. Litigant cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back)/ conceal other facts.

3. Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or mis representation which has no place in equitable and prerogative jurisdiction.

4. If litigant does not disclose all the material facts fairly and truly or states them in a distorted manner and misleads the Court, the Court has inherent power to refuse to proceed further with the examination of the case on merits. If Court does not reject the petition on that ground, the Court would be failing in its duty.

5. Such a litigant requires to be dealt with for Contempt of Court for abusing the process of the Court.

6. There is a compelling need to take a serious view in such matters to ensure purity and grace in the administration of justice.

7. The litigation in the Court of law is not a game of chess. The Court is bound to see the conduct of party who is invoking such jurisdiction."

12. In view of the aforesaid discussion, this petition is sans merit and the same is otherwise liable to be dismissed with heavy costs, more particularly, when the petitioner by misleading this Court has obtained ad-interim orders on 16.02.2016 and thereby deprived the residents of village Mangyari, P.O. Kanthali, Tehsil Chirgaon, District Shimla, H.P. of the fair price shop. Though, it is represented by the petitioner that he is extremely poor and unemployed person and suffering physical disability of 45%. However, these fact in themselves, do not give licence to the petitioner to adopt unscrupulous methods while approaching the temple of justice, that too, claiming therein equitable and discretionary relief.

13. Accordingly, the petition is dismissed with costs assessed at Rs. 25,000/- (Twenty Five Thousand) to be paid to respondent No.2 within a period of four weeks from today, failing which, respondent No.2 shall be free to have this order executed by filing execution petition.

14. The petition stands disposed of in the aforesaid terms, so also the pending application(s) if any. Interim order granted by this Court on 16.02.2016 is vacated.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Aadesh Kumar s/o Sh. Rambir Singh ....Petitioner/Co-accused

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 1401 of 2016
Order Reserved on 25.11.2016
Date of Order: 30.11.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances

peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions.

(Para-5 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 Apex Court 179

The State Vs. Captain Jagjit Singh, AIR 1962 Apex Court 253

Sanjay Chandra Vs. CBI, 2012 Criminal Law Journal 702 Apex Court

For petitioner/Co-accused : Mr. Sanjeev Bhushan, Sr.Advocate with Mr. Rakesh Chauhan, Advocate

For Non-petitioner : Mr. Pankaj Negi, Dy. A.G.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 Cr.PC for grant of bail relating to FIR No.274 of 2016 dated 20.10.2016 registered under Sections 341, 323, 324, 307 read with section 34 IPC in Police Station Hamirpur Distt. Hamirpur (H.P.).

Brief facts of case:

2. On dated 20.10.2016 injured Vishal reported to the investigating agency that on 20.10.2016 he visited Govt. Degree College Hamirpur to appear in a paper and after examination at about 4.15 P.M. he was returning home alongwith Neeraj Sharma on his motorcycle. It is alleged that when injured Vishal came out of the gate of the college then accused persons namely Santosh Kumar, Saurav and Aadesh were standing. It is alleged that accused persons asked the injured to alight from his motorcycle. It is further alleged that as soon as injured alighted from the motorcycle all the accused persons started beating injured with fist and leg blows. It is further alleged that co-accused caught hold the injured from his arms and legs and co-accused Santosh Kumar gave a blow of 'Khukhri' (Sharp edged weapon) on the head of injured. It is further alleged that accused persons also proclaimed that they would kill injured namely Vishal. It is further alleged that after receiving blows of 'Khukhri' (Sharp edged weapon) injured Vishal became unconscious and fell down. It is further alleged that injured was saved by Neeraj Sharma, Pankaj Kumar and Tain Singh who brought the injured to hospital for his medical treatment. It is further alleged that 'Khukhri' (Sharp edged weapon) recovered. It is further alleged that Medical Officer has given opinion that injury upon the body of injured was dangerous to life.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of State and Court also perused the entire record carefully.

4. Following points arises for determination:

(1) Whether bail application filed by co-accused Aadesh Kumar is liable to be accepted as mentioned in memorandum of grounds of bail application?

(2) Final Order.

Findings upon Point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of co-accused Aadesh Kumar that Aadesh Kumar did not commit any offence as alleged by the investigating agency

cannot be decided at this stage of the case. Same fact will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

6. Submission of learned Advocate appearing on behalf of co-accused Aadesh Kumar that investigation is completed in the present case and petitioner is not required for investigation purpose and petitioner is a student of BSc-IIIrd year and he has to appear in coming examination and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered (1) Nature and seriousness of offence. (2) Character of evidence. (3) Reasonable possibility of the presence of accused in trial or investigation. (4) Reasonable apprehension of witnesses being tampered with. (5) Larger interest of the public or State. See AIR 1978 Apex Court 179 ***Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see AIR 1962 Apex Court 253 ***The State Vs. Captain Jagjit Singh.*** It is well settled law that grant of bail is rule and committal to jail is an exception. It is also well settled law that refusal of bail is restriction on the personal liberty of individual guaranteed under Article 21 of the Constitution of India. It is well settled law that it is not in the interest of justice that accused should be kept in jail for an indefinite period. See **2012 Criminal Law Journal 702 Apex Court Sanjay Chandra Vs. CBI.** In the present case accused is in judicial custody and accused is not required for investigation purpose. In the present case weapon is also recovered by the investigating agency. There is no report of investigating agency that injured namely Vishal is admitted in the hospital as in-door patient as of today. In view of the fact that petitioner is a student and in view of the fact that petitioner is not required for investigation purpose by the investigating agency and in view of the fact that trial will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the petitioner on bail.

7. Submission of learned Deputy Advocate General appearing on behalf of the State that if petitioner is released on bail at this stage then petitioner will induce and threat prosecution witnesses and on this ground bail application be declined is rejected being devoid of merits for reasons hereinafter mentioned. Co-accused Aadesh Kumar has given undertaking that he would not induce or threat prosecution witnesses. It is held that conditional bail will be granted to co-accused Aadesh Kumar. It is held that if co-accused Aadesh Kumar will flout terms and conditions of conditional bail then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail as provided under section 439(2) Code of Criminal Procedure 1973. In view of the above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order).

8. In view of my findings on point No.1 above bail application filed by co-accused Aadesh Kumar under Section 439 of Code of Criminal Procedure 1973 is allowed on furnishing personal bond in the sum of Rupees One lac with two sureties in the like amount to the satisfaction of learned Trial Court on following terms and conditions. (1) That co-accused Aadesh Kumar will join investigation whenever and wherever directed by investigating officer in accordance with law. (2) That co-accused Aadesh Kumar will regularly attend proceedings of learned Trial Court till conclusion of trial. (3) That co-accused Aadesh Kumar shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing facts to the investigating officer or to the Court. (4) That co-accused Aadesh Kumar will not leave India without prior permission of the Court. (5) That co-accused Aadesh Kumar will not commit similar offence qua which he is accused. Observations made hereinabove will not effect merits of the case in any manner and will be strictly confined for disposal of present bail application. Cr.MP(M) No.1401/2016 is disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

All Himachal Micro Hydel (100 KW) NGOS and Societies Association through its President Sh. Varinder Thakur .....Petitioner.

Vs.

State of H.P. through Principal Secretary, Non-Conventional Energy Sources-cum-Secretary Power, Government of H.P. and others .....Respondents.

CWP No.: 5213 of 2012
Reserved on : 24.10.2016
Date of Decision: 30.11.2016

Constitution of India, 1950- Article 226- Petitioner had identified project site and completed the work in furtherance of a scheme floated by Government of India – however, a new notification was issued bringing the work to "big zero causing them lot of financial loss of energy and time spent as the entire work would be utilized by some other persons"- held, that the plea of the petitioner that because of its members had applied for allotment of project pursuant to the scheme notified by Government of India, State had no authority to come with the amended policy and the projects have to be allotted to its members as a matter of right is without any merit- no material was placed on record to show that sites were got inspected with the consent of Government of Himachal Pradesh- issuance of policy was the domain of the State Government and Union of India has no role in this process- scheme floated by Government of India did not confer any indefeasible right upon the members of association for allotment of the project – no holding out was made that the site selected by the members of the association would be allotted to the applicant- simply because a pre-feasibility report has been prepared will not confer any right upon the person to get the project – public largesses should be disbursed in a transparent manner by providing an opportunity to all eligible members to participate in the process- mere disappointment of expectation cannot be a ground for interfering with the policy of the State – the legal status of the association was not established – directions issued. (Para-11 to 21)

Cases referred:

Confederation of Ex-Servicemen Associations and others Vs. Union of India and others (2006) 8 Supreme Court Cases 399

Sethi Auto Service Station and another Vs. Delhi Development Authority and others (2009) 1 Supreme Court Case 180

Jasbir Singh Chhabra and others Vs. State of Punjab and others (2010) 4 SCC 192

Monnet Ispat and Energy Limited Vs. Union of India and others (2012) 11 SCC 1

State of Kerala and others Vs. Kerala Rare Earth and Minerals Limited and others (2016) 6 Supreme Court Cases 323

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate.

For the respondents: Mr. V.S. Chauhan, Additional Advocate General, with Mr. Vikram Thakur, Dy. Advocate General, for respondent No. 1.
Mr. Vijay Arora, Advocate, for respondents No. 2 and 3.
Mr. Ashok Sharma, Assistant Solicitor General of India for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this writ petition, the petitioner has prayed for the following reliefs:

"(i) That a writ in the nature of certiorari may be issued and notification Annexure P-6 dated 12.03.2012 may be quashed and set aside.

(ii) That a writ in the nature of mandamus may be issued directing the respondents that all the NGOS/Co-operative Societies who, in furtherance of the publicity made by HIMURJA and their Project Officers have submitted their Pre Feasibility Reports and the inspections have been conducted by the HIMURJA, in their cases, they may be issued allotment letters on the same elevations as submitted by them, in the interest of justice.

(iii) That a writ in the nature of certiorari may be issued and Annexure P-7 and Annexure P-8 may be quashed and set aside whereby the applications of the NGOS/Co-operative Societies have been rejected.

(iv) To produce the entire record pertaining to the case before this Hon'ble Court for its kind perusal.

(v) Any other relief as may be deemed just and proper keeping in view the facts and circumstances of the case may also be granted in favour of the petitioners."

2. Petitioner claims itself to be an association of NGOs./Co-operative Societies, who had identified the project sites (self identified) in furtherance of a Scheme floated by the Government of India, Ministry of New and Renewable Energy (Annexure P-2). As per the petitioner, its members identified the sites and completed entire work on asking of respondent No. 3, but vide a new notification dated 12.03.2012, entire work done by the members of the petitioner-Association was brought to a "big zero causing them lot of financial losses, loss of energy and time spent on this, as entire work done by the members of the petitioner-association would be utilized by some other persons."

3. Case put forth by the petitioner is that Ministry of New and Renewable Energy, Small Hydro Power Division (respondent No. 4) issued a Scheme, i.e. Scheme for Development/Up-gradation of Watermills and setting up Micro Hydel Projects (upto 100 KW capacity) to encourage and accelerate the development of Watermills and Micro Hydel Projects in the remote and hilly areas by providing Central Financial Assistance (hereinafter referred to as "CFA"). Respondent No. 3 HIMURJA was made Nodal Agency of the said Scheme which was to further advertise and propagate the same through its website. The Scheme was accordingly propagated by respondent No. 3 through its website as well as through its District Level Officers. In the backdrop of the Scheme, members of petitioner-association identified the sites as per the Scheme and after identification, various developers started further work and Pre-feasibility Reports qua their self identified sites were prepared and the same were submitted to respondent No. 3. It is further the case of the petitioner-association that after preparation of Pre-feasibility reports, sites were inspected by the field staff of HIMURJA and suitability reports of such self identified sites were submitted by the inspection team to HIMURJA. It is further the case of the petitioner-association that for the identification of sites, NGOs. and Co-operative Societies engaged services of experts and spent huge amounts for the activities so undertaken by them including for joint inspections. It is further the case of the petitioner-association that after clearances were given post inspection, each developer obtained NOC after spending lot of money and time and all the self identified projects were in an advance stage and only execution of the work remained to be commenced. It is further the case of the petitioner-association that these self identified sites fall within Intellectual Property Rights of the developers and respondents were now estopped from cancelling such applications and allocating these projects on the basis of advertisement to others. It is further the case of the petitioner-association that its members had requested for issuance of allotment letters of the projects in their favour as they had completed all other formalities in this regard, however, rather than acting on the Scheme which was so formulated by the Government of India and ignoring the fact that a lot of work had been done at so many sites by the members of the petitioner-association, respondent-State came up with a Draft Policy for setting up Micro Hydel Projects up to 100 KW capacity in Himachal Pradesh. As per the petitioner-association, the members of the petitioner-association were surprised at the Draft Policy which was so circulated by the State, since after completing the entire work in

anticipation of allotment letters, its members which included NGOs./Co-operative Societies were taken back with shock. Further, as per the petitioner-association, detailed objections were filed to the said Draft Policy vide Annexure P-5, however, without taking into consideration the objections so filed by its members, respondent-State notified a Policy, i.e. "Policy for setting up of Micro Hydel Projects up to 100 KW" vide Notification dated 12.03.2012 (Annexure P-6). As per Clause 6.1 of this Policy, the applications of the NGOs/Co-operative Societies were rejected vide Annexure P-7 dated 29.05.2012. It is further the case of the petitioner-association that thereafter all the Projects were also cancelled vide Annexure P-8. In this background, the petitioner-association has filed the present petition praying for quashing of notification dated 12.03.2012 (Annexure P-6) on the ground that the impugned act of the State is arbitrary, discriminatory, illegal and defeats the legitimate expectation of members of petitioner-association and further for issuance of direction to the respondent-State to issue allotment letters in favour of NGOs/Co-operative Societies, who in furtherance of publicity made by HIMURJA and their Project Officers, submitted their Pre-feasibility reports and inspection qua which was carried out by HIMURJA.

4. In their reply, respondents No. 1 to 3 have challenged the maintainability of the writ petition and stated that in fact the Scheme of the Government of India was displayed on HIMURJA website only for the purpose of knowledge of public and the proposals which were submitted by the applicants were without any invitation by HIMURJA. As per respondents No. 1 to 3, no applications were invited by HIMURJA on the basis of Government of India Scheme and 90 aspirants who submitted 207 applications to HIMURJA, had submitted the same out of their own volition. It is further mentioned in the reply filed by the said respondents that these proposals were submitted by the applicants on subsidy format of MNRE, which was meant for availing only capital subsidy from MNRE, Government of India, but were not fulfilling the criteria required for allotment of Project by the respondent-State and said incomplete proposals were not comparable in any meaningful evaluation to draw a merit list. It is further mentioned in the reply that as Government of India had made State Nodal Agency responsible for proper utilization of subsidy (CFA) part, which was comparatively much higher than any other hydro project subsidy being provided by MNRE Government of India, the State Governments were within their right to frame such Rules and Regulations which ensured proper utilization of CFA by way of a policy. Accordingly, as per the said respondents, it was in this background that policy dated 12.03.2012 was notified and it was mentioned in Clause 6.1 of the same that "No preference will be given to the applicants who have already submitted their proposals in HIMURJA. All the applicants will have to submit fresh application for each project with requisite fee on the standard application format (Annexure R-3) and complete other formalities mentioned in the policy." It is further submitted by the said respondents that that the applications submitted pursuant to the Government of India Scheme were not fulfilling the requirements as per the policy which was approved by the Government of Himachal Pradesh and lacked Gram Sabha NOC for setting up of the project, commitment of funds to meet the balance project cost, proof of land availability required for the project, audited balance sheets of the applicant for last three years, certified copy of the registration certificate, memorandum of articles of association or bye laws, proof of bonafide Himachali and proof of financial capability. It is mentioned in the reply that as all the proposals submitted by the applicants had one deficiency or the other, the proposals were accordingly rejected. As far as the issue of maintainability of the writ petition is concerned, it is mentioned in the reply that though 90 applicants had applied under the Scheme notified by the Government of India, but Annexure P-3, which was letter written by the petitioner-association to Secretary (Power) was just signed by 7 Societies/NGOs. It is further mentioned in the reply that with regard to 90 applicants who had submitted 207 applications suo moto, 48 applicants had submitted 115 applications directly to HIMURJA at its Headquarter, whereas 42 applicants had submitted 92 applications through field offices of HIMURJA for setting up projects up to 100 KW. It is further mentioned in the reply that joint inspections, if any, carried out by HIMURJA field staff of these suo moto applications did not study available potential for higher capacity projects available upstream or downstream the water head. It is further mentioned in the reply that whereas projects upto 100 KW had fragmented 154 streams in 8 Districts, it was possible to come up with a single project of higher capacity on a stream which could avoid wastage of land. It is

further mentioned in the reply that majority of applications had been received from the soft areas where power requirement was already met by the Himachal Pradesh State Electricity Board Limited and very few applications were received from tribal and remote areas. It is also mentioned in the reply that even otherwise, the Department could not have had restricted any individual from carrying out any investigation at their own cost and time and that these investigations were carried out by the individual/applicants at their own risk and cost, therefore, such like applicants could not take benefit by pleading that they had made huge investments for identification of the projects, which in fact was far away from true facts. It is further mentioned in the reply that the contention of the petitioner-association that the applicants had spent considerable labour, amount and time was a deliberate attempt made by the petitioner to capture sites without advertisement/notice inviting applications for allotment of projects as per the Scheme issued by the Government of Himachal Pradesh, and if the plea of the petitioner was accepted, then it will create unhealthy competition vis-à-vis petitioner and other applicants who want to apply for 100 KW capacity. It is denied by the State that issuance of policy by the State Government was a surprise and it is submitted in the reply that the persons who submitted their applications earlier suo moto were free to complete all codal formalities as per the State policy and resubmit fresh applications to the Government as and when the applications were so invited. It is further mentioned in the reply that the respondents could not even otherwise have had permitted the applicants to go ahead with the sites without appropriate study and guidelines only because 90% subsidy was available for these projects. It is further mentioned in the reply that in Himachal Pradesh 100% census villages and 98% consumers had been provided electricity through grid connections and these projects were meant for areas where grid connectivity was not available. It is further mentioned in the reply that only 20 applications had been received from remote areas and even in the said remote areas grid availability was available, and in view of less requirement of such projects, 100 KW projects were not a necessity in the State of Himachal Pradesh much less a priority for the State. The claim of Intellectual Property Rights of the applicants as claimed by the petitioner over natural resources is also denied in the reply and on these bases, respondents No. 1 to 3 disputed the claim of the petitioner-association.

5. In its reply filed by respondent No. 4, the stand taken by the said respondent is that the petitioner had sought relief against the Government of Himachal Pradesh and further as the decision of setting up SHP/MHP projects or its allocation was taken by the State Government, respondent No. 4 had no role in this process. Said respondent in its reply has given details of Central Financial Assistance for Watermills and Micro Hydel Projects being granted by the Union and also mentioned the procedure for availing CFA Micro Hydel Projects, which are quoted hereinbelow:

> *"IV Procedure for Availing CFA Micro Hydel Projects:*
>
> *The State Government Departments/State nodal Agencies, Local Bodies, Co-operatives, NGOs. etc. intending to avail CFA are required to submit the application as per enclosed format alongwith the following documets:*
>
> *(i) Two copies of Project report covering various aspects of project implementation, completion schedule, O & M and cost estimates.*
>
> *(ii) State Government approval for the implementation of the project.*
>
> *(iii) Commitment of funds to meet the balance project cost.*
>
> *(iv) Proof of land availability required for the project."*

6. The stand taken in para-4 of the reply affidavit filed by respondent No. 4 to the writ petition is quoted hereinbelow:

> *"4. That further the decision of setting up SHP/MHP projects or its allotment is taken by the State Government. The replying Deponent has "N" role in this process. The expression of interests/proposals/bids from developers are invited by the State Government/HIMURJA. However, it is respectfully submitted here that the deponent i.e. (MNRE) is responsible for the development of small*

hydro projects up to 25 MW station capacity as per Government of India's Allocation of Business Rules. Electricity and electricity generated from hydro projects is concurrent subject of Central and State Governments. Water being State subject, the SHP/MHP projects is governed by the State policies. The decision of setting up SHP/MHP projects or its allotment is taken by the State Government. The Ministry of New and Renewable Energy has no role in this process. The expression of interests/proposals/bids from private developers are invited by the State Government. The MNRE do not set up or allocate any small hydro project. It only provides Central Financial Assistance (CFA) for setting up MHP/SHP projects in the States. For the State of Himachal Pradesh the expression of interests/proposals/bids from MHP/SHP developers are invited by the HIMURJA. However, Central Financial Assistance (CFA)/subsidy to SHP/MHP projects is provided to the developer based on the approval of the project and on the fulfilling the all conditions of eligibility for the same as per applicable MNRE Scheme for SHP programme."

7. No rejoinders were filed to these replies neither any rejoinder was intended to be filed by the petitioners.

8. During the pendency of this writ petition, on 01.03.2016, this Court had passed the following order:

"Shri Vijay Arora, learned counsel appearing for respondents No. 2 and 3 while inviting our attention to notification dated 12th March, 2012, issued by Principal Secretary (NES), State of Himachal Pradesh and communication dated 18th February, 2009, issued by the Ministry of New & Renewable Energy, Government of India, contends that the present petition has become infructuous, inasmuch as the plan period has come to an end w.e.f. 31st March, 2012. Let this fact be ascertained both by the State as also the Central Government. Affidavit in that regard be filed positively within a period of two weeks from today, failing which, respondent No. 1 shall personally remain present in the Court.

List after two weeks."

9. In obedience to the abovementioned order passed by this Court, an affidavit was filed by Additional Chief Secretary (NES) to the Government of Himachal Pradesh, relevant portion of which is quoted hereinbelow:

"7. Now Ministry of New and Renewable Energy vide notification dated 2nd July, 2014, Annexure R-2/A notified Scheme for the financial year 2014-15 & the remaining period of 12th Plan i.e. upto 31st March, 2017, unless further modified and supersedes earlier Scheme in this regard under Small Hydro Project programme of the Ministry of New and Renewable Energy, Government of India. Under this Scheme certain changes has been made prior to the old notification. Comparison of Notification issued by Ministry of New and Renewable Energy dated 18.02.2009 viz a viz notification of Ministry of New and Renewable Energy dated 2.7.2014 is as under:

Notification of Ministry of New and Renewable Energy dated 18.02.2009.	Notification of Ministry of New and Renewable Energy on dated 2nd July, 2014.
Scheme was Notified by Ministry of New and Renewable Energy dated 18.02.2009 which was valid up to 11th five year plan i.e. 31-March 2012, unless further modified and supersedes earlier scheme in this regard under Small Hydro Project	New notification for the scheme was notified by Ministry of New and Renewable Energy on dated 2nd July, 2014, the scheme will be effective for the financial year 2014-15 & the remaining period of 12th Plan i.e. upto 31st March, 2017, unless further

programme of the Ministry of New and Renewable Energy Government of India.	modified and supersedes earlier scheme in this regard under Small Hydro Project programme of the Ministry of New and Renewable Energy, Government of India.
As per the Scheme, the amount of Central Financial Assistance is Rs.80,000/- per KW for North Eastern & Special Category states and Rs.1,00,000/- per KW for international Borders Distts.	As per the scheme the amount of Central Financial Assistance is Rs.1,25,000/- per KW for all States of India.
The Central Financial Assistance is applicable for the projects to be implemented by State Government Deptt/State Nodal Agencies/Local Bodies/Co-operative/NGOs	The Central Financial Assistance is applicable for the projects to be implemented by State Govt. Deptt/State Nodal Agencies/Local Bodies/Co-operative NGOs./Tea Garden & Individual Entrepreneurs.

8. That it is further submitted that now Ministry of New and Renewable Energy has made certain changes in their new notification dated 2.7.2014 for 100 KW projects i.e. the Central financial assistance was changed from Rs. 80,000/- per KW to Rs. 1,25,000/- per KW. Ministry of New and Renewable Energy has also modified eligibility criteria. As per new eligibility criteria, the Central Finanncial Assistance is applicable for the projects to be implemented by State Govt. Deptt/State Nodal Agencies/Local Bodies/Co-operative/NGOs/Tea Garden & Individual Entrepreneurs. The chance to the Tea Garden & Individual Entrepreneurs was also given by the Ministry in its new notification dated 2.7.2014. Therefore, to provide fair chance to more interested parties the notification dated 12th March, 2012 will be revised as per the new policy scheme of Ministry of New and Renewable Energy dated 2.7.2014 after final decision of Hon'ble High Court. It is submitted that the application of the petitioner would be considered as per new policy. In the meantime, Govt. may be permitted to notify the policy issued by Ministry of New and Renewable Energy vide dated 2.7.2014 with state amendments. It is therefore, respectfully prayed that in view of the facts and circumstances narrated here in above the present petition may kindly be dismissed in the interest of justice."

10. We have heard the learned counsel for the parties and also gone through the pleadings of the parties.

11. In our considered view, the contention of the petitioner-association that because its members had applied for allotment of projects pursuant to the Scheme notified by Government of India vide Annexure P-2, the State had no authority to come with the amended policy and the projects have to be allotted to its members as a matter of right as they legitimately expected these projects to be allotted to them is without any merit. No material has been placed on record by the petitioner-Society from which it can be inferred that any holding out was made by the respondent-State or HIMURJA on the basis of the Scheme floated by Government of India by inviting applications thereupon. Not only this, no material has been placed on record by the petitioner-association from which it can be inferred that the proposed self identified sites of members of the petitioner-association were got inspected with the consent of the Government of Himachal Pradesh. Not only this, no material has been placed on record by the petitioner from which it can be inferred that the Government of Himachal Pradesh was not having any authority in law to issue notification dated 12.03.2012 which has been challenged by way of this writ petition. On the other hand, it is apparent and evident from the reply which has been filed by

respondent No. 4, i.e. Union of India that issuance of the policy for allotment of SHP/MHP projects or its allotment was the domain of State Government and Union of Indian has no role in this process. It is further evident from the reply of respondent No. 4 that expression of interests/proposals/bids from private developers are invited by the State Governments or the nodal agency of the State Government. Therefore, the contention of the learned counsel for the petitioner that the issuance of the policy by the Government of Himachal Pradesh is without any authority in law has no force. Even otherwise, in our considered view, the Scheme floated by the Government of India did not confer any indefeasible right upon the members of the petitioner-association, who purportedly applied for allotment of the projects on the basis of the Scheme so floated by the Government of India. In view of the reply filed by respondent No. 4, no such indefeasible right could have been created by a Scheme issued by the Government of India by supplanting the powers of respective State Governments in this regard. In this background, there is no question of any legitimate expectation having accrued in favour of the members of the petitioner-association of being allotted projects/sites qua which they submitted their applications pursuant to the Scheme floated by the Government of India. Not only this, there is a specific stand even otherwise taken by the respondent-State in its reply that the applications which were submitted by the applicants in response to the Scheme floated by the Government of India were incomplete applications and there was one discrepancy or the other in these applications. The stand so taken in its reply by respondents No. 1 to 3 has not been contradicted by the petitioner by way of any rejoinder.

12. The contention of the petitioner-association that its members were entitled to be allotted the sites qua which they had submitted their applications pursuant to Scheme floated in this regard by respondent No. 4 and that respondent-State had no authority to issue policy vide notification dated 12.03.2012 has not even been supported by respondent No. 4. On the other hand, it is apparent from the stand taken by respondent No. 4 in its reply in general and in para-4 of its reply in particular that the State had the right to issue a policy for the purpose of laying down a uniform criteria to distribute Government largesse.

13. In our considered view, as far as the facts of the present case are concerned, there was no holding out made at any stage to any of the applicants who applied for a site in response to the Scheme formulated by the Government of India that once the applicant had applied for a particular site, then the applicant shall be granted that site in all eventualities. This kind of a holding out is neither there on behalf of respondent No. 4 nor the petitioner could draw the attention of this Court to any document on record from which it could be inferred that on the basis of the said Scheme, any such holding out was made either by HIMURJA or by the respondent-State. There is no material on record from which it could be inferred that there was either any implied or express consent given to the Societies/NGOs. by either of the respondents to incur expenses for the purpose of identifying the proposed sites and preparing Pre-feasibility reports etc. Even otherwise, every interested party which intends to set up a project has to carry out a Pre-feasibility report to satisfy itself as to whether the project will be viable or not. However, simply because a particular party prepares a Pre-feasibility report or incurs some expenses in this regard, this does not mean that all this confers an indefeasible right over that party to be allotted that site. Even otherwise, after come into force of the policy formulated by the State Government vide notification dated 12.03.2012 it is not as if the Society/NGOs. who had earlier submitted their applications have been barred from participating in the process of allotment of the sites. They are all free to participate in the allotment of the projects subject to their fulfilling the eligibility criteria which has been laid down in the policy by the respondent-State. In this view of the matter, there is no merit in the contention of the learned counsel for the petitioner that any legitimate expectation of all the members of the petitioner-association has been defeated or the respondents were estopped from issuing policy notification dated 12.03.2012 or rejecting the applications earlier filed by Societies/NGOs. in response to the Scheme floated by the Government of India.

14. It is well settled law that public largesses should be distributed in a transparent manner by providing an opportunity to all eligible members to participate in the process. This not

only ensures a healthy competition but also meets the prime object of fair play and transparency in the matter of distribution of public largesses.

15. A five Judges Bench of the Hon'ble Supreme Court **in Confederation of Ex-Servicemen Associations and others** Vs**. Union of India and others** (2006) 8 Supreme Court Cases 399 has held:

> *"34. The expression "legitimate expectation" appears to have been originated by Lord Denning, M.R. in the leading decision Schmidt Vs. Secy. of State. In Attorney General of Hong Kong V. Ng Yuen Shiu, Lord Fraser referring to Schmidr stated: (All ER P. 350 h-j)*
>
> *"The expectations may be based on some statement or undertaking by, or on behalf of , the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."*
>
> *35. In such cases, therefore, the Court may not insist an administrative authority to act judicially but may still insist it to act fairly. The doctirine is based on the principle that good administration demands observance of reasonableness and where it has adopted a particular practice for a long time even in the absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised."*

16. The Hon'ble Supreme Court in **Sethi Auto Service Station and another** Vs. **Delhi Development Authority and others** (2009) 1 Supreme Court Case 180 has held:

> *"33. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power. The court must not usurp the discretion of the public authority which is empowered to take the decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. Therefore, a legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. [Vide Hindustan Development Corporation}"*

17. The Hon'ble Supreme Court in **Jasbir Singh Chhabra and others** Vs. **State of Punjab and others** (2010) 4 Supreme Court Cases 192 while tracing the earlier law laid down by the Hon'ble Supreme Court on the doctrine of promissory estoppel and legitimate expectations has held:

> *"41. In Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409, a two-Judge Bench of this Court discussed the doctrine of promissory estoppel in great detail and laid down the various propositions including the following:*
>
> *"8..... The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and*

this would be so irrespective of whether there is any pre-existing relationship between the parties or not."

"24. The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution.

42. A contrary view was expressed by another two-Judge Bench in Jit Ram v. State of Haryana (1981) 1 SCC 11, but the law laid down in Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P. (supra) was reiterated in Union of India v. Godfrey Philips India Ltd. (1985) 4 SCC 369, which was decided by a three-Judge Bench. Bhagwati, C.J. with whom the other two members of the Bench agreed on the exposition of law relating to the doctrine of promissory estoppel, observed:

"13. Of course we must make it clear, and that is also laid down in Motilal Sugar Mills case that there can be no promissory estoppel against the Legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or, power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires; if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it. This aspect has been dealt with fully in Motilal Sugar Mills case and we find ourselves wholly in agreement with what has been said in that decision on this point."

43. In Hira Tikoo v. Union Territory, Chandigarh (2004) 6 SCC 765, this Court considered whether the High Court was justified in refusing to invoke the doctrine of promissory estoppel for issuing a mandamus to the respondent-Chandigarh Administration to allot industrial plots to the petitioners, who had applied in response to an advertisement issued in 1981. The Court noted that some of the successful applicants were given possession of the plots but majority of them were not given allotment letters on the ground that the land formed part of the reserved forest and partially approved the decision of the High Court by making the following observations:

"25. Surely, the doctrine of estoppel cannot be applied against public authorities when their mistaken advice or representation is found to be in breach of a statute and therefore, against general public interest. The question, however, is whether the parties or individuals, who had suffered because of the mistake and negligence on the part of the statutory public authorities, would have any remedy of redressal for the loss they have suffered. The "rules of fairness" by which every public authority is bound, require them to compensate

loss occasioned to private parties or citizens who were misled in acting on such mistaken or negligent advice of the public authority. There are no allegations and material in these cases to come to a conclusion that the action of the authorities was mala fide. It may be held to be careless or negligent. In some of the English cases, the view taken is that the public authorities cannot be absolved of their liability to provide adequate monetary compensation to the parties who are adversely affected by their erroneous decisions and actions. But in these cases, any directions to the public authorities to pay monetary compensation or damages would also indirectly harm general public interest. The public authorities are entrusted with public fund raised from public money. The funds are in trust with them for utilisation in public interest and strictly for the purposes of the statute under which they are created with specific statutory duties imposed on them. In such a situation when a party or citizen has relied, to his detriment, on an erroneous representation made by public authorities and suffered loss and where the doctrine of "estoppel" will not be invoked to his aid, directing administrative redressal would be a more appropriate remedy than payment of monetary compensation for the loss caused by non-delivery of the possession of the plots and consequent delay caused in setting up industries by the allottees."

44. The plea of the writ petitioners that they had legitimate expectation of being allotted residential plots in Phases VIII-A and VIII-B in Mohali because in 2002 138 plots were allotted to the successful applicants sans merit. At the cost of repetition, it is necessary to mention that the writ petitioners had submitted applications knowing fully well that the same would not obligate the Corporation to allot plots to them. It is rather intriguing that even though approval of the layouts of residential pockets in Phases VIII-A and VIII-B, Mohali by Plan Approval Committee of the Corporation was subject to approval being accorded by the competent authority under the 1995 Act for change of land use from industrial to residential, and the Allotment Committee in which Managing Director of the Corporation had taken part, made a negative recommendation in the matter of allotment of land for housing purposes, the same officer authorized issue of advertisement dated 23.3.2004 for holding provisional draw of lots. In our view, this exercise was wholly unnecessary and uncalled for. If the concerned officer had not acted in haste and waited for the decision of the competent authority on the issue of change of land use, the parties may not have been forced to fight this unwarranted litigation. Be that as it may, the writ petitioners cannot, by any stretch of imagination, claim that they had a legitimate expectation in the matter of allotment of plots despite the fact that change of land use was yet to be sanctioned.

45. The doctrine of legitimate expectation has been described in Halsbury's Laws of England 4th Edn. in the following words:

"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice."

46. In Food Corporation of India v. Kamdhenu Cattle Feed Industries (supra), this Court considered whether by submitting tender in response to notice issued by the Food Corporation of India for sale of stocks of damaged food grains, the respondent had acquired a right to have its tender accepted and the appellant was not entitled to reject the same. While approving the view expressed by the High Court that rejection of the highest tender of the writ petitioner-respondent was legally correct, this Court observed: "The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but

failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

47. In Union of India v. Hindustan Development Corporation (supra), the doctrine of legitimate expectation was explained in the following words: "

28. For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."

The same principle has been stated and reiterated in Punjab Communications Ltd. v. Union of India (1999) 4 SCC 727, Dr. Chanchal Goyal v. State of Rajasthan (2003) 3 SCC 485, J.P. Bansal v. State of Rajasthan (2003) 5 SCC 134, State of Karnataka v. Uma Devi (2006) 4 SCC 1, Kuldeep Singh v. Government of NCT of Delhi (2006) 5 SCC 702, Ram Pravesh Singh v. State of Bihar (2006) 8 SCC 381 and Sethi Auto Service Station v. DDA (2009) 1 SCC 180.

48. In the last mentioned judgment, the Court referred to various precedents and observed:

".....the golden thread running through all these decisions is that a case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation which it would be within its powers to fulfil unless some overriding public interest comes in the way. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles."

49. The plea of discrimination raised by the appellants is being mentioned only to be rejected because no similarity has been pointed out between their cases and the cases of those who had applied for allotment of plots in focal

point, Patiala and Phase VIII (Jeevan Nagar), Ludhiana except that a common draw was held in furtherance of advertisement dated 23.3.2004. In any case, in view of our interpretation of the policy decision contained in Memo dated 26.12.2001, the allotment made in two other focal points, cannot enure to the appellants' advantage and a mandamus cannot be issued in their favour because that would result in compelling the competent authority to sanction change of land use from industrial to residential in contravention of the policy decision taken by the State Government."

18. The Hon'ble Supreme Court in **Monnet Ispat and Energy Limited** Vs. **Union of India and others** (2012) 11 SCC 1 has held that for invocation of the doctrine of promissory estoppel it is necessary that:

"(i) Where one party has by his words or conduct made to the other clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is, in fact, so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.

(ii) The doctrine of promissory estoppel may be applied against the Government where the interest of justice, morality and common fairness dictate such a course. The doctrine is applicable against the State even in its governmental, public or sovereign capacity where it is necessary to prevent fraud or manifest injustice. However, the Government or even a private party under the doctrine of promissory estoppel cannot be asked to do an act prohibited in law. The nature and function which the Government discharges is not very relevant. The Government is subject to the rule of promissory estoppel and if the essential ingredients of this doctrine are satisfied, the Government can be compelled to carry out the promise made by it.

(iii) The doctrine of promissory estoppel is not limited in its application only to defence but it can also furnish a cause of action. In other words, the doctrine of promissory estoppel can by itself be the basis of action.

(iv) For invocation of the doctrine of promissory estoppel, it is necessary for the promisee to show that by acting on promise made by the other party, he altered his position. The alteration of position by the promisee is a sine qua non for the applicability of the doctrine. However, it is not necessary for him to prove any damage, detriment or prejudice because of alteration of such promise.

(v) In no case, the doctrine of promissory estoppel can be pressed into aid to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. No promise can be enforced which is statutorily prohibited or is against public policy.

(vi) It is necessary for invocation of the doctrine of promissory estoppel that a clear, sound and positive foundation is laid in the petition. Bald assertions, averments or allegations without any supporting material are not sufficient to press into aid the doctrine of promissory estoppel.

(vii) The doctrine of promissory estoppel cannot be invoked in abstract. When it is sought to be invoked, the Court must consider all aspects including the result sought to be achieved and the public good at large. The fundamental principle of equity must forever be present to the mind of the court. Absence of it

must not hold the Government or the public authority to its promise, assurance or representation."

19. The Hon'ble Supreme Court recently in **State of Kerala and others** Vs. **Kerala Rare Earth and Minerals Limited and others** (2016) 6 Supreme Court Cases 323 in a matter pertaining to grant of mining lease has held that mere disappointment of expectation cannot be a ground for interfering with the policy of the State.

20. As far as the issue of maintainability of the writ petition is concerned, we may observe that this writ petition has been filed by All Himachal Micro Hydel (100 KW) NGOs. and Societies Association through its President Sh. Varinder Thakur. In the body of the petition, there is no mention as to what is the legal status of this association and who all are the members of this association and what are its aims and objectives. No list of its members is appended with the petition. Communication dated 02.08.2010, which is appended with the petition as Annexure P-3 and which as per the petitioner is a representation made by it to Secretary (Power), to the Government of Himachal Pradesh is also signed by only 7 Societies/NGOs. has also been pointed out in its reply by respondents No. 1 to 3. Annexure P-8, which is list of Societies/NGOs. who applied for 100 KW projects and whose applications were rejected in terms of Clause 6.1 of the approved policy of the Government of Himachal Pradesh contains the names of 90 Societies/NGOs. In addition, the petition is filed on the affidavit of one Shri Varinder Thakur in his capacity as President of 'All Himachal Micro Hydel (100 KW) NGOs. and Societies Association' and the contents of the petition have been sworn by the said deponent to be true and correct to the best of his personal knowledge and belief. Therefore, we doubt as to whether the writ petition in its present form is maintainable or not. However, keeping in view the directions we propose to pass in the present writ petition, we do not deem it proper to dwell any further on the issue of maintainability of the writ petition.

21. Therefore, in view of the discussion held above, while we hold that the petitioner-association is not entitled for any of the reliefs prayed for, however, taking into consideration the averments made in the affidavit dated 11th March, 2016 filed by Additional Chief Secretary (NES) to the Government of Himachal Pradesh, we dispose of this writ petition by passing the following directions:

"1. Respondent-State is at liberty to proceed with allocation of projects as per its policy dated 12.03.2012 as well as subsequent notification issued in this regard by the Government of India dated 2nd July, 2014 forthwith by inviting applications in this regard from all eligible parties, if not already invited.

2. Liberty is also granted to the respondents to invite fresh applications in this regard if so desired from all eligible and NGOs./Societies who had earlier applied pursuant to Scheme floated by the Government of India (Annexure P-2) shall be at liberty to apply for the same if otherwise eligible and respondent-State may, if it so desires, provide for some preference for such like applicants.

3. We are constrained to observe that despite the fact that Ministry of New and Renewable Energy, Small Hydro Power Division, Government of India introduced the Scheme for development/up-gradation of Watermills and setting up Micro Hydel Projects up to 100 KW capacity in the year 2009, the respondent-State woke up from its slumber after three years by issuing notification dated 12.03.2012, vide which it notified the policy for setting up Micro Hydel Projects up to 100 KW in the State. On account of said inaction on the part of the State, colossal loss has been caused by way of the respondent-State not being able to gain the advantage which would have had floated to the State as per the Scheme envisaged by the Government of India. Even now, it is only communication dated 2nd July, 2014 issued by Government of India, vide which implementation of Small Hydro Power Programme with Central Financial Assistance has been

extended/sanctioned up to 31st March, 2017 under the 12th Plan that the same has come to the rescue of the respondent-State.

Accordingly, keeping into consideration the fact that the said sanction, as conveyed by the Government of India is up to 31st March, 2017, we direct the respondent-State to complete the entire process of allocation of the projects as expeditiously as possible and no latter than 31st January, 2017, so that the benefits flowing from the Scheme are harvested by the respondent-State. Chief Secretary to the Government of Himachal Pradesh is directed to ensure that the allocation of projects is completed on all counts before 31.01.2017, failing which, he shall be personally liable for non implementation of the directions passed by this Court.

With these directions, the writ petition is disposed of. Interim order stands vacated. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Bhawani Devi .....Appellant.

Vs.

Deo, S/o Gainda and others .....Respondents.

RSA No.: 294 of 2008
Reserved on : 11.11.2016
Date of Decision: 30.11.2016

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking specific performance of the agreement executed by defendant No.1- it was pleaded that possession was handed over after receiving sale consideration of Rs.10,000/- - the land was a tenancy land and therefore, sale deed could not be executed – it was agreed that sale deed would be executed on the conferment of proprietary rights – defendant No.1 failed to execute the sale deed and after the receipt of the notice, executed a gift deed in favour of defendant No.1- the defendant No.1 denied the execution of the agreement - the suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal that marginal witnesses to the agreement were not produced- there were contradictions regarding the name of the person in whose presence the money was paid- sale deed was executed on the same day, which probablized the version that the agreement was got executed by way of misrepresentation- the delivery of possession was also not established- the suit was rightly dismissed by the Court- appeal dismissed. (Para- 11 to 16)

For the appellant: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate.
For the respondents: Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this appeal, the appellant/plaintiff has challenged the judgment and decree passed by the Court of learned Additional District Judge, Mandi in Civil Appeal No. 63/2005 dated 25.03.2008, vide which learned appellate Court while dismissing the appeal filed by the present appellant, upheld the judgment and decree passed by the Court of learned Civil Judge (Senior Division), Mandi in Civil Suit No. 76/2003 dated 01.07.2005, whereby learned Civil Judge (Senior Division), Mandi dismissed the suit for specific performance of contract filed by the present appellant.

2. Brief facts necessary for the adjudication of the present case are that the appellant/plaintiff filed a suit to the effect that on 1st July, 1981 by way of a written agreement of sale, defendant No. 1 sold his land, i.e. 1/6th share measuring 4-15-17 bighas, comprised in Khewat Khatauni No. 40/99 to 107, Kitas 93, measuring 25-15-2 bighas, situated in Mauja Galu/91, illaqua Baggi Tungal, Tehsil Sadar, District Mandi, H.P., as per jamabandi for the year 1975-76 alongwith house in dilapidated condition, situated in Mauza Galu/91 for a sale consideration of Rs.10,000/- to the plaintiff. As per the plaintiff, the agreement was executed by defendant No. 1 on 01.07.1981 in the presence of witnesses and on that date, defendant No. 1 received entire sale consideration of Rs.10,000/- from the plaintiff and defendant No. 1 handed over the possession of the land as well as house to plaintiff and till the filing of the suit, plaintiff was in possession and enjoying land as well as house. It was further the case of the plaintiff that the said land being tenancy land and defendant No. 1 being non-occupancy tenant alongwith other co-sharers, as such registration of sale deed could not be carried out, however, defendant No. 1 had agreed to execute sale deed and register the land in the name of plaintiff as soon as the proprietary rights were conferred upon him and as soon as he become legally competent to effect sale deed of the land as well as the house. It was further the case of the plaintiff that on 25th May, 2003, she came to know that proprietary rights of the said land had been conferred upon defendant No. 1 vide mutation No. 152 and, as such, defendant No. 1 was competent to execute and register the sale deed in her favour. It was further the case of the plaintiff that she was always ready and willing to perform her terms of the contract and she verbally asked defendant No. 1 to execute the sale deed as per agreement dated 01.07.1981. Further, as per the plaintiff, defendant No. 1 initially avoided to execute and register the sale deed in her favour, so plaintiff through her counsel sent a legal notice on 06.06.2003, which was replied to by defendant No. 1 through his counsel. According to plaintiff, the reply was wrong and illegal and defendant No. 1 had wrongly and illegally refused to register the sale deed in her favour. It was further the case of the plaintiff that after the receipt of notice sent by her to defendant No. 1, he had executed a gift deed in favour of defendants No. 2 and 3 of the suit land to the extent of 4-6-1 bighas of land, which gift deed was bad and illegal and in violation of the terms and conditions of agreement dated 01.07.1981. It was on these bases that the plaintiff filed the suit praying for the following reliefs:

> *"(a) the decree for specific performance of contract may kindly be passed in favour of plaintiff and against the defendant No. 1 and the defendant No. 1 be directed to execute and register the sale deed of the land in question in consonance with the agreement dated 01.07.1981 in favour of the plaintiff;*
>
> *(b) it be declared that the gift deed dated 19.09.2003 is wrong and illegal, null and void;*
>
> *(c) the defendants may kindly be restrained by way of permanent prohibitory injunction from causing any interference in the possession and enjoyment of the plaintiff in the land in question; and*
>
> *(d) in the alternative, if the plaintiff is dispossessed forcibly by the defendants during the pendency of the suit and the plaintiff is found put of possession in that event, decree for possession of the land in question may kindly be passed in favour of the plaintiff and against the defendants and as such the suit of the plaintiff may kindly be decreed with costs and justice be done."*

3. The claim of the plaintiff was contested by the defendants. Execution of agreement to sell dated 01.07.1981 was denied by defendant No. 1 and it was also denied by defendant No. 1 that any consideration was received by him as alleged by the plaintiff or that the possession of the suit land was delivered to the plaintiff as alleged. As per defendant No. 1, he was an illiterate old man and simple villager and had never agreed to sell the suit land and register the same in the name of the plaintiff. It was further mentioned in the written statement that legal notice issued by the plaintiff was correctly replied by defendant No. 1 and the gift deed executed by defendant No. 1 in favour of defendants No. 2 and 3, who were his grandsons, was a

valid gift deed as neither defendant No. 1 had agreed to sell the suit land to the plaintiff nor he had parted the possession of the same to the plaintiff. It was further mentioned in the written statement that as the house was jointly owned and possessed by plaintiff and other co-sharers in the year 1981, there was no question of selling the same as alleged by the plaintiff. It was further mentioned in the written statement that plaintiff had no right to file a suit for specific performance and the right of the plaintiff was waived, abandoned and barred by limitation.

4. On the basis of pleadings of the parties, learned trial Court framed the following issues:

"1. Whether the defendant No. 1 through an agreement dated 01.07.1981 agreed to sell his entire 1/6th share in the suit land alongwith a house situated over the suit land for a consideration of Rs.10,000/- to plaintiff as alleged?OPP

2. Whether the plaintiff who performed and still willing to perform his part of the agreement as alleged? OPP

3. If issues No. 1 and 2 are proved in affirmative whether the plaintiff is entitled for the relief of specific performance of contract as alleged?OPP

4. Whether the plaintiff is entitled for possession as alleged? OPP

5. Whether the gift deed dated 19.09.2003 executed by defendant No. 1 in favour of defendants Nos. 2 and 3 is wrong, null and void as alleged? OPP

6. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP

7. Whether the suit is barred by limitation? OPD

8. Whether the suit is not maintainable? OPD.

9. Relief.

5. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	No.
Issue No. 2:	No.
Issue No. 3:	No.
Issue No. 4:	No.
Issue No. 5:	No.
Issue No. 6:	No.
Issue No. 7:	Yes.
Issue No. 8:	No.
Relief:	Suit dismissed as per operative part of judgment."

6. While dismissing the suit filed by the plaintiff, it was held by the learned trial Court that remedy of specific performance was an equitable remedy and under Section 20 of the Specific Relief Act, Court was not bound to grant the relief just because there was an agreement to sell. It was further held by the learned trial Court that it stood proved from records that defendant No. 1 was illiterate person and as per him, contents of agreement Ex. PW1/A were never disclosed to him and his signatures were in fact obtained on the said agreement while obtaining his signatures on the sale deed Ex. PW2/A, which was executed between him and the plaintiff with respect to some other land, owned by defendant No. 1 for an amount of Rs.11,000/-. Learned trial Court further held that in these circumstances, burden was heavily on the plaintiff to prove that defendant No. 1 had put his signatures on the agreement to sell with full knowledge of the contents thereof, which the plaintiff had failed to prove on the basis of evidence led by her.

Learned trial Court further held that in fact evidence proved that signatures obtained on the said agreement were obtained alongwith sale deed Ex. PW2/A, which was executed by defendant No. 1 in favour of the plaintiff on the same day, by the Document Writer who drafted the sale deed. It was further held by the learned trial Court that according to the plaintiff, a sum of Rs.10,000/- which was the sale consideration of the agreement to sell was paid to defendant No. 1 by her in the presence of Jatia Ram and Khem Singh. Learned trial Court held that Khem Singh in his statement has specifically denied that no money was paid to defendant No. 1 by the plaintiff, whereas PW-8 Jatia Ram/J.R. Thakur in his statement had no where stated that an amount of Rs.10,000/- was paid to Deo by the plaintiff in his presence. Learned trial Court also took note of the fact that husband of the plaintiff Kaul Ram, who entered the witness box as PW-6 deposed that the sale consideration was paid to defendant No. 1 by his wife before the execution of sale deed in presence of Chet Ram, Khem Singh and Jatia Ram Thakur. On these bases, it was held by the learned trial Court that there was no evidence on record to show that Rs.10,000/- was in fact paid by the plaintiff to defendant No. 1, as mentioned in Ex. PW1/A. Learned trial Court also held that in ordinary course of business, whenever an agreement to sell is executed, a small part of the total amount is paid and major part of the consideration is paid at the time of registration of the sale deed and thus, execution of agreement Ex. PW1/A suffered from artificiality. On these bases, it was held by the learned trial Court that the plaintiff had failed to prove on record that defendant No. 1 had executed a legal and valid agreement Ex. PW1/A in favour of the plaintiff and had agreed to sell his entire 1/6th share to the plaintiff for consideration of Rs.10,000/-, which had been paid to him at the time of execution of agreement to sell. Learned trial Court also held that there was no evidence on record to prove that defendant No. 1 put his signatures on the agreement with full knowledge of the same. Learned trial Court further held that the plaintiff had also failed to prove on record that possession of the suit land was delivered to her by defendant No. 1 at the time of execution of the sale deed. It was also held by the learned trial Court that as proprietary rights were conferred upon defendant No. 1 through mutation No. 152 dated 18.04.1991 and as per plaintiff, she came to know about this fact on 25.05.2003, however, plaintiff led no evidence to substantiate as to how she came to know about mutation only on 25.05.2003. Learned trial Court also took note of the fact that it was admitted by the plaintiff and her witnesses that the factum of agreement was concealed from every one including defendant for 22 years and even copy of agreement was not given to defendant No. 1 and the agreement was only shown to him by her husband about two years before the filing of the suit. On these bases, it was also held by the learned trial Court that the suit was also barred by limitation.

7. Feeling aggrieved by the judgment and decree passed by the learned trial Court, the plaintiff filed an appeal, which was dismissed by the learned appellate Court vide its judgment and decree dated 25.03.2008. While dismissing the appeal so filed by the plaintiff, it was held by the learned appellate Court that perusal of agreement Ex. PW1/A demonstrated that the same was signed by Chet Ram with different pen and ink, whereas plaintiff Bhawani Devi had signed the same with different pen and ink and attesting witness Khem Singh had signed the agreement with same pen with which the agreement was inscribed. It was held by the learned appellate Court that it was apparent that signatures of the attesting witnesses on agreement were procured at different time with different pen and ink, which rendered the execution of the agreement to be highly doubtful. It was further held by the learned appellate Court that PW-2, D.N. Sharma, who was working as Document Writer had stated that agreement Ex. PW1/A was scribed by him as per the instructions of plaintiff Bhawani Devi and Deo, however, name and address of PW-2, D.N. Sharma was not written on Ex. PW1/A. Learned appellate Court held that being a Document Writer, PW-2 under Rules was required to maintain a register, but he neither entered the agreement in his register nor he had signed the same. As per learned appellate Court, this also rendered execution of the agreement to be doubtful. It was further held by the learned appellate Court that plaintiff could not prove that he had paid sale consideration of Rs.10,000/- to defendant No. 1. It was held by the learned appellate Court that as per recitals of Ex. PW1/A, sale consideration of Rs.10,000/- was already paid to defendant No. 1, whereas PW-1 had stated that sale consideration of Rs.10,000/- was paid to defendant No. 1 in presence of Khem Singh and J.R. Thakur, however, PW-6 Kaul Ram had stated that the same was paid in presence of

attesting witnesses Chet Ram and Khem Singh. Learned appellate Court further held that PW-7 Chet Ram had stated that no sale consideration was paid by plaintiff to defendant No. 1 in his presence or in the presence of other attesting witnesses nor plaintiff had brought any other document on record to substantiate that an amount of Rs.10,0000/- was paid by the plaintiff to defendant No. 1. On these bases, it was held by the learned appellate Court that evidence led by the plaintiff could not prove the execution of agreement Ex. PW1/A by defendant No. 1 in favour of the plaintiff nor it could be proved by the plaintiff that she had paid sale consideration of Rs.10,000/- to defendant No. 1 at the time of execution of the agreement. It was further held by the learned appellate Court that records demonstrated that plaintiff had purchased land measuring 13-9-18 bighas from defendant No. 1 for consideration of Rs.11,000/- vide sale deed Ex. PW2/A and it also stood proved that agreement Ex. PW1/A was prepared by Kaul Ram, husband of plaintiff and signatures of defendant No. 1 and attesting witnesses were obtained at the time of execution of sale deed Ex. PW2/A. Learned appellate Court further held that keeping into consideration the fact that defendant No. 1 was duly recorded as owner in possession of the suit land, he was competent to execute gift deed in favour of defendants No. 2 and 3 and no evidence was led by plaintiff to prove that gift so executed by defendant No. 1 in favour of defendants No. 2 and 3 was illegal. Learned appellate Court also upheld the finding returned by the learned trial Court on the point of limitation by holding that as per the pleadings of the plaintiff, the sale deed was agreed to be executed after acquisition of proprietary rights of the suit land by defendant No. 1, which were acquired by him vide mutation No. 152 dated 18.04.1991 and hence time started from 18.04.1991, whereas plaintiff had not instituted the suit within three years form the said date. On these bases, the appeal so filed by the plaintiff was dismissed by the learned appellate Court.

8. These judgments and decrees passed by both the learned Courts below are under challenge by way of this appeal.

9. This appeal was admitted on 26.06.2008 on the following substantial questions of law:

> *"1. Whether the learned Courts below mis-read and mis-construed the evidence especially the documentary evidence in coming to the conclusion that no agreement to sell has been entered into between the parties?*
>
> *2. Whether the learned Courts below have wrongly come to the conclusion that the suit filed by the plaintiff was time barred?*

10. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

11. A perusal of Ex. PW1/A demonstrates that it is mentioned therein that in lieu of the said agreement to sell, an amount of Rs.10,000/- stood paid by plaintiff to defendant No. 1 and he has handed over the possession of the land, subject matter of the said agreement to the plaintiff. Plaintiff in Court as PW-1 has stated that she had paid Rs.10,000/- to defendant No. 1 in the presence of her lawyer Jatia Ram and Khem Singh. Khem Singh was not produced as a witness by the plaintiff. Besides this, a perusal of the agreement to sell Ex. PW1/A demonstrates that execution of the same has been witnessed by Chet Ram and Khem Singh. Jatia Ram @ J.R. Thakur has neither appended his signatures on the same as a witness nor he has identified the vendor and vendee. This fact has also been admitted in his cross-examination by Jatia Ram/J.R. Thakur, who entered the witness box as PW-8. Further, Jatia Ram has nowhere stated in his deposition in the Court that in lieu of the execution of agreement to sell Ex. PW1/A, an amount of Rs.10,000/- was in fact paid to defendant by the plaintiff in his presence.

12. Whereas as per the plaintiff, the sale consideration was paid by her to the defendant in the presence of Chet Ram and Jatia Ram, however, her husband who entered the witness box as PW-6 has stated that the amount of Rs.10,000/- was paid by the plaintiff to the defendant before the agreement to sell was scribed and this payment was made in the presence of Chet Ram, Khem Singh and Jatia Ram. Chet Ram, who entered the witness box as PW-7,

however, has stated in his cross-examination that no exchange of money took place in his presence and neither the defendant had agreed in their presence that he had received the sale consideration. Thus, the concurrent finding returned against the plaintiff by both the learned Courts below that there was no evidence on record to show that a sum of Rs.10,000/- was paid by plaintiff to defendant No. 1, as mentioned in Ex. PW1/A, is correct finding which is duly borne out from the records of the case.

13. Besides this, it is an admitted fact that on that very day when the alleged agreement to sell Ex. PW1/A was purportedly entered into between the plaintiff and the defendant, a sale deed was executed between the plaintiff and the defendant, vide which defendant had sold some other land in his ownership to the plaintiff for an amount of Rs.11,000/-. The specific stand of the defendant in the written statement was that he was an illiterate rustic person and was not aware of the contents of the document on which his signatures were obtained by the plaintiff and in fact he had not entered into any agreement to sell the land which was under his tenancy in favour of the plaintiff vide Ex. PW2/A nor he had received any sale consideration in lieu of the same. Both the learned Courts below while disbelieving the case of the plaintiff have held that plaintiff had failed to prove on record that in fact any agreement to sell was actually entered into between the plaintiff and the defendant vide Ex. PW1/A.

14. In my considered view, the findings so returned by both the learned Courts below can neither be said to be perverse nor it can be said that the findings so returned were not borne out from the records of the case. The evidence led by the plaintiff to prove her case is neither cogent nor convincing as held by both the learned Courts below. It otherwise defies logic as to why defendant would have had agreed to enter into an agreement to sell vis-à-vis land which was only under his tenancy on the terms and conditions as are contained in Ex. PW1/A. The factum of the possession of the suit land having been parted by defendant in favour of the plaintiff in lieu of Ex. PW-1/A has also not been substantiated on record by the plaintiff. The execution of Ex. PW1/A in the mode and manner in which the plaintiff wants this Court to believe is shrouded with suspicion, especially in the light of the testimony of PW-2, the Document Writer, who has incidentally stated that though he had scribed the said document, but he neither entered this agreement in his register nor he had signed the same. Further, in my considered view, as the plaintiff was not able to prove the execution of agreement to sell, the findings returned by both the learned Courts below to the effect that as defendant No. 1 was owner-in-possession of the suit land, he was competent to execute gift deed in favour of defendants No. 2 and 3, cannot be faulted with. This gift deed admittedly was executed by defendant No. 1 in favour of defendants No. 2 and 3 after ownership rights were conferred upon him vide mutation No. 152 dated 18.04.1991. Besides this, despite the fact that mutation was attested in favour of defendant No. 1 on 18.04.1991, the suit was filed by the plaintiff in the year 2003. Learned trial Court has categorically held that no evidence was led by the plaintiff to substantiate that she came to know about the mutation which was entered in favour of defendant No. 1 only on 25.05.2003, as stated in the plaint. Learned trial Court while deciding the issue of limitation against the plaintiff has also taken note of the fact that neither there was any copy of agreement Ex. PW1/A handed over to defendant No. 1 and in fact this agreement was brought to the notice of defendant No. 1 by the husband of plaintiff only about two years before filing of the suit. The finding returned by learned appellate Court that signatures of attesting witnesses on agreement were procured at different times, as was evident from different pen and ink used by them, which rendered the execution of the agreement to be highly doubtful is also duly borne out from the records of the case.

15. I have carefully perused the judgments and decrees passed by both the learned Courts below as well as the records of the case and in my considered view, it cannot be said that the findings returned by both the learned Courts below are either contrary to the records or are not borne out from the records of the case. There is no misreading or mis-construction of the evidence on record and the conclusion arrived at by both the Courts below that in fact no agreement to sell was entered into between the parties and no payment was made by plaintiff to defendant No. 1 is duly borne out from the records of the case.

16. Similarly, the fact that the suit filed by the plaintiff being time barred is also duly borne out from the records of the case and it cannot be said that the finding returned to this effect is perverse or contrary to the records as already discussed above. Substantial questions of law are answered accordingly.

In view of the discussion held above, as there is no merit in the appeal, the same is dismissed with costs.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Fateh Singh and others ....Petitioners.
Versus
State of H.P. ....Respondent.

Cr.R. No. : 116 of 2008.
Reserved on: 17.11.2016.
Decided on: 30.11.2016.

Indian Forest Act, 1927- Section 41 and 42- **Himachal Pradesh Forest Produce Transit (Land Routes) Rules, 1978**- Rule 20- Accused were found transporting 37 wooden frames of different sizes without any valid permit – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- the Court can interfere in exercise of revisional jurisdiction only if the findings are perverse, untenable in law, grossly erroneous, glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously- the prosecution case was for non- cognizable offence- however, police conducted investigations without an order of the Magistrate – Courts below failed to appreciate that police officer could not have investigated the case against the accused in absence of the order of the Magistrate and entire proceedings were vitiated – further, there was no reference in the notice of accusation to the Rule 20 of H.P. Produce Transit (Land Routes) Rules, 1978 and the same was defective- revision allowed and the accused acquitted. (Para-9 to 14)

Cases referred:
Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 SCC 123
State of H.P. versus Satpal Singh @ Satta and another and the connected matter, Latest HLJ 2009 (HP) 732
Shiv Narain Bhasin v. State of Himachal Pradeswh 1985 SLC 274

For the petitioners : Mr. G.R. Palsra, Advocate.
For the respondent : Mr. Vikram Thakur and Ms. Parul Negi, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, petitioners have challenged the judgment passed by the Court of learned Additional Sessions Judge, Mandi, District Mandi, in Criminal Appeal No. 3 of 2005, dated 23.05.2008, vide which learned Appellate Court, while dismissing the appeal filed by the present petitioners, affirmed the judgment of conviction and sentence imposed upon the present petitioners by the Court of learned Sub Divisional Judicial Magistrate, Chachiot at Gohar, District Mandi, in Police Challan No. 257-I/2001 (2000), dated 12.01.2005, whereby learned trial Court while convicting the present petitioners for commission of offences punishable under Sections 41 and 42 of the I.F. Act (hereinafter referred to as 'I.F. Act') and Rule 20 of Himachal

Pradesh Forest Produce Transit (Land Routes) Rules, 1978 framed under the said Sections, sentenced each of the petitioners (hereinafter referred to as 'accused' for short) to undergo simple imprisonment for a period of six months and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo simple imprisonment for a period of one month.

2. The case of the prosecution was that on 25.02.2000 at 1:30 p.m. Head Constable Paras Ram alongwith LHC Prem Singh while patrolling at Chel Chowk intercepted one Eicher truck bearing registration No. HP-32-0909 which came from Gohar side and was proceeding towards Mandi. This truck was intercepted for routine checking and three persons were sitting in the same who revealed their names as Fateh Singh S/o Shri Dharam Singh, driver of the truck, Fateh Singh s/o Shri Devi Singh, owner of the truck and Begam Singh s/o Shri Karam Singh. When the truck was checked, the same was found loaded with bories containing maize. These bories of maize were removed on one side with the help of labourers namely Bhimu and Nagnu, which revealed frames wrapped with Jute mat concealed underneath the bories. On this, photographers Pankaj Kumar and Tapender Singh and Forest Guard Bassa were called on the spot. Bories containing maize were got unloaded with the assistance of labourers. Besides sixty six bories of maize, three bundles of wooden frames wrapped with jute mat were found in the truck. On counting, 37 wooden frames of different sizes were recovered. Photographs of the truck and wooden frames were taken and the owner of the truck was enquired about the transportation of the same who told that the frames were from his timber of T.D. He however could not produce any permit qua transportation of recovered wooden frames. In these circumstances, truck as well as the wooden frames were taken into possession and further investigation was carried out. After completion of the investigation, challan was filed in the court and as a prima facie case was found against the accused, notice of accusation was put to them for commission of offences punishable under Sections 41 and 42 of I.F. Act, to which they pleaded not guilty and claimed trial.

3. On the basis of evidence led by the prosecution both ocular as well as documentary, learned trial Court found the accused guilty of having committed offences punishable under Sections 41 and 42 of the I.F. Act and Rule 20 of Himachal Pradesh Forest Produce Transit (Land Routes) Rules 1978 and sentenced each of them to undergo six months' simple imprisonment and to pay a fine of Rs. 1000/-.

4. In appeal, the judgment of conviction and sentence so imposed upon the accused by the learned trial Court was upheld by the learned Appellate Court.

5. Feelings aggrieved by the said judgments, the petitioners have filed the present revision petition.

6. Mr. G.R. Palsra, learned Counsel appearing for the petitioners argued that the judgment of conviction passed against the accused by the learned trial Court and upheld by the learned Appellate Court is perverse and not sustainable in the eyes of law. Mr. Palsra argued that police are debarred from investigating cases under Sections 41 and 42 of the I.F. Act in view of the provisions of Sub Section (2) of Section 155 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C' for short). Mr. Palsra further argued that in the notice of accusation put to the accused, no reference of violation of Rules under Section 41 and 42 of the I.F. Act was stated, which as per him was necessary especially because Section 42 of the I.F Act is merely an enabling section empowering the State government to prescribe by rules, penalties of imprisonment or fine or both for contravention of Rules framed under Section 41 of the I.F. Act. In these circumstances, according to Mr. Palsra, it was necessary for the trial Magistrate to state the precise Rules framed under Section 41 of the I.F. Act, for the violation of which the accused was required to be punished and therefore, notice of accusation was defective. It was submitted by Mr. Palsra that as the entire proceedings initiated against the petitioners were defective and as this very important aspect of the matter had not been taken into consideration by both the learned Courts below, therefore, on these bases, he argued that the judgment of conviction passed by the learned trial Court and upheld by the learned Appellate Court deserved to be set aside.

7. Mr. Vikram Thakur, learned Deputy Advocate General, on the other hand, argued that there was no merit in the contention of Mr. Palsra as both the learned Courts below on the basis of material on record had held that the petitioners were guilty of the offences for which they were convicted and as there was no plea available with the petitioners on merit to assail the judgments so passed by the learned Courts below, therefore, in the revision petition, the petitioners had come out with this contention of the proceedings initiated against them being void abinitio, which contention of the petitioners, according to Mr. Thakur was totally incorrect and not sustainable in law. On these bases, it was prayed by Mr. Thakur that there was no merit in the present appeal and the same be dismissed.

8. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the Courts below.

9. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and undeserved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

10. Keeping in view the consideration of law so declared by the Hon'ble Supreme Court, this Court proceeds to adjudicate the revision petition on merit.

11. Sub Section 2 of Section 155 of Cr.P.C provides that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. The exception carved out in Sub Section 4 of said Section is that where a case relates to two or more offences, out of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

12. Admittedly in the present case, the case made out by the prosecution against the accused was for non-cognizable offence. However, rather than following the procedure provided in Sub Section (2) of Section 155 of the Cr.P.C, the police officer carried on with the investigation of the non-cognizable case without there being any order of the Magistrate having power to try such case. This is further evident from the fact that FIR registered in this regard Ext. PW9/A, dated 20.06.2002, nowhere contains that the same has been registered on the basis of directions issued by the concerned Magistrate to carry out investigation in the case. Therefore, there is merit in the contention of Mr. Palsra that the police could not have investigated the non-cognizable offence without the prior permission of the Magistrate and information should have been referred to the Magistrate concerned. This Court in ***State of H.P. versus Satpal Singh @ Satta and another and the connected matter, Latest HLJ 2009 (HP) 732*** has held that offences under Sections 41 and 42 of the Indian Forest Act are non cognizable as per Schedule II of the Criminal Procedure Code and if the police are not permitted by the Magistrate to investigate the case for such offences, the investigation carried out would vitiate entire proceedings being illegal. Accordingly, in view of the statutory provisions as well as law laid down by this Court (supra), in my considered view, the judgment and conviction passed against the accused by the learned trial Court and upheld by the learned Appellate Court are perverse and liable to be set aside. Both the learned Courts below have failed to appreciate that police officer could not have had investigated the case against the accused in the absence of order of Magistrate as contemplated under Sub Section (2) of Section 155 of the Cr.P.C and in the absence of any such order by the Magistrate, the entire proceedings initiated against the petitioners were vitiated.

13. Similarly, there is also merit in the contention of Mr. G .R. Palsra, Advocate that the notice of accusation put to the accused was defective as no reference of violation of Rules framed under Sections 41 and 42 of the I.F. Act has been stated in the notice of accusation so put to the respondents. A perusal of the judgment passed by the learned trial Court demonstrates that the accused have been convicted under Rule 20 of Himachal Pradesh Forest Produce Transit (Land Routes) Rules 1978, framed under Sections 41 and 42 of I.F Act. A perusal of the notice of accusation put to the accused demonstrates that there was no reference of violation of any Rule framed under Section 41 and 42 of the I.F Act put to the present petitioners. This Court in ***State of Himachal Pradesh versus Nagnu Ram and others, Criminal Appeal No. 293 of 2004*** while relying upon the judgment passed in *Shiv Narain Bhasin v. State of Himachal Pradeswh 1985 SLC 274* has held that Section 42 of I.F Act is merely an enabling Section empowering the State government to prescribe by Rules, penalties of imprisonment or fine or both for contravention of Rules framed under Section 41 of the I. F. Act and it was necessary for the trial Magistrate to state the precise Rules framed under Section 41 of the Indian Forest Act for the violation of which the accused was required to be punished and therefore, notice of accusation was held to be defective. This Court further held that where there was allegation of violation of Rules, reference of Rule was necessary and absence of reference of Rules, more particularly, Rule 20 framed under Sections 41 and 42 of the I.F. Act by the State Government in the notice of accusation which was put to the accused who were not given an opportunity to project their defence to the accusation of violation of Rules framed under Section 41 and 42 of the Indian Forest Act caused prejudice to the accused/ respondents. Accordingly, in my view, as there was no reference of Rule 20 framed under Sections 41 and 42 of the I.F. Act by the State Government in the notice of accusation which was put to the accused, the same was defective as per law laid down by this Court.

14. Therefore, in view of the above discussion, the judgment of conviction passed against the petitioners and the sentence imposed upon them by the learned trial Court in Police Challan No. 257-I/2001(2000) dated 12.01.2005 is set aside and judgment passed by the learned Appellate Court in Criminal Appeal No. 3 of 2005 dated 23.05.2008 vide which it affirmed the judgment passed by the learned trial Court is also set aside. The petitioners are acquitted of the offences for which they were tried by the learned trial Court. Fine amount, if any, deposited by the accused/petitioners is ordered to be refunded to them in accordance with law. This petition stands disposed of accordingly. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Santosh Kumar s/o Sh. Dharam Singh .....Petitioner/Co-accused

Versus

State of H.P. .....Non-petitioner

Cr.MP(M) No. 1399 of 2016
Order Reserved on 25.11.2016
Date of Order: 30.11.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger

interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions.

(Para-5 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 Apex Court 179
The State Vs. Captain Jagjit Singh, AIR 1962 Apex Court 253
Sanjay Chandra Vs. CBI, 2012 Criminal Law Journal 702 Apex Court

For petitioner/Co-accused : Mr. Sanjeev Bhushan, Sr.Advocate with Mr. Rakesh Chauhan, Advocate
For Non-petitioner : Mr. Pankaj Negi, Dy. A.G.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 Cr.PC for grant of bail relating to FIR No.274 of 2016 dated 20.10.2016 registered under Sections 341, 323, 324, 307 read with section 34 IPC in Police Station Hamirpur Distt. Hamirpur (H.P.).

Brief facts of case:

2. On dated 20.10.2016 injured Vishal reported to the investigating agency that on 20.10.2016 he visited Govt. Degree College Hamirpur to appear in a paper and after examination at about 4.15 P.M. he was returning home alongwith Neeraj Sharma on his motorcycle. It is alleged that when injured Vishal came out of the gate of the college then accused persons namely Santosh Kumar, Saurav and Aadesh were standing. It is alleged that accused persons asked the injured to alight from his motorcycle. It is further alleged that as soon as injured alighted from the motorcycle all the accused persons started beating injured with fist and leg blows. It is further alleged that co-accused caught hold the injured from his arms and legs and co-accused Santosh Kumar gave a blow of 'Khukhri' (Sharp edged weapon) on the head of injured. It is further alleged that accused persons also proclaimed that they would kill injured namely Vishal. It is further alleged that after receiving blows of 'Khukhri' (sharp edged weapon) injured Vishal became unconscious and fell down. It is further alleged that injured was saved by Neeraj Sharma, Pankaj Kumar and Tain Singh who brought the injured to hospital for his medical treatment. It is further alleged that 'Khukhri' (Sharp edged weapon) recovered. It is further alleged that Medical Officer has given opinion that injury upon the body of injured was dangerous to life.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of State and Court also perused the entire record carefully.

4. Following points arises for determination:

(1) Whether bail application filed by co-accused Santosh Kumar is liable to be accepted as mentioned in memorandum of grounds of bail application?

(2) Final Order.

Findings upon Point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of co-accused Santosh Kumar that Santosh Kumar did not commit any offence as alleged by the investigating agency cannot be decided at this stage of the case. Same fact will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

6. Submission of learned Advocate appearing on behalf of co-accused Santosh Kumar that investigation is completed in the present case and petitioner is not required for investigation purpose and petitioner is a student of BA-IInd year and he has to appear in coming

examination and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered (1) Nature and seriousness of offence. (2) Character of evidence. (3) Reasonable possibility of the presence of accused in trial or investigation. (4) Reasonable apprehension of witnesses being tampered with. (5) Larger interest of the public or State. See AIR 1978 Apex Court 179 ***Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see AIR 1962 Apex Court 253 ***The State Vs. Captain Jagjit Singh.*** It is well settled law that grant of bail is rule and committal to jail is an exception. It is also well settled law that refusal of bail is restriction on the personal liberty of individual guaranteed under Article 21 of the Constitution of India. It is well settled law that it is not in the interest of justice that accused should be kept in jail for an indefinite period. See **2012 Criminal Law Journal 702 Apex Court Sanjay Chandra Vs. CBI.** In the present case accused is in judicial custody and accused is not required for investigation purpose. In the present case weapon is also recovered by the investigating agency. There is no report of investigating agency that injured namely Vishal is admitted in the hospital as in-door patient as of today. In view of the fact that petitioner is a student and in view of the fact that petitioner is not required for investigation purpose by the investigating agency and in view of the fact that trial will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the petitioner on bail.

7. Submission of learned Deputy Advocate General appearing on behalf of the State that if petitioner is released on bail at this stage then petitioner will induce and threat prosecution witnesses and on this ground bail application be declined is rejected being devoid of merits for reasons hereinafter mentioned. Co-accused Santosh Kumar has given undertaking that he would not induce or threat prosecution witnesses. It is held that conditional bail will be granted to co-accused Santosh Kumar. It is held that if co-accused Santosh Kumar will flout terms and conditions of conditional bail then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail as provided under section 439(2) Code of Criminal Procedure 1973. In view of the above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order).

8. In view of my findings on point No.1 above bail application filed by co-accused Santosh Kumar under Section 439 of Code of Criminal Procedure 1973 is allowed on furnishing personal bond in the sum of Rupees One lac with two sureties in the like amount to the satisfaction of learned Trial Court on following terms and conditions. (1) That co-accused Santosh Kumar will join investigation whenever and wherever directed by investigating officer in accordance with law. (2) That co-accused Santosh Kumar will regularly attend proceedings of learned Trial Court till conclusion of trial. (3) That co-accused Santosh Kumar shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing facts to the investigating officer or to the Court. (4) That co-accused Santosh Kumar will not leave India without prior permission of the Court. (5) That co-accused Santosh Kumar will not commit similar offence qua which he is accused. Observations made hereinabove will not effect merits of the case in any manner and will be strictly confined for disposal of present bail application. Cr.MP(M) No.1399/2016 is disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Saurav s/o Sh. Braham Dass .....Petitioner/Co-accused

Versus

State of H.P. .....Non-petitioner

Cr.MP(M) No. 1400 of 2016
Order Reserved on 25.11.2016
Date of Order: 30.11.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324, 307 read with Section 34 of I.P.C – petitioner has filed the present petition for bail- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- the petitioner is a student and is not required for investigation – hence, the petition allowed and the petitioner ordered to be released on bail subject to conditions.

(Para-5 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 Apex Court 179
The State Vs. Captain Jagjit Singh, AIR 1962 Apex Court 253
Sanjay Chandra Vs. CBI, 2012 Criminal Law Journal 702 Apex Court

For petitioner/Co-accused : Mr. Sanjeev Bhushan, Sr.Advocate
with Mr. Rakesh Chauhan, Advocate
For Non-petitioner : Mr. Pankaj Negi, Dy. A.G.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 Cr.PC for grant of bail relating to FIR No.274 of 2016 dated 20.10.2016 registered under Sections 341, 323, 324, 307 read with section 34 IPC in Police Station Hamirpur Distt. Hamirpur (H.P.).

Brief facts of case:

2. On dated 20.10.2016 injured Vishal reported to the investigating agency that on 20.10.2016 he visited Govt. Degree College Hamirpur to appear in a paper and after examination at about 4.15 P.M. he was returning home alongwith Neeraj Sharma on his motorcycle. It is alleged that when injured Vishal came out of the gate of the college then accused persons namely Santosh Kumar, Saurav and Aadesh were standing. It is alleged that accused persons asked the injured to alight from his motorcycle. It is further alleged that as soon as injured alighted from the motorcycle all the accused persons started beating injured with fist and leg blows. It is further alleged that co-accused caught hold the injured from his arms and legs and co-accused Santosh Kumar gave a blow of 'Khukhri' (Sharp edged weapon) on the head of injured. It is further alleged that accused persons also proclaimed that they would kill injured namely Vishal. It is further alleged that after receiving blows of 'Khukhri' (Sharp edged weapon) injured Vishal became unconscious and fell down. It is further alleged that injured was saved by Neeraj Sharma, Pankaj Kumar and Tain Singh who brought the injured to hospital for his medical treatment. It is further alleged that 'Khukhri' (Sharp edged weapon) recovered. It is further alleged that Medical Officer has given opinion that injury upon the body of injured was dangerous to life.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Deputy Advocate General appearing on behalf of State and Court also perused the entire record carefully.

4. Following points arises for determination:

(1) Whether bail application filed by co-accused Saurav is liable to be accepted as mentioned in memorandum of grounds of bail application?

(2) Final Order.

Findings upon Point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of co-accused Saurav Kumar that Saurav did not commit any offence as alleged by the investigating agency cannot be decided at this stage of the case. Same fact will be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

6. Submission of learned Advocate appearing on behalf of co-accused Saurav that investigation is completed in the present case and petitioner is not required for investigation purpose and petitioner is a student of BA-IIIrd year and he has to appear in coming examination and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered (1) Nature and seriousness of offence. (2) Character of evidence. (3) Reasonable possibility of the presence of accused in trial or investigation. (4) Reasonable apprehension of witnesses being tampered with. (5) Larger interest of the public or State. See AIR 1978 Apex Court 179 ***Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see AIR 1962 Apex Court 253 ***The State Vs. Captain Jagjit Singh.*** It is well settled law that grant of bail is rule and committal to jail is an exception. It is also well settled law that refusal of bail is restriction on the personal liberty of individual guaranteed under Article 21 of the Constitution of India. It is well settled law that it is not in the interest of justice that accused should be kept in jail for an indefinite period. See **2012 Criminal Law Journal 702 Apex Court Sanjay Chandra Vs. CBI.** In the present case accused is in judicial custody and accused is not required for investigation purpose. In the present case weapon is also recovered by the investigating agency. There is no report of investigating agency that injured namely Vishal is admitted in the hospital as in-door patient as of today. In view of the fact that petitioner is a student and in view of the fact that petitioner is not required for investigation purpose by the investigating agency and in view of the fact that trial will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the petitioner on bail.

7. Submission of learned Deputy Advocate General appearing on behalf of the State that if petitioner is released on bail at this stage then petitioner will induce and threat prosecution witnesses and on this ground bail application be declined is rejected being devoid of merits for reasons hereinafter mentioned. Co-accused Saurav has given undertaking that he would not induce or threat prosecution witnesses. It is held that conditional bail will be granted to co-accused Saurav. It is held that if co-accused Saurav will flout terms and conditions of conditional bail then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail as provided under section 439(2) Code of Criminal Procedure 1973. In view of the above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order).

8. In view of my findings on point No.1 above bail application filed by co-accused Saurav under Section 439 of Code of Criminal Procedure 1973 is allowed on furnishing personal bond in the sum of Rupees One lac with two sureties in the like amount to the satisfaction of learned Trial Court on following terms and conditions. (1) That co-accused Saurav will join investigation whenever and wherever directed by investigating officer in accordance with law. (2) That co-accused Saurav will regularly attend proceedings of learned Trial Court till conclusion of trial. (3) That co-accused Saurav shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing facts to the investigating officer or to the Court. (4) That co-accused Saurav will not leave India without prior permission of the Court. (5) That co-accused Saurav will not commit similar offence qua which he is accused. Observations made hereinabove will not effect merits of the case in any manner and will be strictly confined for disposal of present bail application. Cr.MP(M) No.1400/2016 is disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh and another ....Appellants.
Versus
Shakuntla Devi and others ....Respondents.

RSA No.: 562 of 2007
Reserved on:16.11.2016
Decided on: 30.11.2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiffs pleaded that suit land was jointly possessed by S and D as tenants – it was succeeded by the plaintiffs after the death of S and D- proceedings for ejectment were initiated against the plaintiffs on the basis of ejectment order passed by SDO (Civil) against D- the order was a nullity as no notice was issued to D – the defendants pleaded that the suit land was granted to S and D but the allotment was cancelled on the ground that land was not utilized for the purpose for which it was granted- suit was dismissed by the Trial Court- an appeal was preferred, which was allowed – held in second appeal that the possession of the plaintiffs and the fact that ejectment proceedings were initiated against the plaintiffs were not disputed – plaintiffs were not parties to the earlier ejectment proceedings- even if the plaintiffs are tress passers, they cannot be ejected except in accordance with law- Appellate Court had rightly restrained the defendants from ejecting the plaintiffs – appeal dismissed. (Para-11 to 14)

For the appellants. : Ms. Parul Negi, Dy. Advocate General.
For the respondents : Mr. S.C. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the State has challenged the judgment and decree passed by the Court of learned Additional District Judge, Solan, in Civil Appeal No. 3-S/13 of 2006, dated 28.04.2006, vide which, learned Appellate Court while accepting the appeal filed by the plaintiffs set aside the judgment and decree passed by the Court of learned Civil Judge (Sr. Divn.) Kandaghat, District Solan, in Civil Suit No. 18-K/1 of 2001 dated 24.10.2005.

2. Brief facts necessary for the adjudication of this case are that respondents/plaintiffs (hereinafter referred to as 'plaintiffs') filed a suit for declaration and permanent prohibitory injunction to the effect that Shivia and Dayal Chand were real brothers and inducted as tenants by Gram Panchayat Satrol, Tehsil Kandaghat in the year 1956 as they were possessing land comprised in Khasra No. 833/8 min, measuring 10-00 bighas, situated in Mauza Satrol, Tehsil Kandaghat, District Solan, H.P. (hereinafter referred to as 'suit land'). Further as per the plaintiffs, the suit land was jointly possessed by Shivia and Dayal Chand. Shivia died in the year 1974 and after his death, he was succeeded by Smt. Prago Devi. Shivia had no children. Smt. Prago Devi who possessed the suit land jointly with Dayal Chand died about nine months back (from the filing of suit) and she being issueless was succeeded by the plaintiffs and proforma defendants. It was further the case of the plaintiffs that after the death of Smt. Prago Devi, suit land came to be jointly possessed by the plaintiffs and proforma defendants, as such, plaintiffs were also tenants in possession of the suit land and the defendants had no right to dispossess the plaintiffs from the suit land except in due course of law. As per plaintiffs, learned A.C. 2nd Grade, Kandaghat had initiated ejectment proceedings for dispossessing the plaintiffs from the suit land without issuing any process to the plaintiffs or their predecessor in interest Smt. Prago and /or Shivia alia Shiv Ram. Further, as per plaintiffs, it had come to their notice that said proceedings had been initiated on the basis of a ejectment order which was

passed against Dayal Chand (proforma defendant) by Sub Divisional Collector in case No. 2-8/98 dated 20.01.2001 as well as on the basis of order dated 24.11.1997 passed by A.C. 2nd Grade Kandaghat in case No. 5/13 of 1997 dated 24.11.1997. It was further the case of the plaintiffs that the said order was illegal as at no point of time, plaintiffs or their predecessor in interest Smt. Prago or Shivia were issued notice under Section 163 of the H.P. Land Revenue Act. On these bases, it was urged by the plaintiffs that order dated 20.01.2001 passed by Sub Divisional Collector Kandaghat and order dated 24.11.1997 passed by A.C. 2nd Grade, Kandaghat were illegal, null and void and not binding on the rights, title or interests of the plaintiffs and same cannot be executed against the plaintiffs and the plaintiffs cannot be disposed from the suit land on the basis of said orders. The plaintiffs thus prayed for the following reliefs

> *"a) a decree for declaration to the effect that the judgments/orders dated 20.01.2001 passed in case No. 2/8 of 1998 by the Sub Divisional Collector Kandaghat and the order dt. 24.11.1997 passed by A.C. 2nd Grade Kandaghat in case No. 5/13 of 1997 are wrong, illegal, null and void abinitio and are not binding on the rights, title and interests of the plaintiffs and the same cannot be executed against the plaintiffs and the plaintiffs cannot be dispossessed from the suit land which is joint one under the garb of said orders;*
>
> *b) a decree for permanent prohibitory injuncti9on restraining the defendants from interfering in the suit land, and ousting/dispossessing the plaintiffs from the suit land comprised in Khasra No. 833/min, measuring 10-00 bighas, situated in Mauza Satrol, Tehsil Kandaghat, District Solan, except in due process of law either by themselves or through their agents, servants, assigns, officials whosoever in any manner whatsoever;*
>
> *c) the costs of the suit."*

3. The suit so filed by the plaintiffs was contested by the defendants. It was denied by the defendants that orders challenged in the civil suit were illegal. It was further mentioned in the written statement that the orders passed by the Revenue Officers were binding upon all concerned as plaintiffs had no right, title or interest over the land in dispute granted to Shivia and Dayal Chand was cancelled by learned Collector, Kandaghat, vide order dated 20.03.1991, on the ground that the land was not put to use by the lessee for the purpose for which it was leased out and Department of Forest had already planted 'Cheel' trees on the said land. It was further mentioned in the written statement that Dayal Chand had also approached the High Court by filing a writ petition which was dismissed as infructuous on 27.05.1993 and, therefore, it was contended by defendants No. 1 and 2 specifically that plaintiffs were estopped to file the suit.

4. On the basis of pleadings of the parties, learned trial Court framed the following issues:-

> *"1. Whether the plaintiffs are entitled for the declaration that the order dated 20.1.2001 in case No. 2/8/98 by Sub Divisional Collector, Kandaghat and order dated 24.11.1997 passed in case No. 5/13 by A.C. IInd Grade, Kandaghat, are illegal and void, as alleged? OPP.*
>
> *2. In case, Issue No. 1 is held to be in affirmative, whether the plaintiffs are entitled for the relief of prohibitory/ permanent injunction, as claimed? OPP*
>
> *3. Whether the suit is not maintainable for want of service of legal notice under Section 80 C.P.C? OPD 1 and 2.*
>
> *4. Whether the plaintiffs are not competent to maintain the present suit? OPD 1 and 2.*
>
> *5. Whether the plaintiffs have no locus standi to file the present suit? OPD 1 and 2.*
>
> *6. Relief."*

5. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective cases, the issues so framed were answered by the learned trial Court as under.

"Issue No.1	*: No.*
Issue No. 2	*: No.*
Issue No. 3	*: No.*
Issue No. 4	*: Yes.*
Issue No. 5	*: Yes*
Issue No. 6 (Relief)	*: Suit dismissed as per operative part of Judgment."*

6. Learned trial Court while dismissing the suit filed by the plaintiffs held that Ext. DW3/G, copy of Jamabandi for the year 1986-87, demonstrated that five bighas of land for five years i.e. from 1984 to 1989 was leased to Dayal Chand on Rs. 5/- as rent and order of Collector Ext. DW2/C demonstrated that said lease was cancelled by the Collector vide order dated 20.03.1991. Learned trial Court further held that land had not been reclaimed by the lessee, so the lease had been cancelled by the Collector and as Shivia died in the year 1974, therefore, when he passed away, at that time, he was having no right, title or interest over the suit property. Learned trial Court further held that matter was in fact not even agitated in the years between 1979 to 1984 when fresh lease was granted in favour of Dayal Chand by the State of H.P and none of the plaintiffs or proforma defendants had prayed to the revenue agencies that share of Shivia had devolved upon them. It was further held by the learned trial Court that plaintiffs alongwith proforma defendants remained silent during the eviction proceedings regarding the share of Shivia and after the final order was passed by Sub Divisional Collector, Kandaghat in the year 2001, the present suit was filed rather than taking recourse against the said eviction proceedings/orders. Learned trial Court further held that there was no evidence on record to show that Shivia was lessee after the year 1974 over the suit land, therefore, plaintiffs could not agitate the matter regarding eviction qua the land which was allotted to Dayal Chand as Shivia was not in picture after the year 1974. On these bases, it was held by the learned trial Court that orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat respectively were neither illegal nor void. It was further held by the learned trial Court that as Dayal Chand was the only lessee of the suit land after the year 1978, therefore, plaintiffs could not be permitted to agitate their rights under the principles of natural justice also. Learned trial Court also held that after the death of Shivia, initially his wife succeeded him but as she died issueless, therefore, next line of legal heirs, i.e. plaintiffs and proforma defendants succeeded the estate of Shivia. It further held that as Shivia had no right, title or interest in the suit property as only five bighas of land was allotted to Dayal Chand and he had not succeeded Shivia but a new lease was granted in his favour and same stood cancelled by the competent authority in due course of law, therefore, plaintiffs although were legal heirs of Shivia but they had no right, title or interest to agitate the orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat respectively. On these bases, learned trial Court dismissed the suit.

7. Feeling aggrieved by the said judgment and decree, the plaintiffs filed an appeal. Learned Appellate Court vide its judgment and decree dated 28.04.2006 allowed the appeal so filed and reversed the judgment and decree passed by the learned trial Court.

8. While allowing the appeal, it was held by the learned Appellate Court that learned trial Court committed grave error by holding that orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat could not be declared illegal, null and void because these orders were passed behind the back of plaintiffs who were not parties to the said proceedings and hence, plaintiffs were not bound by them. Learned Appellate Court further held that learned trial Court committed grave error in declining relief of permanent prohibitory injunction to the plaintiffs as the findings returned by the learned trail Court on issues No. 1 and 2 were contrary to the evidence adduced on record and law point involved therein. While arriving at the said conclusion, it was held by the learned Appellate Court that evidence produced on record by the plaintiffs established that Shivia and Dayal Chand were inducted as tenants over the suit land by Gram Panchayat Satrol and after the death of Shivia,

his share was succeeded by Smt. Prago Devi and after her death, estate of Shivia was succeeded by plaintiffs and proforma defendants and they were coming in join possession over the suit land. Learned Appellate Court further held that it stood proved on record that no ejectment proceedings were initiated by Assistant Collector 2nd Grade against the plaintiffs nor they were made party in the ejectment proceedings initiated against proforma defendant Dayal Chand. It was further held by the learned Appellate Court that while DW3 proforma defendant Dayal Chand had admitted the claim of plaintiffs, DW1 Govind Ram, Patwari had stated that he had issued certificate Ext. DW1/A, as per which, after the death of Shivia, his property was succeeded by his wife Smt. Prago Devi. It was further held by the learned Appellate court that DW3 had stated that after the death of Shivia in the year 1974, his share was inherited by his wife Smt. Prago Devi and after her death, her share was succeeded by the plaintiffs and the proforma defendants and he also admitted that plaintiffs and proforma defendants were in joint possession of the suit land. Learned Appellate Court further held that plaintiffs were never ordered to be ejected from the suit land by any revenue authority as no ejectment proceeding was initiated against them and further they being in joint possession of the suit land could not be dispossessed forcibly from the suit land by the defendants except in due course of law and on these bases, it allowed the appeal and decreed the suit in the following terms

> *"The Judgement and decree passed by the learned lower Court is not in accordance with law and is not in accordance with the pleadings of plaintiffs and defendants. As such, the same judgment and decree is to be set aside and suit of the plaintiffs is to be decreed as a whole. Appeal is as such allowed with no order as to cost. Accordingly the impugned judgment and decree dated 24.10.2005 passed by learned trial Court are set aside and findings are quashed. As such decree for declaration and permanent prohibitory injunction is passed in favour of plaintiffs and against defendants No. 1 and 2. The impugned orders dated 20.01.2001 passed by Sub Divisional Collector Kandaghat and order dated 24.11.1997 passed by A.C-II Kandaghat being illegal, null and void are set aside having no binding effects on the rights of plaintiffs qua the suit land. Consequently the decree for permanent prohibitory injunction restraining defendants from interfering over land or dispossessing the plaintiffs forcibly from suit land bearing Khasra No. 833/8 min, measuring 10 bighas situated at Mauja Satrol, Teh. Kandaghat is passed in favour of the plaintiffs and against the defendants No. 1 and 2."*

9. Feeling aggrieved by the said judgment and decree passed by learned Appellate Court, State has filed this appeal, which appeal was admitted on 16.07.2008 on the following substantial questions of law

> *"1. Whether after expiry of lease period or its cancellation the legal representatives of original Lessee can claim any right over the leased property by way of inheritance that too without challenging the cancellation order passed by the competent authorities during the life time of original lessee?*
>
> *2. Whether the Civil Suit filed by the plaintiffs is sheer abuse of the process of law especially when ejectment orders passed in respect of the lease property have been unsuccessfully challenged upto the Hon'ble High Court by the Original lessee?"*

10. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

11. The factum of plaintiffs being in possession of the suit land has not been denied by the defendants/State. It is also not a disputed factual position that the State sought the eviction of the plaintiffs on the basis of orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat respectively and the proceedings out of which the said orders have culminated were filed against Dayal Chand and not against plaintiffs. The factum of plaintiffs having succeeded the estate of Shivia after the death of

Shivia and thereafter Smt. Prago Devi is also not disputed by the State. However, as per the appellants/State, the suit land was never leased out to Shivia but was only leased out to Dayal Chand and it is on these bases that the State has defended the orders passed by the revenue authorities which were challenged by way of civil suit filed by the plaintiffs.

12. In my considered view, taking into consideration the fact that plaintiffs were not the party in the eviction proceedings which culminated into orders dated 24.11.1997 and 20.01.2001, passed by Assistant Collector 2nd Grade and Sub Divisional Collector, Kandaghat respectively, by no stretch of imagination, the eviction of the plaintiffs from the suit property could have been sought by the State on the strength of the said orders. These orders having been passed against Dayal Chand were enforceable only against Dayal Chand. It is not the case of the State that the plaintiffs were also impleaded as party in the said eviction proceedings. In these circumstances, it is not understood as to how the orders which have been passed by the revenue authorities in proceedings initiated against Dayal Chand can be enforced against the plaintiffs. When as per the appellants/State, plaintiffs were coming in joint possession of the suit land then it is but obvious that the plaintiffs are to be dispossessed from the suit land by due process of law. Adjudication in eviction proceedings against Dayal Chand cannot be termed to be "due process of law" for the purpose of evicting the plaintiffs from the suit land when the plaintiffs were not party to the said eviction proceedings. This Court is not even remotely suggesting that the plaintiffs have a right to remain in possession over the suit property on the grounds which have been taken by them in civil suit. However, law demands that even if plaintiffs are trespassers over the suit land and have no right, title or interest over the same, even then they have to be evicted from the same by following the procedure established by the law. Whether after the expiry of lease period or cancellation of the lease deed, legal representatives of the original lessee can claim right over the leased property by way of inheritance is an issue which can be decided by the competent authority once appropriate proceedings are initiated against the plaintiffs before it. Similarly, it cannot be said that civil suit filed by the plaintiffs was abuse of the process of law because the ejectment orders on the basis of which the appellants/State was seeking the ejectment of the plaintiffs were admittedly not passed against the plaintiffs nor were the plaintiffs party in the said ejectment proceedings.

13. A perusal of the judgment passed by the learned Appellate Court demonstrates that it has taken into consideration all these aspects of the matter while concluding that the plaintiffs were never ordered to be ejected from the suit land by any revenue authority as no ejectment proceedings were initiated against them. Similarly, learned Appellate Court correctly held that plaintiffs being in joint possession of the suit land could not be forcibly dispossessed from the suit land by the appellants/State except in due course of law. However, in my considered view, the declaration given by learned Appellate Court to the effect that order dated 20.01.2001 passed by the Sub Divisional Collector, Kandaghat and order dated 24.11.1997 passed by A.C. 2nd Grade are illegal, null and void and are set aside, is not sustainable because these orders are not illegal, null and void as far as Dayal Chand is concerned though they are not enforceable against the plaintiffs. The findings returned by the learned trial Court that these orders have no binding on the rights of the plaintiffs qua the suit land is the correct finding.

14. Therefore, while upholding the judgment and decree passed by the learned Appellate Court to the extent that decree for declaration and permanent prohibitory injunction is passed in favour of the plaintiffs and against defendants No. 1 and 2 restraining them from interfering over land or dispossessing the plaintiffs from the suit land except in due process of law, decree passed by the learned Appellate Court to the extent that order dated 20.01.2001 passed by the Sub Divisional Collector, Kandaghat and order dated 24.11.1997 passed by A.C. 2nd Grade are illegal, null and void is set aside. It is held that these two orders have no binding effect on the rights of the plaintiffs qua the suit land and that the plaintiffs cannot be forcibly dispossessed from the suit land except by following the procedure established by law. Substantial questions of law are answered accordingly. With the said modification in the judgment and decree passed by the learned Appellate Court, appeal is partly allowed to the extent mentioned

hereinabove. No order as to costs. Pending miscellaneous application(s), if any, also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Tara Singh ...Petitioner.
Versus
Govind Singh (deceased) through LRs. ...Respondent.

CMPMO No. 313/2016
Reserved on: 24.11.2016
Decided on: 30.11. 2016

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed- original judgment debtor was stated to have violated the judgement and decree – he died and an application was filed for bringing on record his legal representatives, which was dismissed by the Executing Court- held, that a decree for permanent prohibitory injunction can be executed by the decree holder or his legal representatives against the judgment debtor or his heirs or even the transferee of the judgment debtor, who is the purchaser pendent lite- the order passed by the Trial Court set aside and the application allowed- Court directed to decide the execution petition afresh. (Para-6 to 27)

Cases referred:
Amritlal Vadilal vs. Kantilal Lalbhai, AIR 1931 Bombay 280
Manilal Lallubhai Patel vs Kikabhai Lallubhai, AIR 1931 Bombay 482
Mubarak Begam and another vs Sushil Kumar and others, AIR 1957 Rajasthan 154
Minor Smt. Shanti Devi vs. Khandubala Dasi and others, AIR 1961 Calcutta 336
Ramchandra Deshpande vs. Laxmana Rao Kulkarni, AIR 2000 Karnataka 298
Kathiyammakutty Umma vs. Thalakkadath Kattil Karappan and others, AIR 1989 Kerala 133
Idrish vs. Jaikam and others, (2009) 156 PLR 32
Shivappa Basavantappa Devaravar vs. Babajan, 1999 (Suppl.) Civil Court Cases 98 (Karnataka)
Mohd. Osman vs. Dr. Devid, 2011 (3) Civil Court Cases 42 (Bombay)

For the Petitioner: Mr. Ashok Kumar Tyagi, Advocate.
For the Respondent: Mr. Desh Raj Thakur, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

This petition, under Article 227 of the Constitution of India, is directed against the order passed by the Executing Court on 3.5.2016 whereby it dismissed the application filed by the petitioner-decree holder for substituting the legal heirs of the judgment debtor on account of his death.

2. The proceedings before the learned Executing Court emanate from the judgment and decree passed in favour of the petitioner-decree holder whereby the original judgment debtor Govind Singh was permanently restrained from interfering in the suit land comprised in Khata Khatauni No.397/681 bearing Khasra No.1675/112/4 measuring 14 biswa situated in Mauza Bhagani, Tehsil Paonta Sahib District Sirmaur, H.P.

3. The original debtor Govind Singh was alleged to have violated the judgment and decree leading to file the execution petition under order 21 rule 32 of the Code of Civil Procedure.

He, however, died and after his death, the petitioner moved an application for bringing on record his legal representatives, which has been dismissed by the learned Executing Court on the ground that wilful disobedience and violation of judgment and decree is a penal provision and its cause of action dies with the defaulter.

4. It is against this order that the present petition has been filed on the ground that the findings recorded by the learned Executing Court are totally perverse and based on misconstruction of law on the subject.

5. I have heard the learned counsel for the parties and have gone through the material placed on record.

6. At the outset, it would be necessary to refer to certain provisions of the Code of Civil Procedure:

> **"Section 50. Legal representative.**
>
> (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.
>
> (2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.
>
> **Section 146. Proceedings by or against**
>
> **representatives.**
>
> Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him.
>
> **Order 21 Rule 32 - Decree for specific performance for restitution of conjugal rights, or for an injunction**
>
> (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.
>
> (2) Where the party against whom a decree for specific performance or for an injunctions been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.
>
> (3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for [six months] if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

> (4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or here, at the end of [six months] from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.
>
> (5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.
>
> [Explanation.-For the removal of doubts, it is hereby declared that the expression "the act required to be done" covers prohibitory as well as mandatory injunctions.]

7. The moot question, as observed earlier, is as to whether learned Executing Court was right in observing that the wilful disobedience and violation of judgment and decree dies with the defaulter.

For deciding this issue, certain judgments on the subject may be noticed:

8. At the earliest point of time is the judgment rendered by the Bombay High Court in ***Amritlal Vadilal*** vs. ***Kantilal Lalbhai***, AIR 1931 Bombay 280 wherein it was held that the decree for injunction does not run with the land and in the absence of any statutory provision, such a decree cannot be enforced against the surviving members of a joint family or against a purchaser from a judgment-debtor. But where the sons of the judgment debtor are brought on record as his legal representatives under section 50 of the Code the decree can be executed against them and so also against the transferees from the legal representatives.

9. In ***Manilal Lallubhai Patel*** vs ***Kikabhai Lallubhai***, AIR 1931 Bombay 482, the Bombay High Court held that where a decree for an injunction had been obtained against the father and the son had not been joined as a party and the father died during the pendency of the execution petition, the decree can be enforced under section 50 of the Code against the son as his legal representative by proceeding under order 21 rule 32 of the Code.

10. A Division Bench of Rajasthan High Court in ***Mubarak Begam and another*** vs ***Sushil Kumar and others***, AIR 1957 Rajasthan 154 held that since the judgment debtor dies, his property devolves upon his heirs, and therefore, if the decree holder wants to satisfy the decree from the property which is inherited by them, then he must bring on record the legal representatives of the judgment debtor and so long as they are not impleaded, he cannot take steps which would effect their rights adversely.

11. Similar reiteration of law is found in the full Bench judgment of the Hon'ble Calcutta High Court in ***Minor Smt. Shanti Devi*** vs. ***Khandubala Dasi and others***, AIR 1961 Calcutta 336.

12. A Division Bench of the Hon'ble Karnataka High Court in ***Ramchandra Deshpande*** vs. ***Laxmana Rao Kulkarni***, AIR 2000 Karnataka 298 has held that the transferee judgment debtor is a person claiming under the original judgment debtors as their successor-in interest within the meaning of section 146 CPC and, as such, the decree holder can maintain an application for execution of the decree against him.

13. Hon'ble High Court of Kerala in ***Kathiyammakutty Umma*** vs. ***Thalakkadath Kattil Karappan and others***, AIR 1989 Kerala 133, while relying upon section 50 of the Code, held that where a judgment debtor dies before a decree is fully satisfied, the decree holder can apply to the executing court for implementation of the same against the legal representatives of

the deceased and such legal representatives shall be liable to the extent of the property which has come to their hands by way of inheritance.

14. Similar reiteration of law is found in the judgment of the Hon'ble Punjab and Haryana High Court in ***Idrish*** vs. ***Jaikam and others***, (2009) 156 PLR 32.

15. Learned Single Judge of the Punjab and Haryana High Court in ***Lajwanti*** vs. ***Anoop Kumar***, Civil Revision No. 6983/2013 decided on 24.9.2014 after placing reliance upon the judgment rendered by the Karnataka High Court in ***Ramachandra Deshpande***'s and its own High Court judgment in ***Idrish's*** case (supra) held that where the judgment debtor dies before the decree has been fully satisfied, the decree holder can apply to the Executing Court for implementation of the same against the legal representatives of the deceased.

16. Relying upon the aforesaid exposition of law, Mr. Ashok Kumar Tyagi, learned counsel for the petitioner, would vehemently argue that the findings recorded by the learned executing court are clearly erroneous as the same are based on a total misconception of law, and therefore, deserve to the set aside.

17. As against the aforesaid contention, Mr. Desh Raj Thakur, learned counsel for the respondent, would rely upon the judgment rendered by the ***Shivappa Basavantappa Devaravar*** vs. ***Babajan***, 1999 (Suppl.) Civil Court Cases 98 (Karnataka) to contend that the injunction is a personal remedy against a person, in particular, and therefore, once the person dies, the cause of action dies with him and does not pass on to the legal representatives.

18. In addition thereto, he would also contend that even on earlier occasion, the respondent had been arrayed as one of the judgment debtors in the Execution Petition and the same was held to be not maintainable by the Executing Court vide its decision dated 29.1.2011 and in view of said decision having attained finality, the present petition is not maintainable.

19. Reliance is further placed on the judgment rendered by the Hon'ble Bombay High Court in ***Mohd. Osman*** vs. ***Dr. Devid***, 2011 (3) Civil Court Cases 42 (Bombay) to contend that a decree in injunction is a decree in *personam* and the order of injunction does not run with the land, and therefore, it would be impermissible to execute the decree against the legal representatives of the deceased judgment debtor or transferee of judgment debtor, who is the purchaser *pendente lite*.

20. Having considered the rival submissions of the learned counsel for the parties, it can be taken to be more than settled that a decree for permanent injunction can be executed by the decree holder or his legal representatives against the judgment debtor or his heirs or even the transferee of the judgment debtor, who is the purchaser *pendente lite*.

21. As regards the judgments relied upon by the learned counsel for the respondent, after having gone through the same, I find that the ratio laid down therein has been totally misconstrued and misinterpreted.

22. In ***Shivappa's*** case(supra), the case was still at the appellate stage when the defendant-appellant died and it was under these peculiar facts and circumstances that the Hon'ble High Court of Kerala held that once a man dies, the cause of action dies with him and does not pass on to his legal representatives.

23. Now adverting to the judgment rendered by the Hon'ble Bombay High Court in ***Mohd. Osman's*** case (supra), it would be noticed that the ratio laid down in ***Amritlal Vadilal's*** case (supra) was re-affirmed and in fact supports the contention of the petitioner. Relevant observations read as under:

> "[7] The Division Bench of this Court in a case of"Krishnabai PandurangSalagare and others Vs. Savlaram Gangaram Kumtekar, 1927 AIR(Bom) 93, has held thus:

"Here the transfer was not under the authority of the Court, and it was made during the pendency of a contentious proceeding in execution of this decree. It seems to me that this transfer cannot be allowed to affect the rights of the present plaintiff. He is entitled to such order as he would have obtained under the darkhast if there had been no transfer. If the mere fact of the transfer were accepted as a ground for disallowing his application for execution, it would mean that the transfer is allowed to affect the rights of the plaintiff, which would be contrary to the provisions of S.52 of the Transfer of Property Act."

Even the Division Bench of this Court in a case of "Amritlal Vadilal Vs. Kantilal Lalbhai, 1931 AIR (Bom) 280, which the learned counsel for the appellant has relied has observed thus:

"The decree for injunction does not run with the land and in the absence of any statutory provision, such a decree can not be enforced against the surviving members of a joint family or against a purchaser from a judgment-debtor. But where the sons of the judgment debtor are brought on record as his legal representatives under Section 50 the decree can be executed against them and so also against the transferees from the legal representatives, under Section 52, T.P. Act. On the same principle, viz., that they are bound by the result of the execution proceedings under S.52, T.P. Act. The transferees from the original judgment-debtor during the pendency of execution proceedings against him, can be held to be similarly bound and are liable to be proceeded against in execution."

[8] The Division Bench of the Karnataka High Court in a case of "Ramachandra Deshpande Vs. Laxmana Rao Kulkarni, 2000 AIR(Kar) 298, relying on the aforesaid judgment of our High Court has held that a decree for injunction could be executed against the successor in interest of the deceased judgment debtor as well. Transferee pendente lite for all puiposes be the representative in interest of the judgment debtor."

24. Adverting to the second contention raised by the learned counsel for the respondent that the execution petition against the respondent is not maintainable as the execution petition against him already stands dismissed on 29.1.2011, I find that respondent was impleaded in the execution petition when his father was very much alive. Obviously, once the suit was only against the father of the respondent Sh. Govind Singh, therefore, the execution petition against the son, i.e. the present respondent was not at all maintainable at that stage.

25. Therefore, the order passed by the Executing Court at an earlier occasion on 29.1.2011 dismissing the Execution Petition against the present respondent is of no consequences, as the respondent is now sought to be impleaded in an entirely new capacity as legal representative in place of the original judgment debtor, who had died during the pendency of the execution petition.

26. In view of aforesaid discussion, the view taken by the learned court below is clearly erroneous, and therefore, not sustainable in the eyes of law and is accordingly set aside.

27. Learned court below shall restore the Execution Petition and the Application to its original numbers and then proceed to decide the same in accordance with law.

28. Having said so, the present petition is disposed of, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

H.P. State Forest Corporation .....Appellant
Versus
Nasib Singh .....Respondent

RSA No. 425 of 2006
Decided on: 10.08.2016

Code of Civil Procedure, 1908- Section 100- Contract for extraction of resin was awarded to the defendant – plaintiff pleaded that the target for extraction was 137.75 quintals, whereas, the defendant had extracted 94.11 quintals resin– the defendant is liable to pay compensation/damages for the difference of resin i.e. 43.64 quintals @ Rs.3,100 per quintals- the defendant pleaded that incessant rains during the pre-monsoon period dried the blazes and the trees fell due to high velocity winds – the requests were made to fix the blazes after excluding dried up blazes from which no extraction was possible – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held, that plaintiff had not led any evidence to prove the case – the defendant had denied his liability to pay the amount- the onus was upon the plaintiff to prove the case and in absence of evidence, Court had rightly held that case was not proved – there is no infirmity in the judgment passed by the Court – appeal dismissed – direction issued to initiate disciplinary proceedings against the concerned officer of the Forest Corporation.

(Para-8 to 11)

For the appellant: Mr. Bhupender Pathania, Advocate.
For the respondents: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur , Judge (Oral):

The appellant (here-in-after referred to as plaintiff) has filed suit for recovery of Rs.1,02,035/- from respondent (here-in-after referred to as defendant), on the basis of agreement, for extracting quantity of resin lesser than as was required to be extracted in a work of extraction awarded to defendant in Lot No. 6-R/97.

2. The suit as well as appeal filed by plaintiff-appellant were dismissed, assailing which present appeal has been admitted on following substantial questions of law:-

1. Whether the findings of the ld. Courts below are erroneous in as much as in not appreciating the fact that the respondent in his written statement has not denied the execution of the agreement and the fact that there had been short fall of resin at the time of extraction, though the short fall had been attributed by the respondent/defendant upon certain factors. Was not the respondent/defendant required to produce evidence at the first instance.

2. Whether the Trial Court below has committed grave irregularity and illegality in placing the onus upon the appellant/plaintiff to prove issue No.1.

3. Both above substantial questions of law are inter-linked, hence are considered together.

4. In the plaint, it has been pleaded that extraction target in the work awarded to defendant was 137.75 quintals, whereas defendant has extracted 94.11 Quintals resin and therefore, as per agreement defendant is liable to pay damages/compensation to plaintiff for the difference of resin i.e. 43.64 Quintals @Rs. 3100/- per Quintal.

5. Defendant had filed written statement disputing the claim of plaintiff assigning reasons for lesser extraction as incessant rains during the pre-monsoon period, dried up blazes and falling of trees on ground due to high velocity wind which were beyond his control. It is

further stated in the written statement that defendant had always been informing Officers of plaintiff and factors affecting yield of resin were well within the knowledge of plaintiff and defendant had also represented to plaintiff requesting to fix number of blazes after excluding dried up blazes from which no extraction was possible. He has disputed his liability to pay damages/compensation as claimed in the plaint.

6. The trial Court had framed issues and issue No.1 is as under:-

1. Whether the defendant has failed to extract the agreed quantity of resin as per agreement, as alleged? OPP.

7. It is claim of plaintiff that defendant had failed to extract agreed quantity of resin as per agreement. Therefore, onus of proving this issue was rightly placed on plaintiff. Plaintiff was supposed to substantiate his pleading by leading oral as well as documentary evidence.

8. No replication was filed on behalf of plaintiff. Despite granting six opportunities for leading evidence, plaintiff neither led any oral evidence nor tendered any documents in evidence for determining the issues framed by the trial Court. To adjudicate the controversy in lis, agreement was basic document to be looked into by the Court. Plaintiff has not bothered to prove its case by leading evidence and proving documents i.e. photocopy of agreement, letters and other documents filed with plaint in accordance with law. In the plaint, plaintiff has asserted his claim but in written statement defendant has refuted his liability to pay. In absence of any evidence led by parties, the trial Court as well as First Appellate Court has rightly decided that the claim of plaintiff is not proved and suit as well as appeal of plaintiff has rightly been dismissed by lower Courts.

9. It is true that defendant has not denied execution of agreement and shortfall in extraction of resin but the same is not sufficient to cast liability upon defendant to pay damages as prayed in the plaint because defendant has disputed his liability to pay and for determining such liability, terms of agreement are required to be examined. Though defendant has not denied execution of agreement however at the same time defendant has also not admitted that copy of agreement placed on record is the same which was executed between the parties and also it is not proved on record that the photocopy of agreement placed on record is the true copy of the agreement which was signed between the parties. It was for plaintiff to prove the agreement alleged to be signed between the parties in accordance with law enabling the Court to consider rival contentions of the parties. The onus was definitely on plaintiff to prove its case including documents relied upon in the plaint but plaintiff has failed to discharge his duty.

10. In view of above discussion, there is no infirmity, illegality or perversity in the judgment passed by the Lower Courts. The trial Court has conducted trial in consonance with law of land and both the courts below have correctly and completely appreciated the material placed before them. Substantial questions of law framed in present appeal are answered in above terms. No other point is urged. Therefore, no interference in impugned judgments is warranted in present appeal. Accordingly, appeal is dismissed with costs.

11. Before parting with case, I would like to say that plaintiff Corporation was claiming Rs. 1,02,035/- in the year 2000 from the defendant but despite six opportunities granted by Court, no evidence was led to establish claim of the Corporation. The public Corporation is also dealing with public money and loss to public exchequer caused by conduct of Officers/officials of Corporation certainly amounts to loss to people of State and ultimately loss to nation. In a suit filed by Corporation for recovery of an amount from defendant, there was no occasion or reason to Officers of plaintiff Corporation not to appear in witness box and/or not to lead any evidence in support of plaintiff Corporation. It cannot happen without connivance of Officer of plaintiff Corporation and opponent. It is glaring example not only of willful negligence in performing duty by the concerned Officers but also dereliction of duty for which stein action against officer responsible is required. Therefore, I am constrained to direct Managing Director of plaintiff Corporation to initiate disciplinary proceedings against the concerned Officers of Forest Corporation within two months of receipt of copy of judgment, especially against officer

holding the charge of the post concerned from August 2002 to July, 2003 and amount equivalent to loss caused to plaintiff Corporation be recovered from the erring Officers whether in service or retired, who was/were Incharge and responsible to monitor the case at the relevant point of time and in case there is lapse on the part of other officials/officers in placing the matter before concerned authority or taking necessary steps on their part, disciplinary proceedings also be initiated against them including effecting recovery from them also. Copy of this judgment be also sent to Managing Director of respondent who shall file compliance affidavit in Registry of this Court on or before 31.3.2017.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh .....Appellant

Versus

Ram Chander .....Respondent

Criminal Appeal No. 376 of 2012
Date of Decision: 17.08.2016

Indian Penal Code, 1860- Section 363, 366 and 376(I)- Prosecutrix was studying in class 8th – she had gone to school with her sister – the accused took the prosecutrix away forcibly on a bike – the matter was reported to police- the father of the accused produced the prosecutrix and the accused in the police Station- the accused was tried and acquitted by the Trial Court- held in appeal that the Medical Officer issued MLC stating that prosecutrix was habitual of sexual intercourse and it was not possible to assess the time of first sexual intercourse- no injury was found on the body of the prosecutrix – father of the prosecutrix was not examined as a witness – the prosecutrix and accused had travelled in a taxi – no complaint was made to the taxi driver – the prosecutrix had not made any efforts to resist and to raise alarm when she was taken from the school – prosecutrix had not complained to any person regarding her kidnapping – prosecutrix was not proved to be a minor – her radiological age was found to be between 15½ - 19 years – the prosecutrix was a consenting party and the accused was rightly acquitted by the Trial Court- appeal dismissed. (Para- 7 to 23)

For the appellant Mr. Puneet Rajta, Deputy Advocate General.
For the respondent Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

In the present case Investigating Agency was set in motion by complainant Raju Ram (father of PW-1 prosecutrix) by lodging FIR Ex. PW-13 in Police Station, Paonta Sahib stating therein that his daughter (prosecutrix) born on 22.07.1995, studying in 8th class, had gone to School on 15.07.2011 at about 8.30 AM with her sister Kiran, studying in 10th class. At about 9.00 AM, Kiran saw respondent-accused taking away prosecutrix forcibly on his bike and respondent did not stop even on raising alarm and prosecutrix was not traceable despite best efforts.

2. On 16.08.2011, PW-9 Suresh Kumar, father of respondent produced prosecutrix and respondent in Police Station Paonta Sahib. Respondent-accused was arrested and was medically examined. Prosecutrix was also medically examined and put in custody of her father.

3. After completion of investigation, challan was presented in the court. Respondent-accused was charge-sheeted under Sections 363, 366 & 376 (I) of India Penal Code.

On conclusion of trial, respondent-accused was acquitted. Hence, present appeal by State with prayer to convict respondent-accused.

4. We have heard learned counsel for the State as well as for respondent-accused and have also gone through the record.

5. After medical examination of prosecutrix, PW-10 Dr. Daljeet Kumar issued MLC Ex.PW-10/A opining that prosecutrix was used to sexual intercourse and prosecutrix must have sexual intercourse more than seven times and it was not possible to assess time of first sexual intercourse. There was no external or internal injury on her body.

6. Raju, father of prosecutrix was complainant, but he had neither been examined in Court nor he was cited as witness in challan presented in the Court. Prosecutrix was victim and her elder sister Kiran was witness to forcibly taking away the prosecutrix on 15.7.2011 by respondent-accused and they were examined as PWs-1 and 2. Therefore, before evaluating other evidence on record, veracity of statements of these witnesses is to be assessed.

7. PW-1 prosecutrix stated in the Court that on 15th July 2011 at about 9.00 AM, her sister entered the school but she remained standing outside the school and in the meanwhile, respondent arrived there and asked her to accompany him on his motorcycle by pretending that he was in love with her and wanted to marry. She stated that respondent also threatened to kill her in case of her refusal to accompany him. According to her, she was taken to Dhaulakuan by respondent on motorcycle under threat and thereafter she was taken to Nahan in car and from Nahan to Amritsar she was taken in bus where she stayed for 25 days in Gurudwara and respondent committed rape upon her in Dhaba in Amritsar where they stayed for 6 days. Thereafter they came back from Amritsar to Paonta Sahib by bus where PW-9 Suresh Kumar (father of respondent) met them who produced them in Police Station, Paonta Sahib. She also stated that respondent had not married her but had forced to put Bindi on her forehead. In her cross-examination she admitted that respondent was working in rest house near to their house who used to love her however she was not in love with him and she used to talk with him on telephone since about two months prior to the date of eloping with him. She had stated that she did not know about date, month or year of her birth. She also admitted that many persons met them at Girinagar, in bus and also at Amritsar but she did not make any complaint to any one. She was confronted with her statement made to police in which she had not stated that respondent-accused had threatened her to force her to sit on motor cycle.

8. PW-2 Kiran, sister of prosecutrix stated that on 15.07.2011, she had entered the school whereas prosecutrix had suddenly stopped outside the school gate and from second floor she noticed respondent, pulling her sister from arm and thereafter both of them sat on motorcycle and respondent had taken prosecutrix away on motorcycle and because of rainy day her effort to raise alarm was futile and then she came back home and narrated the entire incident to her mother and prosecutrix was traced after one month. She stated that prosecutrix had not cried when prosecutrix and respondent had gone on motorcycle. In examination in chief, she stated that she had tried to raise alarm, but due to rain it was in vain. However, in cross examination she stated that she had not cried when respondent and prosecutrix left the place on the motor cycle.

9. On 15.07.2011, prosecutrix and respondent had travelled from Dhaulakuan to bus-stand Nahan in Taxi No. UA-07-3881 owned and driven by PW-6 Ajay Gupta. In his cross-examination, he stated that during their journey in taxi both of them were happy and were talking to each other in joyful mood and on inquiry prosecutrix had stated that they were going just for enjoyment. As per him, prosecutrix had not complained that respondent-accused had brought her forcibly.

10. PW-9 Suresh Kumar is father of respondent who had produced respondent and prosecutrix in Police Station. He stated that prosecutrix had told him that she had voluntarily accompanied respondent to marry with him and that being above 18 years of age, she was free to marry a person of her choice.

11. Prosecutrix and her sister PW-2 Kiran had gone to school, prosecutrix remained outside gate of the school and on arrival of respondent, she accompanied him on his motorcycle to Dhaulakuan. As per PW-2 Kiran, respondent was pulling prosecutrix from her arm and thereafter prosecutrix sat over motor cycle. It is not possible for a person riding on a motorcycle to pull a grown up girl from arm and to make her to sit on motorcycle as a pillion rider against her wishes and consent that too at 9.00 AM in the morning. It is also not believable that person who was being forced to ride motorcycle made no efforts to resist or to raise alarm despite knowing that number of students including her sister were present in the school. Prosecutrix travelled with respondent to Dhaulakuan on motor cycle and thereafter accompanied him in a car from Dhaulakuan to Nahan and in bus from Nahan to Amritsar, stayed at Amritsar for 25 days and in Dhaba for 6 days and thereafter came back with him by bus to Paonta Sahib.

12. Though, prosecutrix had stated that respondent used to love her and she was not in love with him, however, she admitted that she was in talking term with respondent on mobile since about two months prior to eloping with him. At the time of making statement to police she had not stated that respondent had forcibly made her to sit on motor cycle by threatening to kill her. This fact was stated by her for the first time in the Court only. Prosecutrix admitted that number of persons had met them, but she had not complained to any person. Rather her statement made to PWs-6 and 9 indicate that she was accompanying respondent-accused on her own desire. Scrutiny of statements of PW-2, PW-6 and PW-9 and the prosecutrix indicated that prosecutrix was accompanying respondent-accused with her own will and free consent. From the conduct of the prosecutrix her consent was writ large.

13. The father of prosecutrix was neither cited as witness nor was examined in Court. PW-3 Suresh Kumar uncle of prosecutrix is witness to the identification of Dhaba in Roshnabad in U.P. and taking into possession of motorcycle used by respondent on 15th July 2011. He had accompanied father of prosecutrix for tracing her and thereafter lodging FIR in Police Station. Only witness to the alleged incident of forcibly taking away prosecutrix is PW-2 Kiran. There is nothing in her statement from which it can be elucidated that PW-1 was forcibly taken away by respondent on 15th July 2011.

14. There is ample evidence on record to infer that prosecutrix eloped with respondent with her will and consent. Despite consent of prosecutrix, respondent would be liable to be punished under Sections 363, 366 and 376 (1) IPC if she was below 16 years on 15.07.2011 and may face conviction under Sections 363 and 366 IPC only in case she was below 18 years but above 16 years of age on 15.07.2011.

15. For proving age of prosecutrix, her date of birth certificate issued from School Ex. PW-5/A, copies of Pariwar Register of Gram Panchayat Ex. PW-12/A and Ex. PW-12/B and report of Radiologist Ex. PW-11/A were relied upon by prosecution.

16. PW-5 Sudarshan Kaur, Head Mistress of School had issued copy of date of certificate of birth of prosecutrix Ex.PW-5/A. She stated that as per that certificate date of birth of prosecutrix was 15th July 1997. In cross-examination she admitted that entry of date of birth of prosecutrix in original register brought by her was not in her hand and the said original register did not contain opening date, certification of pages, total number of pages and authority by whom it was opened.

17. PW-12 Mohan Singh, Panchayat Secretary, Gram Panchayat, Sainwala proved photocopy of extract of pariwar register Ex. PW-12/A and copy of the same issued by him Ex. PW-12/B indicating date of birth of prosecutrix as 15th July 1997. This witness admitted that mother of prosecutrix was resident of District Kinnaur before her marriage and because of posting in Kinnaur, Raja Ram father of prosecutrix used to reside with his family in Kinnaur and prosecutrix was born in Kinnaur and therefore her date of birth was not entered in Death and Birth register maintained by Gram Panchayat, Sainiwal. He expressed his ignorance about the time when names of prosecutrix, her sister and mother were entered in the pariwar register. He did not know about the person who had entered their names in pariwar register. He was also having no knowledge that on whose instance those entries were made. He was unable to deny

that date of birth of prosecutrix was wrongly entered in pariwar register for want of documentary proof which was basis for entry of date of birth of prosecutrix in pariwar register. He stated that Death and Birth register was separately maintained in his Panchayat and in that register entry of birth of prosecutrix was not there. It is settled Law that entries of pariwar register are not conclusive proof of date of birth of a person.

18. PW-11 Dr. D.D. Sharma, Radiologist at Regional Hospital, Nahan had examined prosecutrix for determination of age on reference made by PW-10 Dr. Daljeet Kaur. As per his opinion rendered vide Ex.PW-11/A, age of prosecutrix as on 17th August 2011 was between 15½ to 19 years. In cross-examination he admitted that margin of two years could be given to the age assessed by him on the basis of report Ex. PW-11/A. PW-10 Dr. Daljeet Kaur on basis of report Ex. PW-11/A had again opined that the age of prosecutrix in August 2011 was between 15½ to 19 years.

19. In case of availability of valid, reliable and admissible documentary proof of date of birth, determination of age by medical expert may be ignored. But in present case documents relied upon by prosecution Ex.PW-5/A and Ex.12/A and Ex.12/B cannot be treated conclusive proof of age of prosecutrix for the reason that basis of entries made in school record, in pariwar register is not known. In view of admissions of PW-5 Sudarshan Kaur and PW-12 Mohan Singh, these documents cannot be said to be valid, admissible and reliable proof of date of birth of the prosecutrix particularly when father of prosecutrix, in FIR has stated date of birth of prosecutrix as 22.07.1995 which again renders date of birth mentioned in Ex. PW-5/A, Ex. PW-22/A and Ex. PW-12/B doubtful. In such eventuality opinion of medical expert became relevant. On the basis of evidence on a record exact date of birth of prosecutrix has not been proved nor there is any document on record conclusively proving that prosecutrix at the time of incident was below 18 years of age, rather, there is a opinion of medical expert indicating that prosecutrix may be more than 18 years in August 2011. As per medical evidence age of prosecutrix in August 2011 has been determined between 15½ to 19 years with further clarification that there may be variation of two years. Therefore, prosecution has failed to prove by leading admissible and convincing evidence that prosecutrix at the time of incident, was below 18 years of age. As per medical evidence there is possibility of her age above 18 years on the day of incident and when there two views are possible, view beneficial to accused is to be given preference. Therefore, prosecutrix is to be considered more than 18 years on the day of incident on the basis of material available on record.

20. Once prosecutrix is found to be above 18 years at the time of incident, then for her consents, respondent cannot be said to be guilty under Sections 363, 366 & 376 of the Indian Penal Code.

21. Respondent was examined under Section 313 of the Code of Criminal Procedure. He admitted his love affairs with PW-1 prosecutrix. In answer to question No. 22, he stated that he still wanted to marry with prosecutrix but she had deposed against him under pressure of parents and her relatives In totality of circumstances defence propounded by respondent appears to be convincing and based on truth.

22. Prosecution has failed to prove guilt of the accused beyond all reasonable doubts and there is no merit in the appeal. There is no illegality or perversity in impugned judgment. Learned trial Court has appreciated evidence on record completely and correctly on record.

23. Allegations of prosecutrix are not trustworthy, believable and convincing and therefore, her statement cannot be treated as cogent, reliable and convincing to convict the respondent under Sections 363, 366 and 376 of the Indian Penal Code.

24. The present appeal, devoid of any merit, is dismissed, so also the pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Surinder Mohan ..... Appellant.
Versus
Ramesh Kumar & Anr. ..... Respondents.

RSA No. 516 of 2007
Judgment reserved on: 24.10.2016
Date of Decision: 28th October, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is co-owner of the suit land – the defendants threatened to raise construction over the same- the defendants denied that suit land is owned jointly by the parties and claimed that an old abadi existed over the suit land- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that it was admitted that suit land is abadideh and has not been partitioned by metes and bounds – defendant No.1 had purchased a specific portion of abadi from defendant No. 2 and became a co-sharer – he was raising new construction by demolishing the old one – plaintiff has failed to prove his possession over abadi and is not entitled to the injunction – appeal dismissed. (Para-13 to 24)

Case referred:
Laxmidevamma and Others Vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant : Mr.Deepak Kaushal, Advocate.
For the Respondents: Ms.Shalini Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, is directed against the judgment and decree dated 30.8.2007, passed by learned District Judge, Sirmaur, District Nahan, H.P., affirming the judgment and decree dated 25.10.2005, passed by learned Civil Judge (Senior Division) Rajgarh, District Sirmaur, H.P., in Civil Suit No.81/1 of 2004, whereby suit for injunction filed by the plaintiff was dismissed.

2. In nutshell, facts of the case are that present appellant(hereinafter referred to as the plaintiff) filed suit seeking relief of permanent prohibitory injunction restraining the defendants(hereinafter referred to as the respondents) from raising construction or changing the nature of the land comprised in khata/ khatauni No.72min/116min, khasra Nos.1093/1022/1017, measuring 13 biswas situated in village Johana, Tehsil Pachhad, District Sirmaur, H.P (hereinafter referred to as the suit land). Plaintiff averred in the plaint that on 20.8.2004, defendants with mala-fide intention to raise construction over the suit land started digging the suit land with JCB Machine and in order to level the same for raising construction thereon without the consent of the plaintiff. Plaintiff further averred that since suit land is joint between the parties, the plaintiff being co-sharer is owner of every inch of the suit land till the same is legally partitioned by metes and bounds. Plaintiff further averred in the plaint that the suit land is precious land since it falls in front of Shimla-Dehradun road and defendants solely with a view to grab the best portion of the suit land has resorted to illegal construction over that portion of the land. In view of the aforesaid background, plaintiff filed suit for injunction against the defendants.

3. Defendants by way of filing written statement refuted the claim put forth on behalf of the plaintiff on the grounds of maintainability, locus standi, cause of action and misrepresentation of the facts. Defendants also denied the case of the plaintiff on merits by disputing the status of the plaintiff being co-sharer in the suit land. Defendant specifically

averred that there is old Abadi which belongs to them and they are raising construction of a dwelling house over which the old Abadi/house was situated. Defendants specifically denied that the suit land is joint between the parties, rather defendants claimed that plaintiff preferred the present suit with mala-fide intention in order to harass them.

4. Record reveals that the plaintiff did not file any replication and as such, averments contained in the written statement stood un-rebutted.

5. On the pleadings of the parties, the learned trial Court framed the following issues:-

"1. Whether the plaintiff is entitled for the relief of permanent injunction as prayed for? OPP.

2. Whether the suit is not maintainable in the present form? OPD.

3. Whether the plaintiff has no locus-standi to file the present suit? OPD.

4. Whether the plaintiff has no cause of action to file the present suit? OPD.

5. Relief.

6. The learned trial Court on the basis of the evidence adduced on record by the respective parties, dismissed the suit of the plaintiff vide impugned judgment and decree dated 25.10.2005.

7. Feeling aggrieved and dissatisfied with the impugned judgment dated 25.10.2005, passed by learned trial Court, appellant/plaintiff filed an appeal under Section 96 CPC in the Court of learned District Judge, Sirmaur, H.P, which came to be registered as Civil Appeal No.18-CA/13 of 2007/2005, however fact remains that learned District Judge, vide impugned judgment and decree dated 30.8.2007, dismissed the appeal preferred on behalf of the plaintiff/appellant and upheld the judgment passed by learned trial Court. In the aforesaid background, the present appellant-plaintiff approached this Court by way of Regular Second Appeal, praying therein for quashing and setting aside the impugned judgment passed by both the Courts below.

8. This Regular Second Appeal was admitted on the following substantial questions of law:-

"(1) Whether the land which is described as Shamlat land in revenue record can be used by only one co-owner without there being any partition of the land?.

(2). Whether the land described as Shamlat over which every villager/right holder having common rights can be used by an individual for the construction of his personal house which is obviously not for common purpose?

(3). Whether an individual can be said to be in possession of a Shamlat land without placing on record any evidence to this effect that the land has been partitioned and particular piece of land has been allotted to him?".

9. Mr. Deepak Kaushal, learned counsel representing the appellant, vehemently argued that the judgment passed by both the Courts below are not sustainable as the same are not based on correct appreciation of the evidence available on record and as such, same deserve to be quashed and set-aside. He further contended that both the Courts while non suiting the plaintiff have miserably failed to appreciate the evidence adduced on record by the plaintiff in support of his claim in its rights perspective, as a result of which, erroneous findings have been returned by both the Court and great prejudice has been caused to the plaintiff. Mr. Kaushal, further argued that Courts below failed to appreciate the fact that the land in question is "Shamlat Deh" and every co-owner has right over the "Shamlat land" and same can only be used for common purposes. He further stated that since every co-owner has right to use the "Shamlat land", one individual cannot be allowed to use the "Shamlat land" for his individual purpose. In

the present case, without there being legal partition, defendants resorted to construction over the suit land and as such, judgments passed by both the Courts below deserve to be quashed and set-aside.

10. Mr. Kaushal, while concluding his arguments, strenuously argued that both the Courts below have committed an error of law by deciding all the issues together and both the Courts have given findings qua all the issues contrary to the documents placed on record. Mr. Kaushal, further contended that suit land is classified as "Shamlat land" and have been kept by the villagers for common purposes, right to use common land cannot be given to any individual by infringing the rights of the other co-owners of the "Shamlat land". In this regard, he invited the attention of the Court to the jamabandis placed on record to demonstrate that since the land in question is "Shamlat land", it is not known/understood that on what basis defendants started raising construction over the portion of the suit land for personal purpose without ascertaining the extent of their share. In the aforesaid background, Mr. Kaushal, prayed for decreeing the suit after setting-aside the judgment and decree passed by both the Courts below.

11. Ms. Shalini Thakur, learned counsel representing the respondents, supported the judgment and decree passed by both the Courts below. Ms. Thakur, vehemently argued that bare perusal of the impugned judgment passed by both the Courts below, suggest that same are based upon correct appreciation of the evidence available on record and as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case. With a view to substantiate aforesaid argument, she specifically invited the attention of the Court to the judgment passed by both the Courts below to demonstrate that the Courts below have dealt with each and every aspect of the matter very meticulously and has returned concurrent findings of fact as well as law and as such, this Court has no occasion to differ with the concurrent findings returned by both the Courts below. Ms. Thakur, further contended that this Court has very limited power to re-appreciate the evidence when both the Courts below have returned concurrent findings on the facts as well as law. In this regard, to substantiate the aforesaid plea, she placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others Vs. Ranganath and Others, (2015)4 SCC 264.***

12. I have heard learned counsel for the parties and have gone through the record of the case.

13. In nutshell, it is admitted case of the parties that suit land is "Shamlat Deh" is used as Abadi and the same has not been partitioned by metes and bound. The defendant No.1, who purchased a portion of Abadi land from the defendant No.2, also became co-sharer over the suit land by virtue of sale deed. Until the land is partitioned by metes and bound the defendant No.1 cannot appropriate the land to his exclusive use to the disadvantage of the appellant/plaintiff. Plaintiff/ appellant, who claimed himself to be joint owner of the suit land claimed that the suit land is not legally partitioned and as such, defendants cannot be allowed to raise construction in the suit land, whereas defendants claimed that suit land is not joint between the parties, rather Abadi is situated in the suit land, which is now converted to new construction by dismantling old house existing over the suit land. Plaintiff in support of his contention placed on record certified copy of jamabandi for the year, 2002-03 Ex.PW1/A, perusal whereof clearly suggests that the suit land is recorded as "**Shamlat Deh Hasab Rasad Khewat".** In the column of remarks, it has been clearly reflected that defendant No.1, Ramesh Kumar son of Sh. Pratap Singh, has purchased the share of one of the possessor of the suit land namely Narayan Dutt. The total area of the suit land has also been depicted/ reflected to be constructed/ built up area. But careful perusal of Ex.PW1/A, nowhere reflect the name of plaintiff recorded either in the column of ownership or possession of the suit land.

14. Though, in Ex.PW1/B i.e list of share holders of the suit land, name of the plaintiff has been recorded as one of the shareholder in mauza, Johana, but interestingly, plaintiff nowhere claimed in the plaint that there exists any constructed area over the suit land, which is in his possession, whereas defendants by way of placing on record ample documentary evidence Ex.DW1/B, Ex.DW1/C, Ex.DW1/D and Ex.DW1/E successfully proved on record that

the suit land is built up area for the last so many years, which was further purchased by present defendant from one co-sharer namely Narayan Dutt.

15. Plaintiff primarily filed suit by placing reliance on the jamabandi for the year, 2002-03 Ex.PW1/A and the Farist Malkann (list of owners) Ex.PW1/B as recorded "Shamlat land" on the record. Plaintiff specifically placed reliance upon the document Ex.PW1/B, to demonstrate that he has a right in the shamlat land, but at the cost of repetition, it may be reiterated that though there is mention of the name of plaintiff/appellant as one of the right holder in the list of owners Ex.PW1/B in the Shamlat land, but there is no such reference of his being in possession of land described in the jamabandi Ex.PW1/A. Close reading of Ex.PW1/A, clearly suggests that the suit land has been recorded as "Gair Mumkin Abadi" and as per entry in the column of remarks (Kafiyat), two biswas of land out of aforesaid "Gair Mumkin Abadi" has been shown to be sold by defendant No.2 namely Narayan Dutt, who was admittedly co-sharer in the suit land, in favour of defendant No.1 on 15.6.2004. Similarly, shares of the other shareholders in respect of the suit land have been specifically mentioned in column No.5 of Ex.PW1/A, shown in the jamabandi, referred hereinabove. Interestingly, there are no pleadings that entries as reflected in Ex.PW1/A are illegal and as such, not binding on the rights of the plaintiff. Similarly, there are no pleadings in respect of the other shareholders including defendant No.1 as mentioned in column No.5 of the said jamabandi as illegal and not binding on the rights of the plaintiff, whereas defendants in written statement filed before the trial Court specifically in para No.2 claimed that **"there is an old Abadi which belongs to the defendants and they want to raise construction of dwelling house in the place of this Abadi and old house. The plaintiff has filed the present suit with mala-fide intention and only with a view to harass the defendants."** Aforesaid specific averments contained in the written statement have not been controverted in any manner by the plaintiff by way of replication or by way of ocular evidence led on record before the Court below. Careful perusal of the plaint filed by the plaintiff, clearly suggest that he filed the suit simplicitor for permanent prohibitory injunction without there being any challenge to the correctness of the revenue entries, perusal whereof clearly suggest that suit land is "Gair Mumkin Abadi", which has been further sold by defendant No.2 being its co-sharer in the suit land in favour of defendant No.1 on 15.6.2004.

16. Apart from this, as has been discussed hereinabove, shares of the shareholders in respect of the suit land stands mentioned in column No.5 of Ex.PW1/A. Similarly, this Court during the proceeding of the case had an occasion to peruse the entire evidence led on record by the parties, perusal whereof clearly suggest that plaintiff was not able to prove that there is no Abadi over the suit land, which is admittedly entered as "Shamlat Deh Hasab Rasad Khewat", rather plaintiff by stepping into the witness box stated that name of defendant No.2 has been wrongly incorporated in the column of possession in respect of the suit land and he started digging the land on 20.8.2004 but the same was rightly not considered by the Courts below since no such pleas, as have been discussed hereinabove, were incorporated in the plaint. It is well settled that in the absence of specific pleadings in the plaint, evidence, if any, led in that regard may not be required to be looked by the Court while deciding the controversy.

17. Apart from this, this Court had an occasion to peruse the documents placed on record by the defendants, especially copies of jamabandis for the year, 1967-68 Ex.DW1/B, 1972-73 Ex.DW1/C, 1977-78 Ex.DW1/D and 1992-93 Ex.DW1/E, perusal whereof clearly suggest that plaintiff or his predecessor-in-interest were not in physical possession of the suit land or part thereof at any point of time, rather documents referred hereinabove, clearly suggest that predecessor-in-interest of Narayan Dutt, defendant No.2 had been coming in possession of the suit land. Similarly, the old revenue record, as referred hereinabove, i.e. jamabandis , clearly reflects that the suit land is built up area for the last so many years. Plaintiff Surinder Mohan himself admitted that the suit land is recorded as "Abadi Deh" and said "Abadi Deh" is duly recorded in the revenue record since 1972. If the deposition of plaintiff is examined juxtaposing, averments contained in the plaint it itself falsify the claim of the plaintiff/ appellant that the suit land is jointly owned and possessed by the co-owners. In his cross-examination, he admitted that defendant No.2, Narayan Dutt sold the share in the suit land in favour of defendant No.1 and he

has not obtained any demarcation of the suit land. Defendants by leading cogent and convincing evidence in the shape of documentary evidence were able to prove on record that the suit land is "Abadi Deh" and thee upon built up structure exists, hence the version put forth on behalf of the plaintiff, which was not at all proved by the plaintiff by leading cogent and convincing evidence, was rightly rejected by the Courts below. Similarly, perusal of statement of PW-2, Vijay Kumar adduced on record by the plaintiff, nowhere suggests that he was able to prove the contents of the plaint, rather careful perusal of his statement leads to the conclusion that he did not know anything with regard to suit land because in his cross-examination, he himself admitted that he has no landed property in village Johana and he was working as Safai Karamchari in Tehsil Office, where plaintiff was patwari, whereas, defendant No.1,Ramesh Kumar while deposing before the Court specifically stated that the suit land is constructed portion, which he purchased from defendant No.2,Narayan Dutt. He further stated that old house was situated in the suit land, which was now being reconstructed.

18. DW-2, Narayan Dutt, supported the version put forth on behalf of DW-1, Ramesh Kumar, who categorically deposed that he sold his share in the suit land in favour of defendant No.1. He further stated that defendant No.1 is constructing new house on the same place where his old house was in existence. At the cost of repetition, it may be again stated that aforesaid factum of existence of old house as categorically mentioned in para-2 of the written statement was nowhere refuted by the plaintiff either in the shape of replication or by way of leading cogent and convincing evidence before the Court.

19. Similarly, DW-3, Parkash Chand, supported the version of DW-1 and DW-2, who categorically stated that plaintiff has no concern in the suit land. This Court also perused the cross-examination conducted on these witnesses, which nowhere suggests that plaintiff was able to shatter the testimonies of these witnesses, who unequivocally stated that DW-2 sold constructed portion to defendant No.1. One thing which also emerged from the reading of the plaint that the plaintiff nowhere made mention, if any, with regard to the constructed portion over the suit land, which otherwise appears to be correct after appreciation of the documentary evidence as well as oral evidence led on record by the defendants. Defendants placing reliance upon Ext.DW1/B, Ex.DW1C, Ex.DW1/D and Ex.DW1/E were able to prove on record that the suit land is built up area for so many years but plaintiff nowhere claimed in his plaint that there exists constructed portion over the suit land, rather, he claimed that he alongwith his family members and defendants were owners in possession of the suit land described in the jamabandi for the year, 2002-03 and there is no mention, if any, with regard to the built up area of the land referred hereinabove. Whereas defendants by leading cogent and convincing evidence in the shape of Ex.DW1/B, Ex.DW1/C, Ex.DW1/D and Ex.DW1/E successfully proved on record that the suit land is built up area and construction, if any, by defendant No.1 is being raised upon the same. Though, plaintiff termed revenue record reflecting defendant No.1 in the ownership of the suit land as illegal and wrong but same plea was rightly not considered by the courts below since there is /was no challenge, if any to the entries made in the revenue record.

20. Now coming to the argument having been raised by the learned counsel representing the plaintiff with regard to nature of the land i.e. Shamlat land. It is undisputed as per Ex.PW1/A that present plaintiff is one of the co-sharer in the shamlat land but that cannot be sufficient ground to conclude that the plaintiff had an cause of action for filing the suit against the defendants, who specifically proved on record that he purchased the specific portion of land from defendant No.2. Learned court below rightly came to the conclusion that since plaintiff specifically failed to challenge the status of the defendant No.2 being owner of the suit land to the extent of two biswas of land, who further sold the land to defendant No.1, suit filed by the plaintiff cannot be accepted.

21. Apart from above, status of defendant No.2 being owner of the suit land has not been specifically questioned and denied by the plaintiff and as per revenue record placed on record, it stands duly proved on record that "Gair Mumkin Abadi" exists on the suit land. Similarly, perusal of depositions made by DW-2 and DW-3 suggest that constructed portion of the

land was sold in favour of defendant No.1, meaning thereby specific portion of "Abadi" was purchased by defendant No.1, who on the said old Abadi started raising new construction by demolishing the old construction. Since, plaintiff failed to prove his physical possession, qua the Abadi owned and possessed by the defendants, Court below rightly not granted the discretionary relief of injunction in his favour.

22. Conjoint reading of evidence led on record, compel this Court to come to the conclusion that defendant No.1 successfully proved on record his exclusive possession over the suit land purchased by him from defendant No.2. It is well settled that co-owner, who is not in possession of any part of the property, is not entitled to seek injunction against another co-owner, who has been coming in exclusive possession of the common property, unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession. Since, in the present case, plaintiff was not able to prove his possession over the suit land being co-owner, his plea of making of construction or improvement by defendants on the alleged joint property may not be sufficient to conclude that he was being ousted from the common holding of the parties. There cannot be any dispute that Shamlat land recorded in the revenue record is used commonly by all the co-owners and all the villagers/right holders have common rights to use the same. Similarly, there cannot be any exclusive possession of "Shamla land" without there being partition among the right holders having common rights over the Samlat land. But in the present case, it stands duly proved on record that suit land i.e. "Gair Mumkin Abadi Hasab Rasad Khewat" is used as Abadi and in the column of remarks defendant No.1 namely Ramesh Kuamr has been shown as purchaser of share of one of the co-sharers/ possessor of the suit land namely Narayan Dutt. Similarly, it stands duly proved on record that the suit land sold by defendant No. 2 in favour of defendant No. 1 was constructed built up area. Whereas, name of plaintiff has been nowhere recorded either in the column of ownership and possession of the suit land. Revenue record placed on record in the shape of Ext.DW1/B, Ex.DW1/C, Ex.DW1/D and Ex.DW1/E, clearly establish on record that suit land is built up area of the last so many years and as such, there is no illegality and infirmity in the findings returned by both the Courts below that defendant No.1 purchased share of defendant No.2 in the suit land. Since, plaintiff/appellant could not establish his case legally before the Courts below, his prayer for injunction against the defendants was rightly rejected by the Court.

23. This Court sees no irregularity and infirmity, if any, in the judgments passed by both the Courts below, rather same are based upon correct appreciation of the evidence available on record. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since, both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others*, (2015)4 SCC 264**, herein below:-

> "16. Based on oral and documentary evidence, both the Courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the Courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."

24. Consequently, in view of the detailed discussion made hereinabove, present appeal fails and same is dismissed.

Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

****

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Ram Chand ....Petitioner.
Versus
Smt. Sunita Abrol ... Respondents.

Criminal Revision No.257 of 2010
Date of Decision: 1st November, 2016

Negotiable Instruments Act, 1881- Section 138- A complaint was filed alleging that accused had borrowed sum of Rs.40,000/- from the complainant – accused issued a cheque of Rs.40,000/- for re-payment of the amount, which was dis-honoured with the endorsement insufficient funds – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed on the ground that cheque was presented twice but the notice was issued only once- held in revision that cheque could have been presented many times during the period of validity- the notice was issued only second time – there was holiday on the last day of presentation and the cheque was presented on the next working day- Appellate Court had wrongly set aside the judgment of Trial Court- revision allowed and judgment of Appellate Court set aside while that of the Trial Court restored.(Para-8 to 15)

For the Petitioner : Mr. Umesh Kanwar, Advocate.
For the Respondent : Mr. N.K.Thakur, Senior Advocate, with Ms. Jamuna, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Instant Criminal Revision Petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, is directed against the judgment dated 4.10.2010, passed by learned Sessions Judge, Bilaspur, District Bilaspur, H.P. in Criminal Appeal No.1 of 2008, reversing the judgment of conviction passed by learned Judicial Magistrate 1st Class Court No.2, Ghumarwin, District Bilaspur, H.P. in case No.40/2 of 2005/1999, whereby the respondent (hereinafter referred to as the accused) was held guilty of having committed offence punishable under Section 138 of the Negotiable Instruments Act and accordingly convicted and sentenced the accused to undergo simple imprisonment for the period of three months and to pay a fine of Rs.2000/- and in default of payment of fine, to undergo simple imprisonment for a period of one month. The learned trial Court held the complainant entitled to compensation to the tune of Rs.80,000/- to be paid by the accused.

2. Briefly stated facts of the case as emerged from the record are that the petitioner (hereinafter referred to as the complainant) filed complaint under Section 138 of the Negotiable Instruments Act(hereinafter referred to as the Act) before the learned trial Court stating therein that the accused had borrowed a sum of Rs. 40,000/- from him as loan on 12.5.1998 and agreed to return the same within a period of three months alongwith interest, but despite several requests having been made by the complainant, accused failed to repay the aforesaid amount and finally the accused issued a cheque No.0936994, dated 12.10.1998 amounting to Rs. 40,000/- drawn on H.P. State Co-operative Bank Limited branch Office at Ghumarwin, in favour of the complainant, which on presentation in the bank by the complainant on 27.2.1999, was returned

by the bank with the endorsement "**insufficient funds"**. Complainant again presented the cheque for payment in the bank on 12.4.1999, however fact remains that same was again returned to the complainant with the remarks "**insufficient funds"** in the account of the accused. After receiving the aforesaid information from the bank, complainant got legal notice issued under Section 138 of the Act to the accused calling upon him to make the payment of the cheque amount within a period of 7 days from the receipt of the notice, but the accused failed to make the payment of the said cheque, as a result of which, complainant was compelled to file the complaint under Section 138 of the Act.

3. The learned trial Court on the basis of the evidence adduced on record, found accused guilty of having committed offence punishable under Section 138 of the Act and vide impugned judgment/order dated 29.12.2007/31.12.2007 convicted and sentenced the accused, as per the description given hereinabove.

4. Accused being aggrieved and dissatisfied with the impugned judgment of conviction and order of sentence passed by learned trial Court, filed an appeal under Section 374 of the Code of Criminal Procedure before the Court of learned Sessions Judge, Bilaspur, which came to be registered as Criminal Appeal No.1 of 2008. The learned Sessions Judge, vide impugned judgment dated 4.10.2010, accepted the appeal preferred by the accused and set-aside the judgment of conviction recorded by learned trial Court. Hence, in the aforesaid background, complainant approached this Court by way of instant Criminal Revision Petition, praying therein for quashing and setting-aside the impugned judgment dated 4.10.2010, passed by learned Sessions Judge, Bilaspur, H.P.

5. Mr. Umesh Kanwar, learned counsel representing the complainant, vehemently argued that the impugned judgment, passed by learned Sessions Judge, Bilaspur is not sustainable as the same is not based upon the correct appreciation of the evidence adduced on record by the complainant as well as law on the point and as such, same deserve to be quashed and set-aside. Mr. Kanwar, further contended that lower Appellate Court while accepting the appeal has miserably failed to appreciate the cogent and convincing evidence adduced on record by the complainant in its right perspective, as a result of which, great prejudice has been caused to the complainant. He further contended that complainant successfully proved on record by leading cogent and convincing evidence that the accused issued a cheque amounting to Rs. 40,000/- in favour of the complainant, which was dishonoured on account of "insufficient funds" in the account of the accused. While referring to the judgment passed by learned Sessions Judge, Mr. Kanwar, strenuously argued that bare perusal of the judgment suggests that learned Sessions Judge has not applied its mind while rejecting the complaint by holding that the complainant presented the cheque with the bank after expiry of six months. In this regard, Mr. Kanwar, specifically invited the attention of this Court to Section 25 of the Act, to demonstrate that since on 11.4.1999 there was holiday being Sunday, cheque could only presented on 12.4.1999. Mr. Kanwar, further contended the lower Appellate Court committed further illegality while recording the finding that no proper notice was issued to the accused within stipulated time by the complainant. With a view to substantiate his aforesaid argument, learned counsel representing the complainant invited the attention of the Court to the legal notice Ex.PW1/A, dated 17.4.1999 issued to the accused through postal receipt Ex.CA, dated 21.4.1999. He further contended that bare perusal of legal notice Ex.PW1/A, suggests that same was dated 17.4.1999 and if postal receipt dated 21.4.1999 is taken to be date of posting, even in that eventuality findings returned by the lower Appellate Court is totally contrary to the record that legal notice was not got issued within stipulated time by the complainant. Mr. Kanwar, while concluding his arguments, forcibly contended that reasoning of the lower Appellate Court is manifestly unreasonable and unsustainable as there was no occasion for the Court to disregard the well and consistent testimony of the complainant witnesses on material points and as such, impugned judgment passed by learned lower Appellate Court deserve to be quashed and set-aside.

6. Mr. N.K. Thakur, learned Senior Advocate, duly assisted by Ms. Jamuna, Advocate, supported the impugned judgment passed by learned lower Appellate Court. Mr.

Thakur, submitted that bare perusal of the judgment passed by learned lower Appellate Court is based upon the correct appreciation of the evidence available on record and as such, there is no scope of interference of this Court. Mr. Thakur, further contended that bare perusal of the judgment passed by the learned trial Court, suggests that the same was not based upon the correct appreciation of the evidence adduced on record by the respective parties, rather same was purely based on conjunctures and surmises and as such, was rightly quashed and set-aside by the learned lower Appellate Court while accepting the appeal preferred on behalf of the accused. Mr. Thakur, strenuously argued that it stands duly proved on record that the cheque Ex.PW2/M was deposited with the bank after expiry of six months and as such, there is no illegality and infirmity in the judgment passed by the learned lower appellate Court. Mr. Thakur, further contended that as per own case of the complainant, cheque in question was received by him from the bank with the endorsement "insufficient funds" on 12.4.1999, whereas legal notice Ex.PW1/A advising the accused to make the payment of the cheque amount within 15 days from the date of the receipt of the information from the bank was admittedly got issued after expiry of 15 days and as such, there is no illegality and infirmity in the judgment passed by the lower Appellate Court. Mr. Thakur, while concluding his arguments stated that bare perusal of the evidence led on record by the complainant, clearly suggests that there are major contradictions and as such, rightly discarded by the lower appellate Court while accepting the appeal. In the aforesaid background, learned counsel for the accused sought dismissal of the present revision petition.

7. I have heard learned counsel for the parties and have carefully gone through the record.

8. It is undisputed before me that accused issued a cheque amounting to Rs. 40,000/- in favour of the complainant on 12.10.1998 for consideration of amount which he had borrowed from the complainant. Learned trial Court on the basis of the material on record found accused guilty of having committed the offence under Section 138 of the Act and accordingly convicted and sentenced him as per the description given hereinabove. Learned Lower Appellate Court while accepting the appeal preferred on behalf of the petitioner-accused came to the conclusion that cheque Ex.PW2/M, dated 12.10.1998 was submitted before the bank twice. Learned lower appellate Court further concluded that since complainant presented the cheque in question twice in the bank on 27.2.1999 and 12.4.1999, it was incumbent upon him to issue notice to the petitioner-accused after receiving memo having endorsement" insufficient funds" from the bank on 27.2.1999. Learned Appellate Court further held that once cheque Ex.PW2/M was returned by the bank on 27.2.1999, notice ought to have been issued to the accused by the complainant as contemplated under clause (b) of proviso to Section 138 of the Act. Apart from above, learned appellate Court also concluded that thereafter cheque was presented after prescribed period of six months i.e. 12.4.1999 and as such complaint under Section 138 of the Act was maintainable.

9. After perusing the aforesaid findings returned by the learned lower appellate Court, this Court has no hesitation to conclude that the learned lower appellate Court has miserably failed to appreciate the fact that the cheque could be presented any number of times during the period of its validity by the payee and it is also well settled law that on each presentation of the cheque and its dishonour fresh right and new cause of action accrues in his favour and there is no bar under Section 138 of the Act to present the cheque before the bank for encashment after dishonouring the same at one occasion. True it is that if after getting intimation from the bank with regard to dishonour of the cheque, complainant gives a notice under clause(b) of Section 138 of the Act, he forfeits his right to present the cheque again with the bank even after getting memo of the bank indicating the reasons for dishonouring of the cheque because period of one month for filing the complaint would be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer, expires.

10. Admittedly, in the present case, complainant presented the cheque twice on 27.2.1999 and 12.4.1999, but fact remains that after getting intimation Ex.PW2/A from the bank

with regard to dishonour of the cheque, complainant chose not to send notice, as envisaged under clause (b) of proviso to Section 138 of the Act, rather he again presented the cheque on 12.4.1999 for payment in the bank. Since, on 12.4.1999 cheque was returned by the bank vide memo Ex.PW2/D with the remarks "insufficient funds", he got legal notice issued in terms of clause (b) to Section 138 of the Act, hence, there is no illegality, if any, committed by the complainant while presenting the cheque on second occasion i.e.12.4.1999 without intimating the accused with regard to dishonour of the cheque on 27.2.1999. Had the complainant informed the accused with regard to dishonour of the cheque on 27.2.1999, he would have forfeited his right to present the cheque again on 12.4.1999. Since, the complainant instead of intimating the accused with regard to dishonour of the cheque on 27.2.1999 again presented the cheque on 12.4.1999, there is no illegality, whatsoever, in presenting the cheque on second occasion by the complainant. As far as, another finding returned by the lower appellate Court that cheque Ex.PW2/M was presented with the bank after prescribed period of six months from the date on which it is drawn is also erroneous and without any basis. It is clearly proved on record that cheque Ex.PW2/M was presented by the complainant on 12.4.1999 i.e. after expiry of six months but on 11.4.1999. There was a local holiday being Sunday and the complainant presented the same on 12.4.1999, there is nothing on the record that the bank refused to accept the cheque on 12.4.1999 on the ground of validity, rather bank accepted the same and issued memo Ex.PW2/D with the endorsement "insufficient funds". Since, cheque was dated 12.10.1998, same was valid up to 11.4.1999 but as has been observed that on 11.4.1999 there was holiday being Sunday and as such, there was no occasion for the complainant to present the same on Holiday.

11. At this stage, it would be apt to reproduce Section 25 of the Act as under:-

> "**25. <u>When day of maturity is a holiday</u>:-** When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day."

12 Bare perusal of the aforesaid provision contained in the Act, clearly suggests that if on the day a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day. In the present case, since cheque was to expire on 11.4.1999, which was holiday being Sunday, instrument i.e. cheque was valid up to 12.4.1999 and as such, same was rightly accepted by the bank. Hence, in view of the provisions of law, this Court is not in agreement with the findings returned by the Court below that the complainant failed to deposit the cheque within the period of six months from the date on which it is drawn or within the period of its validity. There is no dispute that cheque in question was to expire on 11.4.1999, on which date, it was holiday being Sunday and as such, there is no delay, if any, on the part of the complainant to present the same on 12.4.1999. Similarly, this Court finds that learned lower appellate Court has fallen in grave error while concluding that the complainant failed to get the legal notice issued to the drawee of the cheque within the period of 15 days from the date of information from the bank. Admittedly, In the instant case, intimation with regard to dishonour of the cheque was received by the complainant from the bank on 12.4.1999. Complainant got issued legal notice Ex.PW1/A to accused through his counsel vide postal receipt Ex.CA. Perusal of Ex.PW1/A, clearly suggests that notice is dated 17.4.1999 and perusal of receipt Ex.CA, clearly suggests that same was posted on 21.4.1999, meaning thereby legal notice was got issued by the complainant well within 15 days from the receipt of the intimation from the bank. In the instant case, since intimation from the bank was received on 12.4.1999, it is not understood how the learned lower appellate Court came to the conclusion that the complainant failed to issue legal notice within prescribed period, as envisaged under Section 138 of the Act, even if the period is counted from the date of postal receipt Ex.CA, dated 21.4.1999, it can be easily concluded that legal notice was got issued within a period of 15 days from the date of receipt of intimation i.e. 12.4.1999. When, it stands duly proved on record that the complainant got legal notice issued on 21.4.1999 through postal receipt Ex.CA, presumption of due service of the notice would stand attracted.

13. It is not the requirement of law to state in the complaint that the notice was served on a particular date as notice is deemed to have been served with the addressee or he is deemed to have the knowledge of the notice unless and until contrary is proved at the stage of evidence. In this regard reliance is placed on the judgment of the Hon'ble Apex Court in the case of Ajeet Seeds Ltd. V. K. Gopala Krishnaiah, 2014(12) SCC 685. The relevant para Nos.4, 5 and 6 of the judgment are reproduced as under:-

> 4. The Proviso (b) & (c) appended to Section 138 of the Act lays down the conditions which are to be complied with before a complaint under Section 138 of the Act could be filed, which are quoted hereunder:--
>
> "138. Dishonour of cheque for insufficiency, etc., of funds in the account.-
>
> Provided that nothing contained in this section shall apply unless--
>
> (a) .....
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
>
> Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.
>
> 5. A perusal of Clauses (b) & (c) to the proviso would indicate that before a complaint could be filed, the payee or the holder in due course of the cheque, as the case may be, is to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and the drawer of such cheque fails to make payment of the said amount to the payee or as the case may be, to the holder in due course within 15 days of the receipt of notice.
>
> 6. The Apex Court in the case C***.C. Alavi Haji v. Palapetty Muhammed and another***, 2007 (6) SCC 555, held as under:--
>
> "10. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the G.C. Act would be attracted; the requirement of Clause (b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.
>
> 11. However, that the referring Bench was of the view that this Court in Vinod Shivappas case (supra) did not take note of Section 114 of Evidence Act in its proper perspective. It felts that the presumption under Section 114 of the Evidence Act being a rebuttable presumption, the complaint should contain necessary averments to raise the presumption of service of notice; that it was not sufficient for a complainant to state that a notice was sent by registered post and that the notice was returned with the endorsement out of station; and that there should be a further averment that the addressee-drawer had deliberately avoided receiving the notice or that the addressee had knowledge of the notice, for raising a presumption under Section 114 of Evidence Act.
>
> 12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Indian Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Indian Evidence Act, 1872 reads as follows:

> Section 114- Court may presume existence of certain facts -The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.
>
> Illustrations
>
> The Court may presume -
>
> (f) That the common course of business has been followed in particular cases.
>
> ....

13. According to Section 114 of the Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

> 27. Meaning of service by post -
>
> Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed. (Vide ***Jagdish Singh v. Natthu Singh AIR 1992 SC 1604; State of M.P. v. Hiralal and Ors (1996) 7 SCC 523 and V. Raja Kumari v. P. Subbarama Naidu and Anr (2004) 8 SCC 774.*** It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the

Court to draw presumption or inference either under Section 27 of the G.C. Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasis that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends."

14. In view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, this Court has no hesitation to conclude that once the notice under Section 138 of the Act is in writing to the drawer of the cheque within 15 days from the date of receipt of intimation from the bank, then presumption under Section 114 of the Evidence Act comes into play that registered notice was sent to the addressee of the cheque and it shall be deemed to have been served to the addressee. In the present case as clearly emerge from the record that legal notice Ex.PW1/A, dated 17.4.199 was sent through registered post on 21.4.1999 i.e within the period of 15 days from the receipt of intimation from the bank and as such, findings of the learned lower Appellate Court deserve to be quashed and set-aside being contrary to facts as well as law.

15. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, judgment passed by learned lower appellate Court deserve to be quashed and set-aside being contrary to the record as well as law. Accordingly, the present revision petition is allowed and judgment passed by learned lower appellate Court is quashed and set-aside. The respondent-accused is directed to surrender herself before the learned trial Court forthwith to serve the sentence as awarded by the learned trial Court.

Accordingly, the present petition is disposed of alongwith pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Amit Singh ...Petitioner.

Versus

State of H.P. & others ...Respondents.

CWP No.: 920 of 2016
Judgment Reserved on: 26.10.2016
Date of Decision: 3rd November, 2016.

Constitution of India, 1950- Article 226- Petitioner applied for the post of drawing master along with other persons- respondent No.6 was selected – petitioner contended that respondent No.6 was not qualified and there were cuttings and over writings in the result sheet- held, that there is no tampering in the result sheet and the marks were awarded as per the notification- two years diploma in Art and Crafts was required – respondent No.6 had obtained the diploma and was

eligible – the petitioner had participated in the selection process and could not have challenged the same – writ petition dismissed.(Para-8 to 19)

Cases referred:
Manish Kumar Shahi Versus State of Bihar and others 2010(12) Supreme Court Cases 576
Madan Lal & Ors versus The State of Jammu & Kashmir and Ors 1995(2) SLR 209
Lila Dhar v. State of Rajasthan, 1981 (4) SCC 159

For the Petitioner : Mr. Ajay Sharma, Advocate.
For the Respondents : Mr. Anup Rattan & Mr. Romesh Verma,Additional Advocate Generals and Mr. J.k.Verma, Deputy Advocate General, for respondents No. 1 to 5. Respondent No.6 already ex-parte.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

By way of present Civil Writ Petition filed under Article 226 of the Constitution of India, the petitioner has prayed for the following relief:-

> "(i) That selection and appointment of private respondent after summoning the appointment letter from the respondents may very kindly be quashed and set aside with direction to the respondents to reconsider the case of the petitioner by allowing him marks in consonance with annexure P-1 and select and appoint him as Drawing Master in Government Senior Secondary School, Haripur-Khol, Tehsil Paonta Sahib, District Sirmaur, H.P."

2. Briefly stated facts as emerged from the record are that pursuant to notice issued by the School Management Committee (for short 'SMC'), Government Senior Secondary School, Haripur-Khol, Tehsil Paonta Sahib, District Sirmaur, H.P, petitioner alongwith other candidates including respondent No.6 applied for the post of Drawing Master through 'SMC'. It also emerge from the record that the Deputy Director, Elementary Education granted permission to 'SMC' for appointing Drawing Master vide communication dated 15.11.2014 in above mentioned school. The 'SMC' after receipt of applications, conducted interviews on 2.11.2015, wherein respondent No.6 was declared selected and accordingly, he was engaged as Drawing Master in the school referred hereinabove. Since, present petitioner was not selected pursuant to interview aforesaid, he applied for certain information under Right to Information Act (for short 'RTI'). The respondents, pursuant to request having been made by the petitioner under RTI, supplied photocopy of result sheet prepared by the selection committee at the time of interview. As per the petitioner, there are cuttings with respect to the marks of interview, especially private respondent No.6, who has been declared selected and as such, entire selection process deserve to be quashed and set-aside.

3. Petitioner has further alleged that perusal of diploma certificate (annexure P-3) annexed by respondent No.6 alongwith his application, clearly suggests that same is not in consonance with the qualification, as prescribed in annexure P-1. Petitioner further alleged that respondent No.6 has allegedly passed diploma of Art & Crafts, which is not the qualification as prescribed in annexure P-1.

4. Mr. Ajay Sharma, learned counsel representing the petitioner, vehemently argued that bare perusal of the mark sheets, clearly suggests that the authorities concerned have tampered with the record solely with a view to offer appointment to respondent No.6 by ignoring other meritorious candidates including the petitioner. While referring to annexure P-3 i.e. certificate of diploma in Art & Crafts annexed by respondent No.6 at the time of his interview, Mr. Sharma, argued that same is not in consonance with the guidelines/regulations, as prescribed in annexure P-1 and as such, same could not be taken into consideration by the authority while

awarding marks in terms of the scheme of marking. Mr. Sharma, further stated that bare perusal of diploma annexure P-3, clearly suggests that respondent No.6 passed subjects of second year in first year, whereas subjects of first year in second year and as such, selection committee has erred in taking note of the same while awarding marks to respondent No.6 on the basis of the aforesaid certificate. Mr. Sharma, further stated that certificate annexure P-4, clearly suggests that petitioner has passed Applied Art & Craft course, which is equivalent to Bachelor of Arts and as such, interview committee ought to have granted more marks and as such, grave injustice has been caused to him. Learned counsel for the petitioner further claimed that as per notification annexure P-1, petitioner was entitled for grant of 10 marks, for the course of duration of three years, but he has been granted only 7.23 marks, which is not in accordance with the scheme of marking annexure P-1.Mr.Sharma,further contended that the petitioner at the time of interview produced experience certificate from H.P.Board of School Education and as such, he was also entitled to be given some marks on account of experience in terms of annexure P-1. Learned counsel for the petitioner while concluding his argument submitted that for three years duration course having undergone by the petitioner being equivalent of Bachelor of Arts, marks were required to be given to him and as such, respondents are liable to be directed to reconsider the case accordingly and prepare a fresh result sheet.

5. Mr. Romesh Verma, learned Additional Advocate General, vehemently argued that there is no illegality and infirmity in the selection of respondent No.6 because he has been selected strictly on the basis of the interview conducted by 'SMC' on 2.11.2015. He further stated that bare perusal of the mark sheet placed on record by the petitioner itself suggests that Sub Divisional Magistrate, Paonta Sahib, District Sirmaur being Chairman himself conducted the interviews alongwith other members, wherein respondent No.6, namely Hardeep Singh, was found to be more meritorious to the present petitioner. While referring annexure P-1, learned Additional Advocate General, contended that it clearly suggests that respondent No.6 procured 29.88 marks in total, whereas petitioner could only procure 27.49 marks and as such, he was rightly not selected for the post of Drawing teacher in Government Senior Secondary School, Haripur-Khol.

6. Learned Additional Advocate General, with a view to refute the allegations having been made in the petition as well as the submissions by the learned counsel for the petitioner that there is tampering in the market sheet, made available original record of selection made by 'SMC' to demonstrate that there is no cutting, whatsoever, as has been alleged by the petitioner. Mr. Verma, while inviting the attention of this Court to annexure P-1 forcibly contended that marking done by interview committee in its meeting held on 2.11.2015 is strictly in accordance with the scheme of marking as prescribed in annexure P-1 i.e. notification, dated 18.11.2014 and as such, there is no force, whatsoever, in the contention put forth on behalf of the petitioner and as such, same deserve to be dismissed.

7. We have heard the learned counsel for the parties and have gone through the record of the case.

8. During the proceedings of the case, learned Additional Advocate General, made available original record pertaining to the selection of respondent No.6, perusal whereof clearly suggests that 'SMC' initiated selection process for the post of Drawing Master on 2.11.2015 after obtaining necessary permission from the Deputy Director, Elementary Education, Sirmaur. Record further reveals that the petitioner as well as respondent No.6 alongwith other eligible candidates appeared before the interview committee headed by the Sub Divisional Magistrate, Paonta Sahib on 2.11.2015, on which date, interview committee on the basis of testimonials pertaining to education qualification found respondent No.6, namely Hardeep Singh more meritorious than the petitioner and as such, accordingly declared him selected. This Court perused the result sheet of the candidates compiled by the interview committee constituted by the SDM for interviewing the candidates for the post of Drawing Master in Government Senior Secondary School, Haripur-Khol. After perusal of the comparative merit/ result sheet, contention

put forth on behalf of the petitioner deserve to be rejected out rightly because this Court sees no tampering, if any, in the result sheet as alleged by the petitioner.

9. Close scrutiny of the result sheet made available on record clearly suggests that all the candidates, who appeared in the interview have been given marks strictly in accordance with the scheme of marking as per notification, dated 18.11.2014 (annexure P-1). Since, respondent No.6 i.e. selected candidate had procured 60% marks in 10+2, he was rightly awarded 6 marks out of 10 marks as provided under the scheme. Respondent No.6, who had secured 68.79% marks in diploma Art & crafts, has been awarded 6.88 marks out of 10 marks. Similarly, being resident of concerned patwar circle where Govt. Secondary school is located, respondent No.6 has been awarded 10 marks and as such, in total 22.88 marks have been awarded to respondent No.6 on the basis of testimonials/ qualifications out of 50 as prescribed under the scheme. The interview committee on the basis of viva-voce, has awarded 7 marks to respondent No.6 out of 10 marks. In total 29.88 marks have been procured by respondent No.6 in the interview.

10. Similarly, further perusal of result sheet reveals that petitioner namely Amit Singh, who had secured 52.6 marks in 10+2, has been awarded 5.26 marks out of 10 marks. The petitioner has been awarded 7.23 marks out of 10 marks for his diploma in Art & Craft, wherein petitioner has secured 72.32% marks. Since, the petitioner was also from the concerned Patwar circle, he has been also awarded 10 marks qua the same. As far as interview is concerned, petitioner has been granted 5 marks out of 10 marks and as such, in total petitioner secured 27.49 marks, which is definitely less than marks i.e. 29.88 secured by respondent No.6.

11. At this stage, it would be profitable to reproduce marking scheme (annexure P-1) as under:-

Drawing Master

Sr.No.	**Qualification**	**Marks**
1.	10+2 with atleast 50% marks	10
2.	Two year Diploma in Art and craft Teacher. Or Bachelor of Arts with Fine Arts/Visual Arts(Painting and Sculpture or applied Arts) an elective subject of 50% marks in Fine Arts. Or Master Decree in Fine Arts/Visual Arts(Painting and Sculpture).	10
3.	A person is Bachelor of Arts with Fine Arts/Visual Arts (Painting and Sculpture or applied Arts) as on elective subject of 50% marks in Fine Arts in Addition to Master Decree Fine Arts/Visual Arts (Painting and Sculpture).	**10**
4.	Permanent resident of the concern Patwar Circle where the High Secondary School located.	**10**
5.	Interview	**10**
	Total	**50**

12. Perusal of marking scheme as reproduced hereinabove, nowhere suggest that the petitioner, who had also passed his diploma in applied Art & Craft from Haryana State Board of Technical Education was entitled to some extra marks as claimed by him in the petition, rather clause-2 of the aforesaid notification suggest that either incumbent should have passed two years diploma in Art & Crafts or he should Bachelor of arts with Fine/Visual Arts(Painting and Sculpture or applied Arts) on elective subject 50% in Fine Arts. Admittedly, in the present case

petitioner had only passed diploma in applied Art & Craft and as such, there was no occasion for the interview committee to equate the same with the person having Bachelor of Arts with Fine Arts. Moreover, no document was placed on record by the petitioner suggestive of the fact that apart from two years in Art & Crafts he was also having Bachelor degree of Bachelor of Arts with Fine Arts.

13. This Court also perused the copy of diploma certificate annexure P-3, which clearly suggests that respondent No.6 passed diploma in Art & Crafts from the Punjab State Board of Technical Education and Industrial Training in 1st Division. Since, respondent No.6 Hardeep Singh secured 68.79% marks in diploma, he was rightly awarded 6.88 marks out of 10 strictly in terms of scheme referred hereinabove. Close scrutiny of aforesaid diploma certificate placed on record by respondent No.6 clearly suggest that respondent No.6 passed 1st year diploma course in the year, 2009 and second year course in 2011 and as such, there is no force in the contention put forth on behalf of the learned counsel for the petitioner that respondent No.6 has not passed diploma course in two years as required under the prescribed notification provided for the appointment to the post of Drawing Master.

14. This Court after carefully examining the pleadings as well as original record made available to this Court by the Principal, Government Senior Secondary School, Haripur-Khol, sees no force in the averments/allegations having been made by the petitioner in the writ petition and same appears to be frivolous, without any basis and same deserve to be rejected outrightly.

15. Petitioner participated in the said selection process, failed to make a grade,has approached this Court by way of present writ petition, which is not permissible at all. It is well settled law that candidate who participates in the selection process has no right to assail the same at subsequent time after having failed in the same.

16. Reliance is placed on the judgment of the Hon'ble Apex Court in **Manish Kumar Shahi Versus State of Bihar and others** 2010(12) Supreme Court Cases 576. The relevant para-16 of the judgment is reproduced as under:-

> "16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in ***Mandan Lal vs. State of J&K*** 1995(3) SCC 486, ***Marripati Nagaraja v. Govt. of A.P.*** 2007(11) SCC 522, ***Dhananjay Malik v. State of Uttaranchal*** 2008 (4)SCC 171, ***Amlan Jyoti Borooah v. State of Assam*** 2009(3) SCC 227 and ***K.A.Nagamani v. Indian Airlines*** 2009(5)SCC 515."

17. It is well settled law that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the selection Board or the method of Selection as being illegal; he is estopped to question the correctness of the selection. In this regard, reliance is placed in the case of **Madan Lal & Ors versus The State of Jammu & Kashmir and Ors** 1995(2) SLR 209. The relevant para-9 of the judgment is reproduced as under:-

> "9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being concerned respondents herein, were all found eligible in the light of (sic) marks obtained in the written test, to be eligible to be called for oral interview. Upto this

state there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the concerned Members of the Commission who interviewed the petitioners as well as the concerned contesting respondents. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, that they have filed that petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted. In the case of **Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors (AIR 1986 SC 1043):[1986(1)SLR 699(SC)],** it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

18. In case of **Lila Dhar v. State of Rajasthan**, 1981 (4) SCC 159, the Hon'ble Apex Court has observed as under:-

" The appellant-petitioner having participated in the interview in this back ground, it is not open to the appellant petitioner to turn round thereafter when they failed in interview and contend that the provision of a minimum mark for interview was not proper."

19. Consequently, in view of detailed discussion made hereinabove, this Court does not see any merit in the petition and the same is accordingly dismissed. Pending application(s), if any, shall also stands disposed of. Record be returned to the learned Additional Advocate General.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Smt. Premvati and others. .....Appellants.

Versus

Vasu Dev .....Respondent.

RSA No. 108 of 2000.
Decided on: 7.11.2016.

Indian Succession Act, 1925- Section 63- The Land was owned by L – he died in the month of June, 1988- mutations were attested on the basis of the Will – the deceased was not competent to execute the Will as he remained ill at the time of the execution of the Will – the suit was decreed by the Trial Court – an appeal was preferred, which was allowed- held, that original Will was not produced before the Court – defendant has not stated anything about the scribe of the Will or the marginal witnesses – the marginal witness failed to identify his signatures on the Will due to poor eye-sight – the execution of the Will was not proved – appeal allowed – judgment and decree passed by the Appellate Court set aside while judgment and decree passed by the Trial Court restored. (Para-10 to 18)

Cases referred:

Kishan son of Shri Kundan versus Smt. Tulki Dev wd/o Shri Kundan, 2013 (1), Civil Court Cases 548 (H.P.)

Asha Devi vs. Smt. Tarsem Devi and ors., Latest HLJ 2015 (HP) 564

M.B. Ramesh vs. K.M.Veeraje Urs. and others, (2013) 7 SCC 490

For the appellant(s): Mr. Sumit Raj Sharma, Advocate.
For the respondent: Mr. G.D.Verma, Sr. Advocate with Mr. B.C.Verma, Advocate.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Plaintiffs are in second appeal before this Court. They are aggrieved by the judgment and decree passed by learned District Judge, Kinnaur Division at Rampur Bushahr, H.P. in Civil Appeal 109/1996, dated 27.9.1999, reversing thereby the judgment and decree dated 19.7.1996 passed by Senior Sub Judge, Kinnaur Division at Rampur Bushahr, Distt. Shimla in Civil Suit No. 137-1 of 1993/92 and dismissed the suit filed by them.

2. The subject matter of dispute in the present lis is land called as Kholti measuring about 16 biswas, Kashu Sataina, Khobar Kyar measuring 15 biswas which is part of land entered in Khata Khatoni No. 27/56 and 28/60 situate in Chak Jhana, Khata Khatoni No. 54/123 to 129, 55/136 to 138, 56/139 to 143, 60/143 and 69/147 situate in Chak Dansa, Khata Khatoni No. 70/148 to 152 situate in Chak Jagoni, Khata Khatoni No. 98/304 to 306 situate in Chak Dhar and the houses situate in *abadi deh* at Village Dansa, the ancestral property of late Lacchman, predecessor-in-interest of the parties to the suit. Lacchman had not acquired any property of his own. The suit property allegedly was co-parcenary property. Sh. Lacchman, their predecessor had died in the month of June, 1988. The respondent (hereinafter referred to as the defendant) allegedly managed the execution of 'Will' Ext. P-1 in his favour qua the land in dispute from deceased Lacchman in the year 1986. He allegedly was ill at that time, hence was not in a fit state of mind nor could have executed a valid Will. The plaintiffs when came to know about the existence of this forged and fictitious Will, requested the defendant not to take any benefit out of it but of no avail and to the contrary the mutations qua the land in dispute were attested on the basis of the Will, which according to the plaintiffs was forged and fictitious on 16.8.1989, 27.12.1989 and 21.2.1991, despite the objections they raised to the attestation thereof. Even after the attestation of the mutation also, they requested the defendant to admit their claim qua the land in dispute but of no avail, hence the suit for decree of declaration that Will dated 30.9.1986 Ext. P-1 was not executed by deceased Lacchman Dass in favour of defendant and the same is void, inoperative and not binding upon the plaintiffs. The mutations attested on the basis thereof were also sought to be declared as null, void and inoperative and the same were also sought to be quashed and set aside.

3. In the Written Statement, the defendant had contested the suit on the grounds of limitation, bad for non-joinder of necessary parties, maintainability and valuation etc. etc. On merits, while denying the contentions to the contrary, being wrong, it was pleaded that the land in dispute was inherited by deceased Lacchman from Daya Nand. It is, however, denied that the land was wrongly vested in the name of Lacchman. The deceased Lacchman allegedly rightly acted while executing the Will in question in his favour. It is denied that he had no right to execute the Will in question.

4. On the pleadings of the parties, learned trial Judge has framed the following issues:

"1. Whether late Sh. Lachhman executed a valid Will on 30.9.1986? OPD.

2. If issue no. 1 is not proved, whether the mutation of inheritance attested on the basis of the Will is not binding on the plaintiff and is liable to be set aside? OPP.

3. Whether the property is ancestral? OPP.

4. Whether the suit of the plaintiff is bad for non-joinder of necessary parties? OPD.

5. Whether the suit of the plaintiff is within limitation ? OPP.
6. Whether the suit of the plaintiffs is not maintainable? OPD.
7. Whether the suit of the plaintiffs has been properly valued for the purposes of court fee and jurisdiction? OPP.
8. Whether the plaintiffs has no locus-standi to file the present suit? OPD.
9. Relief.

5. Learned trial Court, on appreciation of the evidence produced by the parties, while answering issues No. 1 to 3 has concluded that the land though was not ancestral, however, it was held that the same could not have been bequeathed in favour of the defendant vide 'Will' Ext. P-1, which was held to be illegal, null and void. Consequently, the mutations attested on the basis thereof were also held to be illegal, null, void and inoperative against the rights and interest of the plaintiffs over the land in question. While answering issue No. 5 in favour of the plaintiffs, the suit has been held to be well within the period of limitation. The objection that the suit is bad for non-joinder of necessary parties, was answered against the defendant. Issues No. 6 & 8 were also answered in negative i.e. against the defendant and as regards valuation of the suit for the purposes of court fee and jurisdiction, the same was also answered in affirmative i.e. in favour of the plaintiffs. Consequently, learned trial Court has decreed the suit and declared the Will in question as null, void and inoperative. The mutations attested on the basis thereof were also declared as void and not binding on the rights of the plaintiffs over the suit land. In appeal, learned lower appellate Court has, however, accepted the appeal and reversed the judgment and decree passed by the trial Court.

6. The legality and validity of the impugned judgment has been questioned on the grounds, *inter alia*, that the execution of the 'Will' Ext. P-1 is not at all proved in accordance with law. The marginal witness examined by the defendant could not identify his thumb impression as well as that of the executants, deceased Lacchman. The requirement of Section 68 of the Indian Evidence Act, 1872, is not at all proved and as such, learned lower appellate Court has erroneously accepted the appeal and dismissed the suit. The original Will was not produced and proved in accordance with law. The Will Ext. P-1 is a legal and valid document has not at all been proved on record. Learned lower appellate Court, has allegedly mis-construed and mis-appreciated the evidence available on record in this regard. There being joint marriage of Lacchman and Dharma Nand, on the death of Dharma Nand, his share could have not been inherited by Lacchman to the exclusion of the plaintiffs and respondent who were class-I heirs and as such were entitled to inherit the share of Dharma Nand. Therefore, deceased Lacchman could not have alienated the land in dispute in favour of defendant in exclusion of the plaintiffs. Learned lower appellate Court is stated to have not appreciated the evidence available on record in its right perspective and as a result thereof concluded erroneously that the Will was a legal and valid document.

7. The appeal has been admitted on the following substantial question of law:

"1. Whether the execution of the Will Ext. P-1 (sic. Ext. DA) has been proved by the propounder by only proving/producing the copy of Will without the production of the Original Will at the trial stage?"

8. Sh. Sumit Raj Sharma, Advocate, learned counsel representing the appellants-plaintiffs has strenuously contended that 'Will' Ext. P-1 is a genuine document which has not been proved on record in accordance with law. Therefore, according to Mr. Sharma, learned trial Court has rightly decreed the suit. The findings to the contrary recorded by learned lower Appellate Court have resulted in miscarriage of justice to the plaintiffs.

9. On the other hand, Mr. G.D.Verma, learned Sr. Advocate assisted by Mr. B.C.Verma, Advocate has urged that the 'Will' Ext. P-1 is a legal and valid document, duly proved from the evidence as has come on record by way of the own testimony of defendant and also the witness DW-2, he examined. It has, therefore been urged that learned lower appellate Court has appreciated the evidence available on record in its right perspective and has not committed any

illegality and irregularity while allowing the appeal on reversal of the judgment and decree passed by the trial Court.

10. The only substantial question of law, as formulated in the present appeal, has to be adjudicated upon in the light of the facts and circumstances of this case and also the evidence available on record as well as the law applicable in a case of this nature. At the outset, I would like to refer to the provisions contained under Section 63 of Indian Succession Act, which provides for necessary constituents of execution of a valid Will. The same reads as follows:-

(i) the Will must be attested by atleast two witnesses;

(ii) Each of these-

(a) must either see the testator sing or affix his mark to the Will or must see some other person sign the Will, in the presence and by the direction of the testator, or

(b) must receive from the testator a personal acknowledgement of his signature or mark or of the signature of such other person.

(iii) Each of these must sign the Will

(iv) They must sign in the presence of the testator.

11. This Court in ***Kishan son of Shri Kundan*** versus ***Smt. Tulki Dev wd/o Shri Kundan, 2013 (1), Civil Court Cases 548 (H.P.)***, after taking note of the legal position that not only the signature of the executor on the Will are required to be proved but the execution thereof should also be free from any suspicious circumstances and that if a Will is shrouded by suspicious circumstances, it cannot be treated as the last testamentary disposition of the testator in various judicial pronouncements, has held that the Will set up in that case was not the last testamentary disposition of the testator being shrouded by suspicious circumstances.

12. The law, in order to infer the execution of legal and valid Will, has been discussed by this Court in ***Smt. Asha Devi vs. Smt. Tarsem Devi and ors., Latest HLJ 2015 (HP) 564,*** wherein it has been held as follows:

"14. The adjudication of the legal questions takes us to the prerequisites of a legal and valid Will. A reference in this regard can be made to Section 63 of the Indian Succession Act, which reads as follows:

"63. Execution of unprivileged Wills.

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction. (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

15. Section 68 of the Evidence Act also provides for the requirement of law in the matter of execution of legal and valid Will, which reads as follows:

"68. **Proof of execution of document required by law to be attested.**

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the

Court and capable of giving evidence:Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

16. Additionally, Section 30 of the Hindu Succession Act provides that any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being disposed of by him in accordance with the provisions of Indian Succession Act or any other law for the time being in force applicable to Hindus."

13 The Apex Court in ***M.B. Ramesh vs. K.M.Veeraje Urs. and others, (2013) 7 SCC 490,*** has held as follows:

"16. We may, however, note in this behalf that as held by a Constitution bench of this Court in Chunilal Mehta Vs. Century Spinning and Manufacturing Company reported in AIR 1962 SC 1314, it is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties, necessarily raises a question of law. That apart, as held by a bench of three judges in Santosh Hazari Vs. Purushottam Tiwari reported in 2001 (3) SCC 179, whether a particular question is a substantial question of law or not, depends on the facts and circumstances of each case. When the execution of the will of Smt. Nagammanni and construction thereof was the subject matter of consideration, the framing of the question of law cannot be faulted. Recently, in Union of India Vs. Ibrahim Uddin reported in 2012 (8) SCC 148, this Court referred to various previous judgments in this behalf and clarified the legal position in the following words:-

> "67. There is no prohibition to entertain a second appeal even on question of fact, provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse."

17. At the same time we cannot accept the submission on behalf of the respondents as well that merely because the will was more than 30 years old, a presumption under Section 90 of the Indian Evidence Act, 1872 ('Evidence Act' for short) ought to be drawn that the document has been duly executed and attested by the persons by whom it purports to have been executed and attested. As held by this Court in Bharpur Singh Vs. Shamsher Singh reported in 2009 (3) SCC 687, a presumption regarding documents 30 years old does not apply to a will. A will has to be proved in terms of Section 63 (c) of the Succession Act read with Section 68 of the Evidence Act.

18. That takes us to the crucial issue involved in the present case, viz. with respect to the validity and proving of the concerned will. A Will, has to be executed in the manner required by S 63 of theSuccession Act. Section 68 of the Evidence Act requires the will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances", as observed by this Court in paragraph 11 of Janki Narayan Bhoir Vs. Narayan Namdeo Kadam reported in 2003 (2) SCC 91 and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. At the same time, as held in that very judgment the section cannot be read to absolve a party of his

obligation under Section 68 of the Evidence Act read with Section 63 of the Succession Act to present in evidence a witness, though alive and available.

19. The relevant provisions of these three sections read as follows:

> ”Section 63 of the Succession Act "63. Execution of unprivileged wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-
>
> (a) .....
>
> (b) .....
>
> (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."
>
> **Section 68 of the Evidence Act**
>
> "68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving it's execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence..."
>
> **Section 71 of the Evidence Act**
>
> "**71**. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

20. In the present matter, there is no dispute that the requirement of Section 68 of the Evidence Act is satisfied, since one attesting witness i.e. PW-2 was called for the purpose of proving the execution of the will, and he has deposed to that effect. The question, however, arises as to whether the will itself could be said to have been executed in the manner required by law, namely, as perSection 63 (c) of the Succession Act. PW-2 has stated that he has signed the will in the presence of Smt. Nagammanni, and she has also signed the will in his presence. It is however contended that his evidence is silent on the issue as to whether Smt. Nagammanni executed the will in the presence of M. Mallaraje Urs, and whether M. Mallaraje Urs also signed as attesting witness in the presence of Smt. Nagammanni. Section 63 (c) of the Succession Act very much lays down the requirement of a valid and enforceable will that it shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will, and each of the witnesses has signed the will in the presence of the testator. As held by a bench of three judges of this Court (per Gajendragadkar J, as he then was) way back in R. Venkatachala Iyengar Vs. B N. Thimmajamma reported in AIR 1959 SC 443, that a will has to be proved like any other document except that evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Succession Act, apart from the one under Section 68 of the Evidence Act.”

14. Applying the above legal principles in the given facts and circumstances of this case, it would not be improper to conclude that the execution of the Will Ext. P-1 is not at all proved and the same rather is shrouded by suspicious circumstances cannot be treated to be the last testamentary disposition of the testator deceased Lacchman Dass by any stretch of

imagination. The present, as a matter of fact, is a case where cogent and reliable evidence qua scribe of the Will Ext. P-1 at the instance of the testator deceased Lacchman and attestation by two marginal witnesses, in the manner as provided under Section 63 (c) of the Indian Succession Act, is not at all proved.

15. The original Will has not seen the light of the day. The defendant, propounder thereof has not produced the same in evidence while in the witness box. It is an attested copy thereof, which has been tendered in evidence by learned counsel representing the plaintiffs in his own statement recorded separately. When the defendant has failed to produce the original Will, how he could have said, while in the witness box, that the same was executed by his father deceased Lacchman in his favour and that thereby the land in dispute was bequeathed to him exclusively in complete ouster of the plaintiffs, none else but his real brothers. Otherwise also, nothing has come on record in his statement while in the witness box as DW-1 as to who was the scribe of the Will. He has also not said anything about the marginal witnesses who witnessed the execution thereof in the manner as provided under Section 63 (c) of the Indian Succession Act.

16. Now, if coming to the statement of Chura Ram, no doubt, he claims himself to be one of the marginal witnesses to the Will Ext. P-1 and while in the witness box has deposed that the same was executed by deceased Lacchman at Rampur in favour of Vasu Dev (defendant), however, he expressed his ignorance that the same was reduced into writing by the scribe who sits near the side of one Megha Nand. Though, as per his version he had signed this document, however, due to weak eye-sight, expressed his inability to identify the same, meaning thereby that he has failed to identify his signatures on this document. Though, he tells us that the witnesses Moti Ram and Jagat Ram were also present, however, nothing has come in his statement that they had also put their signatures on this document. Interestingly enough, nothing has come on record to show in his statement that Will in question was reduced into writing at the instance of deceased Lacchman. The contents thereof were read over and explained to said deceased Lacchman in vernacular and that after understanding and admitting the same to be true and correct, he had put his signatures in the presence of all the witnesses. Also that, the witnesses had also put their signatures in the presence of testator. In other words, there is no evidence to show that the marginal witnesses have seen the testator while putting his signatures on the Will and the testator had also seen the marginal witnesses while putting their signatures on the Will in question. Therefore, for want of such evidence, it cannot be said by any stretch of imagination that Will Ext. P-1 is a legal and valid document. This is the only evidence produced by the defendant to prove the execution of 'Will' Ext. P-1, which in the opinion of this Court, is neither sufficient nor cogent and reliable. The facts and circumstances of this case rather are identical to ***M.B. Ramesh's case (supra).*** The point in issue in this case, therefore, is squarely covered by the judgment ibid.

17. Now, if coming to the evidence produced by the plaintiffs, plaintiff No. 2 has himself stepped into the witness box as PW-1. He has categorically stated that deceased Lacchman, being 80-90 years of age, was not in a sound disposing state of mind and neither he executed any Will in favour of the defendant nor he could have done so. As per his version, the Will in question is not a legal and valid document. Similar is the version of PW-2 Sh. Madan Lal. Both of them, though have been cross-examined at length, but in sundry. When the onus to prove that the Will executed in his favour is a genuine document has not been discharged by him at all, the same cannot be held as legal and valid by any stretch of imagination. Learned lower appellate Court has neither appreciated the evidence available on record nor legal position in its right perspective and as a result thereof the findings so recorded are erroneous, hence not legally sustainable. The substantial question of law is decided accordingly.

18. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the judgment and decree passed by learned lower appellate Court is quashed and set aside and that of learned trial Court is affirmed. However, no orders so as to costs.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

ICICI Lombard General Insurance Co. ....Petitioner
Versus
Bimla Devi and others. ....Respondents

CWP No. 3922 of 2010
Date of decision: 8.11.2016

Motor Vehicles Act, 1988- Section 166- claimant is a house wife – her income can be taken as Rs.6,000/- per month- the loss of income has to be taken as Rs.3,600/- per month in view of the disability sustained by her - applying the multiplier of 11, loss of future income will be Rs.4,75,200/- - the claimant will face difficulty in movement – hence, in addition to Rs.20,000/- spent during the treatment, Rs.10,000/- granted for future expenses towards movement , Rs.30,000/- awarded towards loss of amenities - Rs.20,000/- awarded for future treatment – total amount of Rs.7,45,200/- awarded as compensation with interest @ 9% per annum- cost of Rs.10,000/- also awarded. (Para-13 to 22)

Cases referred:
National Insurance Company Ltd. Vs. Soma Devi 2003 ACJ 1919
New India Assurance Co. Ltd. Vs. Prem Chand and others, 2008 (1) ACJ 679
United India Insurance Company Ltd. Vs. Shila Datta, (2011) 10 SCC 509
Arun Kumar Agrawal and another Vs. National Insurance Company Limited and others (2010) 9 SCC 218

For the Petitioner: Mr.Jagdish Thakur, Advocate.
For the Respondents: Mr.Karan Singh Kanwar, Advocate, for respondent No. 1.
Mr.Janesh Gupta, Advocate, vice Mr.I.N. Mehta, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Vivek Singh Thakur J. (Oral).

Present petition has been filed by petitioner Insurance Company assailing the award dated 9.3.2010, passed by the Motor Accident Claims Tribunal-II, Solan (hereinafter referred to as the MACT) in MAC Petition No. 17-NL/2 of 2009, vide which respondent No. 1/claimant has been awarded compensation of Rs. 10,00,000/- for her disability suffered on account of accident dated 11.12.2008 during her travel in Bus No. HP-64-4697 owned by respondent No. 2 and being driven by respondent No. 3.

2. I have heard learned counsel for the parties and perused documents placed on record.

3. Learned counsel for petitioner-Company submits that in present petition impugned award has been assailed on the ground of perversity and in view of ratio laid down by this Court in ***National Insurance Company Ltd. Vs. Soma Devi 2003 ACJ 1919*** and ***New India Assurance Co. Ltd. Vs. Prem Chand and others, 2008 (1) ACJ 679***, present petition is maintainable against the award passed by the MACT.

4. In Soma Devi's case, referred supra, Full Bench of this Court has held as under:-

> *"**15.**It, therefore, becomes abundantly clear that in all such like cases where the award on the face ofit is a perversity, or is based on fraud, and the insurance company has no remedy under the MotorVehicles Act of either challenging the*

award in appeal or being either to have it recalled or reviewedby the Tribunal itself, the power of judicial review by this Court in the exercise of its extraordinary jurisdiction under Articles 226/227 of the Constitution can always be invoked and exercised by thisCourt in dispensing justice to the parties.

***16**. For the foregoing reasons, therefore, while dealing with the reference made to us vide singleBench order dated 18.7.2003, we hold that with respect to an insurer, if it challenges the awardpassed by the Motor Accidents Claims Tribunal only on the ground of compensation being high,excessive or unreasonable, in a petition filed under Articles 226/227 of the Constitution, such a petition in view of Section 173 of Motor Vehicles Act, 1988 is not maintainable. This was the limited,rather the only question of law, which was referred to us for consideration and we have answered itaccordingly. All the writ petitions shall now be listed before the appropriate single Benches fordisposal according to law.*

Reference answered and disposed of."

5. Following ratio of law laid down by Full Bench in Soma Devi's case, Division Bench of this Court in Prem Chand's case supra had entertained petition under Article 226 of Constitution of India on the ground of perversity with following observations:-

*"**5**. We are bound by the decision of the Full Bench of this court and according to us the only two grounds on which the award passed by Motor Accidents Claims Tribunal can be challenged in a writ petition by the insurance company are that the award is perverse or that it is based on fraud. In the present case, there is no allegation of fraud and the only allegation is that the award is perverse."*

6. It is submitted on behalf of petitioner that at the time of filing of present petition, petitioner Insurance Company had limited right to assail the impugned award, as present petition has been filed prior to pronouncement of Hon'ble Supreme Court in ***United India Insurance Company Ltd. Vs. Shila Datta,*** reported in ***(2011) 10 SCC 509*** and therefore, petitioner was not having any alternative remedy to assail quantum of compensation awarded in impugned award, rather only available remedy to petitioner was present petition and thus petition be decided on merit.

7. Learned counsel for respondent submits that accident had occurred in the year 2008 and respondent No. 1/claimant is waiting for her lawful claim for last eight years. Claim petition was also decided in the year 2010 and for more than last six years, present petition is pending in this Court and therefore, he has prayed that despite the fact that alternate remedies are available to petitioner under the provisions of Motor Vehicles Act to assail the impugned award by filing an appeal, present petition may be decided on merits in the interest of justice and for benefit of poor respondent No. 1/claimant, who is suffering for non release of amount in her favour due to pendency of present lis challenging the award passed in her favour by the MACT.

8. In similar matter coordinate bench of this Court had dismissed CWP No. 542 of 2011 vide judgment dated 24th April, 2012, titled *ICICI Lombard General Insurance Company Limited Vs. Sh. Hem Raj and another*, being non-maintainable. The said judgment was assailed in LPA No.269 of 2012 and Division Bench of this Court vide judgment dated 6th December, 2012 had decided the issue in dispute between parties on merits leaving the question of maintainability of writ petition against the impugned award open.

9. Issue involved in present petition can be adjudicated and decided on the basis of material placed on record and pleadings of parties. Self imposed restriction/rule of exclusion of writ jurisdiction on account of availability of alternative remedy does not operate as an absolute bar to entertain a writ petition. It is a rule of discretion to be exercised depending upon facts of each case. I am of the opinion that in facts and circumstances, it would be in the interest of justice to adjudicate the dispute between parties herein present petition on merits on equitable ground as respondent No. 1/claimant is being deprived of the fruit of award passed in her favour in the year 2010 and relegating the parties to another round of litigation for adjudicating the

matter under the remedy available to petitioner-company under Motor Vehicles Act would result into undue harassment and grave hardship to respondent No. 1/claimant for no fault on her part. Therefore, in peculiar facts and circumstances of this case, especially in the interest of claimant, I proceed to decide this petition on merits by exercising jurisdiction under Article 226 of Constitution of India, without going into question of alternative remedy available to petitioner to assail the impugned award.

10. Learned counsel for petitioner-Company submits that present award deserves to be interfered with for the reasons that there is no positive evidence on record that respondent No. 1/claimant was earning Rs. 10,000/- per month and disability suffered by respondent No. 1 is 42%, whereas she has been awarded compensation by considering her working disability as 60%. It is further submitted that as PW-2 Laxmi Ram, appearing for respondent No. 1, had himself stated that respondent No. 1/claimant belonged to IRDP family and therefore, her income cannot be considered as Rs. 10,000/- per month at any stretch of imagination.

11. On the contrary, learned counsel appearing for respondent No. 1/claimant has supported the award passed by the MACT on the ground that there is no evidence on record that respondent No. 1/claimant belonged to IRDP family except irrelevant bald assertion of PW-2 without any substantial material and no such suggestion was put to her. Further that petitioner-company has not disputed income of respondent No. 1/claimant as Rs. 10,000/- during her cross-examination. He also submits that in given facts and circumstances of a case working disability of a person may be more or less than percentage of physical disability and in present case, respondent No. 1/claimant has suffered 42% physical disability of lower limb which definitely affects her working ability more than percentage of disability of the said limb and further submits that working disability taken as 60% by the MACT is on lower side, whereas for lower limb with 42% disability, working disability of a person will be more than that of 60%.

12. Though there is no positive evidence on record to establish that respondent No. 1 was earning Rs. 10,000/- per month at the time of accident, however, at the same time contention of petitioner-Company is also not tenable that at the time of accident respondent No. 1/claimant belonged to IRDP family as self stated hazy line of PW-2 Laxmi Ram is not sufficient to hold that respondent No. 1/claimant was in IRDP at the time of accident or at the time of his making statement. There is no document on record showing that respondent No. 1/claimant was in IRDP family at the time of accident or even thereafter.

13. So far as working capacity of respondent No. 1 is concerned, same has rightly been determined by the MACT, because working disability cannot be equal to percentage of physical disability of a person in every case. Working disability will vary in each case irrespective of percentage of physical disability depending upon loss of limb or damage to part of the body and also nature of work performed by victim. In facts and circumstances of the case working disability may be lesser and even negligible than physical disability and in some cases, lesser physical disability may have larger effect on working disability of a victim. In present case, there is disability of lower limb to the extent of 42% and in life, for every movement, a person depends upon lower limb. Therefore, even 60% disability may be considered to be taken on the lower side, but as there is also no positive evidence for establishing extent of working disability of respondent No. 1/claimant, in my opinion on the basis of guess work, the MACT has rightly taken the working disability as 60%.

14. In ***Arun Kumar Agrawal and another Vs. National Insurance Company Limited and others (2010) 9 SCC 218***, the Apex Court, for an accident occurred prior to 2003, has considered income of a housewife as Rs. 5,000/-. Hon'ble Mr. Justice A.K. Ganguly, J. in his concurring conclusion/paras, has observed as under:-

> *"**41**. Despite the clear constitutional mandate to eschew discrimination on grounds of sex in Article 15(1) of the Constitution, in its implementation there is a distinct gender bias against women and various social welfare legislations and also in judicial pronouncements.*

> .....
>
> ***44.*** *This bias is shockingly prevalent in the work of Census. In the Census of 2001 it appears that thosewho are doing household duties like cooking, cleaning of utensils, looking after children, fetchingwater, collecting firewood have been categorized as non-workers and equated with beggars,prostitutes and prisoners who, according to Census, are not engaged in economically productivework. As a result of such categorization about 36 crores (367 million) women in India have beenclassified in the Census of India, 2001 as non-workers and placed in the category of beggars,prostitutes and prisoners. This entire exercise of Census operation is done under an Act ofParliament.*
>
> .....
>
> ***49.*** *Work is very vital to the system of gender reconstruction in societies and in this context masculineand feminine work is clearly demarcated. The question which obviously arises is whether Censusdefinition of work reflects the underlying process of gender discrimination.*
>
> ***50.*** *Women are generally engaged in homemaking, bringing up children and also in production ofgoods and services which are not sold in the market but are consumed at the household level. Thus,the work of women mostly goes unrecognized and they are never valued. Therefore, in the categorization by the Census what is ignored is the well known fact that womenmake significant contribution at various levels including agricultural production by sowing,harvesting, transplanting and also tending cattles and by cooking and delivering the food to thosepersons who are on the field during the agriculture season."*

15. In absence of other evidence on record, Rs. 5,000/- per month income of house wife was considered to be appropriate for an accident occurred prior to 2003. In present case date of accident is 11.12.2008. Even it is considered that respondent No. 1/claimant was performing work equivalent to a labourer then also her earning is to be considered that of a labourer. In the year 2003 earnings of house wife were taken as Rs. 5,000/-. In the year 2010, this earning is bound to be increased 30% to 50% i.e. Rs. 6,500/- to Rs. 7,500/-. In the year 2010, daily wage of a labourer was more than Rs. 200/- per day i.e. more than Rs. 6,000/- per month. Even considering earning of respondent No. 1/claimant on lower side, it would be appropriate to consider it to be Rs. 6,000/- per month.

16. Considering income of respondent No. 1/claimant as Rs. 6,000/- per month, loss of income suffered by her comes to be Rs. 3,600/- per month. The MACT has rightly applied multiplier of 11 and after applying this multiplier, loss of future income comes to be Rs. 4,75,200/-.

17. The amount awarded under the heads of amount spent on medicines and in hospital and also for pain and sufferings warrants no interference. However, keeping in view nature of disability, particularly lower limb of the body, respondent No. 1 will definitely face difficulty in movement and some extra care and arrangement causing some extra expenditure for her movement, will be required. Therefore, under head of transportation, besides Rs. 20,000/- spent during the treatment, Rs. 10,000/- also required to be granted for future expenses to be incurred for her movement in life. Besides this, respondent No. 1/claimant is also entitled for loss of enjoyment of amenities to the extent of Rs. 30,000/-

18. At the time of filing petition and also at the time of leading evidence by way of affidavit, respondent No. 1 has clearly stated that she was under treatment at that time. The MACT has awarded Rs. 80,000/- for amount spent on medicine and also amount of Rs. 10,000/- with respect to amount spent in hospital, but nothing has been awarded for undergoing treatment and for future treatment. Therefore, respondent No. 1/claimant is also entitled for Rs. 20,000/- for future treatment and care.

19. In view of above discussion respondent No. 1/claimant is held entitled for following amount of compensation:-

1.	Loss of income:	Rs. 4,75,200/-
2.	Amount spent on medicines:	Rs. 80,000/-
3.	Amount spent in hospital:	Rs. 10,000/-
4.	Amount for future treatment and care.	Rs. 20,000/-
5.	Pain and sufferings:	Rs. 1,00,000/-
6.	Loss of enjoyment and amenities.	Rs. 30,000/-
7.	Transportation including future Expenditure for life time.	Rs. 30,000/-
	Total	**Rs. 7,45,200/-**

20. It is further contended on behalf of the petitioner company that the MACT has awarded interest @12% per annum in the year 2010, which was on higher side at the relevant point of time. Considering the date of filing of petition as well as decision of claim petition, it would be appropriate to award interest @9% per annum from the date of filing of the petition, instead of 12% per annum on the amount of compensation.

21. Impugned award is modified in above terms. Needless to say that respondent No. 1/claimant is also entitled to the cost of petition to the tune of Rs. 10,000/- assessed by the MACT.

22. Registry is directed to calculate the amount adding interest to which respondent No. 1/claimant is entitled on the basis of modified award and the said amount along with up to date proportionate interest be released in her favour by remitting the same in her saving bank account, to be furnished by her counsel and the excess amount, if any, along with up to date proportionate interest, shall be refunded to the petitioner-company by remitting the same to its bank account, particulars of which shall be furnished by its counsel.Petition stands disposed of in above terms along with pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Shri Avtar Singh ....Appellant

Versus

Sh. Tilak Raj & another ....Respondents

FAO No. 355 of 2012
Decided on : 11.11.2016

Motor Vehicles Act, 1988- Section 166- Monthly income of the claimant was Rs.5,000/- - claimant had sustained 25% permanent disability- claimant was 35 years at the time of accident – Tribunal had erred in applying the multiplier of 16- multiplier of 14 is applicable- thus, the claimant is entitled to Rs.1250 x 12 x 14= Rs.2,10,000/- - amount awarded under other head is maintained and total compensation of Rs.3,34,000/- awarded with interest @ 7.5% per annum- the claim of third party cannot be defeated on the ground of breach of the terms and conditions of the policy – the insurer saddled with liability with the right to recovery.(Para-16 to 24)

Cases referred:

Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the Appellant : Mr. Ramakant Sharma, Advocate.
For the Respondents: Nemo for respondent No. 1.
Mr. P.S. Chandel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the judgment and award, dated 5th June, 2012, made by the Motor Accident Claims Tribunal, Hamirpur, H.P. (for short 'the Tribunal') in MAC Petition No. 42 of 2008, titled as Tilak Raj versus Shri Avtar Singh & others, whereby compensation to the tune of Rs. 3,64,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant and appellant-owner was saddled with liability (for short 'the impugned award').

2. The claimant, driver and insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The owner-insured has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellant-owner/insured argued that the Tribunal has fallen in an error in saddling him with the liability and the amount awarded is excessive.

5. Thus, the following questions are to be determined in this appeal:

1. *Whether the Tribunal has rightly saddled the owner-insured with liability and discharged the insurer?*
2. *Whether the amount awarded is adequate?*

6. In order to determine the aforesaid questions, it is necessary to examine the pleadings of the parties and record.

7. The claimant had invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs. 6,00,000/- as per the break-ups given in the claim petition.

8. The respondents resisted and contested the claim petition by filing replies.

9. Following issues came to be framed by the Tribunal:

"1. Whether the petitioner has suffered injuries due to rash and negligent driving of Qualis, bearing No. PB-18-J-0074 by its driver-respondent No. 2, as alleged? ..OPP

2. If Issue No. 1 is proved in affirmative, whether the petitioner/claimant is entitled to compensation, if so, to what amount and from which of the respondents? …OPP

3. Whether the petition is not maintainable in the present form?…OPRs

4. Whether the vehicle in question was being driven by respondent No. 2 at the time of accident in violation of the terms and conditions of the Insurance Policy? …OPR-3

5. Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the vehicle in question at the time of accident?…OPR-3

6. Relief."

10. The parties led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that the driver was not holding a valid and effective driving licence at the time

of accident, the owner-insured has committed willful breach, saddled him with liability and discharged the insurer and granted compensation to the tune of 3,64,000/- with interest @ 7.5% per annum in favour of the claimant.

Issue No. 1

11. There is no dispute qua findings recorded on issue No. 1. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

Issue No. 3

13. The respondents have not led any evidence to prove that the claim petition was not maintainable, thus have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on Issue No. 3 are upheld.

Issues No. 4 & 5

14. The Tribunal has held that the driver was not having a valid and effective driving licence at the time of accident and the same was in the name of Jaswinder Singh, son of Shri Karam Singh and not in the name of Sarvjeet Singh, son of Shri Balbir Singh. Further, it has recorded that there was no evidence on the record to show that the owner-insured had engaged the driver after exercising due care and caution and has taken steps as required under law while engaging driver.

15. Having said so, I am of the considered view that the Tribunal has rightly recorded the findings that the driver was not having a valid and effective driving licence at the time of accident and the owner-insured has committed willful breach. Thus, the findings, recorded by the Tribunal on issues No. 4 & 5 are upheld.

Issue No. 2.

16. The Tribunal has assessed the monthly income of the claimant-injured at Rs. 5,000/- per month and held that the claimant has suffered 25% permanent disability and granted him compensation to the tune of Rs. 15,000/, under the head 'loss of dependency'. The claimant-injured has not questioned the same. Accordingly, the same is upheld.

17. The age of the claimant-injured was 35 years at the time of accident. The Tribunal has fallen in an error in applying the multiplier of '16'.

18. The multiplier of '14' is applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

19. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 1250 x 12 x 14 = Rs. 2,10,000/- under the head 'loss of dependency'.

20. The amount awarded under the other heads is maintained.

21. Accordingly, the claimant-injured is held entitled to total compensation under the following headswith interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization,

(i) loss of dependency :	Rs. 2,10,000/-
(ii) Medical expenses :	Rs. 14,000/-
(iii) Attendant charges, special diet and transportation:	Rs. 15,000/-
(iv) Loss of income:	Rs. 15,000/-
(v) Pain and suffering:	Rs. 30,000/-

(vi) Loss of amenities of life:	Rs. 50,000/-
Total:	Rs. 3,34,000/-

22. Now, the question is- who is to be saddled with liability.

23. As discussed hereinabove, the owner-insured has committed willful breach. The claimant is the third party.

24. It is a beaten law of the land that right of third party cannot be defeated and even if the owner-insured has committed breach, the insurer has to satisfy the award, with right of recovery.

25. Viewed thus, the insurer is saddled with the liability, with right of recovery.

26. Learned Counsel for the appellant-insured stated at the Bar that an amount of Rs. 25,000/- stands already deposited before the Registry.

27. The insurer is at liberty to lay a motion before the Tribunal for recovery of the amount.

28. The insurer is directed to deposit the awarded amount minus the amount already deposited by the owner-insured before the Registry within a period of eight weeks from today.

29. The Registry is directed to release the awarded amount in favour of the claimant-injured, strictly as per the terms and conditions contained in the impugned award after proper identification, through payees' account cheque and by depositing the same in his account.

30. The impugned award is modified, as indicated hereinabove and the appeal is disposed of.

31. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Brij Lal (since deceased) through his LRs Manohar Lal & Ors. ....Appellants-Plaintiffs

Versus

Shakti Chand ..Respondent-Defendant

Regular Second Appeal No.270 of 2006.
Judgment Reserved on: 19.09.2016.
Date of decision: 11.11.2016

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that she is owner in possession of the suit land – defendant has no right over the same - previous owner K had not executed any Will – the defendant pleaded that K had executed a Will in favour of the defendant and he has become the owner after the death of K – suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that plaintiff had not appeared in the witness box to prove that Will was a forged document and adverse inference has to be drawn against her – the deceased had put her thumb impression on the Will and plaintiff had not sought the comparison of the thumb impression to determine the genuineness of the same – the execution of the Will was proved by the defendant by leading cogent and convincing evidence – the Appellate Court had rightly held that the execution of the Will was proved – appeal dismissed.(Para-12 to 35)

Cases referred:

Madhusudan Das vs. Smt.Narayani Bai and Others, AIR 1983 SC 114

H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443

Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529
Daulat Ram and Others vs. Sodha and Others, (2005)1 SCC 40
Khatri Hotels Private Limited and Another vs. Union of India and Another, (2011)9 SCC 126
Man Kaur (Dead) by LRs. Vs. Hartar Singh Sangha, (2010)10 SCC 512, Rattan Dev vs. Pasam Devi, (2002)7 SCC 441
Iswar Bhai C Patel alias Bachu Bhai Patel vs. Harihar Behera and Another, (1999)3 SCC 457
Kamlesh Rani vs. Balwant Singh, 2010(3) Shim.L.C. 141.

For the Appellants:	Mr.Ankush Dass Sood, Senior Advocate with Mr.Rakesh Kumar, Advocate.
For Respondents: No.1, 2, 4 to 6.	Mr.G.D. Verma, Senior Advocate with Mr.Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree dated 24.03.2006, passed by learned District Judge, Hamirpur, District Hamirpur, H.P., reversing the judgment and decree dated 17.06.2004, passed by the learned Civil Judge(Junior Division)-1, 1st Class-I. Hamirpur, District Hamirpur, H.P., whereby the suit filed by late Smt.Geeta Devi, predecessor-in-interest of the appellants-plaintiffs, has been decreed.

2. The brief facts of the case are that late Smt.Geeta Devi, predecessor-in-interest of the appellants-plaintiffs *(herein after referred to as the 'plaintiff'),* filed a suit for declaration with consequential relief of permanent injunction against the respondent-defendant *(hereinafter referred to as the `defendant')* stating therein that she is owner in possession of the suit land comprised in Khata No.70, Khatauni No.87, Khasra Nos.535/414, 555/453, 454, 557/470, Kita 4 measuring 10 Kanal 11 Marlas, situated in Tika Ramehra, Tappa Mehlta, Tehsil Bhoranj, District Hamirpur, H.P. and land comprised in Khata No.49, Khatauni No.83, Khasra Nos.1064, 1068, Kita 2 area 13 Marlas to the extent of 1/7th share and Khata No.46, Khatauni No.87, Khasra No.1092, area measuring 13 Marlas and Khata No.47, Khatauni No.88, Khasra No.1090, area 3 Marla, 1/7th share situated in Tika Loharni Mauza Mehlta, Tehsil Bhoranj, District Hamirpur, H.P. (herein after referred to as the *`suit land'*).

3. It is averred in the plaint that plaintiff Geeta Devi was daughter and Smt.Kaulan Devi was wife of Shri Paras Ram. It is further averred that Shri Paras Ram also married Smt.Nikki Devi and Smt.Kalan Devi, who were died issueless. Thereafter, Shri Paras Ram was also died. It has been averred by the plaintiff that a portion of the suit land was acquired by Smt.Kaulan Devi from her husband Shri Paras Ram. The plaintiff has further averred that she is the legal heir of Smt.Kaulan Devi, who died on 31.10.1993, and after the death of Smt.Kaulan Devi, she became owner in possession of the suit land. It has also been averred that the defendant is stranger to the suit land and has no right, title or interest over the same. It has been averred that the defendant started interfering with the ownership and possession of the plaintiff over the suit land with effect from the 1st week of February, 1994 on the ground of execution of Will dated 25.10.1993, purported to have been executed in his favour by Smt.Kaulan Devi. It has further been pleaded that Smt.Kaulan Devi has not executed any valid Will in favour of the defendant, as she was not in sound disposing state of mind before her death and as such she was unable to execute the alleged Will dated 25.10.1993. The alleged Will, set up by the defendant, is forged, false and fictitious and the same has been prepared fraudulently after the death of Smt.Kaulan Devi in connivance with the scribe and witnesses. It has also been averred that the alleged Will is the result of undue influence and importunity and thus the same is illegal, null and void and is not binding on the plaintiff. The plaintiff has sought declaration of her

ownership and possession over the suit land by restraining the defendant from interfering with her ownership and possession over the suit land.

4. The defendant resisted and contested the suit by filing written statement. It has been admitted by the defendant that the suit land was owned and possessed by Smt.Kaulan Devi wife of Shri Paras Ram. It has also been admitted that the plaintiff is the daughter of Paras Ram. It has been asserted by the defendant that after the death of Smt.Kaulan Devi, he succeeded the suit land on the basis of valid Will dated 25.10.1993 (Ex.DW-2/A) executed by her in her sound disposing state of mind. It has been averred that the defendant and his parents were looking after and maintaining Smt.Kaulan Devi for the last several years. Smt.Kaulan Devi died on 31.10.1993. It has further been averred by the defendant that the plaintiff was step-daughter of Smt.Kaulan Devi, as she was born to Smt.Nikki Devi wife of Shri Paras Ram, who died within a few days of birth of the plaintiff. It has further been averred that the plaintiff was taken away by her maternal uncle and brought up by him. The marriage of the plaintiff was also performed by her maternal uncle. It has been averred by the defendant that after the death of Smt.Kaulan Devi, he is owner in possession of the suit land and the plaintiff is not entitled to any relief, much less to the discretionary relief of permanent injunction.

5. On the pleading of the parties, the learned trial Court framed the following issues:-

"1. Whether the plaintiff is entitled to the relief of declaration and permanent injunction, as prayed ? OPP.

1-A. Whether Smt.Kalan Devi has executed a valid and registered Will dated 25.10.1993 in favour of the defendant, as alleged? OPD.

2. Relief."

6. The learned trial Court decided both the issues in favour of the plaintiff and accordingly decreed the suit of the plaintiff with costs. The appeal preferred by the defendant before the learned Appellate Court was allowed with costs and the judgment and decree of the learned trial Court was reversed.

7. This second appeal was admitted on the following substantial question of law:

"(1) Whether there has been misreading of evidence by the learned first appellate Court who also not recorded the reasoning for reversal of the findings?

8. Mr.Ankush Dass Sood, learned Senior Counsel, argued that judgment passed by learned first appellate Court deserves to be quashed and set aside since same is not based upon the correct appreciation of evidence as well as of law. Mr.Sood further contended that bare perusal of material available on record clearly suggests that Will Ex.DW-2/A is shrouded by suspicion and could not be accepted being a fake and forged document. Mr.Sood strenuously argued that defendant miserably failed to demonstrate on record that Will Ex.DW-2/A was genuine and was actually executed by deceased Paras Ram in sound and disposing state of mind and as such no reliance could be placed on the same. Mr.Sood further argued that learned District Judge being first appellate Court wrongly determined issue No.1A in favour of defendant-respondent No.1, which is contrary to sufficient evidence on record. As per Mr.Sood, there was sufficient evidence on record that Will Ex.DW-2/A, dated 25.10.1993 executed by Smt.Kaulan Devi in favour of defendant was shrouded by suspicious circumstances and as such onus was upon the defendant being propounder of the Will to dispel such suspicious circumstances. But perusal of evidence led on record clearly suggests that defendant was not able to prove beyond reasonable doubt that Will Ex.DW-2/A was free from suspicion. With a view to demonstrate his aforesaid arguments, Mr.Sood invited the attention of this Court to the judgment passed by learned trial Court, wherein learned trial Judge, while discussing the evidence on record, came to the conclusion that Will Ex.DW-2/A in question was shrouded by suspicious circumstances and in this regard he culled out suspicious circumstances in para-22 of his judgment dated 17.6.2004.

9. Mr.Sood, while specifically referring to para-22 of the judgment, made serious attempt to persuade this Court that judgment passed by learned trial Court, wherein Will Ex.DW-2/A was held to be shrouded by suspicious circumstances, is based upon correct appreciation of evidence led on record by the plaintiff as well as law and as such same deserves to be upheld. While concluding his arguments, Mr.Sood forcefully contended that findings of fact returned by learned trial Court could not be reversed by the learned first appellate Court without assigning there sufficient/plausible reasons, but as per him, perusal of judgment passed by learned first appellate Court, nowhere suggests that learned first appellate Court while differing with the judgment passed by the learned trial Court assigned sufficient reasons as required under Section 107 of the Code of Civil Procedure as well as judgment of Hon'ble Apex Court in ***Madhusudan Das vs. Smt.Narayani Bai and Others, AIR 1983 SC 114*** and as such judgment passed by the learned first appellate Court deserves to be quashed and set aside.

10. To the contrary, Shri G.D. Verma, learned Senior Counsel representing the respondent, supported the judgment passed by the first appellate Court. Mr.Verma, argued that judgment passed by learned first appellate Court is based upon correct appreciation of evidence available on record and as such there is no scope of interference, whatsoever, of this Court in the present facts and circumstances of the case. Mr.Verma further contended that Will Ex.DW-2/A was duly executed by deceased Smt.Kaulan Devi in favour of defendant in sound and disposing state of mind and as such same could not be held to be shrouded by suspicious circumstances by the learned trial Court. During arguments having been made by Mr.Verma, he made this Court to travel through the statements made by the plaintiff witnesses as well as documents placed on record to demonstrate that at no point of time plaintiff was able to prove on record that Will Ex.DW-2/A is not genuine document executed by deceased Smt.Kaulan Devi. Mr.Verma further argued that plaintiff miserably failed to lead evidence, be it ocular or documentary, on record suggestive of the fact that Will Ex.DW-2/A was falsely got executed by the defendant using force and undue influence upon testatrix Smt.Kaulan Devi. While concluding his arguments, Mr.Verma, invited the attention of this Court to the judgment passed by the first appellate Court and contended that judgment passed by first appellate Court is based upon correct appreciation of evidence on record and learned first appellate Court, while differing with the judgment passed by trial Court, has assigned sufficient reasons in support of its findings that Will Ex.DW-2/A is valid document, duly executed by Smt.Kaulan Devi in sound and disposing state of mind. He also stated that once suit was filed by the plaintiff alleging therein that Will Ex.DW-2/A set up by defendant is a result of fraud, onus was upon plaintiff to prove the validity of the Will Ex.DW-2/A that the same is not genuine document and is shrouded by suspicious circumstances, by way of leading cogent and convincing evidence, but perusal of material made available on record, nowhere suggests that Will Ex.DW-2/A is result of fraud as alleged by the plaintiff.

11. I have heard learned counsel for the parties and gone through the record of the case.

12. Needless to say that law regarding nature and onus of the proof of the Will is by way of propounder and in that regard the manner in which the evidence is required to be appreciated has been duly prescribed in the judgment passed by the Hon'ble Apex Court in ***H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443***.

13. Guidelines framed in ***H.Venkatachala Iyengar*** case (*supra*) were further reiterated by Constitutional Bench of Hon'ble Apex Court in ***Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529.*** The Court held:

> "4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and Rani Purniama Devi v. Khagendra Narayan Dev, 1962 (3) SCR 195 : 1962 AIR(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of

> proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no. such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested. (Page-531)

14. Now, this Court would be adverting to the evidence led on record by the respective parties to explore the answer to substantial question of law, *"whether there has been mis-reading of evidence by the learned first appellate Court and whether no reasons have been recorded by learned first appellate Court while reversing the findings returned by the learned trial Court that Will Ex.DW-2/A was shrouded by suspicious circumstances".* Keeping in view the pleadings on the point as well as submissions having been made on behalf of the respective parties by their counsel, it would be necessary and apt at this stage to refer to the plaint filed by the plaintiff; namely; Smt.Geeta Devi.

15. Perusal of plaint clearly suggests that plaintiff filed a suit for declaration to the effect that she is owner in possession of suit land, as described hereinabove, with consequential relief of permanent prohibitory injunction restraining the defendant from interfering in the suit land in any manner, whatsoever, or getting mutation sanctioned on the basis of alleged Will Ex.DW-2/A, dated 25.10.993. Plaintiff further in para-3 of plaint, which is reproduced here-in-below, stated that the defendant is stranger to the suit land and he has no right, title or interest over the suit land. It has been further stated in the said para that defendant has started illegal and unauthorized interference over the suit land by alleging that Smt.Kaulan Devi has executed a Will:

> "3. That defendant is a stranger to suit land and defendant has got no right, title over the suit land. Defendant has started illegal and unauthorized interference over the suit land by alleging that Smt.Kalan Devi has executed a Will in his favour. Kalan Devi has not executed any Will in favour of Defendant as she was unable to execute the alleged will dated 25.10.93 as she was not of having disposing mind before her death. The alleged will is fictitious, forged one and has been prepared after her death in connivance with the scribe and witnesses in fraudulent manner. The alleged will could be the result of undue influence and importunity also. The alleged will is illegal, null and void and is not binding on the plaintiff."

16. Perusal of aforesaid para contained in plaint clearly suggests that plaintiff prayed for relief of permanent prohibitory injunction against defendant on the ground that Will Ex.DW-

2/A is allegedly executed by deceased Smt.Kalan Devi in favour of defendant is fictitious, forged one allegedly prepared by defendant after her death in connivance with the scribe and witnesses in fraudulent manner. Plaintiff further claimed that alleged Will, which is a result of undue influence and importunity is not binding on the plaintiff.

17. The defendant in written statement claimed that Smt.Kaulan Devi executed a valid Will in the sound disposing mind on 25.10.93 in favour of defendant and Will was executed by Smt.Kaulan Devi of her own free will without any pressure of any side.

18. It is ample clear from the pleadings, as reproduced hereinabove, that plaintiff sought declaration as well as decree for permanent prohibitory injunction on the ground that Will Ex.DW-2/A set up by defendant is fictitious and forged document got prepared by the defendant after the death of Smt.Kaulan Devi in connivance with scribe and witnesses in fraudulent manner; meaning thereby onus had shifted on plaintiff to prove that Will is not a genuine document, as has been held by the Hon'ble Apex Court in ***Daulat Ram and Others vs. Sodha and Others,*** (***2005)1 SCC 40*** :-

> "10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so." (Page 43)

19. But, interestingly, perusal of judgment dated 17.6.2004 passed by learned trial Court clearly suggests that it proceeded to decide the controversy at hand on the premise that onus, if any, to prove that Will Ex.DW-2/A is a valid document is upon the propounder of the Will i.e. defendant in the present case, completely ignoring the fact that at first instance plaintiff herself termed Will Ex.DW-2/A as a fictitious/forged document procured by playing fraud. At the cost of repetition, it is once again stated that once plaintiff had termed Will Ex.DW-2/A to be forged and fictitious document, onus was upon her to prove on record that Will Ex.DW-2/A is not a forged document, rather the same is a result of fraud, by leading cogent and convincing evidence on record. However, in the present case learned trial Court on the basis of pleadings of the parties framed two following issues:-

> "1. Whether the plaintiff is entitled to the relief of declaration and permanent injunction, as prayed? OPP.
>
> 1A. Whether Smt.Kalan Devi has executed a valid and registered Will dated 25.10.1993 in favour of the defendant, as alleged? OPD."

but, while deciding the matter at hand, proceeded to decide issue No.1A at first instance and for this purpose analyzed the evidence led on record by the defendant. Whereas learned trial Court in view of specific stand taken by the plaintiff vis-à-vis Will Ex.DW-2/A in the plaint ought to have taken evidence led on record by the plaintiff for critically analyses at first instance to reach

just and fair conclusion that whether plaintiff was able to prove on record that Will Ex.DW-2/A is result of fraud as alleged in plaint. Had trial Court taken issue No.1 for discussion at first instance, he would have examined the evidence led on record by the plaintiff at first instance, from where he would have made an attempt to gather, whether plaintiff was able to prove on record that Will Ex.DW-2/A is not a genuine document and the mutation sanctioned on the basis of such Will is of no consequence.

20. Leaving everything aside, this Court solely with a view to answer substantial question of law, examined the judgment passed by the learned first appellate Court, perusal whereof nowhere suggests that learned first appellate Court, while reversing the judgment of trial Court misread the evidence available on record and recorded no reason. Rather, perusal of judgment passed by the first appellate Court clearly suggests that it undertook an exercise to critically examine the evidence led on record while coming to the conclusion that Will Ex.DW-2/A is a valid document duly executed by Smt.Kaulan Devi in her sound disposing state of mind in favour of defendant. This Court solely with a view to ascertain the genuineness and correctness of the arguments having been made on behalf of the plaintiff also examined the evidence led on record by the respective parties.

21. Perusal of para-22 of the judgment passed by the learned trial Court though suggests that trial Court had culled out certain circumstances, which persuaded learned trial Court to conclude that Will Ex.DW-2/A is a forged document shrouded by suspicious circumstances, but, as has been discussed and observed hereinabove that in the given facts and circumstances of the case onus was upon the plaintiff to prove that Will Ex.DW-2/A is a forged document by leading cogent and convincing evidence. But interestingly, none of the plaintiff witness stated that Will Ex.DW-2/A is a result of fraud and was procured by defendant by playing fraud upon testatrix; namely; Smt.Kaulan Devi. Moreover, plaintiff, who claimed herself to be a legal heir of deceased Kaulan Devi, never stepped into witness box, rather she gave her power of attorney to her husband, who appeared as PW-1. This Court was unable to find on record any explanation rendered by the plaintiff that what prevented her from entering the witness box to prove what she stated in the plaint. Perusal of statement made by PW-1, nowhere suggests that effort, if any, was ever made to prove on record that Will Ex.DW-2/A is a fictitious and forged document procured by the defendant by playing fraud upon the testatrix Smt.Kaulan Devi. PW-1 stated that testatrix Kaulan Devi died in October, 1993 and she was not keeping well at the time of her death. He further stated that Kaulan Devi was not able to speak for the last 15-16 days and she did not execute any Will and nor she was able to execute any Will. He also stated that she was looked after and maintained by him and his wife and her last rites were also performed by him. But in his cross-examination he admitted that Geeta Devi-plaintiff was brought up by her maternal uncle. Though he stated that Kaulan Devi remained ill for 15-20 days before death and he got her medically examined in Government Hospital, Bassi, but interestingly he did not place any document on record to prove that during her last days she was got medically examined by the plaintiff at Government Hospital, Bassi. Similarly, PW-1 nowhere stated that Kaulan Devi was not in a sound and disposing state of mind and was unable to append thumb impression on the alleged Will Ex.DW-2/A. Rather, he stated that Kaulan Devi remained ill for 10-15 days prior to his death and she was not even able to talk. PW-1 nowhere stated that Will in question is a result of fraud and same is a forged document procured by the defendant by playing fraud in connivance with scribe and attesting witnesses as alleged in the plaint.

22. Withholding of the plaintiff herself from the witness box and thereby denying the defendant an opportunity for cross-examination is a valid and sufficient ground for Court to draw an adverse inference against the plaintiff.

23. In this regard reliance is placed on the judgments passed by Hon'ble Apex Court in ***Khatri Hotels Private Limited and Another vs. Union of India and Another, (2011)9 SCC 126 , Man Kaur (Dead) by LRs. Vs. Hartar Singh Sangha, (2010)10 SCC 512, Rattan Dev vs. Pasam Devi, (2002)7 SCC 441, Iswar Bhai C Patel alias Bachu Bhai Patel vs. Harihar***

Behera and Another, (1999)3 SCC 457 and our own High Court in ***Kamlesh Rani vs. Balwant Singh, 2010(3) Shim.L.C. 141.***

24. Similarly, PW-3 stated that Kaulan Devi was not keeping well prior to her death and even she was not able to speak. But he also nowhere stated that Will Ex.DW-2/A is a forged and fictitious document procured by the defendant by playing fraud. He also not stated that Kaulan Devi was totally incapacitated and was not in a position to put thumb impression. Similarly, these aforesaid two witnesses, nowhere stated that defendant had no cordial relation with Kaulan Devi and there was no occasion/motive for Kaulan Devi to execute Will Ex.DW-2/A in favour of defendant. Though these aforesaid plaintiff witnesses stated in their statements that Kaulan Devi was being looked after by plaintiff and her husband, but there is no explanation worth name that in what capacity plaintiff; namely; Geeta Devi was staying with Kaulan Devi because it has come in evidence that plaintiff Geeta Devi was brought up by her maternal uncle and after her marriage she was residing with her husband at a place distant from house of deceased Kaulan Devi. Though plaintiff in plaint specifically alleged that Will was procured fraudulently by the defendant in connivance with the scribe; namely; Ramesh Chand and attesting witnesses but none of plaintiff witnesses stated anything with regard to these aforesaid persons, who allegedly connived with the defendant while procuring/preparing forged Will. Though plaintiff by way of leading documentary evidence made an attempt to prove on record that Kaulan Devi never used to append thumb impression on the documents, rather, she being Pradhan of Gram Panchayat used to sign the document. In this regard plaintiff produced evidence in the shape of various documents allegedly signed by Smt.Kaulan Devi. PW-1 as well as his witnesses stated before the Court below that Smt.Kaulan Devi used to sign the ration card and proceedings of the Gram Panchayat. This Court also perused the Ration Card as well as Register of proceedings of Gram Panchayat of 1962-63, which suggest that Kaulan Devi had been signing documents. But signature of Smt.Kaulan Devi as available in the aforesaid proceedings of Gram Panchayat itself appears to be clumsy. Ex.PW-2/A,placed on record by the plaintiff, pertains to year 1962-63, whereas undisputedly alleged Will is dated 25.10.1993; meaning thereby that thumb impression, if any, was appended upon Will after 30 years of alleged signatures of the Gram Panchayat Proceedings. There cannot be any dispute that a person, who used to sign 30 years back cannot append thumb impressionin later part of his/her life, especially when she was in frail health as claimed by the plaintiff. Moreover, none of the plaintiff witnesses stated that they saw signing Kaulan Devi in their presence. Whereas, defendant also produced Ration Card of Smt.Kaulan Devi on record, perusal whereof suggests that Smt.Kaulan Devi used to put thumb impression on the document.

25. Apart from above, during pendency of appeal, the defendant had moved an application under Order 41 Rule 27 of the Code of Civil Procedure for leading additional evidence, wherein document with regard to holding of time deposit account by the deceased Kaulan Devi in the Post Office was sought to be brought on the record. By way of application, defendant also stated that Kaulan Devi was holding Post Office saving account, whereas plaintiff, while filing reply to the aforesaid application, nowhere disputed the averments and feigned ignorance of having saving account by late Smt.Kaulan Devi with the local Post Office and Cooperative Society. Similarly, the defendant also averred in the application that deceased Kaulan Devi was holding Account No.36 in Cooperative Society and had been operating that account and she was also holding ration card. Defendant specifically stated that in all the aforesaid documents and transactions, Smt.Kaulan Devi had been putting thumb impression. To substantiate averments contained in the application, pass book of account, ration card and certificate issued by Secretary, Cooperative Society were also appended with the application, perusal whereof clearly suggests that deceased Kaulan Devi had been appending thumb impression upon the documents. Whereas, plaintiff while filing reply to the aforesaid application, nowhere disputed the averments and feigned ignorance of having saving bank account by late Smt.Kaulan Devi with the local Post Office and Cooperative Society. Similarly, perusal of reply to the application, nowhere suggests that at any point of time plaintiff stated that Smt.Kaulan Devi had not put thumb impression on the documents in the local Post Office and Cooperative Society. In view of the fact that thumb

impression of the deceased was available on local post Office and Cooperative Society, it could not be concluded by the learned trial Court merely on the basis of statement made by PW-1 that Kaulan Devi never used to put thumb impression, rather she used to sign. Moreover, at no point of time plaintiff applied for comparison of thumb impression of Smt.Kaulan Devi on Will Ex.DW-2/A with that of the account of local Post Office and Cooperative Society, as a result of which Court below had no option but to accept the contention put forth on behalf of the defendant that testatrix Kaulan Devi had been putting thumb impression on the document.

26. PW-1 Brij Lal as well as other witnesses though stated that testatrix Kaulan Devi was not well for 10-15 days prior to her death and she was not able to understand the documents like the Will Ex.DW-2/A, but, as has been discussed hereinabove, none of these plaintiff witnesses stated that at the time of execution of alleged Will Ex.DW-2/A testatrix Kalan Devi was not in sound disposing state of mind. Statements to the effect that Kaulan Devi was not keeping well for 10-15 days prior to her death cannot be termed to besufficient to conclude that she was totally incapacitated even to put thumb impression on the documents.

27. After perusing the entire evidence led on record by the plaintiff, this Court is unable to conclude that plaintiff was able to prove on record that Will Ex.DW-2/A is a forged and fictitious documents procured by the defendant by playing fraud. Since plaintiff had termed the Will to be forged and fictitious documents, onus was upon her to prove on record that Will is forged and fictitious document procured fraudulently by the defendant by leading cogent and convincing evidence, but none of plaintiff witnesses, as has been discussed in detail, has either stated or has explained circumstances from which it could be inferred/gathered that Will Ex.DW-2/A is a result of fraud. Whereas, defendant stated that his parents and he himself had been looking after and maintaining Smt.Kaulan Devi. He also stated that testatrix; namely; Kaulan Devi, had been visiting in defendant's house. Aforesaid assertion stands duly corroborated with the admission having been made by PW-3 Bhuru Ram. In his cross-examination, he categorically admitted that defendant and his parents had been visiting Smt.Kaulan Devi. He admitted the plaintiff to be the daughter of Kaulan Devi, who was the second wife of Paras Ram. He specifically stated that he and his father served Kaulan Devi and Geeta Devi never visited her parental house nor they saw her. It has also come in his statement that plaintiff Geeta Devi was brought up by and was married by her maternal uncle. He further stated that Kaulan Devi executed a Will in his favour and money was bequeathed in favour of his mother.

28. DW-2 Vidya Sagar stated that Will was executed by Kaulan Devi in favour of defendant Shakti in his presence. He specifically stated that Will was read over and explained to Kaulan Devi who after admitting the contents to be correct, put her thumb mark on the Will in his presence and the other witnesses signed the Will as witnesses in his presence. He categorically stated in his statement that she was in sound disposing mind at the time of execution of the Will. It has also come in his statement that Kaulan Devi was being looked after and served by Sandhya Devi and Partap i.e. parents of the defendant. He also stated that he never saw plaintiff Geeta Devi visiting the house of deceased Kaulan Devi. However, in his cross-examination he stated that Will was executed at the residence of Sandhya Devi at Gayaldi, where he was called by nephew of the defendant. He stated that when he reached there, Bhagat Ram and Roop Lal were already sitting there on the cot in the Varandah and Ramesh Chand came after 15 minutes. It is also deposed by him that testatrix Kaulan Devi dictated that she bequeathed her movable and immovable property in favour of Shakti Chand and nothing more was dictated by her.

29. Bhagat Ram DW-3 also stated that Kaulan Devi executed a Will Ex.DW-2/A in favour of defendant in his presence. He also stated that he signed the Will as witness. It has also come in his statement that Will was written by Ramesh Chand at the instance of Kaulan Devi, which was read over and explained to her and thereafter she put her thumb impression on the same. He also stated that other witnesses also signed the Will in her presence. He specifically stated that Kaulan Devi was in sound disposing mind at that time and she was being looked after and served by defendant and her mother. Like DW-2, he also stated that he never saw plaintiff

Geeta Devi visiting Kaulan Devi at any point of time. It has also come in his statement that Will was produced before Tehsildar, where he again signed the Will. Cross-examination conducted upon these aforesaid defendantwitnesses, who allegedly signed as marginal witnesses on the Will Ex.DW-2/A, nowhere suggests that any suggestion worth name was ever put to these attesting witnesses that Kaulan Devi never executed Will in favour of defendant. No suggestion to the effect that thedefendant got the Will prepared fraudulentlyin connivance with scribe andwitnesses. Similarly, no suggestion was put that Will Ex.DW-2/A is a result of fraudand same isforged and fictitious document and they never appended their signatures upon the same. Since scribe Ramesh Chand had passed away, there was no occasion for defendant to cite him as a plaintiff witness in support of his claim, but attesting witnesses, as have been discussed hereinabove, clearly proved on record that Will was executed by late Smt.Kaulan Devi in their presence in sound and disposing state of mind. Both the attesting witnesses categorically stated that they and scribe signed the Will in the presence of testatrix. But learned trial Court while coming to the conclusion that Will is shrouded by suspicious circumstances also observed that thumb impression of testatrix had appeared at the end, whereas attesting witnesses and scribe signed the Will above the thumb impression of the testatrix. But, as has been rightly observed by learned District Judge, Will Ex.DW-2/A was not prepared and scribed by trained/license deed writer and as such aforesaid discrepancy pointed out by learned trial Court could not be termed as suspicious circumstance in any manner, especially in the teeth ofspecific and unequivocal statements of both the attesting witnesses that Kaulan Devi got the Will scribed from late Shri Ramesh Chand in their presence and she had appended signatures in their presence with sound disposing state of mind. It is not understood as to how learned trial Court came to the conclusion that thumb impression of the deceased was available on the blank paper and space of thumb impression was used for preparation of the Will and attestation thereof, because it was none of the case of the plaintiff. Moreover, no evidence, if any, in this regard was ever led on record by the plaintiff witnesses. Perusal of cross-examination conducted upon PW-2 and PW-3 suggests that no suggestion worth the name was ever put to PW-2 and PW-3 with regard to thumb impression of the testatrix appearing at the bottom. Had defendant put this suggestion to PW-2 and PW-3, they would have definitely explained the circumstances under which the thumb impression of the testatrix was obtained at the bottom. Similarly, no attempt was made by the plaintiff to prove on record that Kaulan Devi had put thumb mark on the blank paper for some other purpose, but the same was fraudulently used by the defendant for preparing alleged Will Ex.DW-2/A. It may be noticed that Will Ex.DW-2/A was prepared on the judicial paper of 1987 and in this regard plaintiff, nowhere made an attempt to prove on record that judicial paper used for preparing Will was not procured by Kaulan Devi, especially for execution of Will.

30. This Court, after perusing evidence led on record by the defendant, has no hesitation to conclude that defendant was able to prove on record that Will Ex.DW-2/A was duly executed by late Smt.Kaulan Devi in his favour in sound disposing state of mind. At this juncture, it would be relevant to refer to the provisions of Section 63 of the Indian Succession Act, 1925:

> "63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [12] [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator,

> or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

31. Perusal of aforesaid provision clearly suggests that for valid attestation of Will, it must be proved that Will was attested by at least two witnesses and each of these witnesses must either see the testator signing or affixing his mark on the Will or it shall be signed by some other person, in their presence, on thedirection of testatrix. Similarly, these witnesses must receive from the testator a personal acknowledgement of his signature or mark or the signature of such other person. Apart from above, these witnesses must sign Will in the presence of the testator.

32. In the present case, defendant by leading cogent and convincing evidence, as has been discussed in detail, was successful in proving that Will was executed by late Smt.Kaulan Devi in her sound disposing state of mind after understanding the contents contained in the document and put her signatures on the document on her own free will.

33. This Court, after carefully perusing the evidence led on record by defendant, has no hesitation to conclude that defendant was able to prove that Will Ex.DW-2/A was validly executed by Smt.Kaulan Devi, whereas evidence led on record by the plaintiff, which has been discussed in the earlier part of the judgment, nowhere suggests that plaintiff was able to discharge onus shifted upon her after terming Will Ex.DW-2/A as a forged and fictitious document, that Ex.DW-2/A is a forged document procured fraudulently by the defendant and as such this Court sees no illegality and infirmity in the judgment passed by the learned first appellate Court who definitely while reversing the judgment passed by trial Court examined entire evidence available on record in right perspective and by no stretch of imagination it can be said that there has been a misreading of evidence by Court below. This Court is of the firm view, after perusing the judgment passed by Hon'ble Apex Court in ***Daulat Ram's*** case *supra* that onus was upon plaintiff to prove, especially when in her plaint she had termed the Will to be forged and fictitious document and there was no requirement for this Court to examine the evidence, if any, led on record by the defendant to examine the genuineness and correctness of the judgment passed by the learned trial Court. Perusal of par-22 of the judgment passed by trial Court clearly suggests that trial Court while culling out suspicious circumstance, nowhere taken into consideration evidence led on record by the plaintiff upon whom onus was heavy to prove that Will is forged and fictitious document, rather close reading of para-22 suggests that learned trial Court selectively used the evidence led on record by the defendant while pointing out suspicious circumstances. Careful perusal of aforesaid para-22 of the judgment passed by learned trial Court compels this Court to conclude that the evidence led on record by the defendant was not appreciated in its right perspective by the trial Court, rather same was selectively referred by learned trial Court while decreeing the suit of the plaintiff. Otherwise also plaintiff was supposed to stand on her own legs while proving the contents of the plaint and by no means she could be allowed to take benefit of weakness/discrepancies, if any, in the case of the defendant.

34. While concluding and upholding the judgment passed by the learned first appellate Court, this Court is of the view that learned trial Court wrongly proceeded to decide the case at hand on the premise that onus, if any, to prove that Will is not shrouded by suspicious circumstance was upon the defendant because by now it is well settled that onus to prove that will is forged and fictitious document is upon the person, who alleges the same. Since in this case plaintiff had termed Will as a forged and fictitious document, she was under obligation to prove on record by leading cogent and convincing evidence that Will Ex.DW-2/A is a result of fraud, but in the present case as clearly emerge from the record especially the judgment passed by learned trial Court, that trial Court decided the matter on the premise that onus, if any, to prove that Will was free from suspicion is/was upon defendant.

35. Consequently, in view of the facts and circumstances discussed hereinabove, this Court is of the view that there is no illegality and infirmity in the judgment passed by learned first

appellate Court and as such it does not warrant any interference by this Court, moreover, as has been discussed in detail hereinabove, appellant-plaintiff was not able to make out her case to persuade this Court that Will Ex.DW-2/A is fake and fictitious document procured by the defendant by undue influence. Similarly, this Court, after perusing the evidence led on record by the plaintiff, was unable to see any circumstance which could compel this Court to return the findings that Will Ex.DW-2/A is shrouded by suspicious circumstances. Hence present appeal fails and is dismissed, accordingly.

36. All the interim orders are vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

United India Insurance Company Ltd. .....Appellant.

Versus

Khem Lata and others .....Respondents.

FAO No. 563 of 2016.
Decided on : 15th November, 2016.

Employees Compensation Act, 1923- Section 4- Deceased was employed as driver- he died during the course of his duties- compensation of Rs.9,97,000/- was awarded by the Commissionerwith interest @12% per annum - funeral expenses of Rs.40,000/- were also awarded- held in appeal that it was not disputed that deceased was driver and he had died during the course of his employment – Commissioner had taken the salary as Rs.10,000/- - the claimant had pleaded that deceased was drawing salary of Rs.7,000/- per month and Rs.120/- per day as daily allowance –compensation of Rs.80,000/- in lump sum is to be awarded when the actual income is not proved – since, in the present case the actual income was proved – therefore, compensation could not have been restricted to Rs.80,000/- in lump sum- Rs.40,000/- could not have been awarded towards funeral expenses in absence of any statutory provisions – interest was payable on the compensation amount after one month of the accident – appeal partly allowed. (Para-6 to 8)

For the Appellants: Mr. G.D. Sharma, Advocate.
For the Respondents No.1 to 4 : Mr. G.R. Palsra, Advocate.
Respondent No.5 proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

CMP(M) No. 789 of 2015.

Heard. In view of the averments made in the application which are duly supported by an affidavit and in the interest of justice, the delay in filing the appeal is condoned. Application stands disposed of.

FAO No. 563 of 2016.

The instant appeal arises from an order rendered by the Commissioner for Employees Compensation, Chachiot at Gohar, District Mandi, H.P., (for short the "Commissioner"), on 17.01.2015 in E.C. Act No. 4 of 2011, whereby, compensation quantified in a sum of Rs.9,97,000/- along with simple interest @12% p.a. from the date of death of the deceased till its realization alongwith funeral expenses quantified at Rs.40,000/- stood assessed qua the claimants, who are the successors-in-interest of one Murari Lal, who uncontrovertedly suffered fatal injuries during the course of his performing employment as a driver under respondent No.5.

2. The appellant herein standing aggrieved by the rendition of the learned Commissioner hence concert to assail it by preferring an appeal therefrom before this Court.

3. Uncontrovertedly, the predecessor-in-interest of the claimants/respondents No.1 to 4 herein suffered his demise in a motor vehicle accident involving vehicle bearing No. HP-32B-7777, whereon he stood employed as a driver by respondent No.5 herein. The learned counsel for the appellant herein submits qua his not controverting the factum of the demise of the deceased occurring during the course of his performing employment in the ill-fated vehicle as its driver under respondent No.5. Even, the conclusion recorded by the learned Commissioner on the issue apposite to the aforesaid factum does not disclose qua his conclusion qua the occurrence of demise of the deceased arising during the course of his performing duties as a driver at the relevant time in the ill-fated vehicle bearing No. HP-32B-7777, suffering from any perversity of it standing anchored upon irrelevant or discardable evidence or its omitting to mete deference to the germane besides relevant evidence.

4. The counsel for the appellant herein submits at the bar qua his not contesting the findings recorded in the impugned order by the learned Commissioner qua the claimants/respondents No.1 to 4 herein holding the apposite capacity to on demise of their predecessor-in-interest stake a claim for compensation against respondent No.5, also concomitantly, against the appellant herein, given the evident existence of a valid contract of insurance covering the apposite liability of the insurer to indemnity the insured qua compensation assessed under the Act arising from occurrence of demise of his lawfully engaged driver in the ill-fated vehicle during the course of his performing employment under the insured.

5. The counsel for the appellant makes a vociferous submission qua the determination recorded by the learned Commissioner qua the deceased drawing from his employment as a driver under respondent No.5 an amount of Rs.10,000/- per month standing anvilled upon evidence which is beyond pleadings, significantly when in the claim petition the claimants record a pointed averment qua the deceased drawing from his avocation as a driver under respondent No.5 a sum of Rs.7000/- per month, whereupon he espouses qua any evidence which stood adduced before the learned Commissioner qua his drawing from his relevant employment, a salary/ amount of Rs.10,000/- per month being obviously beyond pleadings, hence, discardable rendering hence the reliance thereupon to be inapt. However, the aforesaid submission is unacceptable especially when apart from the claimants recording an averment in the apposite claim petition qua their predecessor-in-interest drawing an amount of Rs.7000/- per month as salary from his employer, theirs also making a communication therein qua his drawing a sum of Rs.120/- per day as daily allowance from his employer. Since, the totaling of a sum of Rs.7000/- drawn as salary per month by the deceased from his employment as a driver under respondent No.5 alongwith an amount of Rs.120/- per day yields a figure of Rs.10,000/- per mensem, consequently, the testification of the claimants qua their predecessor-in-interest drawing an amount of Rs.10000/- per month as wages/salary from his relevant employment under respondent No.5 is obviously not beyond pleadings. Moreover, a perusal of the order impugned hereat discloses qua the learned Commissioner concluding qua the deceased drawing a sum of Rs.10,000/- per month from his avocation as a driver under respondent No.5 being the apt amount whereto the relevant statutory principles were purportedly enjoined to be applied for computing the compensation amount assessable qua the claimants. For lack of repudiation thereto by respondent No.5 comprised in his adducing cogent evidence therebefore constituted in his adducing into evidence the salary register maintained by him personifying his defraying to the predecessor-in-interest of respondents No.1 to 4 an amount lesser than Rs.10,000/- per month as salary/wages for the work performed by him as a driver in the relevant vehicle. In sequel, the omission of respondent No.5 to adduce the best evidence in portrayal of the deceased drawing an amount lesser than Rs.10,000/- from him as salary/wages from his employment as a driver under him, enhances an inference qua the testification of the claimants qua the facet aforesaid being both credible besides reliable whereupon it was apt for the learned Commissioner to anvil his apposite findings.

6. However, the learned counsel appearing for the appellant has with vigour contended of yet the learned Commissioner proceeding to move stray from the provisions of Section 4 of the Workmen Compensation Act (hereinafter referred to as the "Act"), relevant provisions whereof stand extracted hereinafter, digression whereof by him stands espoused by the learned counsel for the appellant to emanate from his while determining inconsonance with the initial condition embodied in clause (a) to subsection (1) of Section 4 of the Act, the amount per month drawn as salary/wages by the deceased workman from his employment as a driver under respondent No.5 whereto on his inaptly applying the statutory principles, he assessed compensation amount payable to the claimants, his though also standing enjoined to mete deference to the condition alternative to the primary condition of sub section 1(a) of Section 4 of the Act, wherewithin a mandate is held qua his being bound irrespective of the actual amount of the wages/salary drawn by the deceased workman to restrict the relevant compensation amount at Rs.80,000/- in lump sum, whereas, his slighting the impact of the condition alternative to the primary condition to sub section 1(a) of Section 4 of the Act upon the relevant facet, has sequeled his hence grossly mis-assessing the compensation amount qua the claimants. However, the aforesaid submission has no force given the learned counsel appearing for the appellant though aptly submits qua the two conditions enumerated in clause (a) of subsection 1 of Section 4 of the Act standing enjoined to be conjunctively read also he makes an apt submission of the condition alternative to the initial relevant condition wherewithin an echoing is embodied qua the learned Commissioner also standing enjoined to restrict the compensation amount assessable qua the dependents of the deceased workman at Rs.80,000/- yet his further submission qua the learned Commissioner standing hence enjoined to restrict the relevant compensation amount at a sum of Rs.80,000/- is for the reasons ascribed hereinafter grossly inapt. (I) A reading in its entirety of the condition alternative to the relevant statutory initial condition makes a vivid disclosure of it postulating qua its warranting reverence only when the initial condition remains unsatiated. While making a dilation upon the aforesaid factum qua the relevant initial statutory condition holding an expostulation of the Commissioner standing enjoined to deduct 50% of the actual wages drawn by the deceased from his relevant employment whereon he is enjoined to apply the relevant statutory principles for computing the compensation amount, for attraction whereof upsurgings of firm evidence qua the actual wages per mensem drawn by the deceased from his relevant employment under respondent No.5 is enjoined to spur. Also with the initial statutory condition encapsulated in the hereinafter extracted relevant statutory provisions standing satiated there would hence be no occasion for attraction hereat of the condition alternative to it. Since, the conclusion drawn by the learned Commissioner in determining the compensation amount qua the claimants stands anvilled upon the deceased evidently drawing a sum of Rs.10,000/- per month as salary/wages from his employment under respondent No.5, necessarily with the learned Commissioner recording an apt conclusion qua the aforesaid facet, it hence begot satiation of the initial statutory condition embodied in the relevant provisions whereupon obviously the learned Commissioner did not err to mete thereto the relevant statutory deduction of 50%. Consequently, when the initial condition embodied in clause (a) to sub section (1) of Section 4 of the Act stands satiated, the condition alternative to it holding therewithin a mandate of the Commissioner standing enjoined for attracting hereat its application, to stand seized of firm evidence qua paucity of relevant evidence qua the actual amount of wages per mensem drawn by the deceased workman from his relevant employment under his employer, whereupon, he holds an empowerment to determine only a sum of Rs.80,000/- in lump sum as compensation to the dependents of the deceased workman. However, when as aforestated the initial statutory condition stand satiated, the learned Commissioner was not enjoined to place any dependence upon the statutory condition alternative to it. (ii) Also assumingly, if the condition alternative to the initial condition is also construed to be holding any attraction hereat yet with the relevant alternative statutory condition expostulating a sum of Rs.80000/- in lump sum being statutorily available for standing assessed as compensation by the learned Commissioner vis-a-vis the dependents of the deceased workman also assumingly its mandating qua with the Commissioner taking into account both the conditions embodied in the relevant statutory provisions wherefrom his apposite reckonings of the relevant compensation amount stand aroused unraveling qua the

relevant compensation amount arrived at by his applying the initial condition being higher vis-a-vis his applying the condition alternative to it, yet his standing enjoined by the statutory phrase "which ever is more" occurring in the relevant provisions to mete deference to the figure/amount of compensation which is higher whereupon obviously when the working of the initial statutory condition sequels computation of compensation vis-a-vis the claimants of the deceased workman at a figure higher than the one which would stand arrived at on the condition alternative to it also standing applied, the attraction besides workability of the condition alternative to the initial statutory condition stands negated, Imperatively, hence, with the attraction hereat of the primary statutory condition fetching a compensation amount vis-a-vis the dependents of the deceased workman in a sum higher than yielded by application hereat of the condition alternative to it, contrarily, renders hence the reckoning of the initial statutory relevant statutory condition by the learned Commissioner while determining compensation amount vis-a-vis the claimants of the deceased workman to be apt. As a corollary the initial condition when reckoned results in assessment of compensation amount higher than the one which would occur on application of the condition alternative to it embodied in the relevant statutory provisions besides when a literal reading of the condition alternative to the initial condition enshrines qua when on application of the initial statutory condition, compensation amount higher than Rs.80,000/- is assessable qua the claimants of the deceased workman renders it to be discardable whereupon hence the apposite quantification of compensation by the learned Commissioner renders it to fall within the apt relevant statutory ambit of the attractable relevant statutory condition embodied in clause (a) to subsection (1) of Section 4 of the Act.

> **4. Amount of Compensation.- (1) Subject to the provisions of this Act, the amount of compensation shall be follows, namely:-**
>
> (a) Where death result from the injury- an amount equal to (fifty per cent) of the monthly wages of the deceased workman multiplied by th relevant factor;
>
> or
>
> an amount of (eighty thousand rupees), whichever is more;
>
> (b).....

7. The learned counsel appearing for the appellant submits that the quantification by the learned Commissioner vis-a-vis respondents no.1 to 4 a sum of Rs. 40,000/- as funeral charges is beyond the statutory provisions engrafted in the Act. The aforesaid submission of the learned counsel appearing for the appellants holds vigour. Consequently, the quantification by the learned Commissioner under his impugned order qua a sum of Rs.40,000/- being defrayable to respondents No.1 to 4 as funeral charges is set aside.

8. The learned Commissioner in his impugned award has levied interest @ 12% per annum on the compensation amount assessed by him, levy whereof has been ordered to commence from the date of death of the deceased whereas under the relevant statutory provisions the commencement of levy of interest @12% was enjoined to occur on one month elapsing since the accident. Consequently, the levy of interest on the compensation amount assessed by the learned Commissioner shall commence on one month elapsing since the accident.

9. For the reasons recorded herein-above, the instant appeal is partly allowed and the award impugned before this Court is modified to the extent that a sum of Rs.40,000/- adjudged by the learned Commissioner vis-a-vis respondents No.1 to 4 towards funeral expenses of the deceased shall stand excluded from the compensation amount determined by him in their favour. Consequently, the levy of interest on the compensation amount assessed by the learned Commissioner shall commence on one month elapsing since the accident. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, *J.*

Shri Label Chand alias Albel Chand. .....Appellant.

Versus

Smt. Sita Devi & ors. .....Respondents.

RSA No. 126 of 2005.
Date of decision: November 16, 2016.

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that he is owner in possession of the suit land with his sister – defendant applied for partition- plaintiff raised objection but partition was ordered ignoring the objections raised by the plaintiff- plaintiff sought declaration that order of the partition is null and void – the suit was dismissed by the trial Court as barred by Section 171(XVII) of H.P. Land Revenue Act- an appeal was preferred, which was also dismissed- held in second appeal that when the Court had concluded that it had no jurisdiction, it should have returned the plaint for presentation before appropriate forum – the plaintiff was to file an appeal/revision before Revenue authorities – hence, the plaintiff permitted to withdraw the suit with liberty to take appropriate proceedings in the forum having jurisdiction. (Para-8 and 9)

Cases referred:

R.S.D.V. Finance Co. Pvt. Ltd., v. Shree Vallabh Glass Works Ltd., AIR 1993 Supreme Court 2094

Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar, AIR 1965 Supreme Court 338

Governing Council of Kayastha Pathshala, Prayag and others v. Ram Chandra Srivastava and others, AIR 1992 Allahabad 158

For the appellant Mr. Kapil Dev Sood, Sr. Advocate with Mr. Mukul Sood, Advocate.

For the respondents Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate for respondent No. 1.
Mr. Ashwani K. Sharma, Sr.Advocate with Mr. Ishan Thakur, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

This appeal is directed against the judgment and decree dated 6.12.2004 passed by learned District Judge, Solan in Civil Appeal No. 39-S/13 of 2003 whereby learned Lower Appellate Court has dismissed the appeal and affirmed the judgment and decree dated 8.1.2003 passed by learned Sub Judge Ist Class, Kasauli at Solan district Solan in Civil Suit No. 100/1 of 1998.

2. The subject matter of dispute in the present *lis* is the land entered in Khewat Khatauni No. 43/53, Khasra Nos. 295/19, 34, 41, 297/48 and 81, Kitas 5, measuring 9 bighas 11 biswas situate in village Nandal, Pargana Keontan-I Tehsil and District Solan. The appellant (hereinafter referred to as the 'plaintiff') claims the same to be in his possession and that of his sister Sita Devi, the respondent (hereinafter referred to as the 'defendant') in equal shares. On an application filed by the defendant, learned Assistant Collector Ist Grade, Solan has ordered the partition of the suit land and ignored the objections the plaintiff raised against the partition proceedings. His claim is that he was in cultivating physical possession of the suit land since time immemorial and the defendant after her marriage in village Kyar never remained in possession of the suit land. The objections so raised were rejected by the Assistant Collector Ist Grade and while allowing the application for partition had approved the mode of partition. Consequently, the Khataunies and Sanad Taksim were prepared taking into consideration the

nature and possession of the suit land. According to the plaintiff though he had objected to the mode of partition and Sanad Taksim whereby the best piece of suit land was allotted to the defendant, however, the objections so raised by him were erroneously rejected. Therefore, by filing the suit he had sought the decree of declaration that the order of partition dated 7.5.1997 is null and void and also for permanent prohibitory injunction restraining the defendant from causing any interference in the suit land.

2. The defendant on entering appearance had contested the suit. In preliminary, she has raised the objections qua maintainability thereof and that the plaintiff is estopped due to his own act, conduct and acquiescences to file the suit and also that in view of the provision contained under Section 171(XVII) of the H.P. Land Revenue Act the civil court has no jurisdiction to try and entertain the suit. On merits, while denying the plaintiff's case being incorrect it has been asserted that the suit land was rightly ordered to be partitioned and the parties allotted the land taking into consideration its kind and possession.

3. On such pleadings of the parties, following issues were framed:

1. Whether the order dated 7.5.1997 qua Sanad Taksim is illegal null and void as alleged passed by Ld. A.C. Ist Grade Solan in case No. 14/9 of 1991/92 titled as Sita Devi Vs. Lavel Chand? ……OPP
2. In case issue No. 1 is decided in affirmative, whether the plaintiff is entitled to the relief of injunction? ….OPP
3. Whether the suit is not maintainable in the present form? ….OPD
4. Whether the plaintiff is estopped from filing the present suit by his own acts, conduct and acquiescence? ….OPD
5. Whether the suit is bad due to the provisions of section 171(XVII) of H.P. Land Revenue Act? ….OPD
6. Relief.

4. Learned trial Court after holding full trial has taken issues No. 1, 3 and 5 for consideration all together and while issue No. 1 has been answered against the plaintiff whereas issues No. 3 and 5 in favour of the defendant has dismissed the suit being not maintainable as well as barred under the provisions of Section 171 (XVII) of the H.P. Land Revenue Act. Consequently, the plaintiff was not held entitled to the relief of permanent prohibitory injunction and as such issue No. 2 was answered against him.

5. Learned Lower Appellate Court in appeal has affirmed the judgment and decree passed by the trial Court and dismissed the appeal.

6. The judgment and decree passed by learned Lower Appellate Court has been assailed in the present appeal on the grounds, inter-alia, that in view of Sanad Taksim was illegal, the order of partition was not executable. The suit as such was not barred under sub Section (1) of Section 171 (XVII) and XVIII) of the H.P. Land Revenue Act. The partition proceedings being not carried out in accordance with law, it is urged that the declaration as sought should have been granted. In any event the plaint should have been ordered to be returned for presentation in appropriate Court instead of dismissal of the suit or rejection of the plaint.

7. The appeal has been admitted on the following substantial question of law:

Whether in view of the findings that the Civil Court had no jurisdiction to try the suit, ordering rejection of the plaint is sustainable?

8. Mr. Kapil Dev Sood, learned Senior Advocate assisted by Mr. Mukul Sood, Advocate has argued that in the given facts and circumstances at the most the plaint should have been ordered to be returned to the plaintiff for presentation before the competent Court having jurisdiction to adjudicate the dispute between the parties. This is the short question which has been sought to be adjudicated in the preset appeal by Mr. Kapil Dev Sood, learned Senior

Advocate. In support of the submissions so made Mr. Kapil Dev Sood has placed reliance on the judgments of the Apex Court in ***R.S.D.V. Finance Co. Pvt. Ltd., v. Shree Vallabh Glass Works Ltd.*, AIR 1993 Supreme Court 2094, *Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar,* AIR 1965 Supreme Court 338** and that of the High Court of Allahabad in ***Governing Council of Kayastha Pathshala, Prayag and others v. Ram Chandra Srivastava and others,* AIR 1992 Allahabad 158.** The law laid down in these judgments amply demonstrate that where the Court arrives at a conclusion that it has no jurisdiction to try a suit the appropriate order to be passed should not be dismissal of the suit but qua the return of the plaint for presentation before the appropriate forum. Admittedly, the jurisdiction of the civil Court to try and entertain a suit of this nature is barred under Sub Section (1) of Section 171 clause (XVII) and XVIII) of H.P. Land Revenue Act. The remedy available against an order of partition is to file an appeal/revision before the revenue authorities i.e. Collector.

9. Divisional Commissioner and even Financial Commissioner also in hierarchy. Being so, there is substance in the submissions made on behalf of the respondent-defendant that an order to return the plaint in this case may not serve any purpose. According to Mr. G.D. Verma, learned Senior Advocate, an order allowing the plaintiff to withdraw the suit with liberty reserved to seek remedy against the order of partition available under the provisions of the HP Land Revenue Act would serve the ends of justice. Mr. Kapil Dev Sood, learned arguing counsel on behalf of the appellant-plaintiff is also not averse to the submissions so made on behalf of the defendant. Therefore, the judgment and decree under challenge in this appeal is ordered to be quashed and set aside and the plaintiff is permitted to withdraw the suit with liberty reserved to resort to the remedy available to him to challenge the order of partition before appropriate forum having jurisdiction to entertain and decide the controversy between the parties in accordance with law.

10. The present appeal is disposed of accordingly with no order so as to costs. Pending application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

State of Himachal Pradesh .....Appellant.
Versus
Mohinder Singh .....Respondent.

Cr. Appeal No. 339 of 2007
Date of decision: November 16, 2016.

Indian Penal Code, 1860- Section 279 and 337- HRTC bus and a private bus were in competition- the accused was driving the private bus in a rash and negligent manner and hit HRTC bus – the accused was tried and acquitted by the Trial Court- held in appeal that the rashness and negligence should be more than carelessness or error of judgment – prosecution is required to prove that the act on the part of the accused was responsible for the accident - PW-9 did not state that accused was driving the bus in a rash and negligent manner- PW-11 stated in cross-examination that accident had taken place due to the breakage of patta (leaf) of the bus – the prosecution case was contradictory and vague – the accused was rightly acquitted- appeal dismissed. (Para-9 to 15)

Cases referred:
Raj Kumar vs. State of H.P., 1997(2) Shim.L.C. 161
Manju Baradia vs. State of Chhatisgarh, 2002(1) Accidents Compensation Judicial Reports 24
Lalit Kumar vs. Union of India and another, 1990(2) Sim. L. C. 233

For the appellant Mr. Pramod Thakur, Addl. AG.
For the respondent Mr. K.S. Banyal, Sr. Advocate with Mr. Vijender Katoch, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

State of Himachal Pradesh aggrieved by the judgment dated 18.5.2007 passed by learned Additional Chief Judicial magistrate, Hamirpur, District Hamirpur in Police challan No. 194-I-98/195-II-98 has preferred the present appeal. The complaint is that learned trial Court has misread, misconstrued and misappreciated the evidence available on record and erroneously acquitted the respondent (hereinafter referred to as the 'accused') of the accusation put to him under Sections 279 and 337 of the Indian penal Code.

2. Accident of HRTC Bus No. HP-20-0676 and a private bus bearing registration No. HP-22-5785 had taken place at Chabuttra on Sujanpur-Hamirpur road on 15.8.1998 at 5:30 P.M. While the HRTC bus was enroute Palampur to Haridwar and on its way of Hamirpur from Sujanpur, the private bus was on its way from Hamirpur to Sujanpur. The record reveals that another private bus "Sheetla Bus Service" also plies from Palampur to Hamirpur simultaneously behind Palampur-Haridwar HRTC bus. The evidence as has come on record by way of the testimony of PW11 Om Parkash the driver of HRTC bus and PW5/1 Gorakh Ram reveal that on the fateful day also both i.e. HRTC bus and Sheetla bus service were being plied to its destination after each other. Both buses were in competition. According to PW11 it is the driver of Sheetla Bus Service who daily competes with HRTC bus. The case has been registered at the instance of PW9 Bhumi Chand on his statement Ext.PW6/A. It was reported by this witness that the accident occurred at such a stage when the offending bus HP-22-5785 being driven in a rash and negligent manner arrived at the place of accident and struck against the HRTC bus because on account of high speed its driver lost control over the same. The investigation has been conducted by Shri Bakshi Ram PW6, the then SI (SHO) Police Station, Sujanpur. During the course of investigation spot map Ext.PW6/C was prepared and the place of accident with both buses standing there also got photographed vide photographs Ext.P1 to Ext.P7. In the accident the passengers of both buses received minor injuries on their persons.

3. On the completion of investigation the police has filed the challan against the accused. Learned trial Magistrate on finding a prima-facie case having been made out against the accused had put notice of accusation to the accused that it is on account of rash and negligent driving attributed to him the accident had taken place and that he has committed an offence punishable under Sections 279 and 337 of the Indian Penal Code. He, however, pleaded not guilty and has claimed trial. The prosecution has examined 12 witnesses in all. The material prosecution witnesses are PW2 Chandu Lal, who was on duty as conductor with HRTC bus at the time of accident, PW5/1 Shri Gorakh Ram and PW9 Shri Bhumi Chand who were travelling in HRTC bus. The remaining prosecution witnesses are formal.

4. The accused in his statement recorded under Section 313 Cr.P.C. has denied all the incriminating circumstances appearing against him in the prosecution evidence being wrong and stated that the accident has occurred due to rash and negligent driving attributed to the driver of HRTC bus. No evidence, however, has been produced by him in his defence.

5. Learned trial Judge on appreciation of the evidence available on record and analyzing the rival submissions has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. Consequently, the accused has been acquitted of the accusation as was put to him.

6. The legality and validity of the impugned judgment has been questioned on the grounds, inter-alia, that cogent and reliable evidence as has come on record by way of the testimony of PW2 Chandu Lal, PW5/1 Gorakh Ram, PW9 Bhumi Chand and PW11 Om Parkash has been ignored and brushed aside erroneously and to the contrary learned trial Court has based its findings on hypothesis conjectures and surmises. Irrespective of the prosecution having proved its case beyond all reasonable doubt that it is accused who was driving the offending bus at a high speed, the findings to the contrary recorded by the Court below being erroneous and

perverse the accused is stated to be wrongly acquitted. The impugned judgment as such has been sought to be quashed and set aside.

7. Mr. Parmod Thakur, learned Additional Advocate General has pointed out from the record that the ingredients of offence punishable under Sections 279 and 337 of the Indian Penal Code stand satisfactorily proved from the testimony of complainant PW9 and also that of the conductor of bus PW2 as well as its driver PW11. According to Mr. Thakur, the accused in all fairness and in the ends of justice should have been convicted for the commission of offence punishable under Sections 279 and 337 of the Indian penal Code.

8. On the other hand, Mr. K.S. Banyal, learned Senior Advocate assisted by Mr. Vijender Katoch, Advocate while repelling the arguments addressed on behalf of the appellant-State has urged that what to speak of cogent and reliable evidence the present is a case of no evidence and as such the accused according to Mr. Banyal has been rightly acquitted by learned trial Court.

9. Before coming to the given facts and circumstances and also the reappraisal of the evidence available on record it is desirable to take note as to in legal parlance what constitute an offence punishable under Sections 279 and 337 of the Indian penal Code. This Court in ***Raj Kumar*** vs. ***State of H.P., 1997(2) Shim.L.C. 161*** has held that mere rashness and negligence is not sufficient for recording the findings of conviction against an offender, however, such rashness and negligence must be criminal rashness and negligence which in view of the ratio of the judgment ibid is more than mere carelessness or error of judgment. The prosecution is also required to plead and prove that it was an act on the part of the accused alone responsible for the accident in question. The High Court of Chhatisgarh in ***Smt. Manju Baradia*** vs. ***State of Chhatisgarh, 2002(1) Accidents Compensation Judicial Reports 24*** has gone one step further while holding that the speed of offending vehicle alone is no criteria to come to the conclusion that the same was being driven in rash and negligent manner but other factors such as density of traffic, width of the road and the attempt of the driver to take precautions to avert the accident etc. also need to be taken into consideration. It is also observed in this judgment that the latest trend to hold a driver of the vehicle guilty in case of accident is contrary to the law unless it is shown by the prosecution by leading cogent, reliable and positive evidence that it was accused alone who was rash and negligent, hence responsible for the accident in question.

10. Therefore, in view of the above legal position, it is crystal clear that rashness and negligence due to which an accident is occurred should not be mere rashness and mere negligence and rather criminal rashness and criminal negligence.

11. Now it is to be determining from the evidence available on record that the prosecution has been able to show that it was the criminal rashness and criminal negligence on the part of the accused due to which this accident has occurred. The material prosecution witness who is complainant also Shri Bhumi Chand while in the witness box as PW9 has stated that the accident had occurred on account of the fault attributed to the driver of the offending private bus (the accused). He has nowhere stated that at the time of accident the accused was driving the bus in a rash and negligent manner. This witness, therefore, has made all together a contrary statement to his previous statement Ext.PW6/A recorded by the police under Section 154 of the Code of Criminal procedure. He, therefore, while in the witness box has not supported the version in his statement Ext.PW6/A qua the manner in which the accident had occurred. The another witness is PW5/1 Gorakh Ram. He was also travelling in HRTC bus enroute Palampur to Haridwar. As per his version the speed of the bus was normal. He also expressed his inability to tell the manner in which the accident had taken place. Since he resiled from his statement recorded by the I.O. during the course of investigation, therefore, was allowed to be cross-examined by learned Public Prosecutor. He has denied any statement made to the police. It is also denied that he has deliberately avoided to make a statement against the driver to save him. In his further cross-examination conducted on behalf of the accused he has admitted that the contents of his statements were readover and explained to him by the police. He however, expressed his ignorance that one private bus was in competition with HRTC bus in which he was travelling. If coming to the testimony of PW11 who happens to be the driver of HRTC bus, no

doubt, as per his version the offending bus was being driven in speed and on seeing it he stopped the bus being driven by him on road side. However, the accident could not be avoided because the driver of the private bus lost his control and hit the HRTC bus on which he was driver at the relevant time. However, if his statement in cross-examination is seen he admitted that after the departure of the Palampur-Haridwar HRTC bus from Palampur bus stand Sheetla bus also depart simultaneously from Palampur bus stand. Both buses are being plied after each other. He also admits that the driver of Sheetla bus used to be in competition with HRTC bus daily. This witness also admit a curve at the place of accident and as per his version the accident occurred on account of the patta (leaf) of the private bus broken and on account of that the bus skidded in one side of the road. According to him the accident had taken place on account of breakage of patta of the bus.

12. The only material witness is Chandu Lal who was on duty as conductor with HRTC bus on the date of accident. According to him the accident occurred on account of the rash and negligent driving attributed to the driver of Thakur bus (accused). In his cross-examination, he also tells us that the accident occurred at a place where there was curve. His denial that Sheetla bus was being driven behind HRTC bus is contradictory with that of Om Parkash PW11 the driver of the HRTC bus.

13. Now if the evidence as has come on record by way of the testimony of PW2, PW5/1, PW9 and PW11 is closely scrutinized, it is only PW2 who has stated that the offending bus was being driven by the accused in a rash and negligent manner. The testimony of the remaining three witnesses amply demonstrate that they have not said so while in the witness box. As per the testimony of PW5/1 the speed of the bus rather was normal. The close scrutiny of the evidence produced by the prosecution in support of its case that the accused was rash and negligent and as such responsible for the accident in question reveal that the same is contradictory and vague also. This Court in ***Lalit Kumar*** vs. ***Union of India and another, 1990(2) Sim. L. C. 233*** has held that where the evidence qua rashness and negligence on the part of the accused is vague and contrary to the facts of the case he cannot be convicted on the basis thereof.

14. There is ample evidence available on record to show that Sheetla Private Bus Service was also being plied simultaneously after the departure of the HRTC bus from Palampur. Both buses are in fact being driven in competition i.e. one after the other most probably on account of business rivalry. The testimony of PW11 the driver of HRTC bus that the accident has occurred on account of breakage of patta of Sheetla bus being driven by the accused has caused major dent in the prosecution story. Therefore, with such self contradictory evidence and there being no proof that the rashness and negligent if any on the part of accused was criminal rashness and criminal negligence the accused could have not been convicted at all. There is no need to discuss the remaining prosecution evidence being formal in nature and could have been of some help to the prosecution had its case that the accused was driving the offending bus in a rash and negligent manner been proved in accordance with law.

15. I, therefore, find no merit in the appeal. The same is accordingly dismissed. Consequently the judgment under challenge in this appeal is affirmed. Personal bonds furnished by the accused shall stand cancelled and surety discharged.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Cr. Revision No. 47 of 2009 a/w
Cr.Appeal No. 213 of 2009.
Date of Decision: 18.11.2016

1. Cr.R. No. 47 of 2009

Bharti Rana .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

2. Cr.A. No.213 of 2009
State of HP .....Appellant
Versus
Bharti Rana .....Respondent.

Indian Penal Code, 1860- Section 353 and 332- Informant was posted as a clerk in Rural Hospital, Chowari and accused was posted as staff nurse in the same hospital- the accused gave beating to the informant while he was discharging his duties – the accused was tried and convicted by the Trial Court- an appeal was filed, which was partly allowed and the sentence was modified – held in revision that cross complaints were filed by the accused and the informant against each other – both the parties were convicted by the trial Court- however, the informant was acquitted by the Appellate Court – statements of witnesses show that accused was asking for certain papers belonging to her – no person stated that accused had prevented the informant from discharging his duties – it was not proved that intention of the accused was to deter the informant from discharging the duties – the judgment passed by the Court set aside and the accused acquitted.(Para-9 to 28)

Cases referred:
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
D. Chattaiah and Anr. V. State of Andhra Pradesh, (1979) 1 SCC 128

For the petitioner: Mr. V.S. Rathore, Advocate for the petitioner.
For the respondent: Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General, for the respondent(s)-State.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Criminal revision petition No. 47 of 2009 filed under Section 397 of Cr.PC read with Section 401 of the Cr.PC, is directed against the judgment dated 23.3.2009, rendered by the learned Sessions Judge, Chamba Division, Chamba, HP, in Criminal Appeal No.20/2008, modifying the judgment of conviction recorded by the learned Judicial Magistrate, Ist Class, Dalhousie, District Chamba, H.P., in Cr. Case No.138-II of 1999, whereby the petitioner herein was held guilty of having committed offences under Sections 353 and 332 of the IPC and accordingly, was convicted and sentenced to undergo simple imprisonment for one year and to pay fine of Rs. 2000/- under Section 332 of the IPC and in default of payment of fine, to undergo further simple imprisonment for three months and under Section 353 of the IPC, simple imprisonment for one year and to pay fine of Rs. 2000/- and in default of payment of fine, to further undergo simple imprisonment for three months. However, fact remains that the petitioner herein feeling aggrieved and dis-satisfied with the judgment passed by the learned trial Court preferred an appeal before the learned Sessions judge, who vide judgment dated 23.3.2009, modified the judgment by convicting and sentencing the petitioner only under Section 332 of the IPC and imprisonment till the rising of the Court and to pay a fine of Rs. 2000/- and in default, to further undergo simple imprisonment for three months, whereas, criminal appeal No. 213 of 2009 has been filed by the State under Section 377 of the Cr.PC, against the judgment dated 23.3.2009, passed by the learned Sessions Judge Chamba in criminal appeal No. 20/2008, for enhancement of sentence of the petitioner.

2. Since both the cases have arisen from the common judgment dated 23.3.2009 passed in Criminal Appeal No. 20/2008, this Court vide order dated 4.10.2016 clubbed the same for final adjudication together, accordingly, same are being taken for disposal together since common question of law and facts are involved.

3. Briefly stated facts necessary for adjudication of the case are that on 18.5.1999, complainant Suresh Kumar lodged report with police Station R.H. Chowari, District Chamba, that petitioner-accused gave beatings to him while he was discharging his duty as a public servant. Police on the basis of aforesaid compliant registered FIR i.e. Ext.PA and thereafter carried out investigation. After the completion of investigation, police presented the challan under Sections 353 and 332 of IPC, in the competent Court of Law.

4. Learned Judicial Magistrate, Ist Class, Dalhousie, District Chamba, HP, after satisfying itself that prima facie case exists against the accused, put a notice of accusation, to which she pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record by the prosecution, found the accused guilty of having committed offence under Sections 353 and 332 of IPC and accordingly, convicted and sentenced her as per description already given above.

5. The present petitioner-accused being aggrieved with the judgment of conviction passed by the learned trial Court, filed an appeal under Section 374 of Cr.PC, before the Court of learned Sessions Judge, Chamba Division, Chamba, HP, who vide judgment dated 23.3.2009, modified the appeal (as has been mentioned herein above). Hence, this criminal revision petition before this Court.

6. Mr. Virendrer Rathore, Advocate representing the petitioner-accused vehemently argued that the impugned judgments of conviction and sentence recorded by the Courts below are not sustainable as the same are not based upon the correct appreciation of evidence available on record and as such, same deserve to be quashed and set-aside. While referring to the judgments passed by the Courts below, Mr. Rathore further contended that the entire prosecution evidence led on record is not worth lending any credence being unreliable and untrustworthy and as such, no conviction could be recorded on the basis of the same. Mr. Rathore further contended that both the courts below miserably failed to determine the question as to whether the complainant was performing the official duty when the alleged dispute in question occurred between the parties. With a view to substantiate his aforesaid argument, Mr. Rathore, invited attention of this Court to the fact that it has come in the statement of PW3 Rattan Chand that at that relevant time, the file was in his custody, which was demanded by the petitioner and he took out the file in question from the Almirah and showed to the petitioner. Mr. Rathore stated that in view of the aforesaid material fact, there was no occasion for the petitioner to ask file from the complainant Suresh Kumar. He also stated that it stands nowhere proved that Suresh Kumar (complainant) was in charge of the file and same was in his custody, rather it is ample clear from the evidence on record that Suresh Kumar prevented the petitioner from taking the file to SMO for initiating action against Kanchan Rana (nurse), who had in fact encroached upon the hospital land by constructing the septic tank. Mr. Rathore, with a view to prove motive of complainant Suresh Kumar in falsely implicating the petitioner accused, invited attention of this Court to the examination in chief as well as cross-examination conducted on prosecution witnesse Suresh Kumar (complainant), whereby he has admitted his relation with Kanchan Rana, who allegedly raised construction on govt. land by raising septic tank. While concluding his arguments, Mr. Rathore forcefully contended that bare perusal of the judgments vis-a vis statement adduced on record by the parties clearly suggest that both the courts below committed grave irregularity and illegality by ignoring the fact that both the parties (complainant as well as the accused) are public servants and complaint, if any, at the first instance, was lodged at the behest of the petitioner namely Bharti Rana. He further stated that Suresh Kumar only lodged complaint to counter the FIR of the petitioner. Mr. Rathore further informed that the complainant Suresh was also convicted under Sections 525 and 323 IPC in the FIR lodged by the petitioner accused by the learned trial Court. Mr. Rathore further stated that the courts below committed glaring mistake by not trying both the cases together especially in view of the fact that both the complaints had arisen from one event. In the aforesaid background, Mr. Rathore prayed that this petition may be allowed after setting aside the judgments passed by the Courts below. He also prayed that in view of the fats and circumstance of the case, there is no force, if any, in

the criminal appeal preferred by the State for enhancement of the sentence and same may be ordered to be dismissed, in the interest of justice.

7. On the other hand, Mr. P.M. Negi, learned Additional Advocate General duly assisted by Mr. Ramesh Thakur, Deputy Advocate General, representing the State supported the impugned judgments passed by the courts below. Mr. Negi, strenuously argued that the judgments passed by the courts below are based upon the correct appreciation of the evidence available on record and as such, in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted, especially in view of the fact that courts below have dealt with each and every aspect of the matter very meticulously. He further argued that learned first appellate Court while accepting the appeal preferred by the petitioner has taken very lenient view and has modified the sentence till rising of the Court, which is not in consonance with the alleged offence having been committed by the petitioner and as such, same deserves to be enhanced. He further stated that bare perusal of the statements adduced on record by the prosecution suggests that prosecution was able to prove its case beyond reasonable doubt and the petitioner-accused had given beatings to the complainant Suresh Kumar, who was discharging his official duty at the time of the incident and as such, no leniency, if any can be showed to the petitioner by this Court. While concluding his arguments, Mr. Negi, also reminded this Court that it has very limited powers while exercising its revisionary powers under Section 397 of the Cr.PC as far as re-appreciation of the evidence is concerned. In this regard, he placed reliance upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> "In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

8. I have heard learned counsel for the parties as well carefully gone through the record

9. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused has been convicted and sentenced, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned courts below are not perverse and same are based on correct appreciation of the evidence on record.

10. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

> 8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest

continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

11. During the proceedings of the case, this Court had an occasion to peruse the entire evidence adduced on record by the respective parties, perusal whereof clearly suggests that complainant Suresh Kumar as well as the petitioner accused were posted and working as clerk and staff nurse, respectively in Rural Hospital, Chowari, at the time of alleged incident. It also emerge from the record that both the aforesaid persons lodged counter complaint against each other in the police station, which ultimately culminated into trial and conviction of both the parties, as recorded by the trial Court.

12. It appears that though complainant Suresh Kumar was convicted by the learned trial Court under Sections 325 and 323 IPC but later on he was acquitted of the charges by learned first appellate Court in the appeal preferred by him and thereafter, State chose not to file any appeal against his acquittal in FIR lodged by the petitioner accused. In the present case, which has arisen on the complaint of PW1, proseuciton with a view to prove its case examined was many as seven witnesses.

13. PW1 Dr. C.B.P. Singh, SMO, deposed before the Court below that on 18.5.1999, petitioner Bharti Rana reported to him that complainant Suresh Kumar (clerk) gave beatings to her. He further stated that thereafter Suresh also came there and stated that Bharti Rana gave him beating with slaps and shoes. He further stated that Prehlad Singh rescued Suresh Kumar from Bharti Rana and thereafter complainant also gave a slap to Bharti Rana. But in is cross-examination, he specifically denied that Suresh Kumar gave beatings to Bharti.

14. PW2 Suresh Kumar (complainant) deposed that on 18.5.1999, he was sitting in his office along with Rattan Chand and Yashpal. He further stated that in the meantime, accused came there and asked for file pertaining to some Govt. land. It has come in his statement that file was handed over to her but she insisted that papers were not complete. He further stated that thereafter he handed over the file to the Rattan Chand but accused demanded all the papers of file but she was advised to get the same with the permission of the Senior Medical Officer. PW2 further stated that thereafter accused mis-behaved and started pulling the file and thereafter accused snatched the file and started beating him with the shoe but he was rescued by the Rattan Chand and Yashpal Verma. He also stated that in the meantime, Sanjay Kumar also came to the room and also stopped the accused from beating him. PW2 also stated that after aforesaid incident, accused went to the office of SMO and accused again gave beating to him with shoe in the office of SMO. He further stated that he also slapped accused in order to rescue himself from being beaten by the accused however, in his cross-examination; he denied that he gave beatings to Bharti Rana and inflicted injuries on her person.

15. PW3 Rattan Chand also supported the version of PW2 by stating that at about 12 am, Bharti Rana demanded the file from PW2 concerning land papers. She asked him to separate the papers in the file but he showed is inability to do the same without the permission of SMO and thereafter the complainant closed the file and the accused started pulling the file. He specifically stated that when she pulled the file towards him, Bharti gave him beatings with Chappal. He further stated that Suresh Kumar was rescued by Yashpal, who was in the room. PW3 further stated that thereafter Bharti went to the room of SMO and Suresh also followed her.

However fact remains that in his cross examination, he denied that Suresh Kumar ever gave beatings to Bharti Rana.

16. PW4 Sanjay Gupta also supported the version of PW2 that on 18.5.1999, he was in the office of SMO, and while passing through the corridor, he heard noise of quarrel from the office room. He went inside the room and saw that accused was holding shoe in her hand to give beatings to the complainant. PW4 further stated that he advised both the complainant and the accused to report the matter to SMO. But in is cross-examination, he feigned ignorance, if the complainant had given beatings to Bharti Rana.

17. PW5 Dr. Rameshwar Jyoti, who medically examined the complainant Suresh Kumar stated that while examining the complainant, he found two injuries on his person as mentioned in the MLC Ext.PW5/A.

18. PW6 HC, Pritam Singh, I.O. stated that he had moved an application for medical examination of complainant Suresh Kumar and during investigation, he had prepared spot map Ext.PW6/A. He also stated that on 21.5.1999, Bharti Rana handed over one Sandal Ext.P1, which was taken into possession vide memo Ext.PW3/A.

19. Petitioner-accused in her statement recorded under Section 313 Cr.PC, denied the case of the prosecution and stated that the complainant Suresh Kumar is brother of Kanchan, who is having litigation with her and she has been falsely implicated by the complainant, Suresh Kumar at the behest of the Kanchan.

20. Close scrutiny of the prosecution evidence, as has been discussed in detail above, clearly suggests that on 18.5.1999, the complainant Suresh as well as petitioner accused had dispute over some file pertaining to land of RH hospital, which resulted in the allegation and counter allegation of assault on each other. PW1 Dr. CBP Singh categorically stated that the complainant Suresh Kumar also gave slap to the Bharti petitioner-accused. If his statement is read in its entirety, it clearly emerges from the record that both the parties (petitioner as well as complainant) gave beatings to each other. It is also undisputed that both the persons were posted and working as clerk and Staff nurse respectively in the same hospital and at that time, both were discharging official duties at that particular time.

21. PW2 in his own statement stated that accused came to his room and demanded file pertaining to govt. land from him, meaning thereby, she had asked for file, if any, in the capacity of official of that particular office because none of the prosecution witnesses have stated that documents as were asked for, by the petitioner accused, were of private in nature. PW2 in his statement specifically stated that he showed file to her, whereupon petitioner accused told that her papers were not on file and she started abusing him. He further stated that thereafter accused Bharti asked him to separate the documents from the file, which he refused to do by saying that same cannot be done without permission of SMO.

22. This Court, after perusing the aforesaid portions of statements made by PW2 as well as PW3, has reason to presume that petitioner accused was asking for certain papers which belonged to her. Though all the prosecution witnesses have stated that petitioner accused gave beatings to the complainant but none of the PWs have specifically stated that petitioner accused prevented Suresh Kumar from discharging his public duty. Though, PW1 in his cross-examination denied that Suresh Kumar gave beatings to her but in examination he specially stated that Prehlad Singh rescued him from Bharti and thereafter Suresh Kumar also gave slap to Bharti Rana, meaning thereby dispute in question between the parties, which ultimately resulted into scuffle, was admittedly personal in nature.

23. PW2 complainant also admitted that he slapped the accused in order to rescue himself from being beaten by the accused. It has come in the statements of PW2 i.e. the complainant Suresh Kumar and PW3 Rattan Chand clerk that the complainant Suresh Kumar was rescued by the Yashpal Verma, who was in the room but interestingly, he was not cited as prosecution witnesses and as such, no much reliance could be placed upon the statement of PW2

and PW3, who were admittedly in the room when scuffle between the parties took place. Rather after perusing the statements of PW2 and PW3, it clearly emerges that information, as was being asked by the petitioner-accused, was denied by tPW2 Suresh Kumar as well as Rattan Chand in whose custody those document were. PW4 Dr. Sanjay Gupta though stated that when he was going to office of SMO, he heard noise coming from the office room. He further stated that he saw Bharti Rana was holding a shoe in her hand to give beating to Suresh Kumar.

24. Careful perusal of statement of PW4 nowhere suggests that he saw Bharti Rana beating Suresh Kumar. He also stated that he advised both the complainant and the accused to report the matter to SMO. However, in his cross examination, he feigned ignorance, if Suresh PW2 also gave beatings to the petitioner but that may not be of any consequence, especially in view of the candid admission of the complainant himself that he gave beatings to the accused Bharti Rana with a view to rescue himself.

25. This Court, after bestowing thoughtful consideration upon the evidence led on record by the prosecution as well as stand taken by the petitioner-accused in her statement recorded under Section 313 Cr.PC, is of the view that prosecution was not able to prove its case that petitioner-accused Bharti tried to prevent/obstruct the complainant from discharging his duty and in this process, she gave beating to the complainant. At the cost of the repetition, it may be stated that none of the PWs stated that the petitioner obstructed the complainant from discharging his public duties and as such, this Court sees force in the contention raised by the petitioner that since prosecution was unable to prove that the complainant was given beating while he was discharging public duties, no conviction, if any, could be recorded under Section 332 of the IPC. Though , perusal of prosecution evidence available on record indicates towards the use of criminal force by the petitioner-accused over the complainant but definitely, there is no evidence to suggest that same was done to deter public servant from discharging his public duty and as such, conviction, if any, under Section 332 IPC, cannot be held to be valid and legal.

26. Moreover as emerge from the record that both the parties (petitioner and the complainant) were discharging their public duty in the same office at that relevant time. It also stands proved on record that both the parties gave beating to each other. Learned trial Court has also convicted the complainant under Sections 325 and 323 of the IPC, but later on he was acquitted by the learned first appellate Court.

27. This Court after carefully examining the evidence led on record has no hesitation to conclude that the prosecution was not able to prove the offence under Section 332 of the IPC allegedly having been committed by the petitioner-accused because there is no evidence on record to suggest that intention of petitioner-accused was to prevent or deter the complainant from discharge of his duty. None of prosecution witness has specifically sated that petitioner-accused made an attempt to prevent or deter complainant from discharge of his duty, rather, this Court, after perusing the entire evidence led on record, is of the view that dispute, if any, between the parties was personal in nature. Apart from above, prosecution has not been able to prove that alleged assault had any nexus or casual connection or consequent relation with the performance of the duty by the complainant as public servant. It is settled law that to punish a person under Section 332 of the IPC, there should be evidence suggestive of the fact that accused had intent to prevent or deter the victim from discharge of his duty as such public servant. In this regard, reliance is placed upon ***D. Chattaiah and Anr. V. State of Andhra Pradesh, (1979) 1 SCC 128***, wherein Hon'ble the Apex Court has held as under:-

> "10. It was thus manifest that the assault on the Typist (P.W.1) had no real nexus or casual connection, or consequential relation with the performance of his duty as public servant. There was not even a soientilla of evidence from which it could be reasonably inferred that the intent of the assailants was to prevent or deter P.W.1. from the discharge of his duty as such public servant,
>
> 11. In view of the above, the charge as laid under Section 332 I.P.C. and, the conviction of the appellant on that count, cannot be sustained. The appellants

could, at the most, be held guilty under Section 323 I.P.C. the injuries caused being simple."

28. Consequently, in view of the detailed discussion made herein above, present petition is allowed and judgments passed by the courts below are quashed and set-aside, as a result of which, criminal appeal preferred by the State for enhancement is also dismissed. Petitioner accused is acquitted of the charges framed against her. Interim order, if any, vacated. Bail bonds of the accused are discharged. Pending application, if any also stands disposed of

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Shri Ram Swarup ....Petitioner

Versus

Smt. Lila Wati & Others ....Respondents

CMPMO No.192 of 2014
Judgment Reserved on: 24.10.2016
Date of decision: 18.11.2016

Code of Civil Procedure, 1908- Order 8 Rule 9- Plaintiff amended the plaint – L.Rs. Of defendant No. 1 filed an amended written statement- plaintiff filed an application for rejection of the amended written statement on the ground that it was beyond the scope of amendment - held, that defendant can amend the written statement to the extent of amendment in the plaint – if the defendant wants to amend the written statement, he has to seek permission from the Court – L.Rs had amended the written statement beyond the scope of the amendment- L.Rs. can file written statement appropriate to their character as L.Rs. but they have to seek permission from the Court before filing additional written statement – the order passed by trial Court set aside and amended written statement filed by the L.Rs. ordered to be rejected. (Para-9 to 25)

Cases referred:

V.K.N. Pillai vs. P.Pillai, AIR 2000 SC 614
Ram Chandra vs. Mahindra Singh, AIR 1980 Rajasthan 04 (303)
Sawan Singh and Others vs. Radha Kishan and Others, AIR 1980 HP 8
J.C. Chatterjee & Others vs. Shri Sri Kishan Tandon and another, AIR 1972 SC 2526

For the Petitioners:	Mr.Bhupinder Gupta, Sr.Advocate with Mr.Himanshu Sharma, Advocate.
For Respondents 1 to 7:	Mr.Bimal Gupta, Senior Advocate with Mr.Vineet Vashishta, Advocate.
For Respondent No.8:	Mr.Rakesh Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

The instant petition filed under Article 227 of the Constitution of India is directed against the order dated 27.3.2014 passed by learned Civil Judge (Junior Division), Solan, District Solan, rejecting the application filed by the plaintiff-petitioner *(hereinafter referred to as the 'plaintiff')* under Section 151 read with Order 8 Rule 9 of the Code of Civil Procedure *(for short 'CPC')* praying therein for rejection of amended written statement filed by the respondents.-defendants *(hereinafter referred to as the 'defendants').*

2. Briefly stated the facts, as emerged from the record, are that the plaintiff filed a suit for specific performance of contract against the predecessor-in-interest of defendants No.1 to 7, whereas defendant No.8 was arrayed as proforma defendant. During the course of trial, plaintiff moved an application under Order 6 Rule 17 read with Section 151 CPC for carrying out amendment in the plaint since there was a clerical/mathematical error in the original plaint filed by the plaintiff. By way of amendment, plaintiff proposed to make change in para-2 of the plaint, whereby plaintiff intended to substitute dated 14.12.1976 by 14.12.1978. Plaintiff in application claimed that inadvertently date of agreement was mentioned as 14.12.1976, whereas agreement between the parties was entered into on 14.12.1978. Aforesaid application was resisted by the defendants, but fact remains that learned trial Court below allowed the aforesaid amendment. Accordingly, plaintiff filed amended plaint (Annexure P-2).

3. At this stage, it may be noticed that predecessor-in-interest of defendants No.1 to 7; namely Shri Sukh Ram, had already filed written statement to the un-amended plaint i.e. Annexure P-3. But since he expired during the pendency of the suit, his legal representatives *(for short 'LRs')* were brought on record and arrayed as defendants No.1 to 7. Consequent upon filing of amended plaint by plaintiff, LRs of deceased defendant No.1 i.e. 1(a) to 1(g) filed written statement. Plaintiff, being aggrieved with filing of amended written statement by the LRs of deceased defendant No.1, filed an application under Section 151 read with Order 8 Rule 9 CPC praying therein for rejection of written statement filed by the defendants as same was beyond the scope of amendment.

4. Learned trial Court vide order dated 27.3.2014 (Annexure P-8), rejected the application preferred on behalf of the plaintiff *(for short 'impugned order')*. Learned trial Court, while dismissing the application, came to the conclusion that since defendant No.2 had not filed any written statement before settlement of issues, written statement filed by him is liable to be rejected and he cannot take undue advantage of the fact that the plaintiff was allowed to amend the plaint. But as far as amended written statement filed by defendants No.1(a) to (g) is concerned, learned Court below came to the conclusion that defendant No.1 is free to take many pleas, whatsoever, of his choice and his written statement cannot be confined to amendment made in the plaint filed by the plaintiff. Learned Court below further concluded that perusal of the written statements filed by defendant nowhere suggests that defendant No.1 has withdrawn any statement made in his earlier statement but he has taken some additional plea in the amended written statement for which he is entitled. In this regard learned trial Court placed reliance upon the judgment passed by Hon'ble Apex Court in ***V.K.N. Pillai vs. P.Pillai AIR 2005 SC 614,*** wherein the Hon'ble Apex Court has observed that Courts should be more generous in allowing amendment of written statement as question of prejudice is less likely to operate in that event.

5. Plaintiff, being aggrieved and dis-satisfied with the impugned order dated 27.03.2014, passed by the learned trial Court, approached this Court by way of instant petition praying therein for quashing and setting aside of the same.

6. Mr. Bhupinder Gupta, learned Senior Advocate duly assisted by Mr.Janesh Gupta, Advocate, vehemently argued that impugned order is not based upon correct appreciation of the facts as well as law and as such same deserves to be quashed and set aside. Mr.Gupta termed impugned order as highly unjust, illegal, arbitrary, against facts and law and prayed that the same cannot be allowed to sustain. Mr. Gupta contended that no fresh plea could have been raised by defendants in the amended written statement while specifically filing reply to the amended petition preferred on behalf of plaintiff without leave of the Court. With a view to substantiate his arguments that there is drastic deviation/change in the amended written statement filed by defendants No.1(a) to 1(g), Mr. Gupta made this Court to travel through the original plaint vis-à-vis original written statement filed by the parties. While referring to the averments contained in the original plaint, Mr. Gupta stated that by way of amendment only correction of date was carried out with the permission of the Court by moving an application under Order 6 Rule 17 CPC, whereas defendants, without obtaining any leave from the Court,

made drastic changes in the written statement, wherein altogether new pleas have been taken in the written statement. As per Mr. Gupta, since amendment of plaint was only to rectify the clerical/mathematical mistake, no fresh plea could have been taken by the defendants for filing written statement, which have drastically changed the original stand taken by their predecessor-in-interest. He further stated that since defendants No.1(a) to 1(g) stepped into the shoes of original defendant No.1, they had not independent stand and they were bound by the written statement filed by their predecessor-in-interest, but bare perusal of amended written statement clearly suggests that defendants No.1(a) to 1(g) changed the entire complexion of the original pleadings placed on record by their predecessor-in-interest, which was not permissible without obtaining leave of the Court by moving appropriate application under Order 6 Rule 17 CPC. While concluding his arguments, Mr. Gupta forcefully contended that whole approach adopted by learned trial Court, while rejecting the application on behalf of plaintiff for rejection of written statement filed by defendants No.1(a) to 1(g) is not only erroneous but patently adverse and as such same deserves to be quashed and set aside.

7. Mr.Bimal Gupta, learned Senior Counsel, duly assisted by Mr.Vineet Vashishta, Advocate, supported the impugned order passed by the learned trial Court. While referring to the impugned order, Mr.Bimal Gupta, strenuously argued that there is no illegality/infirmity in the order passed by the learned trial Court, as such, there is no scope of interference as far as this Court is concerned, because bare perusal of impugned order suggests that same is based upon correct appreciation of law laid down by Hon'ble Apex Court and respective High Courts. Mr.Gupta further contended that when defendants No.1(a) to 1(g) were impleaded as LRs of defendant No.1, they have every right to file written statement and as such there is no illegality and infirmity in the impugned orders passed by learned trial Court and same deserves to be upheld. With a view to substantiate his aforesaid arguments, he invited the attention of this Court to Order 22 Rules 3 & 4 CPC to demonstrate that being LRs of original defendant No.1, they have every right to file additional written statement taking therein inasmuch as pleas appropriate to their character as LRs of the deceased defendant. However, Mr.Gupta, while refuting the contention put forth on behalf of the plaintiff that defendants by way of amended written statement carried out drastic deviation/changes in the written statement, made this Court to travel through the amended written statement to suggest that no additional pleas have been taken by the defendants in the amended written statement, rather pleas, already having been taken by original defendant, have been simply elaborated and explained and as such there is no inconsistency/ variation in the pleas taken in the pleadings originally made by deceased defendant No.1. In support of his aforesaid contention that being LRs of deceased defendant No.1, defendants No.1(a) to 1(g) were entitled to file independent defence appropriate to their character, Mr.Gupta placed reliance upon the judgments passed by Hon'ble Apex Court, our own High Court as well as other High Courts in ***Abdul Razak (Dead) through LRs and Others vs. Mangesh Rajaram Wagle and Others, (2010)2 SCC 432, Sumtibai and Others vs. Paras Finance Co.Regd.Partnership Firm Beawer (Raj.) thorough Mankanwar (Smt) w/o Parasmal Chordia (Dead) and Others, (2007)10 SCC 82, M.P. State Agro Industries Development Corpn.Ltd. and Another vs. Jahan Khan, (2007)10 SCC 88 and Sawan Singh vs. Radha Kishan, 1979 Law Suit (HP) 11, Smt.Amar Devi vs. Smt.Shakntla Devi, RSA No.81 of 1969, decided on May, 1, 1975, Sayed Sirajul Hasan vs. Sh.Syed Murtaza Ali Khan Bahadur and Others, AIR 1992 Delhi*** and ***Sri Srinivasmurthy Mandiram rep. by its Executive Trustee D.Srinivasan vs. Mrs.Gnanasoundari, AIR 2004 (Mad.) 513.***

8. I have heard learned counsel for the parties and gone through the record of the case carefully.

9. Before proceeding to decide the controversy at hand on merits, it would be appropriate to reproduce relevant provisions of Order 6 Rule 17 as well as Order 8 Rule 9 CPC, which are as follows:

> ***"ORDER 6 - PLEADINGS GENERALLY***
>
> *1.Pleading— "Pleading", shall mean plaint or written statement.*

2. Pleading to state material facts and not evidence

Rule 17*-Amendment of pleadings— The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*

ORDER 8 - WRITTEN STATEMENT, SET-OF AND COUNTER- CLAIM.

Rule 9. Subsequent pleadings— No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than 30 days for for presenting the same."

10. The aforesaid provisions of law clearly suggests that in normal circumstances any party to lis can move an application under aforesaid provisions of law for carrying out amendment, which may be necessary for determining the real controversy between the parties. Though Court has power to allow amendments even after commencement of trial but in that eventuality party seeking amendment needs to prove on record that inspite of due diligence it could not have moved the application for amendment before the commencement of trial.

11. Similarly, Order 8 Rule 9 clearly suggests that no pleadings, subsequent to written statement of a defendant other than by way of defence to set up a counter claim, can be presented except by leave of Court. In the event of application having been made on behalf of party to carry amendment in the written statement, Court may fix time which may not exceed 30 days from presenting the same. But fact remains that for carrying out amendment, if any, in the written statement, prior leave of the Court is necessary.

12. Conjoint reading of aforesaid provisions of law i.e. Order 8 Rule 9 and Order 6 Rule 17 CPC clearly lays down a rule of pleadings. If a party intends to make further pleadings, after filing of the original plaint, on account of his having failed to make certain pleas in the original plaint, can certainly file an application under Order 6 Rule 17 CPC seeking leave of Court to carry out necessary amendment. Similarly, if defendant wants to make further pleading after the written statement having been filed to raise certain pleas in the original written statement can move an application under aforesaid provisions of law. But in both these eventualities, parties need to move an application seeking therein leave of Court to amend their respective pleadings.

13. Conjoint reading of the aforesaid provisions of law clearly suggests that party seeking to file amended plaint/written statement necessarily need to show to the Court the circumstances as to why they failed to raise plea in the original pleadings preferred by them and definitely amendment cannot be claimed as a matter of right because close reading of aforesaid provisions of law clearly suggests that Court in exercise of its discretion may or may not grant leave to present a fresh pleading.

14. In the instant case, as clearly emerge from the pleadings, as have been filed by both the parties, plaintiff moved an application under Order 6 Rule 17 CPC seeking therein relief to amend original plaint, wherein inadvertently date of agreement was not correctly mentioned, accordingly after obtaining leave of the Court plaintiff carried out amendment by substituting date of agreement from 14.12.1976 to 14.12.1978. At this stage it may be noticed that prior to aforesaid amendment in the plaint, original defendant No.1 had already filed written statement specifically answering all the averments contained in the original plaint. Since Court had allowed the amendment, defendants No.1(a) to 1(g) being LRs of original defendant No.1 filed amended written statement, perusal whereof certainly suggests that defendants No.1(a) to 1(g) raised many pleas which changed the complexion of original written statement filed by defendant No.1.

15. Mr.Bimal Gupta, learned Senior counsel representing defendants-respondents, while refuting the contention put forth on behalf of Mr.Bhupinder Gupta, learned Senior counsel for the plaintiff-petitioner, though stated that there is no drastic change/deviation from the original stand taken by the original defendant No.1 in original written statement, but this Court perused both the written statements i.e. amended and un-amended juxtaposing each other, which clearly suggests that defendants raised numerous new pleas, which were not originally taken in the original written statement filed by the deceased defendant No.1. True, it is that defendants No.1(a) to 1(g) by way of amended written statement made an attempt to elaborate and explain the pleas already taken by the deceased defendant No.1 in original written statement, but perusal of amended written statement clearly suggests that in the aforesaid process LRs of deceased defendant No.1 have carved out altogether new case to the detriment of plaintiff who only after seeking leave of the Court corrected date of agreement of contract. As has been discussed hereinabove, pleadings filed by both the parties can be suitably amended at any stage by the respective parties in terms of Order 6 Rule 17 CPC, but in that regard party, intending to carry out amendment, needs to file an appropriate application assigning therein the reasons for amendment and amendment, if any, can be carried out only after obtaining the leave of the Court.

16. In the present case, there is nothing on record suggestive of the fact that defendants No.1(a) to 1(g), before filing amended written statement, wherein entire complexion of original written statement has been changed, moved appropriate application under Order 6 Rule 17 CPC praying for amendment in the written statement. There is no dispute that defendants No.1(a) to 1(g) had right to file additional written statement to the amended plaint but definitely under the garb of that right defendants could not amend the entire written statement filed by their predecessor-in-interest. At best defendant, while filing reply to the amended petition, could only carry out amendment to the extent the plaint is amended. In case written statement in toto is/was to be amended, defendants ought to have filed an independent application under Order 6 Rule 17 CPC seeking leave of the Court to amend the written statement. Court, while exercising powers under Order 6 Rule 17 CPC, may or may not grant leave to amend written statement.

17. In the present case, this Court, after perusing the entire pleadings made available on record, has no hesitation to conclude that defendants No.1(a) to 1(g) without obtaining leave of the Court amended written statement beyond the pleadings of amended plaint and as such this Court is not in a position to accept the reasoning assigned by the Court below while rejecting the application under Order 8 Rule 9 CPC filed by the plaintiff to reject the written statement. This Court, while examining the correctness and genuineness of the impugned order passed by the learned trial Court below, made an attempt to lay its hand to the judgment of Hon'ble Apex Court as mentioned by trial Court i.e. ***V.K.N. Pillai vs. P.Pillai, AIR 2005 SC 614***, but there is no such judgment available in the book.

18. No doubt, Hon'ble Apex Court has repeatedly held that Court should be more generous in allowing amendments, but in that regard parties seeking amendment needs to apply in terms of specific provisions of law citing therein reasons for carrying out amendment in the pleadings. In the instant case, as has been discussed in detail, defendants No.1(a) to 1(g) being LRs of original defendant No.1 in the garb of reply to the amended plaint carried out whole sale amendment in the written statement that too without obtaining leave of the Court. Amendment, if any, in the written statement by the defendant was justified to the extent of amendment carried out in the plaint, but, as has been observed hereinabove, perusal of amended written statement clearly suggests that entire stand taken by original defendant in original written statement has been changed. Learned trial Court while rejecting the application has also placed reliance on the judgment passed by Hon'ble High Court of Rajasthan in ***Ram Chandra vs. Mahindra Singh, AIR 1980 Rajasthan 04 (303)***, but same may not be applicable in view of law laid down by our own High Court in ***Sawan Singh and Others vs. Radha Kishan and Others, AIR 1980 HP 8,*** wherein this Court has concluded that new or inconsistent pleas can only be taken by filing appropriate application for amendment under Order 6 Rule 17 CPC. In ***Sawan Singh's*** case *supra*, this Court in paras 11 and 12 has held as under:-

"11. As evident from the above noted observation, the learned Judge was led away by the consideration that rules of procedure are handmaids of justice, and since he was considering the amendment of written statement, he was inclined to hold that in defence all plausible pleas can be taken by a defendant. It was held that once the court directed the additional written statement to be filed, impliedly the court permitted the defendant to take up even inconsistent pleas without seeking for an amendment under Order VI, Rule 17. In the subsequent decision New Bank of India Ltd. v. Smt. Raj Rani, AIR 1966 Punj 162 (supra) the learned Judge, who spoke for the Bench in Girdharilal v. Krishan Datt, AIR 1960 Punj 575 (supra), was the Presiding Judge and once again he reiterated his previous view with slight modification that one has to see the order granting amendment of the plaint and permission for the filing of additional written statement. If the said order is unrestricted and merely says that additional written statement be filed, it would mean that the defendant gets the unrestricted right to take up any pleas he prefers, may be inconsistent with the original pleas or may be new pleas or may consist of new grounds.

In that case, the plaintiff sought for the amendment because a certain fixed deposit receipt had matured and he wanted a decree for that amount as well. The court asked for additional written statement. New pleas were taken and it was contended that without amendment in the pleadings, such new pleas could not be raised. The learned Judge upheld his previous view, and held that the defendant got untrammelled right to take up any pleas he preferred, and the order under Rule 9 of Order VIII was required to be seen and if there was nothing to indicate in that order that pleadings were restricted, new pleas or even inconsistent pleas could be taken up by the defendant. These two cases were followed in Lachhmi Devi (supra) and the learned Judge of this Court while allowing the plaintiff to amend the plaint because a certain party was to be added, asked for additional written statement. New and inconsistent pleas were taken in the additional written statement and the same were allowed by the court. Thus the above noted three cases took the view contrary to that in Tek Chand Chitkara v. Union of India, ILR (1974) Him Pra 616 (supra).

12. As we have already pointed out, Order VI deals with pleadings generally and the provisions of that order do apply to plaint as well as to written statement. Under Order VIII, Rule 9, there is a provision for subsequent written statement. Nevertheless Rule 9, Order VIII has to stand with Rule 7 and 17 of Order VI. Under Rule 9, Order VIII, additional written statement can be permitted to be filed. But that does not mean that Rule 7 and 17 of Order VI have been given a go-bye. If such additional written statement contains any departure in the pleadings within the meaning of Order VI, Rule 7, in our opinion Rule 17, Order VI will be effective and a proper amendment of the pleadings will have to be asked for. Without the court applying its mind as to whether there has been really a departure in the pleadings and as to whether the amendments should be permitted for the purpose of determining the real question in controversy, in OUT opinion, the mere fact that additional written statement has been permitted to be filed under Rule 9 of Order VIII will not give a right to the defendant to raise new or inconsistent pleas, or to make allegation contrary to the facts alleged in the previous pleadings.

The observations, of the learned Judge in Girdharilal (supra) and New Bank of India Ltd. (supra) depending upon the nature and application of the law of procedure, in our opinion will be of no avail, the reason being that it would by itself be a rule of law as to whether Rule 7 and 17 of Order VI are not required to be complied with and merely because Rule 9 of Order VIII has been observed, a departure would be permitted in the pleadings without seeking for an amendment

under Rule 17 of Order VI. That would not be a question of procedure, although while allowing or disallowing the amendment the court can always take a liberal view and may even permit the defendant to raise whatever defence he choses to take in his favour.

Therefore, in our opinion, it will be a question of the application of the law pointed out in Rule 7 and 17 of Order VI and not a pure question of procedure to be decided for allowing a departure in the pleadings under a pretence that additional written statement is permitted to be filed under Rule 9 of Order VIII. With respects to the opinion expressed in the above-noted two Punjab cases we have further to observe that the language used in the order allowing the amendment in the plaint or allowing the additional written statement to be filed would be of no consequence. It is obviously correct that under Order VIII, Rule 9 the Court would allow the subsequent written statement merely because the plaint was amended. While making that order the court is not expected to be aware of the pleas which may be taken while filing such additional written statement. It is only when the additional written statement is filed that the court will become conversant with the pleas taken in that additional written statement. At that point of time Rule 7 and 17 of Order VI will come into play and in case in the opinion of the court the additional written statement is not confined to the amendments sought for in the plaint, the defendant will be compelled to file an application for amendment of the pleadings under Rule 17 of Order VI. Thereafter the court will examine the entire matter, and if the amendments sought for were necessary for determining the real question in controversy the court may or may not allow the amendments. In fact, the mere direction by the court that additional written statement be filed, would convey only one meaning that the additional written statement hereinafter to be filed has to confine to the amendments already sought for by the plaintiff. If the court prejudges the issues and permits additional pleas to be taken by the defendant, in a particular case it may elaborate its order seeking for the additional written statement by making pertinent observations. But, as we have stated above, we cannot conceive of a case in which the court will be in a position to prejudge the issues and make an elaboration in its order to enable new pleas in additional written statement.

At any rate, in the case before us, the orders were simple under Order VIII, Rule 9 permitting additional written statements to be filed. After that stage the court was not aware as to what sort of pleas were likely to be raised in the additional written statements. The question arose at the time when the additional written statements were filed and the court found that there was departure in the pleadings and rightly asked for the amendment under Rule 17 of Order VI."

(pp.12-13)

19. Now, this Court would be adverting to the another contention put forth on behalf of the counsel representing the defendants that being LRs of deceased defendant No.1, they are entitled to file written statement appropriate to their character as LRs of deceased defendant. At this stage, it would be relevant to reproduce hereinbelow the provisions contained in Order 22 Rules 3 & 4 CPC:

"ORDER 22 - DEATH, MARRIAGE AND INSOLVENCY OR PARTIES

Rule-3. Procedure in case of death of one of several plaintiffs or of sole plaintiff—

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4. Procedure in case of death of one of several defendants or of sole defendant—

(1) …. …. …. …. …. …. …. …. …. …. …. …. …. …. ….

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant."

20. Before perusing the aforesaid provisions of law, it may be stated that sub-rule 2 of Rule 4 of Order 22 definitely does not deal with rule of pleadings i.e. Order 6 Rule 17 and Order 8 Rule 9 CPC. Aforesaid provisions of law are nothing to do with Order 6 Rule 17 CPC and same are independent of Order 8 Rule 9. Close scrutiny of aforesaid provisions of law clearly suggests that it is complete in itself and it enables a person, who has been made a party under Order 22 Rule 4 to take any defence, which may be appropriate to his/her character as LRs of deceased defendant. The aforesaid provisions of law clearly suggests that being LRs of deceased i.e. the original defendant/party can file any defence which is appropriate to his character as LRs of deceased and Court has no discretion to stop or debar him from doing so. But careful perusal of the aforesaid provisions clearly suggests that a party, seeking to file an additional written statement being LRs of deceased defendant, necessarily need to move an application under Order 8 Rule 9 read with Order 22 Rule 4 CPC and seek permission of the Court before raising a defence appropriate to his character as LRs of deceased defendant. Party applying under Order 8 Rule 9 needs to assign cogent reason for additional written statement because written statement, if any, in terms of sub-rule 2 of Rule 4 of Order 22 would be additional written statement on behalf of LRs appropriate to their character as LRs of deceased defendant. Sub-rule 2 of Rule 4 of Order 22 is not a rule of pleading and it has no relation, whatsoever, with Order 6 Rule 17 CPC and similarly the same are independent of Order 8 Rule 9 CPC. Sub-rule 2 Rule 4 of Order 22 has its own application and limitation and it enables a person, who has been made a party under Order 22 Rule 4, to take any defence subject to the condition that defence so made should be appropriate to his character as LRs of deceased defendant. Whereas, Order 8 Rule 9 empowers the Court with a discretion to allow a defence or to file written statement; meaning thereby party cannot raise as a matter of right any fresh plea by way of filing written statement without obtaining leave of the Court, which the Court, in its discretion, may or may not grant.

21. But as per case titled: ***J.C. Chatterjee & Others vs. Shri Sri Kishan Tandon and another, AIR 1972 SC 2526***, Hon'ble Apex Court has held that if LRs of deceased defendant chooses to raise any such defence, he being entitled to do so, Court has no discretion to stop or debar him from doing so and in that eventuality Order 8 Rule 9 may not have any application. But aforesaid reference/observation in the judgment cited hereinabove was made by the Hon'ble Apex Court while dealing with the issue of entitlement of filing additional written statement by the LRs of deceased defendant under Order 22 Rule 4 CPC.

22. Close scrutiny of aforesaid provisions of law under Order 22 Rule 4 clearly suggests that leave is given to the substituted defendants to render appearance and to make any defence appropriate to their character as LRs of deceased defendant and leave is given to these defendants being LRs to file additional written statement. Once additional written statement in terms of Order 22 Rule 4 is filed by LRs of original defendant, Court before whom written statement is filed needs to examine whether defence taken by the LRs is appropriate to his/their character of LRs of the deceased defendant or not. Though plain reading of Order 8 Rule 9 CPC suggests that grant of leave before making amendment in written statement or filing additional statement is necessary, but if Order 22 Rule 4 CPC is read in its entirety with the judgment passed by Hon'ble Apex Court, referred hereinabove, it suggests that LRs have the right to make

the defence appropriate to their character as LRs and Order 8 Rule 9 has no application in that event and Court has no discretion to stop or debar them from doing so.

23. In the instant case there is nothing on record suggestive of the fact that defendants No.1(a) to 1(g) filed additional written statement in terms of Order 22 Rule 4 sub-rule 2 as LRs of the deceased defendant where they had independent right to raise any defence appropriate to their character as LRs of the deceased defendant. Rather, they filed amended written statement pursuant to amendment carried out by the plaintiff in plaint after seeking due leave of the Court by moving an application under Order 6 Rule 17 CPC. This Court is of the view that since defendants No.1(a) to 1(g) entered into the shoes of original defendant, who had already filed written statement to the plaint, they could only carry out amendment, if any, to the extent of amendment carried out in the plaint and by no stretch of imagination they could carry out wholesale amendment in the written statement, as has been observed above. There is no quarrel that under Order 22 Rule 4 sub-rule 2, defendants being LRs of deceased defendant have/had right to raise any defence, which is appropriate to their character as LRs, but in that eventuality they could only file an additional written statement in their independent capacity incorporating therein their defence appropriate to their character. But in the instant case, LRs of deceased defendant without resorting to the provisions contained in Order 22 Rule 4 sub-rule 2 CPC filed amended written statement to the original written statement, that is not permissible. Once LRs No.1(a) to 1(g) chose to file amendment to the written statement originally filed by their predecessor-in-interest, they could only restrict themselves to the stand already taken by their predecessor-in-interest. New pleas, if any, in defence appropriate to their character could only be taken by defendants No.1(a) to 1(g) being LRs of deceased defendant in terms of Order 22 Rule 4 by way of filing additional written statement.

24. Perusal of the judgments relied upon hereinabove by learned Senior counsel appearing on behalf of defendants clearly suggests that LRs of deceased defendant can raise, as a matter of right, any defence which is appropriate to his/their character as LRs of deceased defendant and Court has no discretion to stop or de-bar him/them from doing so. But in the present case, as has been discussed in detail, there is nothing on record suggestive of the fact that defendants 1(a) to 1(g) while carrying out amendment in the original written statement filed by their predecessor-in-interest exercised their right as envisaged under Order 22 Rule 4(2) because at no point of time additional written statement, if any, in terms of aforesaid provision of law was filed.

25. Consequently, in view of detailed discussion made hereinabove, impugned order passed by learned trial Court deserves to be quashed and set aside and amended written statement filed by defendants 1(a) to 1(g) is rejected. However, it may be clarified that defendants being LRs of original defendant No.1 are always at liberty to file additional written statement in terms of provisions of Order 22 Rule 4, if so advised. This petition is disposed of with the aforesaid observation. Interim order, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Suman Sharma and others ....Respondents.

Cr. Appeal No. 755 of 2008.

Date of Decision: 18th November, 2016.

Indian penal Code, 1860- Section 451, 352 and 506 read with Section 34- Informant had gone to attend a local fair, where she was abused by the accused- the accused gave beatings to her on her return- the accused were tried and acquitted by the Trial Court- held in appeal that testimony

of the informant is corroborated by PW-2 and PW-3- there is nothing in their cross-examination to show that they were making incorrect statements – delay in reporting the matter was satisfactorily explained- appeal allowed- accused convicted of the commission of offences punishable under Sections 451, 352 and 506 read with Section 34 of I.P.C. (Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For the Respondents: Mr. Rakesh Dogra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Sub Divisional Judicial Magistrate, Rampur Bushehar, District Shimla, H.P., rendered on 01.09.2008 in Case No. 111-2 of 2004, whereby, he acquitted the accused/respondents herein for theirs allegedly committing offences punishable under Sections 451, 352 and 506 of the IPC read with Section 34 of the IPC.

2. The facts relevant to decide the instant case are that on 15.05.2004 at about 8.30 p.m. at place Kumarsain complainant Rekha Devi resident as tenant of Subhash Bhardwaj with her children and niece Jogindra Devi. The niece of complainant Jogindra Devi solemnized the marriage with one Raju. The complainant was being harassed by the parents of Raju that she is the main culprit. She further narrated to the police that when she had gone to attend a local fair then accused persons abused her. When the complainant returned back to her home at about 8.30 p.m. then accused persons appeared on the spot and gave beatings to her. She brought the matter to the notice of Police Station Kumarsain wherein FIR Ex.PW1/A was lodged against the accused. During the course of investigating site plan of the site of occurrence was prepared. Statements of the witnesses were recorded as per their version.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for theirs committing offences punishable under Sections 451, 352 and 506 read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 4 witnesses. On conclusion of recording of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the trial Court, in which they claimed innocence and pleaded false implication. However, they did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondents herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The testification of the complainant qua the relevant incident embodied in FIR comprised in Ex.PW1/A is free from any taint or blemish qua hers (a) either contradicting her previous statement recorded in writing (b) besides the sanctity of her testification comprised in her examination-in-chief stands uneroded given hers in her cross-examination not deposing contradictorily thereto. Consequently, the testification of the complainant unbereft of any blemish or taint for thereupon it being construable to be uncreditworthy warrants imputation of reliance thereupon. Moreover, the testifications of the eye witnesses to the occurrence, who deposed as PW-2 and PW-3 lend formidable vigour to the testification of PW-1. A perusal of their respective testifications unveils the trite factum qua theirs deposing qua the relevant incident in tandem with the testification of PW-1 also an incisive reading of their respective testification omits to disclose qua their respective testimonies standing ridden with any taint of their improving or embellishing upon their respective previous statements recorded in writing nor their respective cross-examinations unveil a version qua the occurrence contradictory to the one enunciated by them in their examinations-in-chief also the respective testifications of the prosecution witnesses are unbereft of any taint or stain of any intra se contradictions. Consequently, when the untaint ridden besides obviously creditworthy evidence qua the relevant occurrence stood adduced by the prosecution before the learned trial Court, the latter for merely frivolous reasons embedded in evidence disclosing the prevalence of enmity inter se the complainant and the accused arising from theirs rearing a vendetta against her for hers encouraging Raju son of accused No.1 and brother of accused No. 2 to solemnize marriage by elopement with one Jogindra, who stands related to the complainant besides though with the police station concerned standing located in proximity to the relevant site of occurrence, the incident standing not promptly reported thereat by the complainant, rather hers reporting the incident before the police station concerned with one day's delay, whereupon, it concluded qua the embodiments occurring in the FIR acquiring a stain of theirs holding a concocted besides an engineered version qua the incident.

10. The tenacity of the aforesaid reasons, is bereft of any vigour especially when all the prosecution witnesses render an untaint ridden creditworthy version qua the occurrence. The mere factum of PW-3 in her cross-examination echoing qua in her presence no scuffling or fighting occurring inter se the complainant with the accused/respondents herein stood also inaptly concluded by the learned trial Court qua hers hence not lending corroboration to the testimony of PW-1, whereas, with hers in her testification comprised in her examination-in-chief making a disclosure qua hers evacuating the complainant from the clutches of the accused/respondents herein, testification whereof when stood unconcerted to be shred of its efficacy by the learned defence counsel while holding her to cross-examination comprised in his not putting apposite suggestions to her, begets an inference qua hence the aforesaid testification of PW-3 comprised in her examination-in-chief qua hers evacuating the complainant from the clutches of the accused/respondents vividly unveiling qua the accused/respondents holding the complainant imperatively hence it also conveying qua there occurring a scuffle inter se the complainant with the accused/respondents herein whereupon the effect of the testification of PW-3 in her cross-examination wherein she had deposed qua no scuffle or fighting occurring in her presence inter se the complainant with the accused not acquiring any paramount worth, for constraining the learned trial Court to dispel the testification of PW-3 embodied in her examination-in-chief wherein she has with candor made a communication qua hers besides others evacuating the complainant from the clutches of the accused/respondents herein. Conspicuously, when hence there was an imminent display therein qua a scuffle occurring inter se complainant and the accused/respondents herein merely on hers desultorily deposing in her cross-examination qua no scuffling and fighting occurring inter se both would not benumb the effect of the relevant communications made by her in her examination-in-chief nor the learned trial Court could hence erode its effect.

11. Since, in explication of the apposite delay, the complainant has purveyed a tangible ground comprised in the factum qua at the relevant time her husband being unavailable at home also hers tending to her minor children hence when it did comprise a tangible ground

for the learned trial Court to dispel the vigour of the omission of the complainant to with utmost promptitude report the matter to the police station concerned, whereas, its negating the effect of the aforesaid explication purveyed by the complainant for the delay in the lodging of the FIR qua the relevant incident before the police station concerned, has hence committed a gross illegality in undermining the impact of the relevant explication besides it has committed a gross illegality in mis-appreciating the impact of the untaint ridden testimonies of prosecution witnesses thereto.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

13. Consequently, the instant appeal is allowed and the judgment of acquittal recorded by the learned trial Court in favour of the accused/respondents herein is set aside. Accordingly, the accused are held guilt for theirs committing offences punishable under Sections 451, 352 and 506 of the IPC read with Section 34 of the IPC. They be produced before this Court on 2.12.2016 for theirs being heard on quantum of sentence.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Anjana Devi ....Appellant/Petitioner.
Versus
Manjit Singh ....Respondent.

FAO No. 463 of 2012.
Reserved on : 10.11.2016.
Decided on : 21st November, 2016.

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized on 4.12.1994 – two children were born- the husband assaulted the wife causing her injuries – she was residing with her parents – husband had not made any efforts to take her to matrimonial home- the petition was dismissed by the Trial Court- held in appeal that it was duly proved that husband had subjected the wife to physical cruelty – he had not made any efforts to bring the wife from her parental home- this proved the desertion on the part of the husband – the marital ties had broken down irretrievably – petition allowed and the marriage between the parties ordered to be dissolved.(Para-7 to 10)

For the Appellant: Mr. Amandeep Sharma, Advocate.
For the Respondent : Mr. Anil Jaswal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered by the learned Additional District Judge, Fast Track Court, Hamirpur, H.P. ON 22.08.2012 in H.M.A. Petition No. 41 of 2009, whereby, the petition aforesaid constituted therebefore by the petitioner/appellant herein stood dismissed.

2. The brief facts of the case are that the marriage inter se the contesting parties hereat stood solemnized on 4.12.1994 at village Matwar, PO Jalari, Tehsil Nadaun, District Hamirpur, H.P. Two children stand begotten from their wedlock. In the apposite petition, the petitioner herein averred qua the respondent herein had at public place abused and assaulted her whereupon she stood constrained to lodge an FIR with the Police Station, Naudan. Also she

averred therein on 11.05.2007, the respondent herein assaulting her at bus stand Naudan, in sequel, whereto injuries stood inflicted upon her. She continued to aver therein qua the respondent herein being habitual drunkard besides his openly threatening to eliminate her. Since, three years hitherto, the institution of the apposite petition before the learned Additional District Judge, Hamirpur, she avers of her staying with her parents. She avers of the respondent herein not making any concerted efforts to retrieve her to her matrimonial home whereupon she deposes qua the respondent herein hence with his holding the apposite animus deserdendi alienating her from his matrimonial company. Moreover, she avers qua her stay at her matrimonial home being incongenial arising from the respondent herein perpetrating physical cruelty upon her rendering her stay with the respondent herein at latter's home to be unsafe.

3. The petition for divorce instituted by the petitioner/appellant herein before the learned Additional District Judge, Hamirpur stood contested by the respondent herein by his instituting reply thereto wherein he controverted all the allegations constituted against him in the apposite petition by the appellant herein in the petition.

4. The petitioner/appellant herein filed rejoinder to the reply of the respondent, wherein, he denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

5. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the respondent has treated the petitioner, his wife with cruelty as alleged ?OPP
2. Whether the respondent has deserted his wife petitioner as alleged? OPP
3. Whether the petition is not maintainable, as alleged? OPR
4. Whether the petitioner is estopped to file the present petition by her own act and conduct, as alleged? OPR
5. Relief.

6. On an appraisal of evidence adduced before the learned Additional District Judge, he concluded qua the incidents of physical cruelty embodied in the apposite petition remaining unproven for paucity of adduction of germane apposite cogent evidence. Also he concluded of the petitioner/appellant herein against the wish besides without the consent of the respondent herein departing from her matrimonial home, wherefrom, he concluded qua proof of the imperative ingredient of the respondent herein holding the enjoined animus deserdendi not emanating, leading him to conclude of the entire evidence adduced before him not holding any formidable sinew to make a conclusion qua either the respondent herein treating the petitioner/appellant herein with physical beside mental cruelty also no clinching evidence standing adduced in portrayal of the respondent herein deserting the matrimonial company of his lawfully married spouse, constraining it to hence decline the relief claimed in the apposite petition preferred before him by the petitioner/appellant herein. The learned trial Court in making the aforesaid conclusions has remained grossly oblivious to the relevant germane evidence in portrayal of the incident(s) of physical cruelty averred in the petition sequeling the lodging of an FIR by the petitioner/appellant herein before the Police Station concerned. Even if, a copy of the FIR stood not tendered into evidence, its non adduction into evidence was insignificant especially when in his cross-examination to which the respondent herein stood subjected to by the learned counsel appearing for the petitioner/appellant herein, he acquiesces qua in the year 2007, an FIR standing lodged by the petitioner/appellant herein against him qua the incident of cruelty averred in the petition. In sequel whereto, he has also acquiesced qua his facing trial before the Court concerned. The further concomitant effect of the aforesaid acquiescences of the respondent herein is qua this Court standing entailed to record a firm inference qua thereupon the petitioner/appellant herein while imputing qua the respondent herein incidents of cruelty, her imputation not lacking in veracity besides obviously her departure in sequel thereto from her matrimonial home to her parental home standing prodded by a good and reasonable cause. The

incidents of physical cruelty perpetrated upon the petitioner/appellant herein by the respondent herein when stand concluded to constitute a reasonable cause for the lawfully married spouse of the respondent herein to depart from her matrimonial home to her parental home renders unbereft of vigour the conclusion recorded by the learned trial Court qua her departure to her parental home being against the wish besides without the consent of her husband wherefrom it also inaptly concluded qua her continuous stay at her parental home not warranting it to afford the relief claimed in the apposite petition.

7. Be that as it may, even if, the petitioner/appellant herein had for a prolonged and inordinate duration refrained from cohabiting with her husband yet the aforesaid omission of the appellant herein/petitioner to cohabit with her husband would not inhibit this Court to conclude qua the respondent herein not holding the requisite animus deserdendi unless evidence of immense potency stood adduced in portrayal of the respondent herein throughout the period when the petitioner/appellant herein continued to stay at her parental home, his making vigorous sincere, genuine efforts to retrieve her to his matrimonial company. Though, the respondent herein has in his testification made an attempt to articulate qua his concerting to retrieve his married spouse to her matrimonial home, yet his endeavour visibly appears to smack of ingrained falsity, inference whereof is derivable from the factum of his sister-in-law (sister of the appellant herein) while deposing as RW-4 making a communication in her examination-in-chief qua the petitioner/appellant herein unraveling her to qua her husband belabouring her at her matrimonial home whereupon she stands constrained to cohabit with him. Also she in her testimony comprised in her examination-in-chief unveils therein qua hers concerting to persuade her to return to her matrimonial home by guaranteeing her safe stay thereat. Moreover, in her cross-examination to which she stood subjected to by the learned counsel appearing for the appellant/petitioner she acquiesces to the suggestion put her by the learned counsel appearing for the petitioner/appellant herein qua the father of the petitioner/appellant herein receiving a telephonic call whereupon he stood apprised qua the respondent herein belabouring the petitioner/appellant herein. She has also acquiesced to the suggestion put to her by the learned counsel appearing for the appellant while holding her to cross-examination qua hers not making any personal effort along with the respondent herein to visit the parental home of the petitioner/appellant herein for thereupon theirs conjointly endeavouring to retrieve her to her matrimonial home. The effect of the aforesaid acquiescences made by the respondent's witness is qua the respondent herein at her matrimonial home belaboruing his married spouse also therefrom bely the proclamations made by him qua his making efforts to retrieve his married spouse to her matrimonial home.

8. In aftermath, with the conclusion recorded by this Court qua the petitioner/appellant herein holding a good reasonable cause to depart to her parental home when stands entwined with the inference aforesaid erected qua the respondent herein not making any sincere concerted efforts to retrieve his married spouse to her matrimonial home, begets a derivative of the respondent herein holding the animus deserdendi to permanently alienate himself from the matrimonial company of his married spouse. In sequel thereto, with the incidents of perpetration of physical cruelty upon the petitioner/appellant herein by the respondent herein standing emphatically established besides with the respondent herein evidently holding the relevant animus deserdendi to alienate himself from the matrimonial company of his married spouse though enjoined the learned trial court to render a decree in the apposite petition for dissolution of marital ties laid therebefore by the petitioner/appellant, whereas, it omitting to afford the relief as prayed for, has apparently committed a grave legal misdemeanor.

9. Moreover, RW-4 acquiesces in her cross-examination qua hers trying to prevail upon the respondent herein to wean himself from consuming liquor also hers concerting to dissuade him from belabouring the petitioner/appellant herein wherefrom also the apposite averments in consonance therewith constituted in the apposite petition acquire corroborative succor besides with hers in her cross-examination acquiescing to the suggestion put to her by the learned counsel for the petitioner qua hers concerting to wean the respondent herein from his ill

conduct towards the petitioner herein not yielding the appropriate result constrains an inference of the casting in the apposite petition an apposite averment qua the stay of the petitioner/appellant herein at her matrimonial home being both unsafe besides incongenial hence standing proved, wherefrom, it is inevitable to conclude of their being abysmal want of affability inter se the married spouses also their mutual discord not being amenable to any truce or improvement rather their marital ties standing irretrievably broken down, wherefrom the rendering of an apposite decree for dissolution of their marital ties is both befitting besides sagacious.

10. For the foregoing reasons, it is apt to clinchingly conclude of with the marital ties of the petitioner/appellant herein with the respondent herein standing broken down irretrievably hence, the rendition of a decree qua severance of their marital ties would be both just and expedient. Consequently, the instant appeal is allowed. Accordingly, the marriage inter se the petitioner/appellant and the respondent herein is ordered to be dissolved. In sequel, the judgment and decree impugned before this Court is quashed and set aside. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Ashok Kumar and another ..Appellants-Defendants
Versus
Amrit Lal and others ..Respondents.

RSA No. 583 of 2006.
Reserved on: 16th November, 2016.
Date of Decision : 21st November, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – the defendants have encroached upon a portion of the suit land – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the demarcation proved the encroachment – there was no infirmity in the process of demarcation – an owner has a right to claim possession of the encroached land- the suit was rightly decreed by the Courts- appeal dismissed.(Para-8 to 13)

Case referred:
Dr. Abdul Khair versus Miss Shella Myrtla James and another, AIR 1957, Patna, 308

For the Appellant: Mr. R.K. Gautam, Senior Advocate with Mr. Gaurav Gautam, Advocate.
For Respondents No.1 to 3: Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Regular Second Appeal stands directed by the defendants/appellants herein against the impugned rendition of the learned District Judge, Chamba, Himachal Pradesh, whereby he dismissed the appeal of the defendants/appellants herein and affirmed the judgment and decree rendered by the learned Cvil Judge (Senior Division), Dalhousie, District Chamba, H.P., whereby the latter Court decreed the suit of the plaintiff. The defendants/appellants herein stand aggrieved by the judgment and decree of the learned District Judge, Chamba. Theirs standing aggrieved, they have therefrom preferred the

instant appeal before this Court for seeking from this Court an order reversing the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of the suit land comprising khata/khatauni No.39/54, khasra No.192, measuring 252-3 square yards situated in Mauza Kasba Chowari, Pargana Chowari, Tehsil Bhatiyat, District Chamba, H.P., alongwith proforma defendants No.3 and 4. The defendants are strangers to the suit land having no right, title or interest in the same. Land of the defendants comprising khasra No.193 is just adjacent to the suit land. Defendants have encroached upon the 49.0 sq. yards area of the suit land by raising structure and constructing sehan. Demarcation of the suit land was carried outon 27.05.2003 and it was found that defendants have encroached upon the khasra No. 192/1 measuring 49 sq. yards. It has been prayed that the suit of the plaintiff be decreed for possession of 49 sq. yards of suit land, specifically khasra No.192/1. It has also been prayed that the suit be decreed for permanent prohibitory injunction and defendants be restrained from raising any further structure on the suit land.

3. Defendants No.1 and 2 contested the suit and filed written statement, wherein, they have taken preliminary objections qua maintainability, estoppel and locus standi. On merits, it has been submitted that the demarcation report is illegal and the suit land has not been legally partitioned by Assistant Collector 1st Grade, Bhatiyat and it is not binding on the defendants.

4. The plaintiff/respondent herein filed replication to the written statement of the defendants/appellants herein, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is entitled to relief of possession as prayed for? OPP

2. Whether plaintiff is entitled to relief of mandatory injunction, as prayed for? OPP

3. Whether plaintiff is entitled to relief of permanent prohibitory injunction, as prayed for? OPP

4. Whether the suit in the present form is not maintainable as alleged? OPD

5. Whether the plaintiff has no locus standi to sue as alleged? OPD

6. Whether the plaintiff is estopped from filing the present suit as alleged? OPD

7. Whether suit land has not been legally partitioned by the A.C. 1st Grade, if so, its effect, as alleged? OPD.

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the respondent herein/plaintiff. In an appeal, preferred therefrom by the appellants/defendants before the learned first Appellate Court, the latter Court dismissed the appeal.

7. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court assailing the findings recorded by the learned first Appellate Court in its impugned judgement and decree. When the appeal came up for admission on 18.09.2007, this Court, admitted the appeal instituted herbeforeby the defendants/appellants against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

1. Whether the Courts below have wrongly given undue weightage to the demarcation report Ex.DW3/A which is otherwise not liable to be admitted being

based against the set provisions of law specially Instructions issued by the Financial Commissioner, H.P. regarding conducting of demarcation?

Substantial question of Law No.1:

8. The respective estates of the litigating parties adjoin each other. The best germane evidence for clinching the trite factum of the contesting defendants while raising construction upon their land contiguous to the land of the plaintiff, theirs also subjecting the land of the latter to construction, stands comprised in a demarcation report prepared by the demarcating officer concerned, in sequel, to his holding a valid demarcation of the contiguous estates of the parties at contest. The best evidence aforesaid stands comprised in Ex.PW3/A besides in Ex.PW3/B respectively comprising the demarcation report and the tatima, whereunder unravelments occur qua the extent of encroachment made by the defendants on the land owned and possessed by the plaintiff. However, the mere factum of the relevant enunciations occurring therein would not per se imbue any sanctity to them unless evidence stands adduced qua the demarcating officer concerned while holding demarcation of the contiguous estates of the parties at lis, his revering the mandate of the apposite rules and instructions. For validating the apposite demarcation held by PW-3, enjoined upsurging of evidence qua his preceding his holding the relevant demarcation his obtaining the consent of the litigating parties qua the fixed points wherefrom he stood authorized to conduct the relevant demarcation proceedings. However, satiation qua the aforesaid mandate stands evidently unbegotten. Even if, PW-3, preceding his holding the relevant demarcation of the contiguous estates of the contesting parties hereat omitted to obtain their consent qua the fixed points wherefrom he stood authorised to hold the relevant demarcation would not per se negate nor invalidate his demarcation report comprised in Ex.PW3/A unless potent unflinching evidence stood adduced before the learned trial Court depicting qua his not at the relevant time holding the relevant musabi also evidence standing adduced qua his therefrom not holding the apposite measurements besides potent evidence displaying his thereafter not relaying onto the relevant fields the apposite measurements borrowed by him from the relevant musabi standing adduced. However, the aforesaid evidence is amiss. In aftermath, the findings recorded by the demarcating officer comprised in Ex.PW3/A and in Ex.PW3/B qua the defendants subjecting the land owned and possessed by the plaintiff to unauthorized construction do not suffer from any inherent infirmity. Also conclusivity to the relevant pronouncements made therein are acquired by the factum of the defendants, on Ex.PW3/A and Ex.PW3/B standing adduced into evidence before the learned trial Court not thereat ventilating their apposite objections thereto holding portrayals qua on account of the demarcating officer infracting the apposite mandate of the relevant rules and instructions, theirs holding no tenacity. The effect of theirs omitting to before the learned trial Court prefer objections to the validity of Ex.PW3/A besides to the validity of Ex.PW3/B begets an inference qua theirs acquiescing to the relevant unfoldments occurring therewithin.

9. Be that as it may, the learned counsel appearing for the appellant has contended with much vigour qua with the prescriptions held in the relevant rules and instructions qua the demarcating officer at the relevant time holding the relevant “musabi” standing infracted, infraction whereof arising from PW-3 voicing in his cross-examination qua his not at the relevant time holding the relevant “musabi” rather his holding the “momy”, hence, the tenacity of the relevant pronouncements occurring in Ex.PW3/A besides in Ex.PW3/B suffering erosion, whereupon he contends qua the relevant concurrently recorded renditions of both the learned Courts below warranting theirs being set aside. However, the aforesaid submission lacks force or vigour arising from the factum of though the relevant rules prescribe qua the demarcating officer at the relevant time holding the relevant “musabi” yet the mere factum of his thereat not holding the relevant “musabi” rather his holding the “momy” which too carries replications of all the relevant reflections occurring in the “musabi” whereupon obviously the “momy” alike the “musabi” purveys leverage to the demarcating officer to borrow therefrom all the relevant measurements of the relevant fields, would not erode the efficacy of Ex.PW3/A and Ex.PW3/B unless forthright evidence stood adduced qua the “momy” carried at the relevant time by the demarcating officer not therein replicating the relevant manifestations borne on the relevant

"musabi". However, when no evidence stood adduced qua the "momy" carried at the relevant time by the demarcating officer not replicating the relevant manifestations occurring in the apposite "musabi" constrains an inference qua the "momy" holding omnibus affinity with the "musabi" qua all the relevant manifestations also leads to a deduction qua the demarcating officer borrowing therefrom the relevant measurements , whereafter he relayed them onto the relevant fields, significantly, when no evidence to bely the aforesaid inference stood adduced by the defendants/appellants before the learned trial Court whereupon immense teancity stands acquired by Ex.PW3/A.

10. With this Court concluding qua the pronouncements occurring in Ex.PW3/A besides in Ex.PW3/B not standing bereft of tenacity, it is appropriate to adjudicate the submission addressed herebefore by the counsel for the defendants/appellant, anvilled upon the pronouncement made by this Court in RSA No.390 of 2002, titled as Prem Chand and others versus Kesho Ram and others, decided on 10.01.2013, whereupon, this Court after validating the relevant pronouncements occurring in the relevant demarcation report proceeded to in substitution of it rendering a decree of demolition of the structure raised by the delinquent litigant upon the land, owned and possessed by the persons aggrieved by the errant conduct of the delinquent, rendered a decree of compensation vis-a-vis the plaintiffs therein. A close reading of the pronouncement of this Court recorded in the aforesaid rendition unveils (a) the factum qua raising of construction by the defendant(s) on the land owned and possessed by the plaintiff(s) not begetting an inference of the latter acquiescing or abandoning or waiving his rights thereon unless evidence stood adduced in display of his despite knowing the factum of the defendant raising construction on land owned and possessed by him yet his permitting the defendants to raise construction thereon; (b) the demarcation report alone comprising the relevant best evidence also it constituting the relevant material wherefrom the relevant knowledge emanates qua the defendant(s) encroaching upon the land of the plaintiff(s) also no inference qua earlier thereto the plaintiff(s) deriving knowledge qua the defendant(s) raising construction upon the land owned and possessed by him/them can stand imputed to the plaintiff(s) nor also earlier thereto any inference being erectable qua the plaintiff(s) acquiescing besides abandoning or waiving his/their rights qua the land owned and possessed by him/them whereon construction stood raised by the defendant(s), whereupon the principle of waiver for estopping him/them to agitate his/their relevant grievance is unavailable for erection vis-a-vis the plaintiff(s) merely for his/their failing to make prompt concerts holding contemporaneity in timing vis-a-vis the the stage of raising of construction by the defendant(s).

11. With the mandate encapsulated in a decision reported in ***Dr. Abdul Khair versus Miss Shella Myrtla James and another, AIR 1957, Patna, 308***, the relevant paragraph 15 whereof stands extracted hereinafter, wherewithin the trite expostulation of law stands expounded qua the relief for compensation to the aggrieved plaintiff(s) in substitution to the rendition of a decree of demolition of the unauthorized construction raised by the defendant(s) upon his/their land being unamenable for standing pronounced by Courts of law, constrains this Court to not accept the submission addressed herebefore by the counsel for the defendants/appellants qua this Court modifying the concurrently recorded verdicts of both the Courts below by its awarding damages qua the plaintiffs. Relevant paragraph No.15 reads as under:

> "(15) the next important question for consideration is, is the decree for compensation in lieu of the ejectment, awarded by the first court of appeal, which has been affirmed by Mr. Justice Misra, correct in law. IN my opinion such a decree is contrary to law. When the first court of appeal found in agreement with the first court, that the land in question belonged to the plaintiff, such being the findings as to the property in the land, the courts could not compel the plaintiff to part with his legal rights and accept compensation against will, howsoever reasonable it might appear to be.
>
> A similar question came up for consideration before the Bombay High Court in two cases,- 'Govind Vankaji Kulkarni v. Sadashiv Bharma Shet', ILR Bom 771 (L);

and – Jethalal Hirachand v. Lalbhai', ilr 28 boM 298 (m). In the latter case, inw hich the first case was affirmed Chandavarkar J., while considering the finding of the learned District Judge that the plaintiff was entitled to no more than compensation, because there has been on the part of the defendant a technical encroachment in as much as a foot or so of the plaintiff ground had been taken to support the wall which divided the properties of the parties observed:

> "But if the foot or so of ground so taken by the defendant belongs to the plaintiff the act of the defendant is one of continuous trespass on the plaintiff's property and the wrongdoer cannot be heard to say that he has deprived the owner of only a little and that of not much use to the latter. Too allow such a defence and on the strength of it award compensation is to let a trespasser put a value of money's worth on another man's property and deprive him of its against his will".

His Lordship went on further to observe:

> "But where a man builds on another man's property against the will of the latter or without his consent, the invasion, is practically one where pecuniary compensation cannot be regarded as not only deprived of the property be he is also entitled to make. How are the damages to be estimated in such a case and and how can it be said that an award of compensation can do justice to the owner who leases the property, and all opportunity besides of using it for purposes which he may consider profitable, on beneficial to himself."

His Lordship for the above principle relied (N). I respectfully agree with his Lordship Chandavarkar J., with his above statement of law on the subject, and consider that his Lordship has laid down the correct statement of law on the point. Relief by way of compensation in such a case is tantamount to allowing a trespasser to purchase another man's property against that man's will.

On no principle of law or equity is that allowable. In my opinion therefore, the second question posed by me must also be answered in the negative by saying that the plaintiff cannot in law or equity be awarded compensation in lieu of ejectment to which he is legally entitled. His right to recover the encroached land arises out of his ownership and he is no t estopped, either by acquiescence or waiver, to estopped by conduct from claiming his right to possession."

12. Even otherwise, even if, assuming the aforesaid manner of redressing the grievance of the plaintiff/aggrieved holds any legal weight, it was enjoined upon the defendant(s) to raise it earlier before the Courts below also they stood enjoined to adduce evidence qua the value borne by the suit land whereon unauthorised construction stands raised by them, significantly, when it would facilitate this Court to record an order qua the quantum of damages assessable vis-a-vis the plaintiff(s). However, for lack of aforesaid concerts earlier hereto by the defendants/appellants does not empower them to espouse herebefore qua this Court in the manner aforesaid modifying the concurrently recorded decrees of demolition of the unauthorised construction raised by the defendants upon the suit land owned and possessed by the plaintiff(s).

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Consequently, substantial question of law is answered in favour of the respondent/plaintiff and against defendants/appellants herein.

14. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Harnam Dass .....Appellant-plaintiff.
Versus
Jagdish and others .....Respondents-defendants.

RSA No. 318 of 2003.
Reserved on: 16th November, 2016.
Date of Decision :21st November, 2016.

Specific Relief Act, 1963- Section 34- P was owner in possession of the suit land – plaintiff, defendant No.1 and father of defendants No.6 and 7 are the sons of P, who constituted a joint Hindu Family- P had 1/5th share – he is stated to have executed a Will – defendant No.2 executed a gift deed in favour of defendants No.5 to 12, which is impermissible- hence, a suit was filed for seeking declaration – the suit was partly decreed- an appeal was preferred, which was dismissed- held in second appeal that suit land located in C was proved to be coparcenary property- suit land located in L and H was not proved to be coparcenary property – it was not proved that land in L and H was acquired from the usufructs of land located in C- the Courts had rightly appreciated the evidence- appeal dismissed. (Para-7 to 11)

For the Appellant: Mr. Ashwani K.Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.
For Respondents No.1 and 5 to 9: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Regular Second Appeal stands directed by the plaintiff/appellant against the impugned rendition of the learned District Judge, Bilaspur, Himachal Pradesh, whereby he dismissed the appeal of the plaintiff/appellant herein and affirmed the judgment and decree rendered by the learned Sub Judge 1st Class, Ghumarwin, District Bilaspur, H.P., whereby the latter Court partly decreed the suit of the plaintiff. The plaintiff/appellant herein stands aggrieved by the judgment and decree of the learned District Judge, Bilaspur. His standing aggrieved, he has therefrom preferred the instant appeal before this Court for seeking from this Court an order reversing the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff had instituted a suit for declaration with consequential relief of permanent injunction against defendants NO.1 to 12 on the allegations that Shri Puran son of Shri Ram Saran was owner in possession of land described in khasra Nos. 112/35, 74, 75, and 76 measuring 10-12 bighas situated in revenue estate Halwari, Khasra No. 499/1, measuring 2/3 bighas situated in revenue estate Ladda and Khasra Nos. 27, 146, 457/165, 209, 213, 249, 322, 388, 399 and 389 measuring 19-10 bighas situated in revenue estate, Chhaproh, Pargana Sarium, Tehsil Ghumarwin, District Bilaspur. The plaintiff, defendant No.1 and Shri Sita Ram (father of defendants No.6 and 7) are sons of Shri Puran. Defendants No. 3, 4 are sons of the plaintiff. It is stated that the parties were Brahmins by caste and were governed by Hindu Mitakshra Law in the matter of alienation and succession. The plaintiff, defendant No.1 and Shri Sita Ram along with their father Shri Puran constituted a joint Hindu family. The suit land was ancestral though recorded under the ownership and possession of Shri Puran in the books of the Collector. The suit was stated to be joint Hindu coparcenary property. As such, Shri Puran could not alienate the same through Will. The plaintiff had stated that he had 1/5th share in the suit land. Shri Puran had died in 1971. Much after the death of Shri Puran, the plaintiff had been informed of succession to the estate of his father. In the books of the Collector, defendant No.1 had been recorded owner in possession of

the suit land measuring 19-10 bighas of revenue estate, Chhaproh. Defendant No.2 had been recorded owner in possession of the rest of the suit land of revenue estates Ladda and Halwari. Mutation of the suit land had been attested in favour of defendants No.1 and 2 on the strength of Will dated 22.6.1965 purported to have been executed by Shri Puran in favour of defendant No.1 and his mother defendant No.2. It is stated that Shri Puran could not have executed the Will of the suit land in favour of his wife and defendant No.1. The plaintiff wanted to institute suit claiming his share in the suit land after the death of his father. Defendant No.1 as also defendant No.2 had requested the plaintiff not to institute the suit since the litigation would bring bad name to the family. Defendant No.1 had got suit land measuring 19.10 bighas of revenue estate Chhaproh of the share of the plaintiff and Sit Ram mutated in their favour as per relinquishment deed. Defendant No.2 had assured the plaintiff that after her death the suit land of revenue estate, Ladda and Halwari shall go to the natural male heirs. As such, the plaintiff did not institute the suit claiming his share in the joint Hindu coparcenary property in 1971. The plaintiff had stated that defendant No.2 on 5.9.1989 had gifted the suit land of revenue estates Ladda and Halwari in favour of defendants No.5 to 12. Defendant No.2 could not gift the joint Hindu coparcenary property of revenue estates Ladda and Halwari in favour of her daughters or their husbands. The plaintiff had, therefore, instituted suit for declaration to the effect that the defendants No. 1,3,4, 6 and 7 and himself constituted a joint Hindu family. The suit land was ancestral joint Hindu coparcenary property with Shri Puran. Shri Puran could not execute the Will of the suit land in favour of defendants No.1 and his mother. Also the defendant NO.2 could not execute gift of the suit land situated in revenue estates Ladda and Halwari in favour of defendants No.5 to 12. A permanent injunction had been sought restraining defendants No.1 to 12 from not allowing the plaintiff to enjoy his share of the joint property. Alternatively, the plaintiff had sought relief of possession of his share of the suit land.

3. Defendants No.1,2 and 5 to 12 contested the suit and filed written statement, wherein, they have taken preliminary objections qua maintainability, limitation, estoppel and misjoinder. It had also been averred that the plaintiff had not paid correct court fees and as such, the court could not proceed with the trial of the suit. On merits, the defendants admitted the relationship of the plaintiff and the defendants with Shri Puran. It had been stated that Shri Puran had been absolute owner of the suit land. The suit land was not ancestral property of Shri Puran qua the plaintiff. The plaintiff and defendants No.1,3,4,6 and 7 did not constitute a joint Hindu family. The parties were separate in mess and worship. Shri Puran was competent to execute the Will of the suit land in favour of defendants No.1 and 2. The Will dated 22.6.1965 executed by Shri Puran was stated valid and binding on the plaintiff. Mutation of the suit land had been rightly sanctioned in favour of defendants No.1 and 2 on the strength of the last and final Will dated 22.6.1965 of Shri Puran. The plaintiff had been notified of the Will executed by his father in favour of defendants No.1 and 2 in due course. Defendants No.1, 2 and 5 to 12 had denied having agreed to grant the share, if any, of the plaintiff in the suit land situated in revenue estate, Chhaproh. Defendant No.2 had no where stated that after her death, the suit land of revenue estates Ladd and Halwari shall go to male natural heirs. Defendant No.2 was absolute owner in possession of the suit land situated in revenue estates Ladda and Halwari. Defendants No. 5 to 12 had been looking after and maintaining defendant No.2 Defendant No.2 had been competent to gift her property in favour of defendants NO.5 to 12. The plaintiff was bound by the registered gift deed dated 5.2.1989. The plaintiff was not entitled to 1/5th share of the suit land. The plaintiff was not entitled to any relief much less to the discretionary relief of permanent injunction.

4. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the suit land is joint Hindu Family coparcenary and ancestral property in the hands of plaintiff and defendants Nos.1,3,4, 6 and 7?OPP

2. Whether the Will dated 22.06.1965 with regard to suit land executed by Shri Puran in favour of the defendants No.1 and 2 is illegal and void? OPP.

3. Whether the gift deed dated 5.2.1989 executed by Smt. Ajudhiya Devi in favour of defendants is wrong and void? OPP

4. Whether the plaintiff along with defendants No.1, 2, father of defendants Nos.6 and 7 and defendants No.9 and 10 are having 1/5th share in suit land after successor of Shri Puran? OPP

5. Whether the plaintiff is entitled to a decree for permanent prohibitory injunction? OPP.

6. Whether the suit is not maintainable? OPD.

7. Whether the suit is not within limitation? OPD

8. Whether the plaintiff is estopped to file the suit by his conduct and deeds? OPD

9. Whether the suit is not maintainable on the grounds of non-payment of court fee? OPD

10. Whether the suit is bad for misjoinder of necessary parties? OPD

11. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the latter Court partly decreed the suit of the appellant herein/plaintiff. In an appeal, preferred therefrom by the appellant/plaintiff before the learned first Appellate Court, the latter Court dismissed the appeal.

6. Now the plaintiff/appellant has instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgement and decree by the learned first Appellate Court . When the appeal came up for admission on 16.03.2005, this Court, admitted the appeal instituted herebefore by the plaintiff/appellant against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the Will of ancestral property can be validly executed without legal necessity by divesting any beneficiary of such ancestral property, having acquired right over the property by birth?

2. Whether the gift deed Ex.P-19 executed by Smt. Ajudiya Devi is without consideration and he same is illegal in as much as she is not the owner of the suit property to the extent of the share of the plaintiff; if so its effect?

Substantial questions of Law No.1 and 2:

7. Late Shri Puran, the predecessor-in-interest of the parties at contest, owned land located in mauza Chaproh besides in mauzas Halwari and Ladda. During his life time, he executed a testamentary disposition qua his land located in the aforesaid mohals/mauza vis-a-vis the contesting defendants No.1 and 2. Defendant Ajudhiya Devi, his surviving widow in pursuance to hers thereupon receiving the aforesaid estates of her pre-deceased husband executed a gift deed comprised in Ex.P-19. Both the learned courts below concurrently recorded qua the suit land borne in mauza Chhaproh partaking the trait of ancestral coparcenary property whereas the suit land borne in mauza Halwari and mauza Laddda not partaking the trait of ancestral coparcenary property rather the suit land located in the latter Mohals/mauzas comprising the self acquired property of deceased Puran. Both the concurrently recorded renditions of both the learned Courts below record a finding qua the apposite Will standing stained with a stain of illegality qua embodiments occurring therein qua land located in village Chhaproh standing bequeathed therein vis-a-vis defendants No.1 and 2. However, gift deed comprised in Ex.P19 stands concurrently concluded to be valid. The stain of illegality omnibusly imbuing the aforesaid documents qua lands borne in all mauza/mohals aforesaid stands canvassed by the counsel for the plaintiff/appellant to spur from one Puran, the common ancestor of the litigating parties hereat making acquisition of land(s) located in mauja Halwari and in mauja Ladda from the income earned by him from ancestral coparcenary property located

at Mohal Chhaproh rendering them hence to also acquire the characteristic trait of theirs being construable to be ancestral coparcenary property whereupon he qua them also stood interdicted to execute a valid testamentary disposition vis-a-vis defendants No.1 and 2. Significantly, he reiterates qua with the land held by Puran located in Village Chhaproh standing concluded by the concurrently recorded renditions of both the Courts below to partake the trait of ancestral property/coparcenary property also when evidently there occur enunciations qua the aforesaid Puran from the income derived by him from land located in village Chhaproh, his acquiring lands located in village Ladda and Harwali renders the estates occurring in latter mohals to acquire an alike trait.

8. Both the learned Courts below dispelled the vigour of the aforesaid espousal of the learned counsel for the plaintiff. However, the learned counsel for the plaintiff contends qua the appreciation meted by the learned Courts below of the relevant evidence suffering from a taint qua theirs mis-appraising besides omitting to appreciate its probative worth. The aforesaid submission made herebefore by the counsel for the plaintiff/appellant herein would yield formidability only on forthright evidence standing adduced in display of the plaintiff's espousal qua deceased Puran from the earnings reared by him from lands located in Village Chhaproh, his acquiring estates/properties located in village Halwari and in village Ladda. The best evidence qua the aforesaid facet stood comprised in the plaintiff adducing the relevant revenue records pertaining to the time contemporaneous to the year 1955 whereat Puran acquired properties/estates located in village Halwari and in village Ladda, holding a candid visible display therein qua the quality of land located at village Chhaproh besides its income generating capacity. However, the aforesaid evidence remained unadduced by the plaintiff before the learned trial Court. For omission of the plaintiff to adduce the aforesaid best evidence for clinching his espousal contrarily benumbs his contention qua one Puran acquiring, from the income reared by him from lands located in Village Chhaproh properties/estates located in village Ladda and Halwari besides thereupon the estates/properties of Puran located in the latter mohals/mauzas concomitantly do not partake or acquire any trait of ancestral coparcenary property. Concomitantly also the renditions concurrently recorded by both the learned Courts below qua hence with the aforesaid Puran standing bestowed with absolute title thereto, his thereupon holding the relevant capacity to execute vis-a-vis his properties/estates located in village Ladda and Halwari, a valid testamentary disposition vis-a-vis defendants No.1 and 2 do not suffer from any taint of any illegality. Also when Ajudhiya Devi has under a gift deed comprised in Ex.P-19 alienated her interest/title qua the lands located in villages Ladda and Halwari, hence, obviously does not render it to stand vitiated.

9. Even otherwise, the plaintiff in discharging the relevant onus of proving qua one Puran acquiring from his income reared from ancestral coparcenary property located in village Chhaproh, estates/properties located in villages Halwari and Ladda, had merely depended upon his bald oral testimony. His bald testimony carries no legal vigour for want of his omitting to adduce the aforesaid relevant best evidence. Also the testification of the plaintiff qua his since his employment in the year 1957 in Bharat Petroleum at New Delhi remitting funds to his father Puran through money orders, hence, his contributing to the income of the Hindu Undivided Family of which he was a constituent, wherefrom, he espouses qua the relevant acquisitions stood consummated by his deceased father Puran also does not hold any legal worth for want of his (a) not placing on record except one receipt of Rs.50/- pertaining to the year 1959, the relevant apposite documentary evidence for succoring his espousal; (b) with the relevant acquisition occurring in the year 1955 renders the effect, if any, of any remissions made by the plaintiff to his deceased father Puran in the year 1957 to not hold no vigour qua thereupon the latter in the year 1955 whereon the relevant acquisitions occurred hence utilizing any portion of remissions, if any, made by PW-1 to deceased Puran for thereupon facilitating the latter to purportedly therefrom acquire estates/properties located in village Halwari and Ladda and (c) reliable evidence standing adduced in portrayal of Puran, the common ancestor of the litigating parties hereat serving in the Indian Railway, wherefrom, it can be concluded qua his drawing salary from his relevant employment in the Indian Railway wherefrom it is to be concluded qua

his purchasing therefrom the estates/properties located in villages Ladda and Halwari, whereupon, hence, the properties located thereat partake the characteristic trait qua their being hence construable to be his self acquired properties.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Consequently, both the substantial questions of law are answered in favour of the defendants/respondents and against the plaintiff/appellant herein.

11. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

CWP No. No.2392 of 2016 a/w
CWP No.1740 of 2016
Reserved on :10.11.2016
Date of Order: 24th November, 2016.

1. CWP No.2392 of 2016

Jyoti Education Welfare Society ...Petitioner.

Versus

State of H.P. & another ...Respondents.

2.CWP No.1740 of 2016

National Career Public Education Committee ...Petitioner.

Versus

State of H.P. & others ...Respondents

Constitution of India, 1950- Article 226- Petitioners made applications for grant of GNM and B.Sc. (Nursing) at Rohru and Tanda– the approval was granted in favour of respondent No.2- held, that no uniform yardstick was applied while carrying out the inspection- the authorities directed to carry out fresh inspection in terms of guidelines after affording opportunity of being heard to all the applicants. (Para-13 and 14)

Present: Mr. B.C.Negi, Senior Advocate with Mr. Pranay Partap Singh, Advocate, for the petitioner in CWP No.2392 of 2016.

Mr. Dushyant Dadwal, Advocate, for the petitioner in CWP No.1740 of 2016.

Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.k.Verma, Deputy Advocate General, for respondent No. 1 in CWP No.2392 of 2016 and for respondents No. 1 and 2 in CWP No.1740 of 2016.

Mr. N.K.Sood, Senior Advocate, with Mr. Aman Sood, Advocate, for respondent No.2 in CWP No.2392 of 2016 and for respondent 4 in CWP No.1740 of 2016.

Mr. Ravinder Thakur, Advocate, for respondent No.3 in CWP No.1740 of 2016.

Mr. Sunil Mohan Goel, Advocate, for respondent No.5 in CWP No.1740 of 2016.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Since common questions of law as well as facts are involved in the present cases, this Court vide order dated 6.10.2016 clubbed aforesaid petitions and since then has been hearing them together with the consent of the parties.

2. By way of present Civil Writ Petition(s) filed under Article 226 of the Constitution of India, the petitioners have laid challenge to the decision of the respondent-State Annexures P-17 & P-11 respectively, whereby approval of Government has been conveyed for issuance of essentiality and feasibility certificate/NOC in favour of respondent No.2, Northern International Educational Society in CWP No.2392 of 2016 and respondent No.5, Kangra Valley Nursing College Educational Society in CWP No.1740 of 2016(in short 'Respondents societies') for starting GNM/B.Sc. Nursing courses attached to Dr. RPGMC, Tanda, District Kangra, H.P, whereby respondents-societies have been allotted 60 seats each in both courses.

3. In nutshell, case of the petitioners is that since the respondents-societies had not applied in terms of notice inviting expression of interest for opening of B.Sc. (Nursing) College and General Nursing & Midwifery (GNM) training schools in Himachal Pradesh in terms of the advertisement (Annexure P-3), dated 24.9.2014 published in daily news paper, there was no occasion for the respondent-State to consider the case of the 'Respondents-societies' for grant of courses and allotment of seats attached to Dr. RPGMC, Tanda, District Kangra, H.P. The Department of Medical Education & Research, Government of Himachal Pradesh vide Annexure P-3, invited expression of interest for opening of B.Sc (Nursing) College and General Nursing and Midwifery (GNM) training schools in Himachal Pradesh at two locations i.e. Rohru and Tanda. As per advertisement, Government of Himachal Pradesh expressed its intention to establish B.Sc Nursing College and General Midwifery Schools under Public Private Partnership in terms of notifications No. HFW-B(F)4-5/2013,dated 04-06-2013 and No. HFW-B(F)4-3/2014, dated 30.6.2013 and No. HFW-B(F)4-9/2014, dated 24.07.2014 at Rohru and Tanda. The aforesaid notifications issued by the respondent-State provided 40 seats in General Nursing and Midwifery at Rohru attached with Civil Hospital, Rohru and Jubbal, whereas 60 seats each in GNM and B.Sc Nursing were offered for location Tanda attached to Dr. RPGMC, Tanda. Note appended with the aforesaid advertisement clearly provided that the party/Trust/ Society which have already applied for opening of GNM Schools/B.Sc Nursing College under preferred location Rohru & Tanda are also required to submit fresh proposals alongwith supporting documents but no initial inspection fee would be charged from those institutions which had paid inspection fee earlier.

4. In the instant case pursuant to aforesaid advertisement, petitioners as well as respondents-societies made applications for grant of courses at Rohru and Tanda.

5. Documents annexed with the petitions suggest that respondent-authorities after evaluating the proposals submitted by the petitioners namely Jyoti Education Welfare Society and National Career Public Education Committee as well as respondents-Societies, submitted its evaluation report Annexure P-6. The final evaluation report submitted by the committee suggests that respondent Kangra Valley Nursing College Educational Society was awarded 36 points, whereas present petitioner Jyoti Institute of Nursing was awarded 32 points. But before some action could be taken on the aforesaid report having been submitted by the Directorate Level Evaluation Committee, Additional Chief Secretary(Heath) to the Government of Himachal Pradesh on the representation filed by the Chairman, Northern International Education & Research Centre, Ghurkhari, District Kangra, H.P., directed the Director Medical Education & Research, Himachal Pradesh to examine the case of Northern International Education & Research Centre for starting up GNM & B.Sc courses with annual intake of 60 seats each for preferred location at Tanda.

6. Perusal of Annexure P-9, dated 20.12.2014 suggests that the Director Medical Education & Research with reference to communication sent by the Additional Chief Secretary (Health) to the Government of Himachal Pradesh informed that the advertisement had been published in news paper dated 24.9.2014 inviting expression of interest from the interested parties for preferred location Rohru and Tanda on or before 15.10.2014. The Director, specifically informed the Additional Chief Secretary (Health) that as per the note appended in aforesaid notice inviting expression, "the party/Trust/ Society, which had already applied for opening of GNM Schools/ B.Sc Nursing College under preferred location Rohru & Tanda were also called/advised to submit fresh proposal alongwith supporting documents. The Director, Medical Education

&Research further informed that all the 11 applicants who had earlier applied for GNM & B.Sc Nursing courses under preferred location at Tanda in the year, 2008 could also respond to the EOI called by the department in the month of September, 2014 alongwith other applicants without any initial inspection fee, but none of the applicants except Kangra Valley Nursing College Educational Society submitted their proposals/ representations afresh in the light of advertisement dated 24.9.2014 and as such, department considered the proposals of four applicants for opening of Nursing Institution at Rohru and Tanda. The Director further informed the Additional Chief Secretary (Health) that evaluation report in respect of four applicants already stands submitted to the Government vide letter dated 18.12.2014 for taking further necessary action at Government level. But it appears that despite aforesaid communication having been sent by the Director Medical Education and Research, respondent–State directed the Director Medical Education & Research to carry out inspection of Northern International Education & Research Society Ghurkari alongwith other four applicants who had applied in terms of advertisement dated 24.9.2014. The communication (Annexure P-11), dated 19.5.2015 further suggests that the Directorate Level Evaluation Committee after carrying out necessary inspection submitted its report alongwith photocopy of inspection reports conducted by SDM level committee in respect of Northern International Education Society Ghurkhari, District Kangra, H.P. However, evaluation Committee, on the basis of inspection carried out by it, awarded 35 points in favour of Northern International Education & Research Centre Society. Aforesaid evaluation report submitted by the Director Medical Education, who is also Chairman of the evaluation committee did not recommend the case of aforesaid society. The Chairman Evaluation committee categorically stated that the applicant does not fulfill the parameters of the INC, hence, his application cannot be considered.

7. Further, perusal of communication (Annexure P-13), dated 30.11.2015, suggests that respondent-State again directed the Director Medical Education and Research Himachal Pradesh to carryout fresh inspection of Northern international Education & Research Centre Society on the basis of the criteria already in practice and send report to the department. Pursuant to the aforesaid communication, the Director Medical Education submitted Directorate level evaluation committee report in respect of Northern International Education & Research Centre Society, whereby society was declared qualified.

8. Accordingly, in view of aforesaid report submitted by the Directorate level evaluation committee, proposal regarding issuance of NOC/Essentiality certificate to start GNM and B.Sc Nursing courses under preferred location i.e. Dr. RPGMC, Tanda in favour of Northern International Education Society was placed before the cabinet in its meeting held on 14.1.2016.

9. It is undisputed that respondents-societies had not applied in terms of advertisement dated 24.9.2014 at first instance and as such, their cases were not considered by the SDM level evaluation committee while submitting evaluation report dated 18.12.2014, wherein respondent Kangra Valley Nursing College Educational Society was awarded 36 points and the petitioner Jyoti Institute was awarded 32 points. It emerges from the record that respondent Northern International Education & Research Centre Society filed representation (Annexure P-8) before Additional Chief Secretary (Health) to the Government of Himachal Pradesh in terms of the order dated 4.12.2014 passed by this Court in CWP No.209/2013, praying therein that it may be granted NOC for running courses in GNM and B.Sc Nursing with Dr. RPGMC Tanda.

10. Perusal of representation Annexure P-8, suggests that pursuant to different notifications issued by the respondent-State inviting applications for setting up GNM & B.Sc Nursing at Tanda, Northern International Education and Research Centre had applied and inspection of the premises was done but no NOC was issued in favour of this institute regarding Tanda and as such, it filed CWP No.1438 of 2009. During the pendency of aforesaid petition, Court was informed that though location at Dharamshala is vacant but same has been rejected by Indian Nursing Council. In the meanwhile, respondent-State issued notification dated 23.7.2011 providing therein that now there is no bar that only one Nursing Institution can be attached with one hospital, however, it was informed that Dr. RPGMC Tanda would not be

provided as preferred location since centre of excellence is proposed to be opened there. But subsequently, as per notification dated 30.9.2013, Dr. RPGMC Tanda was again preferred as a location for opening Nursing Institutes(s) in private sector with 60 seats each in GNM and B.Sc. (Nursing), accordingly, Northern International Education Society submitted its application on 3.7.2008, praying therein for starting B.Sc(Nursing) and GNM Courses at Ghurkhari attached with Dr. RPGMC at Tanda. But it appears that pursuant to aforesaid application having been preferred by Northern International Education Society, no decision could be taken by the authorities.

11. By way of aforesaid representation, respondent society prayed for granting essentiality certificate in view of the fact that its premises were earlier inspected on two occasions in the years 2005 and 2008 by the authorities pursuant to earlier application submitted by it.

12. Perusal of Annexure P-9 suggests that respondent-State taking cognizance on the aforesaid representation of the respondent society, directed the Director, Medical Education & Research to carry out inspection of Northern International Education & Research Centre alongwith other applicants, who had applied in terms of advertisement dated 24.9.2014. Thereafter, the Director, Medical Education & Research, after evaluating the premises, submitted its report declaring therein respondent to be qualified.

13. In the instant case, this Court after carefully perusing the material placed on record is not satisfied and convinced with the method adopted by the respondent authorities while analyzing/scrutinizing the applications submitted by the petitioners as well as respondents societies pursuant to the advertisement dated 24.9.2014 and we have no hesitation to conclude that no uniform yardstick was applied by the evaluation committee while carrying out the inspection of applicant institutions and as such, is of the view that it would be in the interest of justice if authorities are directed to conduct fresh inspection of all the institutions/societies, had applied in terms of the advertisement dated 24.9.2014 as well as Northern International Education and Research Centre, whose case was considered by the Government while accepting its representation dated 6.1.2015 so that allegations of bias as well as arbitrary exercise of power as alleged by the parties, is put to rest.

14. Needless to say, authorities would carry out fresh inspection strictly in terms of the guidelines framed in this regard by the respondent-State as well as INC after affording adequate opportunity of being heard to all the applicants including petitioners as well as respondents-societies. At this stage, it may be observed that this Court deemed to have passed this order while keeping in view the claims and counter claims of the parties viz-a-viz genuineness and correctness of the evaluation report submitted by the evaluation committee formulated by State of Himachal Pradesh while recommending issuance of NOC as well as feasibility certificate for setting up GNM & B.Sc nursing courses.

15. The observations made hereinabove shall not cause prejudice to the parties, in any way.

16. Respondent-State is directed to do the needful in view of the aforesaid observations within a period of two weeks from today and submit its report in sealed cover to this Court on or before the next date of hearing. List on 30.11.2016. Copy **Dasti.**

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Kubja Devi. .....Appellant.

Versus

Shri Ishwar Dass. .....Respondent.

FAO(HMA) No. 138 of 2010.

Date of decision: November 24, 2016.

Hindu Marriage Act, 1955- Section 25- Petitioner had applied for a decree of judicial separation – the parties agreed to dissolve their marriage by a decree of customary divorce – maintenance of Rs.450/- per month was awarded- petition for enhancement was filed, which was dismissed on the ground that maintenance amount was mutually settled by the parties and there was no provision for enhancement – held in appeal that agreement regarding the receipt of Rs.450/- per month as maintenance will not create estoppel to debar the petitioner from seeking enhancement of the amount of alimony in the changed circumstances- husband admitted that his salary was Rs.3,300/- per month when he had agreed to pay Rs.450/- as maintenance -he further admitted that his salary was Rs.16,000/- per month at the time of retirement – his total salary was Rs.23,204/- per month as per salary certificate – husband is getting handsome amount from pension – hence, maintenance enhanced to Rs.2,500/- per month. (Para-5 to 10)

Cases referred:

Harilal Sarkar vs. Subhra Sarkar, (2016) 165 AIC 784 : 2016 SCC OnLine Tri 356

Ram Shanker Rastogi vs. Smt. Vinay Rastogi, AIR 1991 Allahabad 255

For the appellant	Mr. Surinder Saklani, Advocate.
For the respondent	Mr. R.K. Gautam, Sr. Advocate with Ms. Megha Kapur Gautam, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Appellant, hereinafter referred to as the petitioner, is divorced wife of the respondent. She is aggrieved by the order dated 2.3.2010 passed by learned Additional District Judge, Mandi in an application under Section 25(2) of Hindu Marriage Act registered as HMP No. 30 of 2005 whereby her prayer for enhancement of maintenance allowance/alimony amount from Rs. 450/- per month to Rs. 6000/- per month has been dismissed.

2. The facts are not in controversy. The petitioner was admittedly wife of the respondent. The petitioner-wife had filed a petition under Section 10 of the Hindu Marriage Act for a decree of judicial separation. The petition was allowed by learned District Judge Mandi, Kullu and Lahaul & Spiti districts at Mandi on 31.1.1983. The respondent-husband has filed an appeal registered as FAO No. 76 of 1983 in this Court against the judgment and decree passed by learned District Judge, Mandi. During the course of proceedings in the appeal before this Court the petitioner and respondent have agreed to dissolve the marriage by a decree of customary divorce. The divorce deed in original has been produced in evidence by the petitioner and marked as Ext.DA. In terms of this document, the parties mutually agreed for payment of Rs. 450/- per month towards alimony/maintenance allowance to the petitioner by her husband, the respondent, till her death or she remarried. There is no controversy so as to the payment of Rs. 450/- per month by the respondent to the petitioner for her maintenance. However, her grouse is that with the passage of time the income of her husband, the respondent, is increased, therefore the monthly maintenance Rs. 450/- also deserves to be enhanced accordingly and as such, in the petition under Section 25(2) of the Hindu Marriage Act she filed in the trial Court claimed a sum of Rs. 6000/- per month by way of such enhancement.

3. Learned trial Judge has framed the following issues in the petition:

1. Whether the petitioner is entitled for enhancement of the alimony amount, if so, to what extent? OPR
2. Whether the petition is not maintainable? OPR
3. Whether the petition is lamentably delayed and she is estopped from filing the petition? OPR

4. Relief.

4. Learned trial Judge after having taken on record the evidence and also hearing the parties on both sides has arrived at a conclusion that since the petitioner at the time of dissolution of her marriage with the respondent by a decree of customary divorce had agreed to receive Rs. 450/- per month till her death or remarriage as maintenance allowance and that there is no stipulation in the divorce deed Ext.DA that she will have right for further enhancement of the maintenance allowance, therefore, her claim for enhancement of the alimony/maintenance allowance is not sustainable. The petition, as such was ordered to be dismissed vide order under challenge in this appeal.

5. After hearing the matter at length, in the light of the given facts and circumstances and also the evidence available on record as well as the law cited at the Bar, it would not be improper to conclude that the agreement qua the payment of a sum of Rs. 450/- per month to the petitioner as maintenance allowance in terms of the divorce deed Ext.DA cannot be treated as an estoppal to debar the petitioner for seeking enhancement of the amount of alimony in the changed circumstances. The law on the issue is no more res integra. The High Court of Tripura at Agartala in ***Harilal Sarkar*** vs. **Subhra Sarkar, (2016) 165 AIC 784 :*2016 SCC OnLine Tri 356*** a case having similar facts has held that an order qua maintenance allowance based on the settlement/compromise during the course of proceedings in a divorce petition has to be treated an order of maintenance passed under Section 25(1) of the Hindu Marriage Act and as such a petition for enhancement of the amount filed under Section 25(2) of the Act is maintainable and not barred by the principle of estoppal. It is seen that three points were formulated by learned Judge after taking into consideration the provisions of law and also the law laid down by various high Courts by way of judicial pronouncements and has held as under:

> ***"10.*** *On the face of the submission made by the learned counsel for the parties, 3(three) pertinent questions have emerged for consideration, which are as under :*
>
> *(i) Whether by agreement the jurisdiction of the competent court under Section 25(2) of the Hindu Marriage Act, 1955 can be ousted?*
>
> *(ii) Whether the judgment and order dated 14.09.2010 is the order of maintenance under Section 25(1) of the Hindu Marriage Act or not?*
>
> *(iii) Whether the right to future maintenance is transferrable and if not whether the settlement is void, so far the terms of maintenance is concerned ?*
>
> ***WHETHER BY AGREEMENT THE JURISDICTION OF THE COMPETENT COURT UNDER SECTION 25(2) OF THE HINDU MARRIAGE ACT, 1955 CAN BE OUSTED?***
>
> ***11.*** *By agreement, jurisdiction of the court which has been created by a statute cannot be taken away. Section 25 as a whole confers the jurisdiction on the competent court to provide permanent alimony and maintenance " at the time of passing any decree or at any time subsequent thereto," on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay maintenance and*
>
> *support such gross sum (alimony) which is factored by various element as statutorily provided or by the law as developed in the course of time. It is no more res integra that if any agreement comes in conflict with any valid statute or its provision that becomes unlawful agreement and void in terms of Section 23 of the Indian Contract Act. Hence the jurisdiction of the court for granting maintenance at the time of passing any decree or subsequent thereto cannot be taken away by the settlement/agreement. It is true that if the order is passed under Section 25(1) of the Hindu Marriage Act, 1955 in that case the competent court may vary, modify or rescind any order of maintenance or gross maintenance in a change in the circumstance under Section*

25(2) of the Hindu Marriage Act, 1955. But at the same time, if any settlement which has been acted on by the court or recorded, the parties thereto cannot in the ordinary course take the stand contrary thereto and in that case, their action might be hit by the principle of estoppel, if not, such stand emanates from the statute.

WHETHER THE JUDGMENT AND ORDER DATED 14.09.2010 IS THE ORDER OF MAINTENANCE UNDER SECTION 25(1) OF THE HINDU MARRIAGE ACT OR NOT?

12*. There was a compromise petition before the court on settlement of the quantum of the maintenance which was termed as the fixed maintenance and the court had given its approval by passing the compromise decree on granting divorce and maintenance. It is a well accepted proposition that compromise decree pertains the charter of agreement and the decree is drawn accordingly. It can perhaps be said that the quantum ofmaintenance under the decree was not the result of any decision by the court, it was the result of an agreement between the parties, which was acknowledged by the court, for purpose of making it executable at the instance of maintenance-holder.*

13. *In Seshi Ammal and another Vs. Thaiyu Ammal, reported in AIR 1964 Madras 217(V 51 C 61), the Madras High*

Court has enunciated the law holding that such a case will be one where the maintenance is fixed by a decree of court though the basis of it was an agreement it will come directly under Section 25. Thus, the respondent will be entitled to have an enhancement of maintenance once she proves that there has been a material change in the circumstances justifying the enhancement. Therefore, even if agreement relating to the quantum may be the part of the settlement but when the decree passed on adopting the said settlement it becomes the order under Section 25(1) of the Hindu Marriage Act. And as such the court has the statutory jurisdiction under Section 25(2) to direct enhancement of the maintenance with a change in the circumstances. The said manner may not be applicable in the case where the permanent alimony has been settled and paid by means of one-time payment. That payment has to be treated as the property transferred for purpose of maintenance.

WHETHER THE RIGHT TO FUTURE MAINTENANCE IS TRANSFERRABLE AND IF NOT WHETHER THE SETTLEMENT IS VOID SO FAR THE TERMS OF MAINTENANCE IS CONCERNED ?

14. Section 6(dd) of the Transfer of Property Act has been incorporated by the Amending Act, 1929. Prior to the amendment there was a conflict of opinion on whether a right of future maintenance when it was fixed by a decree, was transferable. The Madras High Court held that it was, in (Rajah D.K. Thimmanayanim Bahadur Varu, Rajah of Kalahasti and others Vs. Rajah Damara Kumara Venkatappa Nayanim Bahadur Varu and others reported in AIR 1928 Madras 713), but the Calcutta High Court ruled that it was not. Asad Ali Mokat Vs. Haidar Ali reported in 1910 (ILR) 38 Cal 13 did not agree with the decision of Madras High Court. The words 'in whatsoever manner arising, secured or determined' as appearing are very comprehensive and it is submitted that they overrule cases in which when the right has been created by a deed of transfer, it was held that the question whether the right was alienable depends upon the intention of the parties as expressed in the deed.

15. *The Privy Council in Lal Rajindra Narain Singh alias Lallu Sahib Vs. Mt. Sundar Bibi reported in AIR 1925 PC 176*

held that a right of future maintenance cannot be attached as the right to future maintenance is not capable of transfer. In this regard provisions of Section 60 of the Code of Civil Procedure, 1908 can be

referred as co-terminous provision of Section 6(dd) of the Transfer of Property Act as the said provision operates in the similar field, for protection of right of future maintenance from attachment. Therefore, so far the settlement is concerned the parties can determine in whatsoever manner the maintenance in the circumstances when the settlement or the compromise was struck. In this case, the decree dated 14.09.2010 as passed by the Judge, Family Court, West Tripura in T.S.(Divorce) No. 183 of 2010 is couched with the order of maintenance though the quantum, has emerged from an agreement as stated, and such order has been passed under Section 25(1) of the Hindu Marriage Act, 1956. There can be no other interpretation, harmonious to the object of Section 25 of the Hindu Marriage Act, 1955. The determination of the maintenance was in the circumstances which existed at the time of execution of the settlement/ compromise cannot extinguish the authority of the court as provided under Section 25(2) of the said Act. If the word 'fixed' quantifying the maintenance is attributed and read in its literal meaning, such agreement shall come in conflict with the statutory provision and the public policy, hence, that part of the agreement shall be void in terms of Section 23 of the Indian Contract Act. In the event of permanent alimony, as settled and as termed as the property for maintenance will not come within the province of Section 25(2).

16. *Hence, there is not illegality when the Judge, Family Court, Agartala exercised the jurisdiction under Section 25(2) of the Hindu Marriage Act by enhancing the maintenance from Rs.4000/-to Rs.6000/-. Even if, a fixed maintenance allowance is agreed upon towards a decree of divorce, the quantum if accorded and recorded by the court, has to be understood for purpose of maintenance within the ambit of Section 25(1) of the Hindu Marriage Act and with the change in the circumstances the same shall be liable to be re-assessed under Section 25(2) of the Hindu Marriage Act. The statutory purpose is very simple is to preserve the value of the maintenance allowance. This statutory principle shall equally apply when the maintenance to be paid periodically in terms of any settlement.*

17*. Having held so, we do not find any merit in this appeal from the order and accordingly the same is dismissed".*

6. Similar is the ratio of High Court of Allahabad in ***Ram Shanker Rastogi*** vs. ***Smt. Vinay Rastogi, AIR 1991 Allahabad 255***. The facts of this case were also identical to the present one before this Court. It has been held in this judgment that the plea of estoppal or *res judicata* cannot be invoked in a case of this nature nor the question of maintainability of petition under Section 25(2) for enhancement of maintenance allowance previously awarded by a consent order cannot be raised. This judgment reads as follows:

"10. Neither the provisions of S. 11 of the Code of Civil Procedure nor the principles of res judicata will bar a suit for maintenance on an enhanced rate for a different period under altered circumstances even though on an earlier occasion a maintenance decree had been passed and a certain rate of maintenance had been fixed thereunder. The reason being that such a decree as to the rate of maintenance is not final.

11. The case of Hirabai Bharucha v. Pirojshah Bharucha, AIR 1945 Bombay 537, stems from proceedings under S. 40 of the Parsi Marriage and Divorce Act, 1936. Under this provision, a Court is authorised to award permanent alimony to a wife either at the time of the passing of any decree under that Act or subsequently thereto. The wife is granted a decree of divorce. After the decree is passed, the

husband and wife arrive at certain consent terms. One of the terms of the consent order is :

"This Court doth declare that the defendant hereby agrees not to claim any alimony now or at any time in future.".

The wife applies under S. 40 for alimony. It is held that on grounds of public policy the wife cannot enter into a contract that she will not claim any alimony in future. The contract is void and the Court will take notice of that and ignore that part of the order although it was made by consent. Reliance is placed upon a remark by Lord Atkin :

"The wife's right to future maintenance is a matter of public concern which she cannot barter away."

Accepting this proposition, the learned Judge takes the view that the wife cannot barter away her right to future maintenance and enter into a contract to that effect and such a contract will be a void contract in the eye of law.

12. Let us now read Section 25. Subsection (1), inter alia, provides that any Court exercising jurisdiction under the Act may, at the time of passing any decree or at any time subsequent thereto, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and the other property of the applicant, the conduct of the parties and other circumstances of the case, which may seem to the Court to just. Sub-section (2) may be extracted :--

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just."

Admittedly, the Second Civil Judge exercised powers under the Act while passing a decree of divorce under S. 13 and, as already indicated, he passed an order fixing a certain sum as the monthly maintenance allowance for the wife. The Court did not pass any order that the wife will not claim an enhancement of the maintenance allowance in future Assuming a wife gives up her right to claim a higher rate of maintenance allowance in future her consent, in our opinion, will not bring into existence a valid contract. Such an agreement will not only defeat the provisions of subsection (2) of S. 25 but will also frustrate the purpose of giving maintenance allowance. Judicial notice can be taken of rising prices with the result that the cost of bare existence is regularly rising, rather mercurially. In principle, it makes no difference between an agreement by a wife not to claim any alimony at all and an agreement not to claim any enhancement of the rate of maintenance allowance, whatever be the change in the circumstances".

7. Now if adverting to the facts of this case, the respondent while in the witness box as RW1 has admitted that at the relevant time when the deed of divorce Ext.DA was executed and he agreed to pay Rs. 450/- per month as maintenance allowance to his wife the petitioner his salary was Rs. 3300/-. According to him, at the time of his retirement his salary was Rs. 16,000/- per month. The salary certificate Ext.PW2/A reveals that his total salary as on 31st January 2008 was Rs. 23,204/- per month. He retired as Regional Manager from Himachal Road Transport Corporation after superannuation on 29.2.2008. The petitioner though claimed that she has no source of income and that during these days of exorbitant prices it is not possible for her even to meet with requirement of both ends meal. However, even if it is believed that she is owner in possession of some land which according to respondent is measuring 4-2-10 bighas it cannot be believed by any stretch of imagination that income from the produce thereto is sufficient for her maintenance. The only plea of the respondent that she has earning from selling illicit liquor is not available to him because manufacturing of illicit liquor and its sale is an illegal

act and a husband is not expected to force his wife to indulge in any such illegal activity for earning her livelihood.

8. By way of leading additional evidence respondent intends to produce in evidence the copy of FIR No. 301 dated 27.8.2010 registered in Police Station Balh under Section 61 of the Punjab Excise (HP amendment) Act, 1965 which was registered against the petitioner. Since the maintenance allowance is not sufficient, therefore, in case the FIR is rightly registered against her it is her husband the respondent who by not maintaining her properly has compelled her to indulge in such unlawful activity. The FIR even if taken on record and allowed to be produced in evidence will hardly of any help to the case of the respondent. Therefore, the application being devoid of any merit is ordered to be dismissed.

9. Mr. Surinder Saklani, Advocate, learned Counsel has strenuously contended that the settlement of Rs. 450/- per month as maintenance allowance at the time of dissolution of the marriage of the parties by a decree under customary divorce is hardly of any consequences nor debar the petitioner from seeking enhancement of the maintenance allowance. According to Mr. Saklani there cannot be any estoppal against the statutory provisions and as Section 25(2) of the Hindu Marriage Act extends a right in favour of the wife for seeking enhancement of maintenance allowance. The agreement qua payment of Rs. 450/- towards maintenance allowance does not come in the way of petitioner to seek further enhancement.

10. The respondent is a retired officer from Himachal Road Transport Corporation. It can be reasonably believed that he is getting a handsome amount by way of pension and must have get some amount towards his retiral benefits. True it is, that number of dependants upon him is six. It can reasonably be believed that to maintain a family having six family members is difficult during these days. The facts, however, remain that the respondent must spare additional amount for the maintenance of the petitioner also so that she can lead honorable life and is also not forced to starve. Therefore, having regard to all pros and consthough the petitioner is not entitled to enhancement of the maintenance allowance at Rs. 6000/- per month, however, payment of Rs. 2500/- per month to be payable to her from the date of filing of this appeal in this Court i.e. 3.5.2010 would serve the ends of justice. The arrears towards maintenance allowance in terms of this judgment shall be deposited by the respondent in the trial Court in four equal installments. He shall deposit the first installment on or before 31st March, 2017, the second on or before 30th September 2017, the third by 31st March, 2018 and the last and final by 30th September, 2018. The maintenance allowance from December 2016 onwards shall however be paid by him at the enhanced rates i.e. Rs. 2500/-. The failure of the respondent to adhere to the payment schedule as directed shall result in initiation of execution proceedings against him and in that event he shall be liable to pay the amount/balance amount together with interest @6% per annum.

11. With the above observations, the appeal stands disposed of.

12. Pending application(s), if any, shall also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Partap Singh Rauaut ....Petitioner

Versus

Union of India & Others. ....Respondents

CWP No.2024 of 2015
Judgment Reserved on: 09.11.2016
Date of decision: 24.11.2016

Constitution of India, 1950- Article 226- Petitioner applied for establishing green house for growing agriculture and horticulture produce – he was to pay Rs.18 lacs and remaining amount of Rs.30 lacs was to be financed by the Bank- he was entitled to subsidy – the petitioner failed to repay the amount and notice under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was issued – he approached the writ Court, which passed an order for release of subsidy into the account of the petitioner- however, the subsidy was not released – held, that the project was to be implemented within a period of two years – issuance of letter of intent will not enable a person to get the subsidy – subsidy cannot be claimed as a matter of right- the petitioner had failed to furnish the certificate of completion of project and his case was rightly not considered by the respondents- writ petition dismissed.(Para-10 to 23)

Case referred:
Pashimanchal Vidyut Vitran Nigam Limited and Others vs. Adarsh Textiles and Another, (2014)16 SCC 212

For the Petitioner:	Mr.Ajay Vaidya, Advocate.
For Respondent No.1:	Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate.
For Respondents No.2 & 3:	Mr.L.S. Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of present writ petition filed under Article 226 of the Constitution of India, the petitioner has invoked extra ordinary jurisdiction of this Court and has prayed for following main relief(s):-

> "i) To quash and set aside annexure P-9 and to pass an appropriate writ, order or direction to Respondent No.2 to release the subsidy amounting to Rs.10 (substituted by Rs.10 lacs vide order dated 09.11.2016) in a time bound manner.
>
> b) Respondent No.1 to respondent No.2 may kindly be directed to adhere to the contents of annexure P-2 in letter and spirit, that is to release the subsidy of Rs.Ten lac in a time bound manner."

2. Briefly stated, facts as emerge from record are that the petitioner, who is an agriculturist, applied for Letter of Intent *(for short 'LOI')* under the "Development of Commercial Horticulture through Production and Post Harvest Management of National Horticulture Board", Scheme, *(for short 'Scheme')* for starting the Project, i.e., Green House for growing agriculture and horticulture produces. Total cost of which was Rs.48 lacs, out of which petitioner had to pay Rs.18 lacs and remaining amount of Rs.30 lacs was to be financed by the Bank. Petitioner averred that the said application for LOI was approved by the respondent vide letter dated 08.08.2006 (Annexure P-2), which was valid for one year only. Thereafter, the petitioner approached respondent No.2 for granting of term loan of Rs.30 lacs, who, after verifying that all the formalities have been completed by the petitioner, sanctioned the term loan and then disbursed the same by Central Bank of India on different dates in his favour. As per terms and conditions of LOI, petitioner was entitled to the subsidy on the loan amount to be released by respondent No.2 within two years.

3. Records further reveal that theaforesaid business could not run successfully and due to financial constrains petitioner failed to repay the loan as per the agreement and as such default occurred for not paying the monthly installments. Accordingly, vide notice dated 03.10.2011 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 *(for short 'SARFAESI' Act)* Central Bank of India issued

notice to petitioner for taking possession of the immovable property on account of non-repayment of loan amount. It also emerges from the pleadings that petitioner conveyed the respondents that due to financial constrains he was/is not in a position to pay the total loan amount in one go and prayed for some reasonable installments to clear the same and thereafter petitioner has deposited an amount of Rs.20,98,125/- with the aforesaid Bank. Communication made to the aforesaid Bank by the petitioner also suggests that he was unable to repay the loan amount since he did not receive subsidy from respondent No.1 in terms of LOI (Annexure P-2).

4. In the aforesaid background, petitioner approached this Court by way of writ petition bearing CWP No.2310 of 2012-A, which was disposed of on 29.4.2014 with the direction to respondent No.2 to process the petitioner's case for subsidy, in terms of LOI (Annexure P-2); and the terms of Contract, after affording due opportunity of hearing to all concerned. While passing aforesaid order, this Court also held that amount of subsidy, to which the petitioner would be held entitled, shall be released directly into hisbank account with respondent No.3.

5. Pursuant to directions given in the aforesaid judgment dated 29th April, 2014, respondents No.2 and 3 passed fresh order dated 14th/19th August, 2014 (Annexure P-9), impugned herein, perusal where of suggests that same was passed after hearing the petitioner personally. But fact remains that vide aforesaid impugned order respondent No.3 rejected the case of the petitioner for grant of subsidy on the ground that he was unable to place on record any document suggestive of the fact that he had completed Project in terms of LOI (Annexure P-2) issued by the respondents.

6. Petitioner, being aggrieved and dis-satisfied with the impugned order dated 14th/19th August, 2014 passed by respondent No.3, approached this Court by way of instant writ petition praying therein the reliefs as reproduced above.

7. Shri Ajay Vaidya, learned counsel representing the petitioner, while referring to Annexure P-9, impugned order passed by respondent No.3, vehemently argued that same is not in consonance with the directions contained in judgment dated 29th April, 2014 passed by this Court in CWP No.2310 of 2012-A and as such same deserves to be quashed and set aside. Mr.Vaidya further contended that aforesaid impugned order passed by the authority is patently illegal and contrary to record because there was no question, if any, to submit completion certificate by the petitioner because bare perusal of LOI (Annexure P-2) suggests that the petitioner had completed the Project and he was entitled to the subsidy in terms of Scheme. While concluding his arguments, Mr.Vaidya forcefully contended that bare perusal of impugned order passed by respondent No.3 suggests that there is no application of mind and case of petitioner for grant of subsidy has been turned down on hyper-technical grounds and as such same deserves to be quashed and set aside and petitioner is required to be granted subsidy in light of LOI (Annexure P-2).

8. Mr.L.S. Thakur, learned counsel representing respondents No.2 and 3, supported the impugned order passed by respondent No.3 by stating that a bare perusal of the same suggests that despite ample opportunities, petitioner failed to furnish requisite information/documents to enable the respondents to process his case for subsidy claim. Shri Thakur, with a view to refute the aforesaid contention put forth on behalf of the counsel representing the petitioner that Project was complete in all respect, invited the attention of this Court to the reply filed by respondents No.2 and 3 to demonstrate that Project in question was never completed and same was sold to some other party without informing respondents No.2 and 3. He further stated that since no joint inspection, as per criteria laid down in the column could be conducted for assessment of subsidy, there was no question, if any, to release subsidy as is being claimed by the petitioner and in the aforesaid background he sought dismissal of the petition with costs.

9. We have heard learned counsel for the parties and gone through the record of the case.

10. Careful perusal of LOI (Annexure P-2) suggests that in response to application/proposal submitted by present petitioner, letter of expression was issued under the Scheme for the activity proposed in the application. But same suggests that its scope was limited to merely for approval of activity proposed in the application and in no manner it could be termed as endorsement or approval of the Project. Close scrutiny of documents referred to hereinabove also suggests that LOI issued in favour of present petitioner was subject to certain conditions which are reproduced hereinbelow:

"i) This LOI is being issued on the condition that the proposed activity is a completely new activity and it is not for any pre-existing activity or for any component thereof.

ii) The LOI will be valid for one year from the date of issue. The Promoter should accordingly approach a Bank/FI of his choice immediately after obtaining the LOI from NHB and get his term loan sanctioned by the Bank/FI.

(iii) Mere grant of LOI by NHB does not in any way obviate the responsibility of the Bank/FI to carefully scrutinize the project proposal. The Bank/FI shall be solely responsible for financial appraisal of the project. Therefore, the Bank/FI while sanctioning the project proposal has to cautiously examine/evaluate and appraise the proposal thoroughly after conducting a detailed field inspection to ensure the technical feasibility & financial viability of the project. The Bank after due field verification must ensure that this proposal is not for any pre-existing activity but is in respect of a completely new activity as proposed in the LOI application/DPR submitted by the beneficiary.

iv) The project should, however, be implemented within a period of two years from the date of sanction of loan. The payment of back-ended subsidy will be made after project has been successfully completed according to the term and conditions of the loan/or as per the approved feasibility cum project report, as the case may be.

v) The projects will not be eligible for NHB subsidy under this scheme where cultivation of seasonal/short duration horticulture crops is envisaged in open field.

vi) Mere issuance of LOI will not guarantee the grant of subsidy to the beneficiary unless the proposal is implemented in accordance with the information given in the application of LOI/Detailed Project Report (DPR) and within overall guidelines of the scheme. Any deviation in implementation of project will lead to rejection of proposal for which promoter will be solely responsible.

vii) The quantum of subsidy will be decided after taking into account the recommendation of the Joint Inspection Team as constituted by NHB and on the basis of cost norms of NHB in respect of different admissible items of expenditure in the project. However, in case there is a variation between the cost as appraised by Bank and the cost norms of NHB, the lowest cost will be considered. In addition, NHB will also have the right to restrict admissible components and expenditure thereon to such limit as may be considered justified.

viii) The project will not be eligible to receive subsidy under NHB schemes in case benefit of subsidy/grant-in-aid from other agencies of Govt. of India has been availed/is proposed to be availed.

ix) The Board reserves the right to cancel the LOI at any time in case there has been misrepresentation by the Promoter OR any information furnished by the Promoter is found false or there has been concealment of any facts.

x) NHB reserves the right to modify, add and decide any terms & condition to this LOI without assigning any reason thereof.

xi) NHB's interpretation on various terms & conditions of LOI will be final."

11. Clause-iv of the LOI mentioned hereinabove suggests that Project was required to be implemented within a period of two years from the date of sanction of loan and thereafter payment of back ended subsidy, if any, was to be made, that too, after successful completion of Project according to terms and conditions of the loan and was as per the approved feasibility-cum-project report.

12. Further clause-v clearly suggests that Project could not be granted NHB for subsidy in the Scheme where cultivation of seasonal/short duration horticulture crops is/was envisaged in open field.

13. Most importantly clause-vi suggests that mere issuance of LOI will not guarantee the grant of subsidy to the beneficiary unless the proposal is implemented in accordance with the information given in the application of LOI.

14. Finally quantum of subsidy in terms of Scheme was to be decided by joint inspection Team after taking into account the work done by the applicant.

15. Clause-ix of the LOI further gives liberty to respondents to cancel the LOI at any time in case of mis-representation/concealment of facts by the promoter.

16. Minute reading of aforesaid LOI clearly suggests that completion of Project is condition precedent for grant of subsidy. Similarly, quantum of subsidy is required to be determined by Joint Inspection Team which would visit the Project site and make recommendation qua the admissibility of subsidy.

17. Similarly, condition No.(iv) suggests that Project should be implemented within a period of two years from the date of sanction of loan.

18. This Court with a view to test the correctness and genuineness of submissions having been made on behalf of petitioner that the Project was complete examined LOI (Annexure P-2), but it nowhere suggests that petitioner had completed the Project within stipulated time and in this regard he had furnished information/claim with the respondents for grant of subsidy. Rather, perusal of Annexure P-2 suggests that on the application having been filed by petitioner, LOI was issued to him in token of approval for activity proposed in the application and in no manner it could be termed as an approval of the Project cost indicated in the application. Conditions contained in LOI (Annexure P-2), which have been reproduced hereinabove, itself suggest that it was incumbent upon the petitioner to comply with certain conditions before making himself eligible for grant of subsidy in terms of Scheme, referred hereinabove.

19. Apart from LOI (Annexure P-2), there is no document available on record by the petitioner suggestive of the fact that pursuant to LOI issued vide order dated 8.8.2006, Project was completed within stipulated time and thereafter same was examined by Joint Inspection Team, which had to recommend the case for grant of subsidy. All other documents, save and except Annexure P-2, placed on record by the petitioner relate to communication with the Central Bank of India from where petitioner had availed loan to the tune of Rs.30 lacs for setting up the Project. Hence, this Court has all the reasons to conclude that at no point of time petitioner completed the Project in terms of Annexure P-2, as such, he was rightly not granted subsidy. At this stage, it would be profitable to reproduce para-3 of preliminary submission and para-6 of preliminary objections to the reply filed by respondents No.2 and 3, which reads as under:

"Preliminary Submissions:

3. That it is respectfully submitted that Subsidy is a grant from the government and any citizen cannot claim a right to get subsidy. The sanction and disbursement of the subsidy is strictly governed by the terms and conditions of the scheme and also the Letter of Intent which are as follows:

- The LOI will be valid for one year from the date of issue. The promoter should approach the Bank/FI of his choice immediately after obtaining the LOI from NHB and get his term loan sanctioned by the bank/FI.
    - Mere grant of LOI by NHB does not in any way obviate the responsibility of the Bank/FI to carefully scrutinize the project proposal. The Bank/FI shall be solely responsible for financial appraisal of the project. Therefore, the Bank/FI while sanctioning the proposal has to cautiously examine/evaluate and appraise the proposal thoroughly after conducting a detailed field inspection to ensure the technical feasibility and financial viability of the project.
    - The project should, however, be implemented within a period of two years from the date of sanction of loan. The payment of back-ended subsidy will disbursed after project has been successfully completed according to the term and conditions of the loan/or as per the approved feasibility cum project report, as the case may be.
    - Mere issuance of LOI will not guarantee the grant of subsidy to the beneficiary unless the proposal is implemented in accordance with the information given in the application of LOI/Detailed Project Report (DPR) and within overall guidelines of the scheme. Any deviation in implementation of project will lead to rejection of proposal for which promoter will be solely responsible.
    - NHB reserves the right to modify, add and delete any terms and conditions to the LOI without assigning any reason thereof.
    - Bank/FI are advised to furnished the details as per operational guidelines to our State office immediately after release of full amount of term loan and completion of the project for conducting joint inspection and consideration of subsidy."

"Preliminary Objections:

6. In compliance of the directions passed by this Hon'ble Court, the Petitioner was given due opportunity to represent his case for subsidy along with supporting documents before answering Respondent twice. During personal hearing, Petitioner informed that the project work was not functional since long and he has sold out the assets of the project and the project is now abandoned. It is stated that neither the answering Respondent nor the bank was informed about the disposing of assets. As such joint inspection as per the criteria laid down was not possible for assessment of subsidy and thereby the case of the petitioner was duly rejected in accordance to the guidelines. Further, as per the term loan account provided by the petitioner, it was evident that the project was irregular in payment of installment since beginning and due to which his loan account was declared NPA. As per the guidelines, projects with NPA account are not considered with back end subsidy and the same was duly communicated to the petitioner vide letter dated 19th Aug, 2014 and the same is annexed as "ANNEXURE R-6". Further, the petitioner has deliberately not made Central Bank of India party to these proceedings for his oblique motives. Thus, this petition deserves to be dismissed at preliminary stage."

20. Reply filed by respondents clearly suggests that Project was required to be implemented within a period of two years from the date of sanction of loan and thereafter only payment of back ended subsidy could be disbursed after successful completion of Project in accordance with terms and conditions set out in LOI issued at the time of initial approval. It emerges from the reply filed by the respondents that after issuance of directions by this Court in CWP No.2310 of 2012-A, various opportunities were given to the petitioner to furnish documents in support of his claim, which were essential for taking the joint inspection, but same were not furnished, as a result of which, no assessment of quantum of subsidy could be made by Joint Inspection Team as prescribed in LOI. It also emerges from the record that even during personal

hearing having been afforded to the petitioner, he himself informed the respondents that Project work was not functional since long and as such he sold out the assets of the Project and the Project is now abandoned. But this Court sees no documents available on record suggestive of the fact that in this regard information, if any, was ever sent to the respondents. Perusal of communication dated 14th/19th August, 2014 (Annexure R-6) placed on record further suggests that as per own submission of petitioner that he had obtained Term Loan Account from bank i.e. Central Bank of India, he was irregular in re-payment of installments since beginning and due to his inconsistent default, loan account was declared Non Performing Assets *(for short `NPA')* vide notice dated 3rd October, 2011 under Section 13(2) of SARFAESI Act. Since loan account of petitioner was declared NPA, case of the petitioner for back ended subsidy could not be considered in terms of general guidelines issued for all the Schemes vide Annexure R-4. Otherwise also subsidy, if any, being concession, cannot be claimed as a matter of right, rather it is the prerogative of the State to extend the benefit of subsidy.

21. In this regard reliance is placed on ***Pashimanchal Vidyut Vitran Nigam Limited and Others vs. Adarsh Textiles and Another, (2014)16 SCC 212,*** wherein the Hon'ble Apex Court has held as under:-

> "26. It can be culled out from order dated 14.6.2006 that the State Government intended the benefit to be extended to power-loom 'weavers' alike farmers. The activity of manufacturing textile is generally understood as the weaving of such textile and man who is engaged in such power-loom activity is known as weaver. Weaving means: to form a fabric by interlacing yarn on a loom. It also means the method of pattern of weaving or the structure of a woven fabric, as observed by this Court in Ess Dee Carpet Enterprises v. Union of India (1990) 1 SCC 461. The State Government thus, never intended the benefit to be given to big industries like HV-2 industries. In the circumstances, it was incumbent upon the Commission to consult the State Government before passing clarification order dated 14-15/9/2006 while applying its order dated 11.7.2006 to HV-2 consumers. When the State Government has written to the Commission on 6.10.2006, thereafter there was no justification for the Commission not to recall the clarification issued on 14-15/9/2006 as it was the prerogative of the State Government to extend the benefit ofsubsidy to a class or particular class of consumers and subsidy being a concession could not have been enforced as a matter of right. The Commission was bound to act as per such directives of State Government. (p.220) (Emphasis supplied)

22. After carefully perusing the pleadings as well as documents made available on record, we are fully convinced and satisfied that the petitioner failed to comply with the conditions contained in the LOI (Annexure P-2) and at no point of time he furnished certificate of completion of the Project from the borrower bank and as such his case was rightly not considered by respondents No.2 and 3 for grant of back ended subsidy in terms of Scheme referred hereinabove. It is admitted case of the petitioner that due to financial constrains he was unable to run the Project and he sold the same to other person. It is also clear from the impugned order that the petitioner's account was declared NPA on account of non-repayment of loan advanced for the completion of the Project.

23. Consequently, in view of the detailed discussions made hereinabove, we do not see any illegality and infirmity in the impugned order dated 14th/19th August, 2014 (Annexure P-9) passed by the respondents rejecting the claim of the petitioner and as such this Court sees no occasion to interfere in the present case by invoking extra ordinary jurisdiction, as prayed for, by the petitioner in the present petition. Accordingly, the writ petition is dismissed.

24. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant
Versus
Rajeev Kumar and others .....Respondents

Cr. Appeal No. 294 of 2014
Decided on: 24th November, 2016

Indian Penal Code, 1860- Section 363, 366-A, 376, 506 and 120-B- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Prosecutrix was taken to Beas and thereafter to Baba Bakala – she was subjected to sexual intercourse by accused No.1 without her consent – accused were tried and acquitted by the Trial Court- held in appeal that the age of the prosecutrix was stated to be below 16 years – reliance was placed on the parivar register but the parivar register is not a legal or acceptable piece of evidence to determine the age of person – it was not proved at whose instance the entries were recorded in the register on the basis of which birth certificate was issued – the prosecutrixwas admitted in the school at the age of 6 years – she had failed twice or thrice – she was studying in class 10th at the time of incident- therefore, she was aged (10+6+2/3) =18-19 years at the time of incident- the prosecutrix had accompanied the accused voluntarily and had stayed without lodging any protest –the prosecution version was not proved beyond reasonable doubt – accused were rightly acquitted by the Trial Court- appeal dismissed.(Para-9 to 19)

Cases referred:
State of Punjab Vs. Gurmeet Singh and others, AIR 1996 SC 1393
Ranjit Hazarika Vs. State of Assam, (1998) 8 SCC 635
Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175
Trilok Chand versus State of H.P. 1996(1) Sim. L.C. 187,

For the appellant: Mr. M.A. Khan, Addl. A.G.
For the respondents: Mr. Sunny Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Learned Special Judge, Hamirpur has acquitted respondent No. 1 (hereinafter referred to as 'accused No.1') of the charge framed against him under Section 363, 366-A, 376, 506 and 120-B of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and his co-accused Chander Parkash, father (hereinafter referred to as 'accused No.2') and Salochna Devi, mother (hereinafter referred to as 'accused No.3') of the charge under Section 366-A read with Section 120-B of the Indian Penal Code vide impugned judgment dated 10.06.2014 passed in Sessions Trial No. 22/2013.

2. Accused Nos. 2 and 3 are parents of accused No. 1 Rajeev Kumar. The allegations against them are that on 01.08.2013 accused No. 1 had made a phone call to PW-1, the prosecutrix (name withheld) and asked her to come to Hamirpur. She went to Hamirpur and received there at bus-stand by Chander Parkash, accused No. 2. She was taken to their residence near Gandhi Chowk, Hamirpur, where accused No. 3 happens to meet her. She lived there in the Company of accused persons for five days. Thereafter, she went with accused No. 1 to Beas. They stayed at Beas for a day and then went to 'Baba Bakala'. They stayed there in a 'Saraye' (inn) for 4-5 days. It is at this place, the prosecutrix allegedly was subjected to sexual intercourse by accused No. 1 without her consent and against her will. After visiting 'Baba

Bakala', they went to 'Budha Samadhi'. There also she was subjected to sexual intercourse by the said accused forcibly. They stayed at 'Budha Samadhi' for five days and thereafter went to Amritsar. There, accused Nos. 2 and 3 also joined them. Accused No. 1 had taken her cellphone. She was also threatened by the said accused with dire consequences, if she revealed the incident to anyone else. While at Amritsar, they were traced by the police of Police Station, Hamirpur on 24.08.2013. The prosecutrix was entrusted in superdari to a Lady Constable vide seizure memo Ext. PW-1/A. All the three accused and the prosecutrix were brought by the police to Sujanpur on 25.08.2013. During the course of investigation, the clothes of prosecutrix were taken into possession. She was got medically examined in the hospital. Her statement Ext. PW-1/E was recorded in the Court.

3. On the completion of investigation report under Section 173 of the Code of Criminal Procedure was filed against all the three accused. Learned Special Judge on going through the report and documents annexed thereto and also hearing learned Public Prosecutor and learned defence counsel has found a prima-facie case under Section 363, 366-A, 376, 506, 120-B IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 having been made out against accused No.1, whereas, under Section 366-A and 120-B IPC against accused No.2 and 3. The charge against them was framed accordingly. The accused, however, pleaded not guilty and claimed trial. The prosecution in order to sustain the charge against the accused persons had examined 25 witnesses in all.

4. On the other hand, accused No. 1 in his statement recorded under Section 313 of the Code of Criminal Procedure has admitted that they were traced by the police at Amritsar on 24.08.2013 and the prosecutrix was handed over to Lady Constable Praveen Kumari (PW-5) vide seizure memo Ext. PW-1/A. They were brought to Police Station, Sujanpur on 25.08.2013 by the I.O. ASI Ashok Kumar (PW-25). The Police got him medically examined and it is Dr. Mohinder Singh Rana (PW-14) who had examined him vide MLC Ext. PW-14/B. The rest of the prosecution case has either been denied by him being wrong or for want of knowledge. Similarly, his co-accused while admitting that they were brought to Police Station, Sujanpur by ASI Ashok Kumar (PW-25) on 25.08.2013, have denied all the incriminating circumstances appearing against them in prosecution evidence being wrong. In their defence, it was pleaded that a false case has been engineered against them and that the witnesses have deposed falsely under the pressure of local M.L.A Shri Rajinder Rana. They, however, opted for not producing any evidence in their defence.

5. Learned Special Judge on appreciation of the evidence comprising oral as well documentary has concluded that the prosecution failed to prove its case against the accused beyond all reasonable doubt. Also that, as per evidence available on record, the prosecutrix was above 18 years of age and as such, a consenting party, even if was subjected to sexual intercourse by accused No. 1. No evidence was found to be there on record showing the involvement of accused Nos. 2 and 3 in the commission of offence punishable under Section 366-A and 120-B IPC and the accused, as such, were acquitted of the charge framed against each of them.

6. The respondent-State aggrieved by the findings of acquittal recorded by learned Special Judge has questioned the legality and validity of the impugned judgment on the grounds inter-alia that the evidence available on record has been considered in a slip-shod and perfunctory manner. The impugned judgment has been passed on hypothesis, conjectures and surmises. The evidence as has come on record by way of testimony of the prosecution witnesses has been brushed aside for untenable reasons. The date of birth of the prosecutrix as 12.09.1997 though stands established from the certificate Ext. PW-11/B issued by the Secretary, Gram Panchayat, Chamyana and copy of parivar register Ext. PW-10/B, however, the same has erroneously been ignored and to the contrary learned Special Judge has erroneously concluded that her age was not less than 18 years. The testimony of the mother of the prosecutrix PW-2 and her brother PW-3 in this regard is stated to be misconstrued, misunderstood and mis-appreciated. Learned Special Judge is stated to have gone wrong while calculating the age of prosecutrix at his own in utter disregard to the cogent and reliable evidence produced by the

prosecution. The Court has erroneously swayed by the admission made by PW-2 and PW-3 that the prosecutrix failed twice/thrice while pursuing her studies in the school. Learned Special Judge was also wrong while holding that in view of there was no mark of injuries and symptoms of rape, the present was a case of consent. The prosecutrix has supported the prosecution case that she was called by accused No. 1 by making call to her over cellphone and while in his company, he subjected her to sexual intercourse without her consent and against her will. Such evidence is stated to be erroneously ignored. There is ample evidence to prove that accused Nos. 2 and 3 took active part in ensuring the kidnapping of the prosecutrix by accused No. 1 and thereafter to accompany accused No. 1 to different places under the threat that there is apprehension of they both were likely to be nabbed by the police, however, learned Special Judge has erroneously concluded that cogent and reliable evidence to show the involvement of accused Nos. 2 and 3 was not available on record.

7. Mr. M.A. Khan, learned Additional Advocate General has forcefully contended that the present is a case where a minor below 16 years of age has been sexually assaulted by accused no. 1 and thereby he has committed a heinous offence, however, acquitted by learned Special Judge below while mis-appreciating, mis-construing and misreading cogent and over whelming evidence having come on record.

8. On the other hand, learned defence counsel has urged that the prosecutrix being more than 18 years of age had voluntarily accompanied accused No. 1 and visited several places with him. Although, cogent and reliable evidence except for her own testimony to show that she was subjected to sexual intercourse forcibly by accused No. 1, however, even if ultimately it is held that she was subjected to sexual intercourse such an act was not without her consent and against her will and rather consensual. So far as accused Nos. 2 and 3 are concerned, according to learned defence counsel, the present is a case of no evidence against the said accused. It has, therefore, been urged that all the accused have rightly been acquitted by learned Special Judge and as such the impugned judgment calls for no interference.

9. The nature of the offence, the accused persons allegedly committed is not only heinous but also grievous in nature because as per the allegations, accused No. 1 has not only removed the prosecutrix, allegedly a minor from her lawful guardianship in connivance with his parents, accused Nos. 2 and 3, but also subjected her to sexual intercourse against her will and without her consent.

10. It is, however, yet to be determined by us with the help of evidence available on record that the prosecutrix at the relevant time was a minor or that removed from her lawful guardianship by the accused persons in connivance with each other and also that the sexual assault made on her by accused No. 1 was without her consent and against her will, however, it is desirable to take note as to under what circumstances the commission of offence allegedly committed by the accused can be inferred. A bare perusal of Section 361 IPC reveals that if a female under 18 years of age is enticed away by a person from her lawful guardianship without the consent of her guardian, such person can be said to have committed the offence of kidnapping. The essential ingredients to constitute an offence of kidnapping, therefore, is enticing away a minor from her lawful guardianship without the consent of her guardian or any other person legally authorized to consent on behalf of such guardian of minor. Such person can be said to have committed an offence of kidnapping punishable under Section 363 of the Indian Penal Code. Section 366-A IPC takes care of a situation where a girl below 18 years of age is induced to leave a place so that she can be forced to have illicit intercourse with another person and such person can be said to have committed offence punishable under Section 366-A of the Indian Penal Code.

11. Now if coming to Section 120-B of the Act, it is required to be pleaded and proved that a criminal conspiracy was hatched and the culprit was a party to such conspiracy.

12. Now if coming to the commission of offence punishable under Section 376 of the Indian Penal Code in a case of minor, the commission of offence can be said to have committed if

it is established that the prosecutrix has been subjected to sexual intercourse by the accused or in a case where the prosecutrix is not minor, the prosecution is additionally required to plead and prove beyond all reasonable doubt that such an act with her was against her will and without her consent.

13. Now if coming to the legal principles attracted in a case of this nature, in ***State of Punjab*** Vs. ***Gurmeet Singh and others, AIR 1996 SC 1393***, the Apex Court has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person is not implicated in the commission of an offence of this nature, while taking note of the judgment in ***Gurmeet Singh's*** case supra has however diluted the ratio thereof in ***Ranjit Hazarika*** Vs. ***State of Assam, (1998) 8 SCC 635*** and held that the statement of prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, in such cases, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in V***imal Suresh Kamble*** Vs. ***Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175***. While placing reliance on this judgment and the law laid down by the Apex Court in the judgment supra, this Court in ***Criminal Appeal No. 481 of 2009*** titled ***State of Himachal Pradesh*** V. ***Negi Ram***, decided on 27th May, 2016 has held as under:

> "15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not got swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record."

14. Now if coming to the merits of the case, in a case of this nature, it is the age aspect, which assumes considerable force. As noticed supra, the age of the prosecutrix, in the case in hand, has been claimed below 16 years. It is the extract of parivar register Ext. PW-10/B and the date of birth certificate Ext. PW-11/B have been relied upon by the prosecution to prove this part of the prosecution case. The extract of parivar register Ext. PW-10/B cannot be treated to be a legal and acceptable piece of evidence in order to determine the age of a person because it is the entries in the birth and death register, that too, when the person at whose instance the same were entered at the time of birth of that person, if examined qua authenticity and genuineness thereof can be treated as cogent and convincing evidence qua the exact age of the said person. Therefore, the evidence as has come on record by way of the testimony of Smt. Reeta Chandel (PW-10) who has proved the extract of parivar register Ext. PW-10/B is hardly of any help to the case of the prosecution.

15. Now if coming to the date of birth certificate Ext. PW-11/B issued by Pawan Kumar, Secretary Gram Panchayat, Chamyana, he has not said as to from which record this document was issued by him. Though, he has deposed while in the witness box that the certificate is true and correct as per original record brought by him to the Court and that as per such record, the date of birth of the prosecutrix is 12.09.1997, however, nothing has come on record that the record he had produced was original birth and death register. Even if it is believed that such record was original birth register, nothing has come on record as to at whose instance, the entries qua the birth of prosecutrix were recorded in the said register. On the other hand, he has admitted cutting in this register against the alleged entries qua the birth of the prosecutrix made. Therefore, Ext. PW-11/B cannot also be said to be legal and acceptable evidence in order to inter that the prosecutrix was born on 12.09.1997. In case Ext. PW-11/B is excluded, there hardly remains any other cogent and reliable evidence accept for oral evidence as has come on record by way of testimony of her mother Smt. Sunita Devi (PW-2) and Anil Kumar (PW-3).

16. Now if coming to the statement made by her mother PW-2, the prosecutrix was admitted in school at the age of six years. At the relevant time, she was a student of 10th class. According to this witness prosecutrix failed twice, whereas, as per testimony of PW-3 her brother, she failed twice or thrice. Learned Special Judge, therefore, has not committed any illegality or irregularity while arriving at a conclusion that the prosecutrix on the day of occurrence was above 18-19 years of age for the reason that had she failed before her admission in 10th class twice or thrice, she being admitted in the school at the age of six years was aged (10+6+2/3)=18-19 years. Learned Additional Advocate General, as such, is not right while arguing that evidence qua age aspect of the prosecutrix has not been considered by learned Special Judge in its right perspective. The present rather is a case where the prosecution has miserably failed to prove that on the date of occurrence, the prosecutrix was below 18 years of age. Except for the testimony of the prosecutrix that accused No. 2 met her at Hamirpur in the bus stand and that she was taken by the said accused to his quarter at Gandhi Chowk, Hamirpur, where accused No. 3 happened to meet her and that it is the said accused managed her elopement with accused No. 1 at the pretext that there was every likelihood of they being nabbed by the Hamirpur police, there is no corroboration thereto from any independent source. On the other hand, conduct and behaviour of the prosecutrix to be discussed hereinafter amply demonstrates that she accompanied the accused voluntarily and visited several places without lodging any protest at any stage of her stay with accused No. 1 lead to the only conclusion that she was not a minor below 18 years of age nor enticed away by accused No. 1 himself or at the behest of his parents, accused Nos. 2 and 3, after having hatched conspiracy, with a view to force her to sexual intercourse. The prosecutrix rather had attained the age of discretion and she was at the verge of reaching at the age of majority, hence left the house of her parents without any persuasion or deceitful means and rather voluntarily accompanied accused No. 1 and permitted him to take her away from one place to another. Merely a passing reference in her statement that her cellphone was taken from her by accused No. 1 and that she was threatened with dire consequences cannot be believed to infer that she was threatened to do away with her life by accused No. 1 had hue and cry been raised by her or protest lodged. Therefore, no case either under Section 363 or 366-A and for that matter under Section 506 and 120-B of the Indian Penal Code is made out against accused No. 1. Similarly, no case for the commission of an offence under Section 366-A or 120-B of the Indian Penal Code is made out against his co-accused also. Thus, the prosecution has failed to bring guilt home to any of the accused from the evidence available on record and as such, they have rightly been acquitted of the charge framed against each of them. We are drawing support in this regard from the judgment of this Court in ***Trilok Chand*** versus ***State of H.P. 1996(1) Sim. L.C. 187***, which read as follows:

> "9. After scrutinizing the available evidence carefully, I am of the considered opinion that no offence under Section 366, Indian Penal Code is made out. It may be that the prosecutrix was below eighteen years on the day of occurrence, however, it is absolutely clear from her conduct and the evidence that she had reached the stage of discretion. She was in complete love with the accused for along time. She had written number of letters to him disclosing her close intimacy and friendship with the accused. It is not possible to believe that the prosecutrix was in any way influenced or coerced by the accused either for friendship, or for marriage and providing her ornaments and clothes. It appears that she had already settled to elope with the accused that is why the accused came at that hour of night entering into the room where the prosecutrix was sleeping with her sister and two brothers and parents in the adjoining room. The fact that the prosecutrix had not bolted the door from inside also reinforces the conclusion that she had invited the accused to take her at that time of the night. She changed her clothes and left this place so secretly that the elopement was not noticed by any one of the inmates. There could be no reason for the prosecutrix to be under any kind of pressure from the accused. Voluntarily, she left the place and moved with the accused from place to place for days together without raising hue and cry. The facts rather disclose that it was the prosecutrix

> who played the dominant role in leaving the house. When the elopement was settled, it can be legitimately inferred that the accused may not have at all entered the room of the prosecutrix and coerced her to leave the place as alleged. Rather, she must be waiting for his appearance. At one time, she had gone out during the night looking for the accused, though, she had stated that she had done so for urination, yet the fact remains that when she returned to the room, she did not bolt the door from inside. Consequently, it is plainly clear that the prosecutrix left her father's guardianship voluntarily and the accused was not responsible for the same. The trial Judge has not appreciated the evidence correctly with the result that wrong conclusion has been drawn on this aspect of the case."

17. It is now to be seen that in the given facts and circumstances, the prosecution has been able to prove beyond all reasonable doubt that the prosecutrix has been subjected to sexual intercourse by accused No. 1 without her consent and against her will. As is held in para supra, the prosecutrix has not been proved to be below 16 years of age. She was major above 18 years of age. She, as per the prosecution case itself had received a call over her cellphone from accused No. 1 who asked her to come to Hamirpur. She boarded a bus from village Chhail(Patlandar) to Hamirpur. His mother, who is accused No. 3 also talked with her and told her that marriage will be solemnized with accused No. 1. She, therefore, boarded bus for Hamirpur and received there at bus stand by accused No.2. She was brought by the said accused to Gandhi Chowk to his quarter. There, she met with accused No. 3. She lived in that quarter for 4-5 days. Gandhi Chowk area of Hamirpur town is thickly populated. As a matter of fact, it is headquarter of Hamirpur district. There exists the Collectorate, Police Headquarter and also Judicial Court Complex nearby Gandhi Chowk. Though, no such evidence has come on record, however, judicial notice thereof can be taken. She, however, not raised any hue and cry during her stay in the quarter of accused at Gandhi Chowk. She went to Beas with accsued No. 1. They may have travelled by road from Hamirpur to Beas. There is no evidence that she lodged any protest against her being taken away by the said accused to that place. They stayed at Beas, a religious place, which place is visited by hundreds of devotees everyday. There is no evidence that she raised any hue and cry and lodged protest at Beas. On the other hand, she went along with accused No. 1 to Baba Bakala, where she allegedly was subjected to sexual intercourse for the first time. They stayed there for 4-5 days in a 'Saraye', however, she never lodged any protest at that place also. Then they went to Budha Samadhi and there also they lived for five days. She was subjected to sexual intercourse by accused at this place also. After staying at Budha Samadhi for five days, they came to Amritsar. It is at that place, she was apprehended by the police of Police Station, Sujanpur on 24.08.2013 in the company of accused. According to her, accused No. 1 was known to her one month prior to the occurrence. He used to call her over cellphone, however, she did not disclose the same to her mother and brother. Her brother Anil Kumar (PW-3) was working at the residence of Shri Rajinder Rana, a local M.L.A. No doubt, while in the witness box, it is stated that her cellphone was taken by accused No. 1 and she was threatened by him with dire consequences, in case disclosed anything to anyone. It is denied that accused No. 1 did not entice her away from her lawful guardianship and that she accompanied him voluntarily. It is also denied that the said accused did not subject her to forcible sexual intercourse. She, however, admitted that while she belongs to general category the accused belongs to reserve category.

18. Such evidence having come on record lead to the only conclusion that the accused never subjected the prosecutrix to sexual intercourse without her consent and against her will. Even if it is believed that she was subjected to sexual intercourse by accused No. 1, such an act cannot be said to be without her consent and rather consensual. The present is also not a case where her consent has been obtained by putting her or any person in whom she was interested in fear of death or of hurt. It is also not the prosecution case that she was of unsound mind and as such unable to understand the nature of the act allegedly committed by accused No. 1 with her. As a matter of fact, the present was a case based by the prosecution on 6th situation

below Section 375 of the Indian Penal code, however, failed to prove beyond all reasonable doubt that the prosecutrix was below 18 years of age on the date of occurrence. On the other hand, her conduct, as is apparent from her own testimony itself demonstrates that she was a consenting party to her elopement with accused No. 1. The scientific investigation conducted rule-out the possibility of commission of sexual intercourse with her as blood and semen could not be detected on either of the exhibits, which were sent for chemical analysis, however, the clinical examination conducted by PW-12 Dr. Rajneesh Thakur reveals that she was exposed to quietus. However, there being no evidence qua the mark of violence on her body, it cannot be believed that she was assaulted sexually against her will and without her consent. The evidence as has come on record by way of testimony of PW-2 and PW-3 being hearsay is not of much help to the prosecution case. Similarly, the remaining prosecution witnesses who remained associated during the course of investigation of the case in one way or the other are formal and their testimony would have only been termed as link evidence had the prosecution been otherwise able to bring guilt home to the accused persons beyond all reasonable doubt. The charge under Section 376 of the Indian Penal Code framed against the accused thus also bound to fall to the ground.

19. The reappraisal of the evidence on record leads to the only conclusion that the prosecution has failed to prove its case against the accused persons beyond all reasonable doubt and as such, they have rightly been acquitted of the charge framed against each of them by learned trial Court. Consequently, the findings recorded by learned trial Court calls for no interference. We, therefore, find no illegality, irregularity or infirmity in the impugned judgment. The same, as such, is ordered to be affirmed.

20. For all the reasons discussed hereinabove, this appeal fails and the same is accordingly dismissed. Personal bonds furnished by the accused persons shall stand cancelled and sureties discharged.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Cr. Appeal No.567 of 2000 alongwith
Cr. Appeal No.35 of 2001 and Cr. Revision No.155 of 2000
Judgment reserved on: 26.8.2016
Date of Decision: November 25, 2016

1. Cr. Appeal No.567/2000
Anil Katoch & another .... Appellants
Versus
State of H.P. ...Respondent
2. Cr. Appeal No.35 of 2001
State of H.P. ...Appellant
Versus
Anil Katoch & another ...Respondents
3. Cr. Revision No.155 of 2000
Mrs. Raman Katoch ...Petitioner
Versus
Anil Katoch and another ...Respondents

Indian Penal Code, 1860- Section 302 read with Section 34- Accused murdered A – they were convicted for the commission of offence punishable under Section 304(II) of I.P.C – held in appeal that the eye-witness had not disclosed the incident to the police at the first opportunity – the testimony of eye-witness was contradicted by other witnesses –persons who took the deceased to the hospital were not examined – the incident had taken place during the darkness and it was

difficult to identify the assailants- recovery of clothes did not establish the prosecution version as blood stains on the clothes were not connected to the deceased – the prosecution version was not proved beyond reasonable doubt- appeal allowed and accused acquitted.(Para-26 to 51)

Cases referred:
Sat Paul vs. Delhi Administration, 1976 (1) SCC 727
Ganesh Bhavan Patel vs. State of Maharashtra, 1978 (4) SCC 371
Randhir Singh alias Tira and others vs. State of H.P., 2007 (2) SLC 294
Kansa Behera vs. State of Orissa, 1987(3) SCC 480
State of H.P. vs. Edward Samual Chareton, 2000 (2) Shim. L.C. 228
Ajay Sharma vs. State of Himachal Pradesh, 2002 (3) Sim.L.C. 329

Cr. Appeal No.567 of 2000
For the appellants: Mr. Anup Chiktkara, Advocate with Ms. Rita Goswami, Advocate.
For the Respondents: Mr. D.S. Nainta, Additional Advocate General.
Cr. Appeal No.35 of 2001
For the appellant: Mr. D.S. Nainta, Additional Advocate General.
For the respondents: Mr. Anup Chiktkara, Advocate with Ms. Rita Goswami, Advocate.
Cr. Revision No.155 of 2000
For the petitioner: Mr. Surinder Sharma, Advocate.
For the respondents: Mr. Anup Chiktkara, Advocate with Ms. Rita Goswami, Advocate.
Mr. D.S. Nainta Additional Advocate General for the State.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary.J.

This judgment shall dispose of the present appeal (Cr. Appeal No. 567 of 2000), Criminal Appeal No. 35 of 2001 and Criminal Revision No. 155 of 2000, arising out of the judgment dated 21.8.2000, passed by learned Addl. Sessions Judge (I), Kangra at Dharamshala, H.P. in Sessions Case No. 40-P/97.

2. It is the convicts, (hereinafter referred to as the accused) who have preferred this appeal in this Court. They both were charged under Section 302 read with Section 34 of the Indian Penal Code, with the allegations that on 19.10.1996 around 10 p.m. at Village Sukarna, in furtherance of their common intention to kill one Arjun Singh Katoch, they assaulted him and he succumbed to the injuries inflicted by both of them and thereby they murdered said Shri Arjun Singh. They, however, were convicted by learned Additional Sessions Judge-I, Kangra at Dharamshala for the commission of offence, punishable under Section 304 (II) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 3 years and to pay a fine of Rs.5000/-. In default of payment of fine, each of them has to undergo rigorous imprisonment for a term of 6 months.

3. Connected Criminal Appeal No. 35 of 2001 has been filed by the State of Himachal Pradesh against the conviction and sentence of both convicts under Section 304 (II) read with Section 34 IPC instead of under Section 302 IPC read with Section 34 IPC.

4. If coming to Cr. Appeal No. 155 of 2000, the same has also been preferred against the judgment ibid by Ms. Raman Katoch, the widow of deceased Arjun Singh with a prayer to convict both accused for the commission of offence punishable under Section 302 IPC read with Section 34 IPC and accordingly enhance the sentencepassed against each of them.

5. The prosecution case, as disclosed from the report field under Section 173 of the Code of Criminal Procedure and the documents annexed therewith, in a nutshell, is that not only both the accused, but deceased Arjun Singh was also resident of village Nagehar under Police

Station, Baijnath, District Kangra. They were cousins in relation. The deceased was working as Branch Manager in a Company, namely Golden Land in its Shimla Office.

6. On 19.10.1996, marriage of a fellow villager namely Nagesh, was being solemnized. Deceased Arjun Singh had also gone from Shimla to his village to attend the marriage. The ***Baraat*** of Nagesh had to go to village Sukarna. Deceased Arjun Singh and his friend PW-1 Suresh Dhameja, PW-10 Yudhbir Singh, PW9 Yashbir Singh and PW5 Janak Chand also went to village Sukarna as ***Baraties*** (member of marriage party) in a Maruti Car bearing registration No.CH1-0J-3572. The deceased and his friends had dinner at the place of bride. Around 10 p.m. after having dinner they planned to come back to their native place, village Nagehar. They all boarded the car. Deceased Arjun Singh was on its wheel. They were hardly 100-150 yards away from the house of bride, when noticed that other ***Baraties***, including both the accused, were dancing on the tune of band and the band party following them. On noticing there being congestion over the road, deceased Arjun Singh stopped the vehicle in one side of the road. He switched off the engine and the lights also. He thereafter came out of the car for answering the call of nature. When he did not come back for about 10-12 minutes, other occupants of the car, including PW-1 Suresh Dhameja, who as a matter of fact, is the complainant in this case, noticed that the deceased was being beaten up by some persons. After some time, the front door of the car was opened by some one, who administered a blow on the hand of PW-1 Suresh Dhameja and also slapped him. He got frightened and fled away towards nearby fields. He hided himself in the bushes there. S/Shri Yudbir Singh, Yashbir Singh and Janak Chand, who were occupying the rear seat of the car, also got frightened and they also fled away. When the people who were present at the spot dispersed, someone started the car of the deceased and the deceased was taken to hospital at Baijnath. The complainant (PW1 Suresh Dhameja) went on foot to the hospital. They noticed the deceased in an injured condition there. They also noticed that blood was oozing out of his mouth, nose and head. The deceased was found to have been brought to hospital by one Rani alias Dilwar and Kamal Bhushan in his own car. In the hospital at Baijnath, first aid was given to the deceased. He thereafter was referred to Civil Hospital at Palampur. He was brought in the same car to Palampur. The Medical Officer on duty there, however, had referred the deceased to PGI Chandigarh. While being removed to PGI Chandigarh, he succumbed to the injuries received on his person around 2.30 a.m. on the way to Chandigarh. His dead body was brought back to Baijnath.

7. Consequent upon the information entered in Rapat Rojnamcha Ext.PW17/A of Police Station, Baijnath, police party headed by ASI Roshan Lal PW-17 and comprising HC Uttam Chand, Constable Tilak Raj, Rumal Singh and HHG Rajinder Kumar had already swung into action. They went to the hospital at Baijnath, where the deceased was shifted immediately after the occurrence.

8. Statement of PW-1 Suresh Dhameja to the aforesaid effect was recorded under Section 154 Cr. P.C and on the basis thereof FIR Ext.PW17/B under Section 302 read with Section 34 of the Indian Penal Code was registered against both the accused in Police Station, Baijnath. The investigation was initially conducted by ASI Roshan Lal PW-17. He prepared inquest papers Ext.PW3/A, and made an application Ext.PW2/B for getting the postmortem of the dead body conducted in Sub Divisional Hospital at Palampur. He also got the dead body photographed vide photographs Exts. P-12 to P-18, the negatives whereof are Exts. P-19 to P-25. It is thereafter, he went to the spot and prepared spot map Ext.PW17/C. Blood lying on the spot and broken pieces of wind screen of the car were taken into possession by PW-7.

9. It transpired during the investigation that on seeing the deceased driving his car to his native place after having dinner in the house of the bride and he having stopped the car on seeing the Barateis dancing on the road, both accused shouted on him that he is proud of his having the car and on this they started quarreling with each other. Accused Anil Katoch had given pushes to the deceased on account of which he fell down. Thereafter, both the accused, who happens to be real brothers, administered beatings to him with kicks and fisticuffs. The deceased fell down and became unconscious. It is Rani alias Dilwar and Kamal Bhushan, who

took the deceased from the place of occurrence and brought inside the car in an unconscious condition. While the deceased was being removed to Hospital, both accused warned said Shri Rani and Kamal Bhushan to tell the doctor in the hospital that it was a case of an accident and threatened them to meet the same fate had they failed to do so.

10. When the involvement of both the accused established during the investigation of the case, they were arrested at Dehra near Court Campus on 26.10.1996. During their interrogation, they both admitted their involvement in the murder of Arjun Katoch. Accused Anil Katoch, while in custody, made a statement under Section 27 of the Evidence Act and pursuant to it, identified the place of occurrence to the Police and also got recovered his clothes which he was wearing at the time of occurrence. The clothes of the accused were identified by PW-1 Suresh Dhameja. Investigating Agency recorded the statements of the witnesses under Section 161 Cr. P.C. The clothes of accused Anil Katoch and that of the deceased were sent to Forensic Science Laboratory for analysis. As per the report Ext.PX, received from the laboratory, human blood was found available on the clothes of the deceased, whereas blood was not found on the clothes of accused Anil Katoch.

11. The investigation conducted by the police further reveals that the deceased and the accused are the descendants of a common ancestor. They were quarreling with each other right from the time of their grand father. It is on account of enmity between the families of the accused and the deceased, the accused had shifted from village Nagehar to Bandiankhopa. On account of their enmity, Sub Divisional Magistrate, Palampur in the proceedings under Section 107 Cr. P.c., had released the mother of the accused, Smt. Sayongal, their uncles Shakti Chand and Bideshwari as well as grand father Lal Singh on their personal bonds with the condition to maintain peace and law and be of good behaviour for a period of one year vide order dated 3.10.1972. It is on account of such old enmity, both the accused taking benefit of the occasion of marriage, had beaten up deceased Arjun mercilessly and as a result thereof caused his death.

12. On the completion of the investigation, report under Section 173 Cr. P.C was filed by the Investigating Agency in the Court of learned Sessions Judge, Kangra at Dharamshala. The case was assigned to the Court of learned Additional Sessions Judge (I), Kangra at Dharamshala.

13. As noticed at the outset, learned trial Court after having gone through the Challan and the documents annexed therewith has framed charge under Section 302 read with Section 34 of the Indian Penal Code against each accused person. Since they pleaded not guilty to the charge, therefore, the prosecution was called upon to produce evidence in order to sustain the charge so framed against the accused persons.

14. PW-1 Suresh Dhameja, is a personal friend of deceased Arjun Singh. It is on the basis of statement Ext.PW1/A, he made under Section 154 Cr. P.C., FIR Ext.PW17/B was registered in Police Station, Baijnath. PW-2 Dr. O.P. Ramdev had examined the deceased in Civil Hospital at Baijnath, where he was brought in an injured condition for medical treatment. He has proved MLR Ext.PW2/A. The endorsement Ext.PW2/B on the application made by the police was also made by this witness. PW-3 Dr. D.S. Chandel has conducted the postmortem of the dead body of the deceased, on an application Ext.PW3/A made by the police for the purpose. This witness has proved postmortem report Ext.PW3/B. He has taken in possession shirt Ext.P2, pants Ext.P3, under-wear Ext.P4, vest Ext.P5, belt Ext.P6, golden ring Ext.P7 and other ring Ext.P8 of the deceased. The same were sealed by him in a parcel. PW-4 Dr. Jyotinder Pal, Medical Officer, Civil Hospital, Baijnath had examined injured Ranjit Singh vide MLR Ext.PW4/A, injured Pawan Kumar vide MLR Ext.PW4/B and also one Anish Sharma vide MLR Ext.PW4/D. According to him, the injuries mentioned in Exts. PW4/A and PW4/D could have been caused in a scuffle.

15. The star prosecution witness is PW-5 Janak Chand, who has been examined as an eye witness. PW-6 Tarlok Chand, is Patwari, who has prepared the copy of ***Latha Shajra*** Ext.PW6/A. PW-7 Ajay Kumar is photographer. He has proved photographs Exts. P-12 to P-18 and the negatives thereof Exts. P-19 to P-25. The remaining witnesses who have also been

associated as eye witnesses to the occurrence are PW-8 Yogeshwar Singh, PW-9 Yashbir Singh, PW-10 Yudhbir Singh and PW-11 Sushil Kumar. PW-12 Sanjeet Kumar is running a photo studio at Paprola. This witness had covered the marriage so far as photography and videography are concerned.

16. The other eye witnesses are PW-13 Ranjit, PW-14 Jaswant Kumar, PW-18 Gareesh Sharma and PW-21 Parveen Kumar. The remaining witnesses i.e. PW-15 LHC Dhruv Singh, PW-16 LHC Tilak Raj and PW-19 LHC Trilok Chand are police officials, who remained associated in one way or the other during the investigation of the case. PW-17 ASI Roshan Lal is Investigating Officer of this case. PW-20 Durga Chand is the real brother of deceased Arjun Singh. PW-22 Shakti Chand is the then Inspector/SHO, Police Station, Baijnath, who has investigated the case partly and also filed the Challan in the Court.

17. On the other hand, the statements of both the accused were also recorded under section 313 Cr. P.C. They, however, not opted for producing any evidence in their defence.

18. Learned trial Judge on appreciation of the evidence available on record and affording due opportunity of being heard to the prosecution as well as the accused, has held both the accused guilty for the commission of an offence punishable under Section 304 Part-II of the Indian Penal Code and they both have been convicted and sentenced in the manner, as pointed out at the outset.

19. In this appeal, it has been averred that out of 22 witnesses examined by the prosecution to bring guilt home to both accused, none of them has supported the prosecution case and some of them even were declared hostile also. However, irrespective of it, learned trial Court has erroneously convicted the accused for the commission of offence punishable under Section 304 (II) read with Section 34 IPC. The findings recorded by learned trial Court are stated to be against settled principles in criminal administration of justice. Learned trial Court has gravely erred in recording the findings of conviction against convicts solely on the basis of few sentences in the statement of PW-5 Janak Singh, irrespective of the fact that his statement was not reliable because he allegedly tried to save his nephew Ranjit and cousin Raju from their prosecution in this case. Also that as per the prosecution case, the deceased alighted from the Car whereas other occupants remained seated inside. The occurrence was, therefore, not witnessed by anyone as such there was no question of identification of the assailants by either of the witnesses. Therefore, how PW-5 Janak Singh could have seen the accused beating the deceased. The other occupants PW-1 Suresh Kumar, PW-9 Yashbir Singh and PW-10 Yudhbir Singh have categorically stated that since the deceased had alighted from the Car after switching off its engine and lights, therefore, they could not see as to what has happened outside and when someone hit PW-1, they all ran away from the spot. PW-5 Janak Singh, went to the hospital on the same day. On the next day also, he did not tell anything to the police though remained present in Police Station from 7:30 AM till 2:30 PM. He did not tell anything to the police at the time of prepration of the inquest report. It is only on 21.10.1996, in the evening, he has improved his version and named the accused as the assailants for the first time. Therefore, his testimony was highly undependable and unreliable and hence could not have been relied upon to record the findings of conviction against the accused. It has, therefore been urged that learned trial Court has convicted both the accused by placing reliance on highly inadmissible evidence.

20. If coming to the connected appeal preferred by the State of Himachal Pradesh, the legality and validity of the impugned judgment has been questioned on the grounds, *inter alia,* that the trial Court though has rightly appreciated the evidence in so far as commission of offence is concerned, however, it has gone wrong in holding that only an offence punishable under Section 304 (II) IPC is made out. The evidence available on record clearly establishes that the offence committed by the accused was punishable under Section 302 of the IPC and not under Section 304 (II) IPC. Therefore, the impugned judgment to this extent has been sought to be quashed. The deceased who had been mercilessly beaten up and injuries caused on vital parts of his body, the present was a clear cut case of intention to kill him. Therefore, the accused have allegedly committed his murder. The motive to kill him was old enmity between the two families.

The evidence, oral as well as documentary, to this effect was produced by the prosecution. Therefore, it has been urged that the offence committed by both accused is punishable under Section 302 read with Section 34 IPC and not under Section 304 (II) IPC.

21. If coming to Criminal Revision Petition No. 155 of 2000, the grouse of the widow of deceased Arjun Katoch is also similar to that of the State of Himachal Pradesh in Cr. Appeal No. 35 of 2001. As per her version, the only bread winner in the family consisting of herself and three children has been murdered by the accused, therefore, according to her, they are liable to be convicted under Section 302 IPC and not under Section 304(II) IPC. Her husband was beaten up to death mercilessly by both the accused due to enmity and lesser sentence awarded against them according to her neither commensurate with the heinous offence they committed with nor the sentencing policy. Since, learned trial Court has convicted them under Section 304 (II) of the IPC instead of under Section 302 IPC, therefore, it has been urged that while convicting them under Section 302 IPC, in the matter of awarding sentence they both be dealt with sternly.

22. Sh. Anoop Chitkara, Advocate learned counsel representing the accused has vehemently argued that the trial Court has placed reliance on the sole testimony of PW-5 Janak Chand and ignored the evidence as has come on record by way of remaining witnesses, including the complainant PW-1 Suresh Dhameja, the presence of whom on the spot is satisfactorily established and as such according to Mr. Chitkara, learned trial Court has erroneously concluded that a case punishable under Section 304(II) IPC read with Section 34 IPC is made out against them. According to Mr. Chitkara, the present is a case of no evidence and as such no findings of conviction could have been recorded against the accused. It has also been pointed out that as per the prosecution case itself, several persons were present at the place of occurrence and as nothing tangible suggesting the involvement of the accused in the commission of offence has come on record, therefore, it is not safe to place reliance on the sole testimony of PW-5 Janak Chand, who according to learned counsel is a liar and has deposed falsely.

23. On the other hand, Mr. D.S.Nainta, learned Addl. Advocate General, while repelling the arguments addressed on behalf of the accused, has urged that the sole testimony of PW-5 Janak Chand and the attendant surrounding circumstances leave no manner of doubt that the assailants were none else but both the accused. According to Mr. Nainta, both the accused have brutally murdered deceased Arjun Katoch in view of enmity between the two families i.e. the family of the deceased on one hand and that of the accused on the other. It has also been argued that both the accused were liable to be convicted and punished for the commission of offence punishable under Section 302 read with Section 34 IPC and not under Section 304(II) read with Section 34 IPC and as such the trial Court is stated to have misread and misconstrued the evidence while arriving at a conclusion that no case under Section 302 IPC was made out against the accused. It has, therefore, been urged that the judgment to the extent of the accused have committed the offence punishable under Section 304(II) IPC read with Section 34 IPC be quashed and set aside with further prayer that both the accused be convicted under Section 302 IPC read with Section 34 IPC and sentenced accordingly.

24. Mr. Surender Sharma, Advocate representing the widow of deceased Arjun Katoch in connected Cr. Revision No. 155 of 2000 while adopting the arguments addressed on behalf of the State of H.P. has further urged that the manner in which the deceased has been brutally murdered and a sole bread winner snatched from the members of his family rendering thereby them to starve, the accused may be convicted and sentenced under Section 302 of the IPC. A deterrent sentence has been sought to be passed against both the accused.

25. We have carefully analysed the rival submissions and also appreciated the entire evidence available on record.

26. Admittedly, the marriage of one Nagesh resident of village Nagehar was scheduled to be held on 19.10.1996 at his native place Nagehar, Tehsil Baijnath, District Kangra. The barat of Nagesh had to go to village Sukarna. Bridegroom Nagesh was co-villager of the deceased. The deceased and both accused were successors-in-interest of common ancestor. Both families

initially were residing at Village Bandiankhopan, however, on account of enmity, the family of deceased had shifted to Village Nagehar and constructed a house there. The deceased and both convicts as well as witnesses examined by the prosecution in support of its case had attended the barat of aforesaid Nagesh and they were present at the place of bride i.e. village Sukarna.

27. If coming to the prosecution case, the deceased was accompanied by his friends PW-1 Suresh Dhameja, PW-5 Janak Chand, PW-9 Yashbir Singh, PW-10 Yudhbir Singh and one Suresh Kumar Kapoor his servant. They had reached well before the arrival of barat at the place of bride. Not only this, but they also had their dinner before the baratis who reached later on in barat there. The complainant in this case is PW-1 Suresh Dhameja. He was residing at that time at Shimla. Since the deceased was also working as Branch Manager in a Company, namely, Golden Land at Shimla, therefore, they both were known to each other. It is, in this background, PW-1 Suresh Dhameja also accompanied the deceased to his native place village Nagehar in Tehsil Baijnath, Distt. Kangra and attended the barat with him at village Sukarna, the bride's native place.

28. PW-1 Suresh Dhameja, in his statement Ext. PW-1/A recorded under Section 154 Cr.P.C. has reported to the police that after having dinner they started their return journey to village Nagehar around 10:00 PM. While at a distance of 200 yards from the house of bride, they noticed barat proceeding towards her house and baratis in good number dancing on the tune of the band. Finding the road congested at that place, Arjun Stopped his Maruti Car bearing No. CH-01-J-3572 on road side and not only switched off its engine but also the lights in order to give safe passage to the procession. He himself opened the door and alighted from the Car to answer the call of nature. He, however, did not come back for 10-12 minutes. There was lot of commotion behind the Car. On this, he peeped out from the door of Car and noticed that out of the persons in procession/barat, few of them were beating the deceased. After some time, someone came near the window of front seat where he was sitting and gave a blow on his head on the back side and also slapped him twice or thrice. On this, he had fled away from the Car and hided himself in nearby fields. Later on, the occupants of the rear seat had also fled away from the Car. When the crowd in procession dispersed, that very car was started by someone and deceased was removed to the hospital at Baijnath in injured condition. He accompanied by PW-5 Janak Chand, PW-9 Yashbir Singh and PW-10 Yudhbir Singh also went to the hospital at Baijnath on foot and noticed the deceased lying there in injured condition and blood was oozing out from his nose, mouth and also the head. He was brought to hospital by Rani @ Dilawar, Kamal Bhushan and Om Prakash. The doctor on duty provided first medical aid to the deceased and he was referred to Sub Divisional Hospital, Palampur for further treatment. The doctor on duty there referred the deceased to PGI, Chandigarh. He, however, died on the way to PGI, Chandigarh around 2:30-3:00 AM on 20.10.1996. It was reported by PW-1 Suresh Dhameja that Arjun died on account of the injuries he sustained in the occurrence. He requested the appellants to enquire from the baratis about the occurrence. He, however, refused for his own medical examination as no visible injuries were on his person. It is, on the basis of this statement, FIR Ext. PW-17/B was registered in PS Baijnath and the police swung into action.

29. Besides the complainant PW-1 Suresh Dhameja, the prosecution has examined PW-5 Janak Chand another occupant of the car of the deceased, PW-8 Yogeshwar Singh, a witness to the inquest papers Ext. PW-3-A, PW-9 Yashbir Singh and PW-10 Yudhbir Singh who were also travelling in the same car being driven by the deceased. PW-11 Sushil Kumar, a member of band party, PW-13 Ranjt, PW-14 Jaswant Kumar, PW-18 Girish Sharma and PW-21 Parveen Kumar, who being in barat were present at the place of bride at village Sukarna. PW-20 Durga Chand is the elder brother of deceased Arjun Katoch. The remaining witnesses i.e. PW-6 Tarlok Chand Patwari Patwar Circle Bahi, PW-7 Ajay Kumar photographer and PW-12 Sanjeet Kumar another photographer are formal. The remaining prosecution witnesses PW-17 ASI Roshan Lal and PW-22 Insp. Shakti Chand are police officials who remained associated in one way or the other during the course of investigation of the case, hence formal. PW-17 ASI Roshan Lal has conducted the investigation of this case partly and partly by PW-22 Insp. Shakti Chand, the then Insp./SHO PS Baijnath.

30. The statements of both the accused under Section 313 Cr.P.C have also been recorded. They have denied the entire prosecution case for want of knowledge or being incorrect. They both pleaded in their defence that they have been implicated by the police in a false case.

31. There cannot be any dispute qua the presence of both accused and the deceased as well as witnesses aforesaid at village Sukarna, as they had gone to attend the barat of one Nagesh. There cannot also be any quarrel so as to vital injuries present on the person of deceased he sustained after alighting from the Car. There cannot also be any dispute qua deceased Arjun Katoch succumbed to injuries he received on the way to PGI Chandigarh.

32. According to PW-1 Suresh Dhameja when he saw behind from the window of the Car, he found that quarrel was going on behind the Car. Few persons were giving beatings to deceased Arjun Katoch. In the meantime, somebody came and gave him fist blows. That person also gave him 3-4 slaps. PW-1 Suresh Dhameja since ran away from the spot and hided himself in fields situate nearby, therefore, nothing has come in his statement as to who were the assailants and rightly so because he had no occasion to witness as to who were administering beatings to the deceased. Similarly, PW-9 Yashbir Singh and PW-10 Yudhbir Singh who were other occupants of the car while in the witness-box have not stated anything that it is the accused who were the assailants and rather as per their version, being pitch dark, they could not witness the occurrence. As per the version of PW-9 Yashbir Singh, 40-50 persons were dancing on the tune of band whereas as per PW-10 Yudhbir Singh, the number of such persons was 20-25. If coming to the testimony of PW-11 Sushil Kumar, a member of the band party, he admitted that both the accused were also in procession. While few baratis had left for dinner, the remaining 15-20 were dancing on the band which the band party was playing. The time was 10:00 PM when a Car approached them. The Car was stopped and as the band party left for the place of bride, therefore, nothing happened in their presence. Likewise, PW-9 Yashbir Singh and PW-10 Yudhbir Singh, PW-11 Sushil Kumar is also turned hostile to the prosecution. They all have been cross-examined at length by learned Public Prosecutor, however, their testimony that they have not witnessed the occurrence nor seen the accused administering beatings to the deceased remained un-shattered.

33. According to PW-13 Ranjit, he was having dinner when he heard about some quarrel having taken place. He had neither visited the place of occurrence nor the deceased was beaten by the accused in his presence. Similar is the version of PW-14 Jaswant Kumar. According to him, though he was present in the procession/barat and on a call to baratis to have dinner, he had gone to have dinner and nothing happened in his presence nor the deceased was beaten up by the accused in his presence. PW-13 Ranjit and PW-14 Jaswant Kumar were also allowed to be cross-examined by learned Public Prosecutor, however, nothing lending support to the prosecution case, could be elicited from their testimony.

34. Another witness PW-18 Girish Sharma, while admitting the presence of Arjun Katoch, the deceased and both the accused at village Sukarna in connection with marriage of Nagesh, has also denied any quarrel or occurrence having taken place in his presence because as per his version, he had already gone to have dinner. Therefore, the baratis present at village Sukarna in connection with marriage of Nagesh and cited as witnesses except for PW-5 Janak Chand have supported the prosecution case that it is the accused persons who have beaten up the deceased with kicks as well as inflicted fist blows and thereby caused multiple injuries, grievous in nature on his person.

35. It is seen that learned trial Court in order to record the findings of conviction against both the accused has heavily relied upon the sole testimony of PW-5 Janak Chand. Interestingly enough, in case PW-5 Janak Chand had witnessed that it were the accused, the assailants and administered beatings to the deceased, it is not understandable as to why he did not disclose so to the police at the first available opportunity i.e. on 19.10.1996 itself in the hospital at Baijnath, where he had gone with PW-1 Suresh Dhameja and as per the evidence available on record, the police of PS Baijnath had also arrived there by that time. Neither other occupants of the Car i.e. PW-1 Suresh Dhameja, PW-5 Janak Chand, PW-9 Yashbir Singh, PW-10

Yudhbir Singh nor other baratis were examined by the prosecution who could have corroborated the testimony of PW-5 Janak Chand to the effect that it is the accused who have administered beatings to the deceased. His testimony rather stands fully contradicted from that of other occupants of the car i.e. PW-1 Suresh Dhameja, PW-5 Janak Chand, PW-9 Yashbir Singh, PW-10 Yudhbir Singh and one Suresh Kumar Kapoor. PW-1 Suresh Dhameja has even not been declared hostile nor cross-examined on behalf of the prosecution. PW-17 ASI Roshan Lal met in Civil Hospital Baijnath with all the occupants of car, including PW-5 Janak Chand, however, none of them including this witness had revealed to PW-17 ASI Roshan Lal that it is the accused who had been quarrelling with the deceased and administered beatings to him. The statement of PW-1 Suresh Dhameja was recorded on the following morning i.e. on 20.10.1996 around 7:00 AM, after the death of Arjun Katoch, early in the morning i.e. at 2:30-3:00 AM. The police had also interrogated PW-5 Janak Chand, PW-9 Yashbir Singh and PW-10 Yudhbir Singh, however, it was not revealed by either of them that the assailants were the accused. PW-1 Suresh Dhameja has also not disclosed in his statement Ext. PW-1/A that the accused were the assailants. PW-5 Janak Chand is a witness to the inquest papers Ext. PW-3/A, however, at that time also, he did not inform the police that the assailants were the accused. He is also one of the signatory to the inquest papers.

36. The prosecution evidence reveals that it was during the night intervening 20-21.10.1996, PW-5 Janak Chand for the first time introduced the story that he had seen the accused quarrelling with deceased Arjun Katoch. This story to the reasons best known to the prosecution and for that matter to PW-5 Janak Chand, also is false and concocted in view of the reasons, as discussed hereinabove. When, as per the prosecution case itself, the deceased had not only turned off the engine but also switched off the head lights of the car and alighted alone therefrom to urinate, no doubt, the occupants of the car observed commotion at backside of the car. However, when PW-1 Suresh Dhameja was assaulted by un-identified persons, who even tried to damage the car also, all the occupants of the car alighted from it and ran away for their safety. The deceased was removed to hospital by Rani @ Dilawar, Kamal Bhushan and Om Prakash. They have not been cited as witnesses by the prosecution for the reasons best known to it.

37. If coming to the testimony of PW-2 Dr. O.P. Ramdev, who had examined the deceased in CH Baijnath, aforesaid Rani @ Dilawar, Kamal Bhushan and Om Prakash had disclosed that deceased had received injuries in a road accident. It is these three persons, who could have supplied some authentic and material information qua the manner in which the incident sparked off or the deceased received injuries in an accident. However, as already pointed out, the prosecution to the reasons best known to it has withheld them from the Court. In such circumstances, an adverse inference has to be drawn against the prosecution.

38. As noticed hereinabove, the police and all occupants of the car, including PW-5 Janak Chand had reached in the hospital at Baijnath. That was the earliest opportunity to PW-5 Janak Chand to have disclosed to the police that he had seen accused quarrelling with the deceased. No explanation, whatsoever, is forthcoming to show as to why their statements, including that of PW-5 Janak Chand were not recorded at the earliest possible occasion which was available to the police. The testimony of PW-5 Janak Chand that he could only identify the accused and not other baratis is highly unbelievable for the reason that being a co-villager, how it can be said that he could not identify the remaining 20-25 baratis and that too his co-villagers. His testimony to the effect that other occupants except for PW-1 Suresh Dhameja also alighted from the car and PW-1 Suresh Dhameja came to them with a complaint that somebody had administered beatings to him seems to be false because in view of the testimony of PW-1 Suresh Dhameja, PW-9 Yashbir Singh, PW-10 Yudhbir Singh, they all were sitting in the car when PW-1 Suresh Dhameja was assaulted by someone from behind. It is rather they all ran away from the spot to save their lives. The time being 10:00 PM, it can reasonably be believed that there was complete darkness, how PW-5 Janak Chand could have identified the accused persons alone to be the assailants, particularly when as per the prosecution case, the engine and lights of the car were turned off by the deceased before alighting therefrom. The testimony of PW-5 Janak Chand

that no one including him intervened in the fight between the accused persons and deceased could also not be believed for the reason that in case deceased was being beaten up by two persons i.e. accused in the presence of 20-25 persons, in ordinary course of circumstances, someone would have come forward for his rescue. This witness seems to have made a tutored version while in the witness-box. The story, he introduced, while in the witness-box that when Arjun Katoch stopped the Car, it was accused Anil Katoch who came nearer to him and started altercation with the deceased and it was on this score the deceased alighted from the car after turning off its engine and lights, is also far fetched because as per the own case of the prosecution, the car was stopped by the deceased on seeing baratis in a procession proceeding while singing and dancing towards the house of bride and there being congestion on the road at that place, he turned off the engine and also lights and then alighted from the car to call of nature and not after having altercation with accused Anil Katoch.

39. When the occurrence had taken place behind the car in complete darkness, how PW-5 Janak Chand who sitting in the car on seeing PW-1 Suresh Dhameja was assaulted by someone, ran away with other occupants to save their lives could have witnessed that it is the accused who were assailants and had beaten the deceased. The testimony of this witness that he was standing at a distance of 15 yards from the place of occurrence is again far fetched and not corroborated by any other and further evidence available on record. It is again far fetched that this witness could have identified a person up to a distance of 60-65 meters and that too when as per his own version it was not a full moonlit night nor he could see the moon. His testimony that when they returned to the spot Arjun was found to be taken to hospital by someone reveals that he had also ran away from the spot to save his life along with other occupants of the car and as such he had no occasion to witness that deceased was being beaten by the accused. PW-1 Suresh Dhameja has also stated that when he came out of the place where he had hided himself, the other occupants of vehicle, including PW-5 Janak Chand also met him and they all went to the hospital. Interestingly enough, the alleged history of road side accident given to PW-2 Dr. O.P. Ramdev by Rani @ Dilawar, Kamal Bhushan and Om Prakash remained unchallenged as the prosecution did not dispute the same at any stage during the course of trial.

40. The intimation to the police was given by PW-2 Dr. O.P. Ramdev at 10:45 PM over phone. The same was entered in daily diary vide Ext. PW-17/A and the police party led by PW-17 ASI Roshan Lal reached in the hospital at Baijnath. When all the occupants of the car, including PW-5 Janak Chand were present in the hospital at that time, this witness did not disclose to the police that he had seen the accused quarrelling with the deceased. He himself admitted the presence of police in the hospital well before their arrival. PW-17 ASI Roshan Lal has admitted in his cross-examination that when he reached in hospital, PW-1 Suresh Dhameja, Dilawar and Janak Chand were present there. PW-9 Yashbir Singh and PW-10 Yudhbir Singh also reached there, however, neither of them disclosed the manner in which the occurrence had taken place nor he recorded their statements. He admitted that when the statement of PW-1 Suresh Dhameja Ext. PW-1/A was recorded, Janak Chand was also present there. Had it been so, this witness could have revealed to the police that the assailants were the accused persons. The statement of PW-5 Janak Chand, therefore, seems to be recorded after due deliberation. In case the evidence as has come on record by way of his testimony is excluded, there hardly remains any evidence to implicate both the accused in the commission of the offence. Further testimony of PW-5 Janak Chand that he did not disclose the manner in which the occurrence had taken place at 7-7:30 AM on 20.10.1996 when interrogated by the police, when the inquest papers were prepared at 2-2:30 PM nor when the post mortem of the dead body was conducted in the hospital due to afraid of from accused Anil Katoch who is an Advocate and Pradhan of the Gram Panchayat as well as a Judo crate player is unbelievable. PW-5 Janak Chand, in our considered opinion, has rather made a false statement in the Court. PW-5 Janak Chand even did not disclose the manner in which the occurrence took place to anyone also because PW-8 Yogeshwar Singh has admitted while in the witness-box that PW-5 Janak Chand did not disclose anything even to him also.

41. Taking into consideration the entire gamut, the ratio of the judgment of the Apex Court in ***Sat Paul vs. Delhi Administration, 1976 (1) SCC 727,*** relied upon by Mr. Chitkara, learned counsel is fully attracted in the given facts and circumstances of this case and as such it would not be improper to place reliance upon the testimony of eye-witnesses who turned hostile, including that of PW-1 Suresh Dhameja that no one could witness that it is the accused who had administered beatings to the deceased. The relevant text of the judgment reads as under:

> "51. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as Washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto."

42. The ratio of the judgment again that of the Apex court in ***Ganesh Bhavan Patel vs. State of Maharashtra, 1978 (4) SCC 371,*** is also fully attracted in the case in hand because here also the I.O. has miserably failed to take down the statements, at least, of the occupants of the car at the earliest opportunity available to him and thereby rendered the entire prosecution story highly doubtful. The relevant text of the judgment reads as follows:

> "15. As noted by the Trial Court, one unusual feature which projects its shadow on the evidence of P.Ws., Welji, Pramila and Kuvarbai and casts a serious doubt about their being eyewitnesses of the occurrence, is the undue delay on the part of the investigating officer in recording their statements. Although these witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, their statements under Section 161 Cr. P.C. were recorded on the following day. Welji (P.W. 3) was examined at 8 a.m., Pramila at 9.15 or 9.30 a.m., and Kuvarbai at 1 p.m. delay of a few hours, simpliciler, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lend such significance to this delay, exists in the instant case."

43. Coming to the instant case, in view of the evidence having come on record by way of the testimony of PW-1 Suresh Dhameja, PW-9 Yashbir Singh, PW-10 Yudhbir Singh, PW-11 Sushil Kumar, PW-12 Sanjeet Kumar, PW-13 Ranjit and PW-14 Jaswant Kumar, no one could witness that the accused were the assailants and caused fatal blows on the person of the deceased leading to his death. PW-5 Janak Chand is a liar and in view of the discussion hereinabove, his testimony that it is the accused who were the assailants and administered beatings to the deceased, being not corroborated by any other independent source, cannot be believed to be true by any stretch of imagination. The prosecution rather has made an effort to engineer a false case against the accused by examining this witness. It is, therefore, not at all proved beyond all reasonable doubt that the assailants were the accused alone and none else. In the criminal administration of justice, the findings of conviction can only be based on cogent, reliable and clinching evidence, which in the present case is lacking. Learned trial Court was not at all justified in placing reliance on the sole testimony of PW-5 Janak Chand while recording the

findings of conviction against the accused. The present rather, in our considered opinion, is a case of no evidence.

44. If coming to the another aspect of the prosecution story that both the accused have beaten up the deceased to death on account of enmity between the two families, the prosecution has examined PW-20 Durga Chand, who is brother of the deceased. As per his version, both accused are sons of his real Uncle. They were not having cordial relations with the accused persons from the very beginning because of quarrelsome nature of their family. PW-5 Janak Chand has also admitted in his cross-examination that the accused were not having cordial relations with the deceased and his brothers nor were on speaking terms. He, however, has expressed his inability to tell that it was due to old enmity, PW-20 Durga Chand and his brother Ranvir had manipulated a false case against the accused. It is pertinent to note that the relations between the two families seems to be inimical, however, it cannot be said that the accused have killed the deceased due to enmity and rather as per the settled legal principles, the enmity is a double edged weapon and as such the possibility of the accused having been implicated in a false case by PW-20 Durga Chand and other relations of the deceased cannot be ruled out.

45. Undue weightage should not have been given by the learned trial Court to the alleged recovery of the clothes of accused Anil Katoch from the place of his in-laws for the reason that this part of the prosecution case has also not been satisfactorily proved. True it is that PW-5 Janak Chand and the I.O. PW-22 Insp. Shakti Chand have deposed about the recovery of the clothes Ext. P-9 to P-12 at the behest of accused Anil Katoch, however, nothing tangible has come on record to show that these clothes were blood stained and the blood, if any, thereon was of the same group as that of the deceased. Even if the blood stains were there on the clothes, the same could have been of the own blood of the said accused as one can receive injury on his person in ordinary course of circumstances also. Above all, no evidence has come on record to show that it were the same clothes worn by accused Anil Katoch at the time of so called occurrence. No witness from the place of the in-laws of accused Anil Katoch was associated at the time of alleged recovery of the clothes. This Court in ***Randhir Singh alias Tira and others vs. State of H.P., 2007 (2) SLC 294,*** has emphasized for the necessity of association of independent witnesses from the locality at the time of recovery. Above all, the report of Forensic Science Laboratory Ext. PX is inconclusive for want of the findings that the blood found on these clothes was of same person. It is also not the case of the prosecution that accused Anil Katoch has also received injuries on his person in the occurrence. The scientific officer who has prepared the report has not been examined. Therefore, the report is not admissible in evidence, being hit by the provisions contained under Section 293 Cr.P.C. The Apex Court in ***Kansa Behera vs. State of Orissa, 1987(3) SCC 480,*** a case where no evidence in the report of serologist about the group of blood was found during analysis of blood stained shirt/dhoti recovered at the instance of the accused, has held that on the basis of such recovery, the accused cannot be connected with the commission of the offence. The relevant text of this judgment reads as under:

> "11. As regards the recovery of a shirt or a dhoti with blood stains which according to the serologist report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the cloths of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn."

46. Similar is the ratio of the judgments of this Court in ***State of H.P. vs. Edward Samual Chareton, 2000 (2) Shim. L.C. 228,*** and ***Ajay Sharma vs. State of Himachal Pradesh, 2002 (3) Sim.L.C. 329.***

47. When PW-1 Suresh Dhameja, while in the witness-box, has expressed his inability to tell the number of persons who allegedly were giving beatings to the deceased and as per that of PW-3 Dr. D.S.Chandel in his cross-examination that the injuries on the person of the deceased can possibly be sustained in an attack by mob whereas as per that of PW-2 Dr. O.P. Ramdev such injuries are possible by fist blows and kicks, the possibility of the deceased having been thrashed and assaulted by the mob cannot be ruled out. The perusal of Ext. PW-4/C reveals that Anish was one of the material witness in this case, however, he has been withheld and as such an adverse inference under Section 114 G of the Indian Evidence Act can be drawn against the prosecution on this score also. As per the own evidence produced by the prosecution, the injuries were there on the person of Ranjit Singh (PW-13), Pawan Kumar and Anish Sharma, corresponding to the period of scuffle with Arjun Singh deceased. They were medically examined by PW-4 Dr. Jyotindra Pal vide MLRs Ext. PW-4/A and PW-4/B, the possibility that they were got medically examined on account of police having suspected their involvement in the scuffle cannot be ruled out. Their medical examination vide Ext. PW-4/A and PW-4/B find support from the testimony of PW-4 Dr. Jyotinder Pal.

48. According to PW-18 Girish Sharma, Ranjit Singh, Pawan Kumar, Kaku, Anish and K.K. Thakur had also attended the barat. PW-5 Janak Chand is the brother of Ranjit Singh aforesaid. PW-5 Janak Chand has expressed his ignorance that Raju and Ranjit were also among those baratis who were singing and dancing. According to him, he had not stated so in his statement recorded under Section 161 Cr.P.C. He, however, when confronted with portion F to F of his statement Ext. PW-5/D it was found recorded therein that Raju and Ranjit had also attended the marriage. He has admitted that Ranjit is his real brother whereas Raju the son of his real Uncle. Though, the suggestion that it was Raju and Ranjit who were the main culprits having given beatings to Arjun Katoch is denied being wrong by PW-5 Janak Chand. However, the possibility of the said accused having deposed falsely to save both Raju and Ranjit from their prosecution in this case cannot be ruled out. The plea in defence raised by the accused to this effect appears to be nearer to the factual position.

49. Therefore, in view of the above, the prosecution story that the accused had mercilessly administered beatings to deceased and killed him on account of old enmity and that the recovery of clothes at the instance of accused Anil Katoch connect them with the commission of the offence also not substantiate the findings of conviction recorded against both the accused. On the other hand, as pointed out hereinabove, neither of the witness implicate the accused persons in the commission of the offence. It is, PW-5 Janak Chand, who alone has deposed against them. The possibility of he having deposed falsely to save his brother Ranjit and cousin Raju, in view of the detailed discussion hereinabove, can't also be ruled out.

50. Therefore, examining the prosecution case from any angle, no case either under Section 302 read with Section 34 IPC or for that matter under Section 304(II) read with Section 34 IPC is made out against either of the accused. In our considered opinion, learned trial Court has went wrong and recorded the findings of conviction against them erroneously on the basis of the sole testimony of PW-5 Janak Chand. Being so, what to speak of the conviction and sentence of both the accused for the commission of offence punishable under Section 302 IPC, as claimed by the State of H.P. in connected Cr. Appeal No. 35 of 2001 as well as by Smt. Raman Katoch widow of deceased Arjun Katoch in Cr. Revision No. 155 of 2000, no case is made out against the accused persons and they as such deserves to be acquitted from the charge framed against each of them.

51. In view of what has been said hereinabove, Cr. Appeal No. 567 of 2000 succeeds and the same is accordingly allowed. Consequently, the impugned judgment dated 21.8.2000 is quashed and set aside and both the accused are acquitted of the charge framed against each of them. Connected Cr. Appeal No. 35 of 2001 filed by the State of Himachal Pradesh and Cr.

Revision No. 155 of 2000 filed by Smt. Raman Katoch, being devoid of any merit are hereby dismissed. Consequently, personal bonds executed by both the accused are cancelled and sureties discharged.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Kalimudeen .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr. Revision No. 115 of 2008.
Date of Decision: 28.11.2016.

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a truck in a rash and negligent manner- Truck went off the road and fell into the gorge - the occupants sustained injuries and some of them died – the accused was tried and convicted by the Trial court- an appeal was preferred, which was dismissed- held, that accused has not disputed the accident or the fact that he was driving the truck – the material prosecution witnesses turned hostile – the truck was carrying 80-90 peoples, which by itself is an act of negligence especially when the truck is not meant to carry the passengers – benefit of Probation of Offenders Act cannot be granted in a case of rash and negligent driving- however, keeping in view the time elapsed since the incident, sentence modified. (Para-8 to 42)

Cases referred:
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858
Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127
State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182

For the petitioner: Mr. Vinay Thakur, Advocate.
For the respondent: Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

The present criminal revision petition filed under Sections 397/401 of the Cr.PC, is directed against the judgment dated 2.5.2008, passed by the learned Sessions Judge, (F), Shimla, HP, in Criminal Appeal No. 1-S/10 of 2008/03, affirming the judgment of conviction dated 20.9.2003, passed by the learned Judicial Magistrate Ist Class, Chopal, District Shimla, HP, in Case No. 55-1 of 2003/24-II of 2003, whereby the accused-petitioner has been sentenced as per description given herein below:-

"Section 279 IPC

To undergo simple imprisonment for a period of six monthsand in case of default, to further undergo simple imprisonment for a period of one month.

Section 337 of IPC

To undergo simple imprisonment for three months with fine of Rs. 500/- and in default of deposit of fine, further simple imprisonment for a period of one month.

Section 338 of IPC

The convict is sentenced for six months with fine of Rs. 500/-.

Section 304 (A) *of IPC*

One year rigorous imprisonment with fine of Rs. 2000/- and in case of default of deposit of payment, to further undergo simple imprisonment for a period of two months."

2. Briefly stated facts as emerge from the record are that on 24.2.2003, one Sh. Rajinder Lal, got his statement recorded under Section 154 of Cr.PC, to the police stating therein that he was going with Dak to Post Office Nerwa and when he reached Rana Kiyar, he boarded the truck bearing No. HP-08-0811 and sat in the body of truck along with 80-90 persons. He further reported that vehicle in question was being driven by the petitioner accused namely Kalimudeen, who was known to him. As per, the complainant, when truck reached near Mahila Mandal Halao, it suddenly went off the road and fell into 150 feet deep gorge as a result of which, many people sustained injuries and some of them died on the spot. The complainant further stated that truck in question was being driven by the accused rashly and negligently, as a consequence, truck met with an accident. On the basis of aforesaid statement having been made by the complainant, police registered formal FIR Ext.PW17/A and I.O. visited the spot. After completion of investigation, police came to conclusion that accident occurred due to rash and negligent driving of the petitioner accused, and accordingly, presented the challan under Sections 279, 337, 338 and 304(A) of the IPC, before the competent court of law.

3. Learned Judicial Magistrate Ist Class, Chopal District Shimla, (HP), after satisfying itself that prima facie case exists against the accused put a notice of accusation, to which he pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record by the prosecution, found the accused guilty of having committed offence under the aforesaid Sections and convicted and sentenced him as per description already given above.

4. The present petitioner-accused being aggrieved with the judgment of conviction passed by the learned trial Court, filed an appeal under Section 374 of Cr.PC before the Court of learned Sessions Judge, (F), Shimla, HP, who vide judgment dated 2.5.2008, dismissed the appeal. Hence, this criminal revision petition before this Court.

5. Mr. Vinay Thakur, Advocate, representing the petitioner vehemently argued that the impugned judgments of conviction and sentence recorded by the Courts below are not sustainable as the same are not based upon the correct appreciation of evidence available on record, as such, same deserve to be quashed and set-aside. Mr. Thakur, while referring to the judgments passed by the courts below, strenuously argued that bare perusal of the same suggests that both the courts below have failed to appreciate the evidence in its right perspective, as a result of which, great prejudice has been caused to the petitioner, who was admittedly not driving the vehicle rashly and negligently. Mr. Thakur, further contended that both the courts below wrongly convicted the petitioner for the aforesaid offences because, none of the prosecution witnesses supported the case of the prosecution that vehicle in question was being driven rashly and negligently at that relevant time, rather all the material prosecution witnesses turned hostile. Mr. Vinay further, contended that learned courts below failed to appreciate the positive evidence available on record suggestive of the fact that accident occurred due to mechanical defect in the truck. He further stated that it has specifically come in the statement of PWs that after noticing the mechanical defect by the accused, he (accused) shouted to passengers to save their lives, if possible, because truck went out of the control of the petitioner but by no stretch of imagination, it could be concluded by the courts below on the basis of evidence available on record that the accident occurred due to rash and negligent driving of the petitioner, especially, when his own children were also travelling in the same. Mr. Vinay, while referring to the finding of the courts below to the effect that when the truck was in bad condition, petitioner should not have plied the same or he should have avoided the accident by applying brakes, contended that aforesaid

circumstances relied upon to the petitioner were never put to him under Section 313 Cr.PC and as such, trial was vitiated as petitioner has been prejudiced by not putting such circumstances/evidence to him. He further stated that case of the prosecution was that petitioner was driving the vehicle rashly and negligently as he was driving the vehicle in high speed but there is no evidence led on record by the prosecution to prove speed at that relevant time of the vehicle involved in the accident. While concluding his arguments, Mr. Vinay, invited attention of this Court to the judgment passed by the Hon'ble Apex Court, in case titled ***Jacob Mathew vs. State of Punjab, 2005 Cr. LJ. 3710*** to suggest that "to prove the criminal negligence, the mensrea has to be proved and the principle of res-ipsa liquitor is not applicable in the criminal case especially when the accused is sought to be punished for criminal negligence. He also invited attention of this Court to the statements having been made by the PWs to demonstrate that none of PWs supported the case of the prosecution that vehicle in question was being driven rashly and negligently by the petitioner-accused that too in high speed and as such, no conviction could be recorded by the courts below on the aforesaid evidence adduced on record by the prosecution. Mr. Vinay Thakur, also contended that the learned trial Court swayed with emotion while recording the conviction of the petitioner because many people died and some of them suffered injuries on account of accident. In the aforesaid background, Mr. Vinay, prayed for acquittal of the petitioner after setting aside the judgment of conviction recorded by the courts below.

6. Per contra, Mr. Ramesh Thakur, learned Deputy Advocate General, representing the State supported the impugned judgments passed by the courts below. He vehemently argued that bare perusal of the impugned judgments suggests that same are based upon the correct appreciation of the evidence available on record and prosecution has been able to prove its case beyond reasonable doubt. He further contended that in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted, especially, in view of the concurrent findings of fact recorded by the courts below. Mr. Ramesh, further argued that there is no force in the contention put forth by the counsel representing the petitioner that none of prosecution witness has supported the case of the prosecution because all the material PWs though turned hostile, but in their cross examination, they have categorically admitted that at that relevant time, 80-90 people were travelling in the truck being driven by the petitioner in high speed. Mr. Thakur, further contended that bare factum that at that relevant time 80-90 people were travelling in the truck, was sufficient to conclude sheer negligence of the petitioner accused, which was not a passengers vehicle but was meant for carrying goods. He specifically invited attention of this Court to the mechanical report Ext.PZ led on record by the prosecution to refute the contention put forth by the counsel representing the petitioner that there was mechanical defect, which led to the accident. While specifically referring to the mechanical report, Mr. Ramesh, vehemently argued that as per mechanical report, there was no defect in the truck at that relevant time, rather same was found to be in third gear, which suggest that vehicle in question was being plied in high speed at that relevant time. While concluding his arguments, Mr. Ramesh Thakur also reminded this Court that it has very limited powers while exercising its revisionary powers under Section 397 of the Cr. PC to re-appreciate the evidence, especially when it stands duly proved on record that the courts below have dealt with each and every aspect of the matter very meticulously. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (***1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> "In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the

> same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

7. I have heard learned counsel for the parties as well carefully gone through the record

8. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused has been convicted and sentenced, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned courts below are not perverse and same are based on correct appreciation of the evidence on record.

9. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

> 8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

10. Perusal of the records made available to this Court suggests that on 24.2.2003, truck bearing No. HP-08-0811, carrying 80-90 persons met with an accident, as a result of which several people suffered injuries whereas some occupants lost their lives. Petitioner accused has admitted in his statement under Section 313 recorded by the court below as far as death of various occupants is concerned but denied that vehicle was being driven by him rashly and negligently. Hence, in view of the aforesaid statement having been made by the petitioner accused under Section 313, there is no dispute, if any, qua the accident as well as driving of the vehicle by him at that relevant time. Accordingly this Court, with a view to ascertain the genuineness and correctness of pleas/submissions having been made/taken by the learned counsel for the petitioner that there is no evidence available on record suggestive of the fact that accident took place due to rash and negligent act of the driver, carefully perused the entire evidence adduced on record by the prosecution. Prosecution with a view to prove its case examined as many as 23 witnesses.

11. PW1 Rajinder Singh (complainant) while making deposition before the learned trial Court stated that at that relevant time, he was travelling in the truck along with other persons but he is not aware who was driving the vehicle and he heard some noise and truck rolled down. He further stated that he does not know who was at fault and accident took place and some people have died and some received injuries. This witness was declared hostile but in

his cross examination, aforesaid witness denied that he is not known to the accused. He also denied that accused was plying the vehicle rashly and negligently and caused accident.

12. Similarly, PW2 Kumari Savita stated that she was travelling in truck and accused was plying the truck and when they reached near Halao, truck rolled down, as a result of which, she sustained injury but she is not aware how accident occurred. This witness also turned hostile. But in her cross examination, she admitted that truck was in full speed and rolled down.

13. PW3 Govind (conductor of the truck) stated that there was a rally of Shatrughan Sinha at Nerwa and many people were sitting in truck and truck was being driven by the accused. He further stated that truck was in slow speed and he was seated on the conductor seat. He further stated that he heard the accused shouting that if any person can save himself, he can. This aforesaid witness was also declared hostile but in cross examination conducted by learned APP, he admitted that people were also sitting on the tool and body of the truck. He also in his cross examination denied the suggestion that vehicle in question was being driven rashly ad negligently by the petitioner accused.

14. PW4, Master Parkash (minor) also stated that he was not aware how accident took place but he was in the truck which rolled down.

15. PW5 Santosh Kumar stated that about 86 persons were sitting in the truck which met with an accident, as a result of which he sustained injuries. He also stated that his wife also sustained injuries but he is not aware about who was plying the truck.

16. PW6 Radho Devi stated that truck was in speed and it rolled down and she sustained injuries.

17. PW7 Ashok Kumar while deposing before the learned trial Court stated that at that relevant time there were about 75-80 persons in the truck. He further stated that people were sitting in the tool and body of the vehicle in question because there was a rally of BJP and truck was in speed and it rolled down due to negligent driving of the accused. However, in his cross examination, he stated that truck was in the speed of 100 km per hour. He denied that on that day, he came to Nerwa after running from house. He further admitted that he never drove the truck and cannot say about the speed of the truck.

18. PW8 Kumari Kaushalya and PW9 Kumari Devi also stated that at that relevant time, 70-80 persons were occupying the truck and truck was going to rally. In their cross-examination, they stated that they were not aware of the speed of the truck.

19. PW10 Parma Nand though stated that truck was in rash speed but in his cross examination, he admitted that there was defect in truck, as a result of which, accident took place. Aforesaid witness, on his re-examination on the aforesaid point again stated that he had heard the sound of breaking of “Kamani” of the truck, as a result of which, accident took place.

20. PW11 Sant Ram in his cross examination admitted that people were raising slogans and people were also telling the driver to ply the vehicle in speed as they wanted to reach the destination. But in his cross examination, PW11 specifically stated that since he never plied the vehicle, he cannot tell the exact speed of the vehicle.

21. PW12, Khiyali Ram stated that truck was full with people but he is not aware of the speed of the truck. PW 13 Rainu Devi stated that truck was in speed and rolled down.

22. PW14 Kumari Lalita stated that the truck was in speed. She also admitted in cross-examination that she was sitting in the back side of the truck. Similarly, PW15 Deeva Devi and PW16 Bali Devi also corroborated the version put forth by the PW14 that truck was in speed

23. PW17 ASI Yodha Ram only registered the FIR Ext. PW17/A. PW18 Bjagat Singh only identified the deceased.

24. PW19 Ran Singh, who also suffered injury on the accident also not supported the case of prosecution and as such, he was declared hostile. He in his cross examination by APP, also stated that he cannot tell about the actual speed of truck.

25. PW20 Jagat Ram also corroborated the version put forth by the other PWs that truck met with an accident, as a result of which some people died and some sustained injuries. But in his cross-examination, he was unable to state about the speed of the truck because many people had occupied the truck. PW21 Nek Mohammad (one of the injured) also supported the version put forth by PW10 that he heard some noise of breaking 'kamani'. He also stated that truck was in slow speed.

26. PW23 ASI Ramesh Chand, stated that accident occurred due to rash and negligent driving of the accused. In his cross examination, he admitted that no witness from the village of the accused was associated. He further admitted that there are four shops of photographs and he did not get photographs clicked from the place from where the truck was rolled down. He also admitted that three daughters of the accused were also sitting in the truck but he denied that anybody told him that accused was plying the vehicle in rash and negligent manner. He further admitted in his cross examination that from where the vehicle rolled down, there is no parapet but he is not aware about from which door mechanic entered into the vehicle.

27. Conjoint reading of aforesaid PWs clearly suggests that none of PWs supported the version put forth on behalf of the prosecution. True, it is that all aforesaid prosecution witnesses stated that vehicle in question was carrying 80-90 people at that relevant time and the vehicle in question was being driven by the petitioner accused. But fact remains that all material prosecution witnesses who were occupants at that time of accident turned hostile as far as factum of rash and negligent driving of the petitioner accused is concerned. PW8, PW 14, PW15 and PW16 though in their examination in chief stated that truck was in speed but in their cross–examination all these aforesaid prosecution witnesses stated that they are unable to tell the exact speed of the vehicle at that relevant time. Similarly, depositions made by other prosecution witnesses in examination-in-chief though suggests that truck was in rash speed but if their cross examination is perused carefully, it nowhere supports the case of the prosecution that vehicle in question was being driven rashly and negligently, at that relevant time by the petitioner. Admittedly, all the PWs in one voice stated that at that relevant time there may be more than 80-90 people sitting in the truck. True, it is that some of the PWs stated that truck was being driven rashly and in speed but admittedly, there was no evidence worth the name led on record by the prosecution suggestive of the fact that vehicle in question was being driven rashly and negligently by the petitioner accused at that relevant time because none of the prosecution witness stated something qua the exact speed, if any, of the vehicle.

28. True, it is that speed may not be exact criteria to determine the question with regard to rash and negligent driving of the accused, but while proving rash and negligent driving of the driver of the il- fated vehicle, prosecution is expected to lead positive evidence on record suggestive of the act that vehicle was in high speed or same was being driven in such a manner it endangered the human lives travelling in the same.

29. Though petitioner has made an attempt to demonstrate that accident occurred due to sudden mechanical defect occurred in the truck, which version of the petitioner, finds strength with statements of PW3, PW10 and PW21, wherein they stated that they heard some noise and thereafter, truck fell in the gorge. PW3 further stated that after noticing the mechanical effect petitioner accused, shouted and asked people to save their lives. But aforesaid attempt having been made by the petitioner accused could not succeed in view of the mechanical report i.e. Ext.PZ, whereby it has been specifically reported that truck was found in third gear and steering and break system were found in working order and there is no mention with regard to breakage of 'kamani' as claimed by the petitioner.

30. Leaving everything aside, this Court after perusing the entire evidence available on record is fully convinced and satisfied that prosecution was able to prove on record that at

that relevant time, vehicle in question was carrying 80-90 people. It also emerge from the statement of PWs that people were sitting on the tool box and body of the truck also. It has also come in the statement of PWs that people were going to attend some political rally at Nerwa, which suggest that vehicle in question was specifically engaged by the occupants of the ill fated truck on that relevant date for carrying them to the site of rally.

31. Now the question which arises for determination of this court is :-

> "Whether act of petitioner accused, who was driving the vehicle at that relevant time, in allowing 80-90 people to board the truck, which is admittedly not a passenger vehicle, is rash and negligent act or not?"

This Court has no hesitation to conclude that though, there may not be any evidence suggestive of the fact that vehicle in question was being driven in rash and negligent manner by the petitioner accused at that relevant time but admittedly there is ample evidence suggestive of the fact that petitioner accused was negligent in allowing 80-90 people to board the vehicle in question on that day. Suggestion put forth by the defence to some of the prosecution witnesses that some of the occupants of the vehicle were insisting upon driver of the vehicle to drive fast also supports the case of the prosecution that driver was negligent while driving the vehicle as a result of which so many people lost their lives and many sustained injury.

32. Hence, this Court sees force much less substantial in the argument having been made by the learned Deputy Advocate General that petitioner accused was negligent. Mere permission by the petitioner accused to allow 80-90 people to board the vehicle is itself a sheer negligence at his part. True, it is that concept of negligence differs in civil and criminal law and what may be negligence in civil law may not necessarily be negligence in criminal law. To prove negligence in criminal law, the element of mens rea must be shown to exist.In the ***Jacob Mathew***'s case supra, Hon'ble Apex Court has stated that for an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. In the instant case, conduct of the petitioner in allowing 80-90 people to board the truck itself indicates towards the high degree of negligence.

33. It is not the case of the petitioner that he was compelled to drive ill fated truck, which was carrying 80-90 people at that relevant time, meaning thereby, decision, if any, to allow 80-90 people to board ill fated truck was of petitioner accused. There cannot be any quarrel with the argument having been advanced by the counsel representing the petitioner that driving of vehicle at fast speed cannot be termed as rash and negligent act but as has been discussed above, sheer conduct of the petitioner to allow large number of people in truck suggest that he was negligent and because of his rash and negligent act, many people lost their lives and others suffered injuries.

34. In the present case, it stands duly proved that accused allowed 80-90 people to board his truck, which was not meant for carrying the passengers. It also emerges from the evidence available on record that the petitioner accused allowed some passengers to sit in the tool box on a hilly road, which is certainly an act of serious negligence. It may be taken note of that there is no space or sitting for passenger, if any, in the truck, which is admittedly a goods transport vehicle.

35. This Court while sifting evidence also found that suggestion was put to PW11 Sant Ram that vehicle was not in good condition and more people should not have boarded the same. This aforesaid suggestion having been made by the defence also indicates towards the high degree of negligence on the part of the petitioner accused, because if at all, vehicle was not in good condition, petitioner ought not to have allowed the passengers to board the truck but in the present case, it stands duly proved on record that vehicle in question was carrying passengers to the rally at Nerwa. This Court cannot lose sight of the fact that due to aforesaid act of negligence, many people lost their lives and suffered several injuries, which fact stands duly proved by the medical evidence led on record by the prosecution.

36. Hence, this Court sees no illegality and infirmity in the judgments passed by the courts below and same deserve to be quashed and set-aside.

37. Faced with this situation, learned counsel for the petitioner-accused also prayed that accused may be given the benefit of probation under Section 4(b) of the Probation of Offenders Act, 1958 keeping in view his age and his being first offender. He also stated that mitigating circumstance in this case is that more than 13 years have passed after happening of that incident and passing the judgment dated 20.9.2003, whereby the accused was convicted and he has already suffered agony during the pendency of the appeal in the court of learned Sessions Judge, as well as in High Court of Himachal Pradesh. In support of the aforesaid arguments, Mr. Vinay Thakur, also invited the attention of this Court to the judgment passed by this Hon'ble Court in ***Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58***, wherein it has been held as under:

> 9. The only mitigating circumstance that appears to be there is that the time gap of about six years between the date of occurrence as well as the date of decision of this revision petitioner. During this entire period sword of present case looming over the head of the petitioner was always there. That being so, this court is of the view that instead of sending the petitioner to jail as ordered by the courts below, he is given the benefit of Section 4 of the Probation of Offenders Act. Accordingly, it is ordered that he shall furnish personal bond in the sum of Rs. 5,000/- to the satisfaction of the trial Court within a period of four weeks from today to keep peace and to be of good behavior for a period of one year from the date of execution of the bond before the court below as well as not to commit any such offence. In addition to being given benefit of Section 4 of the Probation of Offenders Act, petitioner is further directed to pay a sum of Rs. 3,000/- each to PWs Baldev Singh and Dilbagh Singh injured as compensation. Shri R.K. Gautam submitted that this amount of compensation be deposited with the trial Court on or before 31.8.1997, who will thereafter pay the same to said persons.

38. In this regard, reliance is also placed upon Hon'ble Apex Court judgment ***Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858***, wherein it has been held as under:

> "7. Accordingly the appeal is allowed in part by converting appellant's conviction under Section 307 IPC to one under Section 324 IPC. On the question of sentence, it is pertinent to note that the occurrence took place in 1997. In his statement under Section 313 of the code of Criminal Procedure the appellant gave his age in 2002 as 36 years. He claimed that he and others went to the place of occurrence on getting information that his brother Sanjay Kumar was assaulted by Ramesh Kumar (Complainant). He brought his brother to Police Station and lodged a report. As noticed by trial court, parties are involved in civil as well as criminal litigation from before. High Court has noted that appellant, as per custody certificate, is not involved in any other case. In such circumstances, it is not deemed necessary to send the appellant immediately to Jail custody after about 19 years of the occurrence when he appears to be 50 years of age and fully settled in life.
>
> 8. In view of aforesaid, in our view the ends of justice would be met by granting benefit of Probation of Offenders Act to the appellant. We order accordingly and direct that the appellant be released on executing appropriate bond before the trial court to appear and receive sentence of rigorous imprisonment for 1 (one) year when called upon to do so and in the meantime to keep the peace and be of good behaviour."

39. The reliance is also placed upon the Hon'ble Apex Court judgment ***Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127***, wherein it has been held as under:

"8. The question next to be considered is whether the accused are entitled to the benefit of probation of good conduct? We gave our anxious consideration to the contentions urged by counsel. We are of opinion that the High Court has not committed any error in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. In this case, the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not showing to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore, the extension of benefit of the beneficial legislation applicable to the first offenders cannot be said to be inappropriate.

9. This takes us to, the third questions which we have formulated earlier in this judgments. The High Court has directed each of the respondents to pay Rs.2500/- as compensation to Joginder. The High Court has not referred to any provision of law in support of the order of compensation. But that can be traced to section 357 Criminal Procedure Code Section 357, leaving aside the unnecessary, provides:-

"357. Order to pay compensation:

(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a civil Court;

Xxxxxxxxxxxxxx

Xxxxxxxxxxx

Xxxxxx

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation. Such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its power of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this Section.

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The Court may enforce the order by imposing sentence in default."

40. This Court also cannot lose sight of the stern observations made by the Hon'ble Apex Court in ***State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182***, *w*hile dealing with the accident case. Their lordships in the aforesaid judgment in paras No. 1, 14, 24 and 25 have held as under;

> "1. Long back, an eminent thinker and author, Sophocles, had to say:
>
> "Law can never be enforced unless fear supports them."
>
> Though the aforesaid statement was made centuries back, it has its pertinence, in a way, with the enormous vigour, in today's society. It is the duty of every right thinking citizen to show veneration to law so that an orderly, civilized and peaceful society emerges. It has to be borne in mind that law is averse to any kind of chaos. It is totally intolerant of anarchy. If any one defies law, he has to face the wrath of law, depending on the concept of proportionality that the law recognizes. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is sometimes said in an egocentric and uncivilised manner that law cannot bind the individual actions which are perceived as flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy, the individual notions are to be ignored. At times certain crimes assume more accent and gravity depending on the nature and impact of the crime on the society. No court should ignore the same being swayed by passion of mercy. It is the obligation of the court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised. In this context one may recapitulate the saying of Justice Benjamin N. Cardizo "Justice, though due to the accused, is due to the accuser too". And, therefore, the requisite norm has to be the established principles laid down in precedents. It is neither to be guided by a sense of sentimentality nor to be governed by prejudices.
>
> 14. In this context, we may refer with profit to the decision in Balwinder Singh (supra) wherein the High Court had allowed the revision and reduced the quantum of sentence awarded by the Judicial Magistrate, First Class, for the offences punishable under Section 304A, 337, 279 of IPC by reducing the sentence of imprisonment already undergone that is 15 days. The court referred to the decision in Dalbir Singh v. State of Haryana and reproduced two paragraphs which we feel extremely necessary for reproduction:- (Balwinder Singh case, SCC pp. 186-87, para12)
>
> "12...1. When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.
>
> 13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of

> Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles." (Dalbir Singh case, SCC pp. 84—85 & 87, paras 1 &13)"
>
> 24. Needless to say, the principle of sentencing recognizes the corrective measures but there are occasions when the deterrence is an imperative necessity depending upon the facts of the case. In our opinion, it is a fit case where we are constrained to say that the High Court has been swayed away by the passion of mercy in applying the principle that payment of compensation is a factor for reduction of sentence to 24 days. It is absolutely in the realm of misplaced sympathy. It is, in a way mockery of justice. Because justice is "the crowning glory", "the sovereign mistress" and "queen of virtue" as Cicero had said. Such a crime blights not only the lives of the victims but of many others around them. It ultimately shatters the faith of the public in judicial system. In our view, the sentence of one year as imposed by the trial Magistrate which has been affirmed by the appellate court should be reduced to six months
>
> 25. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a nonchalant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the law-makers should scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

41. After giving my thoughtful consideration to the submissions as well as law cited by Mr. Vinay Thakur, Advocate representing the accused in the present case, I am of the view that same cannot be made applicable in the present case for granting the benefit of Section 4 of probation of Offenders Act, 1958. The Hon'ble Apex Court in the judgment cited above has deprecated the practice of courts in settling the matter by awarding compensation or releasing the accused by giving the benefit of Probation of Offenders Act, 1958.

42. After bestowing my thoughtful consideration to the evidence led on record, I have no hesitation to conclude that prosecution was not able to prove on record rash and negligent driving, if any, on the part of the petitioner accused. However, action of accused in allowing 80-90 persons to board the ill fated truck clearly suggests that he was negligent. It has also come in evidence that truck was not in good condition and as such, petitioner accused should not have allowed the people to board the truck, which is/was definitely meant for carrying passengers. Hence, this Court is of the view that boarding of 80-90 people in the ill fated truck, certainly indicates towards the negligent conduct on the part of the petitioner and as such, he deserves to

be convicted and sentenced for the same. In view of the above, judgment passed by the courts below deserve to be upheld. This Court is of the view that conviction recorded by the courts below is on higher side and same needs to be modified, especially, when prosecution was not able to prove the rash and negligent driving of the petitioner. Moreover, more than 13 years have passed after occurrence of the incident and during this period, petitioner must have suffered mental agony. It has also come in evidence that at the time of incident, his daughters were also travelling in the same. Hence, this Court deems it fit to modify the sentence as imposed by the courts below to three months for all the offences. Petitioner accused is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by learned trial Court, which has been further modified by this Court vide this judgment. Needless to say that order dated 22.10.2009, passed by this Court, whereby sentence imposed by the Court below was suspended, shall stand vacated automatically. Pending applications, if any, stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Lal Chand .....Petitioner
Versus
State of HP .....Respondent

Cr. Revision No. 193 of 2010.
Date of Decision: 28.11.2016.

Indian Penal Code, 1860- Section 341, 323, 326, 504 and 506- Wife of the accused knocked at the door of the informant saying that accused was beating her -when the informant and his wife went to the house of the accused, the accused abused them- he inflicted a blow withdanda on her head – the accused inflicted a blow by darat on the left wrist of the informant – the accused was tried and convicted by the trial Court- an appeal was filed, which was dismissed- held in revision that parties were in litigation for 18-19 years – all the material witnesses had turned hostile – the defence version was rejected without any justification- there are material contradictions in the testimonies of the witnesses- there was insufficient evidence to prove the prosecution case- revision allowed and accused acquitted.(Para-8 to 36)

Cases referred:
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

For the petitioner: Mr. Vijay Chaudhary, Advocate.
For the respondent: Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

The present criminal revision petition filed under Sections 397/ 401 of the Cr.PC, is directed against the judgment dated 18.8.2010, passed by the learned Sessions Judge, Hamirpur, HP, in Criminal Appeal No. 30 of 2010, affirming the judgment/order of conviction and sentence dated 31.5.2010 and 2.6.2010, passed by the learned Judicial Magistrate, Ist Class, Barsar, District Hamirpur, HP, in Criminal Case No. 19-II-2008/2007, whereby present petitioner has been sentenced as under:-

"Section 341 of IPC

To pay fine of Rs. 500/- and in default of payment of fine, simple imprisonment for one month;

Section 323 of IPC

To undergo six months rigorous imprisonment and pay fine of Rs. 500/- and in default, two months simple imprisonment;

Section 326 of IPC

To undergo three years rigorous imprisonment and to pay fine of Rs. 3500/- under Section 326 of the IPC and in default of payment of fine, simple imprisonment for one year;

Section 504 of IPC

To undergo six months rigorous imprisonment;

Section 506 IPC

To undergo six months rigorous imprisonment."

2. Briefly stated facts as emerged from the record are that during the intervening night of July 19/20, 2007, at about 10:40 pm, Police Post, Deothsidh received telephonic call from the Medical Officer, PHC, Bijhar that one Ram Chand and Urmila Devi had been brought to the hospital in injured condition. On the basis of aforesaid information, police entered rapat Ext.PW11/B and immediately, recorded statement Ext.PW1/A of the complainant namely Ram Chand, wherein the complainant stated that he is resident of Village Mangnoti and has three sons. He further disclosed to the police that they are residing outside due to employment and he is a handicap person and tailor by profession. He further stated that he and his wife have been residing together in the house. On 19.7.2007, after taking meals, when they were sleeping in their house, Anita Devi, wife of Lal Chand (accused) knocked at their door and told that Lal Chand (accused for the sake of brevity) was beating her and asked for help. The complainant suggested her to call respectable persons of the village but she insisted them to accompany her. When they accompanied her towards her house, the accused came there and started hurling abuses to them. The complainant and his wife asked him not to abuse, upon the same, the accused came in anger and assaulted his wife with "Danda" on her head. The complainant turned back out and wanted to run, but the accused assaulted him with a "Darat" on his left wrist causing grievous injury on his person. When he raised alarm, Sapna Devi, Ram Kishan, Baldev and other villagers came there and the accused ran away from there by threatening them. On the basis of aforesaid statement, police registered formal FIR Ext.PW14/A and conducted investigation. Police prepared the site plan Ext.PW16/B. As per story of prosecution, accused made a disclosure statement Ext.PW15/A, stating therein that he had concealed one "Darat" in his house about which he knows and that he can get the same recovered. Accordingly, "darat" Ext.P6 and Danda Ext.P5 were taken into possession vide memo Ext.PW7/A. Khaka of "Darat" Ext.PW15/E and map of the spot Ext.PW15/F, were also prepared. Police also recorded statement of witnesses under Section 161 and thereafter, presented challan under Sections 341,323, 326, 504 and 506 of IPC, before the competent Court of law.

3. Learned Judicial Magistrate, Ist Class, Barsar, District Hamirpur, HP, on being satisfied that prima facie case exists against the accused put a notice of accusation to him under Sections 341,323, 326, 504 and 506 IPC, to which he pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record, held the accused guilty of having committed offence under the aforesaid Sections and accordingly convicted and sentenced him as per description already given above.

4. Being aggrieved and dis-satisfied with the judgment of conviction passed by the learned trial Court, the petitioner-accused filed appeal under Section 374 of Cr.PC before the Court of learned Sessions Judge, Hamirpur, HP, who vide judgment dated 18.8.2010, dismissed the appeal preferred by the petitioner accused. Hence, this criminal revision petition before this Court.

5. At this stage, it may be noticed that sequel to order dated 30.9.2016, Registry issued notice to the petitioner, who has come present in the Court. Petitioner namely Lal Chand,

submitted that he is not in a position to engage the lawyer and as such, he may be given service of legal aid counsel. Accordingly, in view of the aforesaid request, this Court requested Mr. Vijay Chaudhary, Advocate, to conduct his case, who readily agreed for the same. Mr. Vijay Chaudhary, Advocate, representing the petitioner-accused vehemently argued that the impugned judgments of conviction and sentence recorded by the Courts below are not sustainable as the same are not based upon the correct appreciation of evidence available on record and as such, same deserve to be quashed and set-aside. Mr. Chaudhary, while referring to the judgments passed by the Courts below further contended that courts below have not read the evidence in its right perspective, rather judgments are based upon the conjectures and surmises, as a result of which great prejudice has been caused to the petitioner, who is an innocent person Mr. Chaudhary, further stated that the courts below have not taken into consideration that no explanation worth the name was rendered by the prosecution for delay in lodging the FIR because PW2 admittedly admitted that incident took place on 17.9.2007, whereas it was reported to the police on the intervening night of 19/20.9.2007 and as such, story put forth by the prosecution could not be accepted while recording conviction of the petitioner accused that too on the flimsy grounds. While referring to the statements made by the prosecution witnesses, Mr. Chaudhary, forcefully contended that none of the independent witness has supported the case of the prosecution, rather turned hostile, but despite that courts below merely on the statement of the complainant and his wife, recorded conviction of the petitioner accused. Mr. Chaudhary, further argued that both the courts below miserably failed to appreciate that the complainant had made an attempt to outrage the modesty of wife of the petitioner accused, which fact stands duly proved with the statement made by PW4 Sapna Devi, who in her cross examination specifically stated that the complainant had made complaint with regard to the alleged attempt to outrage the modesty of wife of the petitioner accused. While concluding his arguments, Mr. Chaudhary strenuously argued that the complainant himself admitted in his cross examination that there is a litigation pending between them, which clearly suggests that the complainant had motive to falsely implicate the accused, whereas court below despite noticing the factum qua litigation pending between the parties, wrongly came to conclusion that such defence is a double edged weapon and it has to be appreciated in the light of the facts of the each case and wrongly recorded the conviction of the petitioner accused. In the aforesaid background, Mr. Chaudhary, prayed that present petitioner accused may be acquitted of the charges framed against him after setting aside the judgment of conviction recorded by the courts below, which are not based upon the true facts.

6. On the other hand, Mr. Ramesh Thakur, learned Deputy Advocate General, representing the respondent-state supported the impugned judgments passed by the courts below. Mr. Thakur strenuously argued that the judgments passed by the courts below are based upon the correct appreciation of the evidence available on record and as such, in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted, especially in view of the fact that courts below have dealt with each and every aspect of the matter very meticulously. With a view to refute the contention put forth by Mr. Chaudhary, he also invited attention of this Court to the statement of PWs to demonstrate that there are no inconsistencies in the statements made by the PW1 and PW2, who in unequivocal terms have stated that they were given beatings by the petitioner-accused. Mr. Thakur further stated that though Independent witnesses turned hostile but if their statements are read in its entirety, it suggests that on that day, the complainant and his wife Urmila were given beatings by the petitioner accused and as such, there is no illegality and infirmity in the judgments passed by the courts below. He also invited attention of this Court to the medical evidence adduced on record by the prosecution to suggest that bare reading of MLC Ext. PW13/A and Ext.PW13/B suggests that the complainant as well as his wife suffered grievous injuries, which were admittedly caused by the petitioner accused and as such, he does not deserve any leniency and he has been rightly convicted by the courts below. While concluding his arguments, Mr. Thakur, reminded this Court that it has very limited powers while exercising its revisionary powers under Section 397 of the Cr.PC as far as re-appreciation of the evidence is concerned. In this regard, he placed reliance upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala Vs.***

Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> "In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

7. I have heard learned counsel for the parties as well carefully gone through the record.

8. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused has been convicted and sentenced, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned courts below are not perverse and same are based on correct appreciation of the evidence on record.

9. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

> 8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

10. During proceedings of the case, this Court had an occasion to peruse the judgments passed by both the Courts below as well as evidence adduced on record by the respective parties, perusal whereof suggests that on 19th July, 2007, the complainant Ram Chand and his wife Urmila received injuries on the arm and head respectively. Petitioner accused in his statement recorded under Section 313 denied the case of the prosecution in toto and produced DW1 as defence witness, who stated that Ram Chand and his wife resides at Chandigarh. He also stated that the petitioner accused had no quarrel with Ram Chan and Urmila Devi and false case has been prepared against the petitioner. He also stated that there is an illicit relation of

Ram Chand with the wife of the accused i.e. Anita. In his cross-examination, he admitted that Lal Chand is his younger brother.

11. Perusal of judgments passed by the courts below suggests that aforesaid version put forth by DW1 Amar Nath was altogether dis-believed on the ground that he was younger brother of the petitioner accused Lal Chand. Careful perusal of the record especially, statement of PW1 i.e. Ram Chand suggests that parties were in litigation for last 18-19 years with each other. PW1 specifically admitted in his cross-examination that his mother had litigation with father of the accused for the last 18-19 years. But it appears that court below brushed aside the aforesaid factum of having litigation between the parties by concluding that plea of litigation and enmity is a double edged weapon and it has to be appreciated in the light of facts of each case.

12. True, it is that plea of litigation and enmity is to be appreciated in the light of the facts of each case and it is a double edge weapon and courts while examining correctness and genuineness of such plea/defence taken by either of the party needs to carefully examine the evidence in its entirety vis-à-vis other material available on record.

13. After carefully examining the entire evidence available on record, especially, where all the material PWs have turned hostile, this Court has no hesitation to conclude that courts below have gravely erred in brushing aside the aforesaid plea of pendency of litigation and enmity between the parties by the petitioner-accused. Similarly, if the judgment passed by the courts below are read in its entirety, it also compels this Court to observe that court below while discarding the evidence adduced on record by the petitioner accused in the shape of DW1 Amar Nath, applied different yardsticks because apparently, version put forth by DW1 in his defence statement was discarded by the court below on the ground that he is a younger brother of the petitioner accused Lal Chand. But judgments passed by the courts below suggest that conviction of the petitioner has been only recorded on the statements of PW1 and PW2, who are admittedly husband and wife and none of the independent witness has corroborated the versions put forth by PW1 and PW2 and as such, it is not understood that when court below discarded the statement of DW1 on the ground that he is an interested witness, and then how conviction of petitioner could be based merely on the statements of PW1 and PW2, who are admittedly related to each other.

14. After observing the aforesaid discrepancies in the judgments passed by the courts below, this Court proceeded to critically examine the entire evidence led on record by the prosecution to ascertain the genuineness and correctness of the submissions having been made on behalf of petitioner accused and to ensure that impugned judgments are not perverse and same are based upon the correct appreciation of the evidence as submitted by the learned Deputy Advocate General appearing for the respondent State.

15. PW1 the complainant Ram Chand, stated that he and his wife were sleeping in their house when Anita (wife of the accused) knocked their door and informed that her husband was beating her. PW1 further stated that he advised her to call the respectable persons of the village but later on, on her asking, they went there, where petitioner accused started hurling abuses on them. He asked him not to abuse him but he snatched the 'danda' and inflicted a blow of the same on the head of his wife. He further stated that he tried to escape but accused also inflicted a sickle blow on his arm, as a result of which, blood started oozing out. He further stated that he raised alarm, upon which, Anil, Baldev, Sapna, Ram Kishan and other person of the village came at the spot. But in the meantime, accused fled away from the spot threatening him to kill him in future. He further stated that he was brought to the hospital in the Jeep of Papu and there, he got recorded statement, Ext.PW1/A, to the police and after discharge from the hospital, he took shelter in the house of Amar Nath DW1. He also stated that blood stained shirt Ext.P2, trouser Ext.P3 and wife's Dupatta Ext.P4 were handed over to the police, which were sealed in a parcel with seal "J" and taken into possession vide memo Ext.PW1/B. He further stated that he was medically examined vide MLC Ext.PW1/C. He also identified stick Ext.P5 as weapon of offence with which his wife was beaten. He also identified sickle Ext.P6 as the weapon of offence.

16. In his cross-examination, PW1 admitted that houses of Laxmi Ram and Anant Ram are at a height from their house and at the time of occurrence, nobody except his wife was present in the spot. He also admitted that ward member Sapna Devi had reached the spot. He also admitted that stick Ext.P5 belonged to him but self stated that it was snatched by the accused. He denied the suggestion put to him that accused had not given beatings to his wife with danda. Similarly, he stated that he did not disclose to the police that accused had snatched danda from his hand. Similarly, in cross examination, he feigned ignorance that he has signed Ext.PW1/B. Most importantly, in his cross examination, he admitted that litigation is pending between his mother and father of the accused for the last 18-19 years. He further denied the suggestion put to him by the defence that on 19.7.2007, he manhandled accused's wife Anita and attempted to outrage her modesty. He also denied that he had earlier tried to ravish Anita and matter was reported to ward member.

17. PW2 Urmila Devi corroborated the version put forth by her husband. She also identified the stick Ext.P5 as weapon of offence with which accused allegedly inflicted blow on her head. She also identified the sickle Ext.P6 with which her husband received injury on his arm. She also identified the accused in the Court. In her cross examination, she admitted that police recorded their statement on 17.7.2007, when she was confronted with her statement where she disclosed to the police that Anita had asked them to call village Panchayat, she feigned ignorance. She was also confronted with her statement made to police that she became unconscious and re-gained consciousness on hearing cries of her husband. She denied the suggestion put to her that stick and sickle were produced to the police by her husband. She also admitted that stick Ext.P5 belongs to her husband, but denied that sickle Ext.P7 also belongs to them. She also admitted that Anita Devi, Sapna Devi along with other villagers reached the spot. She also denied the allegation that accused had ravished the accused's wife Anita.

18. Conjoint reading of aforesaid PWs, who were present at the spot at the time of occurrence, though suggests that on 19.7.2007, they on insistence of Anita Devi, went to her house, whereupon they were given beatings by the petitioner but if their statements are read in its entirety, there are material contradictions with regard to weapon allegedly used by the petitioner accused for giving beatings to the complainant and his wife. PW1 specifically stated in his statement that accused snatched "danda" from his hand and then gave blow on the head of his wife. On the other hand, both the PWs made an attempt to prove on record that at the time of alleged occurrence, petitioner accused was carrying sickle in his hand. It is not understood that if petitioner accused was carrying sickle in his hand, where was the occasion for him to snatch the "danda" from the petitioner accused. Similarly, it is not understood that why at that time, petitioner complainant Ram Chand was carrying danda in his hand. It is admitted case of the prosecution that the complainant Ram Chand and his wife went to the house of Anita (wife of the accused) on her asking, meaning thereby, wife of the petitioner accused was known to the complainant and his wife. As per PW1, after alleged incident of inflicting injury on his arm, he raised alarm upon which Baldev, Subhash, Ram Kishan and other villagers came to the spot for his rescue and thereafter, he was brought to the hospital in Papu's Jeep. But PW1 in his cross examination feigned ignorance whether the statement of Papu was recorded by the police or not.

19. PW3, Anil Kumar while making statement before the Court stated that he is owner of Taxi No. HP-02-8718. He further stated that on the alleged day at about 10/11:00 pm, he heard noise and he went to the roof of his house to see the incident. He further stated that he saw that Ram Chand had sustained injury on his arm and wife of Ram Chand namely Urmila and Anita, wife of the accused, were also present on the spot. He further stated that he was told by the public to take injured to the hospital but he nowhere stated in his statement that, who gave injuries to Ram Chand and his wife. Aforesaid witness was declared hostile by the prosecution but in his cross examination by the prosecution, he admitted that alleged occurrence occurred on 19.7.2007. He denied that Ram Chand had disclosed him that he was given beating by Lal Chand. He admitted that he along with Ram Kishan and Baldev brought the complainant Ram Chand and his wife to Bijari Hospital. In his cross examination, he admitted that Ram Chand is his uncle.

20. PW4 Sapna Devi Ward Member also not supported the case of the proseuciton and accordingly, was declared hostile. In her cross-examination by prosecution, she denied that she resiled from her earlier statement. She further in her cross examination by defence admitted that accused and his wife had complained to her that Ram Chand had ravished Anita. She further stated that Sulochna and Biasan Devi also supported such allegation of the accused. She specifically stated that aforesaid complaint was made to her in the month of July. She further admitted that accused had not caused any hurt to the complainant and his wife. She further admitted that the complainant Ram Chand had illicit relations with the wife of the accused. It has also come in his cross examination that weapon of offence was produced to the police by Ram Chand and she had not taken any action on the complaint of the accused, rather tried conciliation.

21. PW5 Baldev Raj stated that on 20.7.2007, he came out of his house on hearing noise and noticed bleeding wound on the arm of the complainant Ram Chand. He also stated that accused was present on the spot. He further stated that he witnessed injury on the person of Ram Chand and his wife and both of them disclosed to him that accused had beaten them. He further stated that on 21.7.2007, police took into possession the cloths Exts.P.2 to P.4 vide memo Ext.PW1/B but in his cross examination, while admitting that the clothes were sealed by the police in his presence, he feigned ignorance that dupatta Ext.P1, was produced by the police by Sapna Devi. He denied that he has deposed, falsely against the accused due to enmity.

22. Similarly, PW6 Ram Kishan stated that on 19.7.2007, he visited the accused at around 8:00 pm and then he returned back to his house. He stated that at about 9:45 pm, he heard noise and came to spot where he saw injuries on the person of Ram Chand and his wife. He further stated that there was injury on the hand of Ram Chand and on the head of his wife. When he inquired from them, they disclosed that the accused gave beatings to them. He stated that he brought them to the hospital. Ram Chand had produced clothes Ext.P.2 to P4 to the police vide memo Ext.PW1/B. He also Identified the accused person in the Court. But in his cross-examination, he admitted that PW5 Baldev had not reached the spot but met them on the way.

23. Close scrutiny of aforesaid alleged independent witnesses, nowhere proves the case of the prosecution, rather all the prosecution witnesses, especially, PW3 and PW4 have turned hostile because they have specifically denied that petitioner accused gave beatings to the complainant and his wife. PW3 though in his examination in chief stated that the complainant Ram Chand had disclosed him that they have been beaten by the petitioner accused, but in his cross examination; he denied that Ram Chand had disclosed him that he has been beaten by the accused Lal Chand.

24. Similarly, PW4 Sapna specifically denied that petitioner accused gave beating to the complainant and his wife, rather, in her cross examination by the prosecution, she categorically admitted that accused had not caused any hurt to the complainant and his wife. She further stated that the complainant had illicit relation with the wife of the accused and weapon of the offence were produced by the Ram Chand.

25. Similarly, if statements of other independent witnesses Baldev PW5 and PW6 Ram Kishan are also read in juxtaposing each other, there are material contradictions qua the timing and date of incident. Similarly, both the PWs have contradicted each other with regard to their presence on the spot of incident at that relevant time. PW5 stated on 20.7.2007, he came out of his house on hearing noise and noticed bleeding wound on the arm of Ram Chand but the statement of PW6 suggests that he brought them to the hospital and he in his cross-examination admitted that Baldev had not reached the spot but met on the way, which clearly belies the statement of PW5 Baldev Raj, who claimed that he was present at the spot immediately after the alleged incident. Similarly, there are contradiction with regard to the production of Duppata Ext.P1 to the police by Sapna Devi. PW5 feigned ignorance that Dupatta was produced to the police by Sapna Devi, whereas Sapna Devi nowhere stated that Dupatta Ext.P1 was taken into custody by the police in her presence.

26. PW9 Suresh Kumar also not supported the case of prosecution. During his cross-examination by prosecution, he admitted his signatures on Mark-Z but he disowned the contents of the same, rather stated that he had signed the memo in good faith. He also denied that the accused made any disclosure statement in his presence. He also disowned portion A to A of statement Mark-Z recorded by the police.

27. PW7 Pritam Chand also not supported the prosecution case. In his statement, he stated that accused made disclosure statement in his presence. He also like PW9 Suresh, admitted his signature on Mark-Z but disowned the contents of the same. He also disowned portion A to A of the statement of Mark Z recorded by the Police. PW7 stated that on 25.7.2007, the accused led them towards the room of his house, from where he got recovered one sickle and stick to the police vide memo Ext.PW7/A. In his cross examination, he disclosed that he is resident of village Barla, which is 2 ½ k.m. away from the spot of recovery. He also admitted that he is a frequent witness for the police. He admitted in his cross examination that ASI Chhota Ram called him to the spot telephonically.

28. Perusal of the aforesaid PWs 7, 8 and 9, nowhere proves the recovery, if any, of weapon allegedly used by the petitioner accused for inflicting injury on the arm of the complainant and head of his wife Urmila Devi. None of the aforesaid witnesses supported the prosecution case, rather all these PWs before whom, police had allegedly recovered weapon denied that accused made disclosure statement in their presence. Moreover, no prayer, if any, could be made on the statement of PW7, who himself stated that on 25.7.2007, accused Lal Chand led them towards the room of his house from where he got recoverd one sickle and stick. He himself stated that he is a frequent witness to the police and came to the spot on asking of ASI Chhota Ram, who called him to come to the spot telephonically.

29. HC Jagdish Kumar who had conducted some part of the investigation appeared as PW16 and denied that the Sapna Devi had disclosed to him that no such occurrence ever took place. He further denied that Sapna had disclosed about the illicit relation of Ram Chand with the wife of the accused.

30. PW15 ASI Chhota Ram deposed that on July, 24, 2007, the case file was handed over to him for further investigation. He stated that accused Lal Chand had recorded his statement Ext.PW15/A, under Section 27 of the Indian Evidence Act in the presence of witnesses Jagtar Singh and Suresh. He also recorded statements Ext.PW15/B of Suresh Kumar and Ext.PW15/C of Jagtar Singh and thereafter they went to village Mangnoti where in the presence of Pradhan Pritam Chand and Up-Pradhan Mahinder Singh, accused identified his house. He further stated that he made khakha of Darat Ext.PW15/E and map of the spot Ext.PW15/F and handed over the case file to ASI Subhash Chand due to his transfer. In his cross examination, he denied that accused had not made any disclosure statement. It is also denied that he had recorded statements of Jagtar Singh and Suresh on his own.

31. Perusal of statement of PW9 Suresh, PW 7 Pritam Chand and PW15 ASI Chhota Ram, leaves no doubt in the mind of this Court that prosecution was not able to prove the recovery of weapon allegedly used by the petitioner accused while inflicting injury on the arm and head of the complainant and his wife. Aforesaid witnesses especially, PWs 7 and 9 nowhere supported the claim of PW15 that the petitioner made disclosure statement before aforesaid prosecution witnesses and as such, version put forth by PW15 could not be accepted in the absence of corroboration if any, from aforesaid witnesses, who allegedly signed the disclosure statement.

32. PW13 Dr. Shashi Dutt Sharma, who medically examined the complainant and his wife Urmila Devi, stated that he issued MLC Ext.13/A and injury was simple in nature, which could be caused by blow of danda. Similarly, he issued MLC Ext.PW13/B and after going through the X-ray he opined that the complainant Ram Chand had sustained grievous injury caused with sharp weapon possibly with sickle Ext.P6.

33. In his cross examination, he specifically denied that possibility of injury on the person of Urmila was, when a person falls from stairs and when person runs and strikes his-her fore-head with some object. He denied that possibility of injury on the person of the accused Ram Chand by way of fall or when a running person strikes with an object or when arm of a running person is pressed under its weight or if heavy material falls on the arm of a person. He further stated that object will not have enough force to cause such type of injury.

34. In the instant case, though medical evidence on record suggests that complainant and his wife sustained injuries but same was not sufficient to record conviction against the accused because prosecution remained unsuccessful in proving that injuries on the head and arm of PW1 and his wife was in fact caused by accused. None of independent witness associated by the prosecution supported the case of the prosecution, rather all the material witnesses have resiled. Even in the cross-examination, prosecution has not been able to extract anything contrary to what they stated in their examination in chief. Similarly, prosecution has not been able to prove the recovery of alleged weapon allegedly used for inflicting injury on the person of the complainant and his wife. Apart from above, as has been observed, in the earlier part of the judgment, courts below failed to apply same yardstick while weighing the evidence of prosecution as well as defence because evidence led on record by the defence in the shape of DW1 was solely discarded by the courts below on the ground that DW1 was related to the petitioner accused It is ample clear from the perusal of the judgment passed by the courts below that conviction of the petitioner accused has been recorded solely on the statement of PW1 and PW2, who are admittedly husband and wife.

35. This Court after examining the entire prosecution evidence available on record, has no hesitation to conclude that there was no sufficient evidence adduced on record by the prosecution to prove its case beyond reasonable doubt and both the courts below wrongly placed reliance upon the statement of PW1 and 2, who were the sole witnesses to alleged incident and recorded conviction of the petitioner accused, who successfully proved on record that families of the complainant as well as petitioner accused had litigation pending in court for the last 18-19 years. As noticed above this Court, noticed material contradiction in the statement of PWs and as such, same could not be relied upon while recording conviction of the petitioner accused, hence, judgments passed by the courts below deserve to be quashed and set aside.

36. Consequently, in view of the detailed discussion made herein above, present petition is allowed and judgments passed by the courts below are quashed and set-aside. Petitioner accused is acquitted of the charges framed against him. Interim order, if any, vacated. Bail bonds of the accused are discharged. Needles to say, Mr. Chaudhary, shall be entitled to fee as is admissible to the legal aid counsel as per law. Pending application, if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Mansarovar Infratech Private Limited .....Petitioner.

Versus

Neftogaz India Privat Limited and others. .....Respondents.

Arbitration Case No. 70 of 2015
Reserved on: 29.08.2016
Date of decision: 28th November, 2016

Arbitration and Conciliation Act, 1996- Section 8- The work of widening and strengthening of Theog-Kotkhai-Hatkoti-Rohru Road from 0+00 k.m. to 80+684 k.m. was awarded in favour of second respondent who executed a sub contract with the first respondent- first respondent entered into an agreement with the petitioner - the work was subsequently cancelled and the machinery of the petitioner was impounded along with the machinery of second respondent – a

civil suit was filed by the petitioner, which is pending disposal- a civil writ petition was filed, which was dismissed as not maintainable in view of the arbitration clause- the payment of the bill has not been made to the petitioner- hence, permission was sought to appoint the arbitrator – the respondent No.2 stated that it had not entered into any contract with the petitioner and the petition is not maintainable- held, that principal contractor is liable to indemnify the claim of the sub-contractor like the petitioner – however, in absence of any signed written agreement between the parties, the petition is not maintainable against the respondent No.2- however, there is a written memorandum of understanding between the petitioner and the respondent No.1, which can be referred to the arbitrator – the petition allowed and Arbitral Tribunal appointed to adjudicate the claim of non-payment of the dues of the petitioner. (Para-9 to 16)

Cases referred:

Chloro Controls India Private Limited V. Severn Trent Water Purification Inc. and others, (2013) 1 Supreme Court Cases 641

Essar Oil Limited V. Hindustan Shipyard Limited and others, (2015) 10 Supreme Court Cases 642

For the petitioner:	Mr. Rahul Singh Verma, Advocate.
For the respondents:	Mr. N.K. Sood, Sr. Advocate with Mr. Aman Sood, Advocate for respondent No.2. Respondents No. 1 and 3 already *ex-parte*.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

The petitioner is a Company registered under the Companies Act, 1956. This petition has been filed by the petitioner with a prayer to appoint an Arbitral Tribunal for resolution of its disputes with the respondents.

2. The Himachal Pradesh Road and other infrastructure Development Corporation (HPRIDC) had awarded the work namely "Widening and strengthening of Theog-Kotkhai-Hatkoti-Rohru Road from 0+000Km to 80+684 Km." vide Contract No. (PW/SRP/RIDC/HP/5 (ICB)). An agreement came to be executed between the Government of Himachal Pradesh and the 2nd respondent in this regard. The 2nd respondent had executed a sub-contract with Naftogaz India Private Limited, the 1st respondent on 30.07.2011 and thereby tendered the execution of the aforesaid work by respondent No. 1. Respondent No. 1 had further executed memorandum of understanding (MoU)/agreement, Annexure P-1 with the petitioner-Company on 16.12.2011. Before that, letter of intent dated 01.11.2011, Annexure P-2 was issued by respondent No. 1 to petitioner-Company. In terms of Memorandum of Understanding, Annexure P-1, the residuary work was to be executed by petitioner and payment allegedly to be released in its favour by respondent No. 2 i.e. the Principal Contractor. Respondent No. 2 with respect to the work executed by the petitioner has made through RTGS, payment of Rs.1,75,00,000/- on 28.04.2012 and Rs.47,92,436/- on 28.06.2012 on verification of its bills by respondent No. 1 on approval thereof by respondent No. 2. The statement of accounts, Annexure P-3 has been produced by the petitioner in support of this aspect of its case.

3. The Government of Himachal Pradesh had cancelled the work tendered to the 2nd respondent on 2.7.2012. As a result thereof, the machinery of the petitioner deployed for execution of the work was also impounded by the employer along with machinery of Principal Contractor, the 2nd respondent. A Civil Suit for recovery of damages on this score filed by the petitioner is pending disposal in this Court. A Civil Writ Petition bearing No. 3195/2014 filed by the petitioner was dismissed by this Court being not maintainable, in view of the arbitration clause in the Memorandum of Understanding, Annexure P-1. The liberty was reserved to the petitioner to seek appointment of Arbitrator for resolution of disputes in accordance with law.

Since payment of pending bills i.e. dated 5.12.2013 in the sum of Rs.2,08,32,094/- and dated 04.01.2015 in the sum of Rs.3,35,98,304/- has not been made by the 2nd respondent for want of verification thereof by the 1st respondent and as there exist arbitration clause in the MoU, Annexure P-1 qua resolution of disputes between the parties by an Arbitrator, hence this petition.

4. The sub-contractor, the 1st respondent has failed to put in appearance despite due service of notice, therefore, was ordered to be proceeded against ex-parte. The proforma respondent No. 3 is also ex-parte. Now if coming to the reply filed on behalf of Principal Contractor, the 2nd respondent, in preliminary it is averred that there being no arbitration agreement in existence between the petitioner and the said respondent and that in terms of Arbitration and Conciliation Act, 1966, the arbitration can only be between two contracting parties i.e. the signatory to an agreement and also that since the 2nd respondent has never entered into any agreement with the petitioner, therefore, petition qua said respondent is devoid of merits and as such sought to be dismissed. The Memorandum of Understanding, Annexure P-1 is between the petitioner and the 1st respondent and as per the same, arbitral proceedings can only be held at Noida (U.P.), therefore, this petition is stated to be not maintainable in this Court. In view of Civil Suit No. 31/15 is stated to be filed by the petitioner in this Court for recovery of amount based upon similar claims/disputes, therefore, on this score also, this petition is not maintainable, because two parallel proceedings for adjudication of almost same and similar claims are not legally permissible.

5. On merits, while reiterating that there exists no agreement between the petitioner and the 2nd respondent, the petition against the said respondent is stated to be not maintainable. The payment of Rs.1,75,00,000/- on 28.04.2012 and Rs.47,92,436/- on 28.06.2012 by the 2nd respondent to the petitioner were not on account of its liability towards the petitioner nor the same were made towards the part payment for execution of work and rather to respondent No. 1 through bank transfer on account of advance and payment of salary etc., to its workers. The liability of the 2nd respondent qua execution of work in question was towards respondent No. 1 and not the petitioner. The agreement (MoU) dated 16.12.2011, Annexure P-1 is stated to be between the petitioner and respondent No. 1, hence an arrangement mutually binding them and not the 2nd respondent. The claims, if any, of the petitioner have to be met by the 1st respondent and the 2nd respondent is not liable to indemnify the same. The petition, as such, has been sought to be dismissed.

6. In rejoinder, the petitioner-Company has denied the contentions to the contrary being wrong and has reiterated its case as set out in the petition.

7. Mr. Rahul Singh Verma, learned counsel representing the petitioner has strenuously contended that respondents No. 1 and 2 both are liable to indemnify the claims of the petitioner, as according to him, in terms of Section 8 and 45 of the Act, the arbitral proceedings can be sought to be initiated against 3rd party like the 2nd respondent. The Principal Contractor, in the present case, according to Mr. Verma had sub-contracted the work to the 1st respondent and that the petitioner-Company has been associated vide Memorandum of Understanding, Annexure P-1 to execute the work at such sums and costs payable by the Principal Contractor, of course, through its sub-contractor, the 1st respondent. It has, therefore, been urged that in a situation, if arbitral proceedings are allowed to be initiated only against the 1st respondent, the sub-contractor the petitioner will have to file civil suit against the 2nd respondent for adjudication of his claims against the said respondent and in that event two parallel proceedings qua same subject matter of dispute will take place simultaneously. Mr. Verma in support of arguments, he addressed has placed reliance on the judgment of the Apex Court in ***Chloro Controls India Private Limited*** V. ***Severn Trent Water Purification Inc. and others, (2013) 1 Supreme Court Cases 641***.

8. In order to repel the arguments addressed on behalf of the petitioner-Company, Mr. N.K. Sood, learned Senior Advocate assisted by Mr. Aman Sood, Advocate has very ably argued that for want of a singed contract agreement between the petitioner and the 2nd respondent, the appointment of Arbitrator against the 2nd respondent cannot be sought and as

such, the petition qua said respondent has been sought to be dismissed. Mr. Sood has also urged the question of jurisdiction of this Court to entertain the petition. The ratio of judgment in ***Chloro Controls India Private Limited*** (Supra) according to Mr. Sood is not applicable and rather distinguishable in the given facts and circumstances of this case.

9. Analyzing the rival submissions in the given facts and circumstances and also the legal provisions, the sole question arises for determination in this petition is as to whether no arbitral proceedings can be sought to be initiated against the 2nd respondent, who is not signatory to the Memorandum of Understanding, Annexure P-1 nor any contract agreement exists between the said respondent and the petitioner. The answer to this poser in all fairness and in the ends of justice would be in affirmative for the reason that bare reading of Section 8 of the Act makes it crystal clear that it is only those parties who can be referred to arbitration where there exists an arbitration agreement between them and one of such party to such agreement personally or any person claiming through or under him may apply for appointment of arbitrator, however, not later than the date of submitting his first statement on substance of disputes. This Court in this regard is supported by the ratio of judgment of the Apex Court in ***Essar Oil Limited*** V. ***Hindustan Shipyard Limited and others, (2015) 10 Supreme Court Cases 642***, where in the similar facts and circumstances, the Apex Court has held as under:

> "22. We have heard the learned counsel for the parties at length and have also considered some judgments cited by them and the documents which had been placed on record and relied upon by them.
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> 23. Upon hearing the learned counsel and looking at the contract entered into between the appellant and the respondent and upon perusal of other letters, we believe that the view expressed by the High Court cannot be accepted.
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> 24. It is true that the ONGC had made payment to the appellant directly on several occasions. Upon perusal of the correspondence, we find that some understanding, but not amounting to any agreement or contract, was arrived at between the ONGC and the respondent for making direct payment to the appellant, possibly because the respondent was not in a position to make prompt payments to the appellant. It also appears that on account of the delay in making payment to the appellant, the work of the ONGC was likely to be adversely affected. The ONGC was interested in getting its work done promptly and without any hassles. In the circumstances, upon perusal of the correspondence, which had taken place between the ONGC and the respondent, it is clear that so as to facilitate the respondent, the ONGC had made payments on behalf of the respondent to the appellant directly.
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> 25. Simply because some payments had been made by the ONGC to the appellant, it would not be established that there was a privity of contract between the ONGC and the appellant and only for that reason the ONGC cannot be saddled with a liability to pay the amount payable to the appellant by the respondent.
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> 26. It is also pertinent to note that the Arbitration Agreement was only between the appellant and the respondent. The ONGC was not a party to the Arbitration Agreement. When a dispute had arisen between the appellant and the respondent in relation to payment of money, the appellant had initiated the arbitration proceedings. As the ONGC was not a party to the Arbitration Agreement, it could not have been represented before the Arbitral Tribunal. If the ONGC was not a party before the Arbitral Tribunal, the Tribunal could not have made any Award making the ONGC liable to make payment to the appellant. In the aforestated factual and legal position, the Arbitral Tribunal could not have made the ONGC liable in any respect and rightly, the majority view of the Arbitral Tribunal was to the effect that the ONGC, not being a party to any contract or Arbitration

> Agreement with the appellant, could not have been made liable to make any payment to the appellant.
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> 27. We are in agreement with the view expressed by the majority of the Arbitral Tribunal. In our opinion, the High Court had committed an error by not considering the above facts and by observing that the appellant will have to take legal action against the ONGC for recovery of the amount payable to it. If one looks at the relationship between the appellant and the respondent, it is very clear that the respondent had given a sub-contract to the appellant and in the said agreement of sub-contract, the ONGC was not a party and there was no liability on the part of the ONGC to make any payment to the appellant. Moreover, we could not find any correspondence establishing contractual relationship between the ONGC and the appellant. In the circumstances, the ONGC cannot be made legally liable to make any payment to the appellant. As stated hereinabove, only for the sake of convenience and to get the work of the ONGC done without any hassle, the ONGC had made payment to the appellant on behalf of the respondent without incurring any liability to make complete payment on behalf of the respondent.
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> 28. The learned counsel appearing for the appellant failed to show any document in the nature of a contract entered into between the appellant and the ONGC whereby the ONGC had made itself liable to make payment to the appellant. Even when the payment had been made by the ONGC, it was very clear that the payments were made on behalf of the respondent as the ONGC was debiting the account of the respondent by the amount paid to the appellant. It is important that the payment was made to the appellant only upon certification of work done by the respondent. The ONGC had given a contract to the respondent. The ONGC had never entered into any contract with the appellant and therefore, it did not rely upon any certification or any statement made by the appellant in relation to quantum of work done by the appellant. This fact also shows that the ONGC was concerned with the work which had been approved by the respondent and instead of making payment to the respondent, the ONGC had made payment to the appellant on behalf of the respondent, though there was no legal obligation on the part of the ONGC to make such a payment to the appellant.
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> 29. For the aforestated reasons, we do not agree with the view expressed by the High Court and the impugned judgment delivered by the High Court is set aside. The ONGC shall not be liable to make payment, as rightly decided by the Arbitral Tribunal, to the appellant but the payment shall have to be made by the respondent, who had given a sub- contract to the appellant. Majority view of the Arbitral Tribunal on the above issue is confirmed and the view of the High Court is not accepted. The respondent shall accordingly make payment to the appellant."

10. The controversy in this petition is squarely covered by the ratio of the judgment ibid in favour of respondent No. 1 and against the petitioner. The law laid down by the Apex Court in ***Chloro Controls India Private Limited*** (Supra) being distinguishable on facts is not applicable to this case. In that case, the appointment of Arbitrator was sought under Section 45 of the Act, which pertains to the foreign arbitration and not domestic arbitration. True it is that the scope of Section 8 of the Act has also been discussed in this judgment, however, in order to find out a distinction between two provisions i.e. under Section 8 of the Act and also under Section 45. It has been held in this judgment that there is mark distinction between the provisions contained under Section 8 and Section 45 of the Act. As a matter of fact, it is Section 8 of the Act which pertains to the domestic arbitral proceedings in view of the judgment in ***Essar Oil Limited*** (supra). It has further been held in this judgment that the payment to the sub-contractor/an associate like the petitioner herein directly by the Principal Contractor should not be construed to infer that there being no contract agreement in existence, still the Principal

Contractor is liable to indemnify the claims of the associate/sub-contractor like the petitioner. Above all, the 2nd respondent has clarified to the satisfaction of this Court that a sum of Rs.1,75,00,000/- on 28.04.2012 and Rs.47,92,436/- on 28.06.2012 deposited by the 2nd respondent through RTGS in the account of petitioner is the payment made to respondent No.1. The appointment of arbitrator can be sought by a party to an agreement against the other party to such agreement, if there exists a signed contract agreement between the said parties. Being so, the petition against respondent No. 2 is not maintainable nor is there any question of any disputes between the said respondent and the petitioner.

11. There exists a contract agreement (MoU), Annexure P-1 between the petitioner and the sub-contractor i.e. the 1st respondent. The arbitration clause in existence in the contract agreement, Annexure P-1 reads as follows:

> "25. That in respect for the matters requiring resolution of dispute, the parties shall meaningfully negotiate in an endeavor to resolve such matters and will be sorted out amicably. If the matter, question or dispute to arbitration subject to the provision of the India Arbitration and conciliation act 1996 and contract act 1957 and they statuary modifications and enactment thereof. The language of the arbitration shall be the English language and arbitration proceeding shall be held in Noida (Uttar Pradesh)."

12. As noticed at the very out set, since the 1st respondent has not opted for putting appearance despite service and rather allowed itself to be proceeded against ex-parte, the petitioner-Company has been able to show that the disputes on account of non-payment of its dues have arisen. Therefore, such disputes in terms of arbitration clause referred to hereinabove can only be resolved by an arbitral tribunal. Therefore, a case for appointment of Arbitrator to adjudicate the disputes between the petitioner and the 1st respondent deserves to be appointed.

13. Now if coming to the arguments addressed on behalf of the petitioner that exclusion of the 2nd respondent from arbitral proceedings would result in filing a civil suit for recovery of claims against the said respondent and consequently would result into two parallel proceedings qua the same subject matter of dispute, the same in view of there being no contract between the petitioner and the 2nd respondent is far fetched. Whatever is the grouse of the petitioner, it is against respondent No. 1 and not against respondent No.2. Any how these findings shall remain continued to the decision of this petition, the suit or petition, if any, filed by the petitioner against the 2nd respondent will be decided by the Court concerned on its own merits and in accordance with law.

14. Therefore, though the 2nd respondent has denied any outstanding claims of the petitioner against it, however, if any such claims of the petitioner exist against the 2nd respondent, a suit can be filed for recovery of the same in appropriate Court having jurisdiction over the matter.

15. Now if coming to the 2nd limb of arguments that in terms of MoU, the arbitral proceedings can only be initiated in Noida (U.P.). True it is that it find so recorded under Clause 25 thereof, however, the same is only for the purpose of holding the arbitral proceedings and not oust the jurisdiction of this Court to entertain this petition and appoint the Arbitrator. Since the Theog-Kotkhai-Hatkoti-Rohru road, work whereof has been executed by the petitioner is situated within the territorial jurisdiction of this Court, therefore, the Arbitrator can only be appointed by this Court. A reference in this behalf can also be made to the provisions contained under Section 20 of the Code of Civil Procedure, which provides that the suit can be instituted either at a place where defendant resides or where the cause of action arose. In the case in hand, since the cause of action has arisen within the jurisdiction of this Court, therefore, this petition is absolutely maintainable.

16. In view of what has been said hereinabove, this petition succeeds and the same is accordingly allowed. Consequently, an Arbitral Tribunal comprising Shri Harish Bahl, Senior Advocate and Shri Chandranarayana Singh, Advocate, is appointed to resolve the disputes having

arisen on account of non-payment of claims of the petitioner i.e. Rs.2,08,32,094/- as per the bill dated 05.02.2013 and Rs.3,35,98,304/- dated 04.01.2015, total Rs.5,44,30,398/- the balance payment towards execution of work of Theog-Kotkhai-Hatkoti-Rohru road. Learned Arbitral Tribunal shall enter upon the reference within two weeks from the date of receipt of an authenticated copy of this judgment. It is left open to the Arbitral Tribunal to fix the fee at its own, of course taking into consideration the guiding factors in Schedule-IV to Arbitration and Conciliation Act. The parties on both sides shall share the fee so settled equally. A sum of Rs.1,00,000/- is to be deposited by them on the 1st date of hearing. Both the members of Arbitral Tribunal shall share this amount at per their entitlement. The remaining amount shall be payable to the Arbitral Tribunal on termination of proceedings i.e. on or before the pronouncement of award.

17. With these observations, the petition stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. ...Appellant.
Versus
Ashok Kumar and others ....Respondents.

Cr. Appeal No. 606 of 2008
Decided on : 28/11/2016

Indian Penal Code, 1860- Section 323, 325 and 506 read with Section 34- Informant was in her house with her son – the accused came and made inquiry from the informant about her son- accused pulled the arm of the shirt worn by the informant and tore it from arm and neck – son of the informant came, who was beaten by the accused along with other co-accused – the accused were tried and acquitted by the Trial Court- held in appeal that the presence of accused K and A was not disputed in the cross-examination –the grievous hurt was not established as x-ray was not connected to the MLC- recovery of the torn short was proved, which corroborated the prosecution version - no person had deposed about the role of J- hence, he was rightly acquitted- appeal partly allowed and accused A and K convicted of the commission of offences punishable under Sections 451, 323 and 506 read with Section 34 of I.P.C. (Para- 9 to 17)

For the Appellant: Mr. R.S.Thakur, Additional. A.G.
For the Respondents: Mr. N.S.Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 7.6.2008 by the learned Judicial Magistrate, 1st Class, Ghumarwin, District Bilaspur, in Case No. 287/2 of 2004/2001, whereby she acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 15.2.2001 the complainant Kailash Devi came to the Police Station alongwith her son Mukesh Kumar and Kashmiri Devi Pradhan Berthin. The complainant reported that on 15.2.2001 in the morning they were in their house when at about 8.30 the accused Kishore Kumar came in side their house and asked where is Mukesh Kumar. She stated that Mukesh Kumar was in side the house. On this the accused Kishor Kumar asked her to bring Mukesh outside into the courtary. The complainant Kailash Devi asked the accused Kishore Kumar what the matter was, however, Kishor Kumar accused insisted that he shall himself ask to Mukesh Kumar and became angry. The accused Kishor Kumar

pulled the arm of shirt worn by the complainant and tore it from the arm and neck. The accused threatened that he will burn the vehicle belonging to the complainant and he will do away with like of Mukesh Kumar by using pistol. In the meanwhile, Mukesh Kumar came out side to rescue the complainant, however, accused Kishor Kumar pulled Mukesh Kumar towards the Berthin Chowk there accused Kishore Kumar along with his brother Ashok Kumar and co-accused Jeevan started beating Mukesh Kumar with kicks and fist blows. Due to these beatings Mukesh Kumar was injured in his stomach and back etc. On the statement of complainant the F.I.R. was registered. The injuries received by Mukesh Kumar were got medically examined. The injuries were found to be simple in nature except the dental injuries which were found to be grievous with the blunt weapon. Thus case under Section 325 IPC was made out against the accused. Police took into possession shirt belonging to Kailash Devi and prepared spot map and recorded the statement of witnesses. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 325, 323, 506 IPC read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 6 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The learned trial Court had pronounced a verdict of acquittal upon the accused respondents (a) on anvil of the complainants' testification before the learned trial Court holding visible digressions from the contents embodied in Ext. PW1-/A wherein she had unveiled qua Kishore Kumar visiting her house, whereas her testification in contradiction thereto holding echoings qua co-accused Ashok Kumar visiting her house; (b) hers while testifying embellishing besides improving upon the factum qua the wielding of a pistol by Ashok Kumar significantly when the factum aforesaid stood undisclosed by her in her previous statement recorded in writing; (c) the testifications of the prosecution witnesses omitting to unflinchingly unveil the factum qua denture of victim Mukesh Kumar suffering impairment also a tooth standing dislodged therefrom; (d) contradictions occurring in the testification of PW-4 vis.a.vis. the testification of PW-1 qua the place whereat shirt Ext.P-1 belonging to PW-1 begot tearings significantly with PW-1 deposing qua Ext.P-1 begetting tearings at her house whereas in contradiction thereof PW-4 testifying qua the relevant tearings borne thereon occurring near

Berthin Chowk; (e) Omission of examination by the prosecution of the doctor who prepared MLC qua Mukesh Kumar.

10. Insofar as the initial reason as stands propounded by the learned trial Court to pronounce an order of acquittal upon the accused respondents significantly its portraying qua thereupon the genesis of the prosecution case remaining unproven stands bereft of vigour arising from the factum of the learned defence counsel while subjecting PW-1 to cross-examination his putting a suggestion to her couched in an affirmative phraseology, holding therewithin unfoldments, qua both Ashok Kumar and Kishore Kumar visiting the house of PW-1, suggestion whereof obviously elicited from her an apposite affirmative response. However, the learned counsel appearing for the accused respondents contends of the impact of the aforesaid couching in an affirmative phraseology of the suggestion aforesaid put by the learned defence counsel to PW-1 while holding her to cross-examination is merely an attempt on his part to belittle her creditworthiness rendering them to be not readable to hold any communication qua any acquiescence thereof by the defence. However, the aforesaid submission is unacceptable to this Court as the learned counsel for the respondents while holding the prosecution witnesses to cross-examination stands enjoined to with utmost skill besides with extreme wariness formulate the suggestions to be put to the prosecution witnesses. A defence counsel for negativing the testifications of the prosecution witnesses occurring in their respective examinations in chief stands enjoined to put suggestions to them couched in a disaffirmative phraseology whereupon the prosecution witnesses would proceed to render their answer thereto either in the affirmative or in the negative. However, the learned defence counsel while holding PW-1 to cross examination rather has proceeded to couch in an affirmative phraseology the apposite suggestions which he purveyed to PW-1 while holding her to cross examination, answer(s) whereto also stood elicited from her in the affirmative. The sequel of the aforesaid affirmative couching of the phraseology of the apposite suggestions put by the learned defence counsel to PW-1 while holding her to cross-examination cannot hold any communication than of the defence acquiescing to the factum of both Kishore Kumar and Ashok Kumar recording their respective presence at the relevant site of occurrence at the stage when the genesis of the prosecution case erupted. Therefrom it was inapt for the learned trial Magistrate to conclude qua with PW-1 while testifying qua the aforesaid facet hers hence improving besides detracting from her previous statement in writing wherein she disclosed qua accused Kishore Kumar recording his presence at the relevant site of occurrence in contradiction whereof she testified qua rather accused Ashok Kumar recording his presence at the relevant site of occurrence her testification hence standing vitiated with the taints aforesaid nor it was apt for the learned trial Magistrate to conclude qua with blatant contradictions occurring in the testification of PW-1 embodied in her examination in chief vis.a.vis. her previous statement recorded in writing wherein the presence of both Ashok Kumar and Kishore Kumar at the relevant site of occurrence stood unembodied, its vigour hence standing eroded besides dispelled, conspicuously when the effect of the aforesaid acquiescence of the defence for reasons aforestated is qua both accused Ashok Kumar and co-accused Kishore Kumar recording their presence at the relevant site of occurrence.

11. Apparently in the previous statement qua the prosecution case embodied in F.I.R. comprised in Ext.PW-1/A there occurs a bespeaking therein by the complainant qua Kishore Kumar threatening to eliminate Mukesh Kumar by firing a pistol shot at him in consonance therewith the learned defence counsel while holding PW-1 to cross examination put a suggestion to her couched in an affirmative phraseology whereto PW-1 rendered an apposite affirmative answer thereupon the inevitable sequel which is warranted, is qua the defence acquiescing to the aforesaid factum yet unlike the sequel emanating from the precedingly alluded acquiescence made by PW-1, the effect of the acquiescence of the defence of Ashok Kumar at the relevant time wielding a pistol would not capitalize any inference qua thereupon the prosecution succeeding in proving qua accused Ashok Kumar wielding a pistol significantly when on a close reading of the cross-examination of the Investigating Officer it is apparent qua its unveiling qua during the course of his holding investigations his not recovering any pistol from the possession of the accused nor obviously any memo in consonance therewith neither stood adduced in

evidence nor stood concomitantly proven. In sequel thereto it appears of the prosecution not proving the factum of Ashok Kumar wielding a pistol more especially when on conclusion qua the investigations held by the Investigating Officer no recitals occur in the apposite report filed by him before the Court concerned holding therewithin echoings qua accused Ashok Kumar while holding a pistol his infracting the provisions of the Arms Act.

12. The learned trial Magistrate had concluded qua the prosecution abysmally wanting in adducing cogent proof for succoring the charge qua the accused respondents qua theirs committing an offence punishable under Section 325 IPC arising from the teeth of Mukesh Kumar standing dislocated from his denture on blows standing perpetrated upon him by the accused. Also on anvil of the prosecution witnesses deposing contrarily qua the factum aforesaid besides on anvil of the prosecution not proving the apposite MLC nor the prosecution proving the report of the radiologist concerned who conducted an x-ray examination of the denture of Mukesh Kumar, it concluded of hence the aforesaid factum remaining unsubstantiated. Initially the learned Additional Advocate General makes a submission qua with the prosecution witnesses in their respective cross-examinations significantly PW-1, PW-2 and PW-3 while meteing apposite affirmative answers to the suggestions couched in an affirmative phraseology as stood put to them by the learned defence counsel suggestion(s) whereof while encompassing the facet aforesaid hence holding a loud proclamation of the defence acquiescing qua the teeth occurring in the denture of Mukesh Kumar suffering dislocation besides their falling apart therefrom. However, the aforesaid submission warrants its standing discountenanced given the Investigating Officer in his cross-examination echoing therein qua on Mukesh Kumar recording his presence before him his complaining qua only his suffering pain in his denture whereas his thereat not detecting any of his teeth standing dislocated therefrom or their falling apart from his denture. The aforesaid unfoldments made by the Investigating Officer during the course of his standing subjected to cross-examination by the learned defence counsel when obviously is enjoined to be read in coagulation with the testifications occurring in the cross-examination of the prosecution witnesses who contrarily on apposite affirmative suggestions qua the facet aforesaid put respectively to them by the learned defence counsel meted affirmative answers thereto, in sequel whereto the apposite conclusion which warrants its standing formed by this Court significantly when the Investigating Officer on his standing subjected to cross-examination by the learned defence counsel he voices therein qua at the relevant time his not detecting the teeth occurring in the denture of Mukesh Kumar suffering any dislocation or theirs falling apart therefrom yet with the learned APP concerned not thereupon concerting to belie him by making a request upon the learned Magistrate for holding him to cross-examination qua the factum aforesaid begets an inference qua this Court standing constrained to conclude qua the prosecution acquiescing to the factum of the teeth occurring in the denture of Mukesh Kumar neither standing dislocated nor any of his teeth occurring therein falling apart.

13. Moreover, reiteratedly when this Court for reasons aforestated has concluded qua the Investigating Officer belying the testifications of other prosecution witnesses qua the facet aforesaid also when with his hence belying the testifications of the other prosecution witnesses qua the relevant facet aforesaid he stood not concerted by the learned APP to stand subjected to further examination or further cross-examination whereupon hence it is to be concluded of the prosecution acquiescing qua the factum of the relevant testifications qua the facet aforesaid occurring in the cross-examination of the Investigating Officer enjoying an aura of truth besides credibility. Also an inference stands erected qua the aforesaid testification of the Investigating Officer embodied in his cross-examination countervailing the effect of affirmative answers rendered by the prosecution witnesses to the apposite affirmative suggestion put to them by the learned defence counsel while holding them to cross-examination.

14. Furthermore, the prosecution was enjoined to significantly with the MLC concerned also the report of the Radiologist who subjected the denture of Mukesh Kumar to X-ray examination not falling within the ambit of Section 293 Cr.P.C whereupon alone the aforestated apposite report(s) hence falling within the statutory ambit of Section 292 Cr.P.C. would render

them to be per se admissible dehors their respective authors not stepping into the witness box. In sequel thereto it was imperative for the prosecution to prove the apposite MLC prepared by the doctor concerned qua victim Mukesh Kumar also to prove the apposite X-ray conducted by the radiologist concerned by its leading their respective authors into the witness box. The prosecution omitted to discharge the aforesaid onus of hence cogently proving the apposite MLC qua Mukesh Kumar besides the apposite report prepared qua him by the Radiological expert whereupon it is to be concluded of the prosecution not proving the contents existing therein. In sequel, thereto it is to be concluded of the prosecution not succeeding in proving the charge under Section 325 IPC against the accused.

15. Shirt Ext.P-1 stood recovered under memo Ext.PW-1/B and one of the witnesses thereto PW-4 has proven the factum of his signature occurring in memo Ext.PW-1/B whereunder its recovery stood effectuated. Also in his testification PW-4 echos qua Ext.P-1 belonging to PW-1 consequently with his admitting the occurrence of his signatures on Ext.PW-1/B wherein its recovery stood effectuated he stands estopped by the mandate of Sections 91 and 92 of the Indian Evidence Act to resile from its contents whereupon obviously an inference qua hence unflinching proof emanating from PW-4 qua effectuation of the relevant efficacious recovery thereunder can stand formidably erected besides with PW-4 also deposing qua Ext.PW-1/B standing owned by PW-1 whereupon his testification in contradiction with PW-1 qua its begetting tearings not as deposed by PW-1 at the latter's house but at Berthin Chowk pales into insignificance especially when the factum aforesaid of its begetting tearings at the house of PW-1 when stands unveiled in the examination in chief of PW-1 has remained unconcerted to stand rid of its sanctity by the learned defence counsel while holding her to cross-examination by his putting apposite suggestions for hence eroding the tenacity of the aforesaid unfoldments occurring in the examination in chief of PW-1. In sequel thereto also the effect of PW-4 contradicting PW-1 qua the relevant tearings brone on the shirt comprised in Ext.P-1 standing begotten not at the house of PW-1 rather at Berthin Chowk looses its force besides effect nor also thereupon the genesis of the prosecution case qua the relevant tearings qua the shirt of PW-1 standing begotten at her house stands uneroded of its sanctity. A close reading of the testifications of the prosecution witnesses does unfold of the learned defence counsel while holding them to cross-examination putting affirmative suggestion to them holding therewithin communication qua the accused dragging victim mukesh Kumar upto Berthin Chowk whereat they belaboured him whereto affirmative answer stood meted by the prosecution witness. The natural corollary thereof is of with the defence acquiescing to the factum of the accused respondent dragging victim Mukesh Kumar upto Berthin Chowk whereat they belaboured him, the factum aforesaid warranting imputation of credence thereupon.

16. Since none of the prosecution witnesses depose qua any incriminatory role in the alleged occurrence of accused Jeevan Kumar hence he stands acquitted of the charge framed against him in sequel whereto the judgement impugned herebefore against him is maintained and affirmed.

17. For the reasons which have been recorded hereinabove, this Court holds that the learned Judicial Magistrate has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Judicial Magistrate suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record. In sequel thereto, I find merit in the instant appeal, which is accordingly allowed and the judgment of acquittal qua accused respondents Ashok Kumar and Kishore Kumar rendered by the learned Judicial Magistrate, Ghumarwin, District Bilaspur, is quashed and set-aside. Consequently, for the reasons aforesaid the accused respondents Ashok Kumar and Kishore Kumar stand convicted for theirs committing offences punishable under Sections 451, 323 and 506 read with Section 34 IPC whereas they stand acquitted for offences punishable under Section 325 IPC. They be produced before this Court on 16th December, 2016 for theirs being heard on the quantum of sentence.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Sub Division Officer (Civil)-cum-Land Acquisition Collector. .....Appellant.

Versus

Harbhagwant Singh .....Respondent.

RFA No.111 of 2009 along with
RFAs No. 304, 307, 308, 337, 344, 345, 346, 347, 348, 349, 350, 351 and 352 of 2011
Reserved on: 17th November, 2016.
RFA No. 358 of 2011 along with
RFAs No. 359, 360, 361, 362, 363 and 364 of 2011.
Reserved on: 18th November, 2016.
Decided on : 28th November, 2016.

Land Acquisition Act, 1894- Section 18- The land was acquired for the extension of Airport, Gaggal – the land owners sought reference and the Reference Court enhanced the compensation – aggrieved from the order, the present appeal was filed – held in appeal that exemplar sale deed was executed subsequent to the date of notification and cannot be relied upon - the benefit of 20% increase was also not permissible – appeal allowed- award of the reference Court set aside and that of the Land Acquisition Collector restored. (Para-6 to 13)

Cases referred:

A. Natesam Pillai versus Special Tahsildar, Land Acquisition, Tiruchy, (2010)9 SCC 118

K. Posayya and others versus Special Tahsildar, (1955)5 SCC 233

Bhakra Beas Management Board & Anr. Versus State of H.P. & others, Latest HLJ 2003(H)) 1202

For the Appellant (s): Mr. Vivek Singh Attri, Deputy Advocate General.

For Respondent(s) : Mr. R.K. Sharma, Senior Advocate with Mr. Mohan Sharma, Advocate.

For the applicants in CMP No. 9535 of 2016 in RFA No.352 of 2011 : Mr. Sanjay Jaswal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

All the aforesaid appeals are being disposed of by a common judgment as they all pertain to lands which stood acquired under a notification common each of them besides thereupon the Land Acquisition Collector pronounced a common award.

2. Under the impugned awards recorded by the learned Reference Court(s), the latter assessed compensation qua the lands of the landowners @ Rs.750/- per square meter, whereupon, the compensation amount assessed qua the lands of the landowners by the Land Acquisition Collector suffered a steep hike. The State of Himachal Pradesh, standing aggrieved by the impugned awards of the learned Reference Court whereupon it for begetting their reversal has instituted herebefore the instant appeal(s).

3. RFA No. 358 of 2011 stands directed against the impugned award rendered on 22.5.2010 in RBT Ref. Case No. 28-K/05/03 by the learned Reference Court whereby it on the anvil of previous awards comprised in Ex.PW1/B and in Ex. C-1 has qua lands of the respondents concerned herein assessed compensation amount at par with the compensation

amount determined qua the lands of the landowners in RBT Ref. Case No.47-K/05/03, wherefrom RFA No. 352 of 2011 has arisen.

4. The lands of the landowners were brought to acquisition for the purpose of extension of Air Port at Gaggal. In respect of the lands of the landowners as stood brought to acquisition, the Land Acquisition Collector, on anvil of the annual average market price of lands prevailing in the mohal concerned at the stage contemporaneous to the issuance of the apposite notification had thereupon, assessed compensation qua the lands brought to acquisition. The landowners standing aggrieved by the relevant pronouncement of the Land Acquisition Collector, had therefrom preferred reference petitions before the learned Reference Court whereupon the latter proceeded to pronounce the relevant awards impugned hereat.

5. The learned Reference Court while pronouncing its rendition in RBT Ref. Case No. 55-K/2003, (pronouncement whereof stood relied upon by the learned Reference Court concerned in making its pronouncement in RBT Ref. Case No. 47-K/05/03) wherefrom RFA No. 111 of 2009 has arisen had computed compensation qua the lands of the landowner(s) by placing reliance upon sale exemplar comprised in Ex.PW3/A. For reliance thereupon by the learned Reference Court to hold a sanctified aura of validity, it was incumbent upon the learned Reference Court to ensure qua existence therebefore of evidence pronouncing qua satiation standing begotten qua the twin legal parameters (a) proximity in location angle occurring inter se the lands/land comprised in sale exemplar Ex.PW3/A vis-a-vis the lands of the landowners as stood brought to acquisition and (b) The execution of Ex.PW3/A holding proximity in time angle vis-a-vis the issuance of an apposite notification for bringing to acquisition the lands of the landowners.

6. At the outset, it is imperative to determine from the evidence as exists herebefore qua satiation standing begotten qua the enshrined parameter qua proximity in time angle occurring inter se issuance of the apposite notification under the Act whereupon the lands of the landowners stood brought to acquisition vis-a-vis the execution of Ex.PW3/A, whereupon, reliance as stood placed thereupon would hold tenacity. The principle of proximity in time occurring inter se execution of Ex.PW3/A vis-a-vis the issuance of the apposite notification whereupon the land/lands of the landowners stood brought to acquisition would stand satiated on Ex.PW3/A standing provenly executed in close proximity preceding the issuance of a notification under Section 4 of the Land Acquisition Act (hereinafter referred to as the Act) or its execution occurring in contemporaneity vis-a-vis the issuance of the apposite notification under the Act whereupon the lands of the landowners stood brought to acquisition. However, hereat the execution of the sale exemplar embodied in Ex.PW3/A occurred on 3.11.2000 whereas the apposite notification under the Act whereupon the lands of the landowners stood brought to acquisition, stood prior thereto issued on 28.6.1999. However, the mere factum qua the occurrence of execution of Ex.PW3/A taking place subsequent to the issuance of the apposite notification under the Act, would not dispel its sanctity nor thereupon the learned Reference Court would stand faulted in placing reliance thereupon unless as mandated in a verdict recorded by the Hon'ble Apex Court reported in ***A. Natesam Pillai versus Special Tahsildar, Land Acquisition, Tiruchy, (2010)9 SCC 118,*** the relevant paragraph No.13 whereof stands extracted hereinafter, unflinching evidence stood adduced before the learned Reference Court in portrayal of the market value borne by the lands occurring in proximity to the location of the land(s) which stood brought to acquisition earlier thereto besides thereupto its execution remaining unfluctuated besides stable also evidence standing adduced qua their occurring no apparent upsurgings or hikes in the market value of the apposite lands borne on the apposite post notification executed sale exemplar since the issuance of the apposite notification under the Act upto the execution of the sale exemplar comprised in Ex.PW3/A. However, with a portrayal standing embodied in Ex.PW3/A qua the value of the lands depicted therein standing constituted in a sum of Rs.45,000/- per kanal at a stage subsequent to the issuance of the apposite notification under Section 4 of the Act whereas with PW2 Vinod Kumar in his testification communicating therein qua the land(s) brought to acquisition holding a value Rs. 5 to 6 lacs per kanal whereupon obviously an evident steep hike since the issuance of the apposite notification

under Section 4 of the Act vis-a-vis the occurrence of execution of a sale exemplar embodied in Ex.PW3/A, stands evidently evinced. Accentuated vigour to the inference aforesaid qua since in close contemporaneity to the issuance of the apposite notifucation under the Act whereunder the lands of the landowners stood brought to acquisition upto the stage of post notification executed sale exemplar comprised in Ex.PW3/A, the market value of lands occurring in close proximity vis-a-vis the lands of the landowners noticing fluctuations besides escalations stands galvanized from the testification of RW-1, who has therein unveiled qua in close contemporaneity to the issuance of the apposite notification, the market value borne by the lands in the mohal concerned standing constituted in a sum of Rs.14,974/- per kanal, whereas, with the market value of land comprised in Ex.PW3/A pronouncing therewithin qua its sale consideration standing constituted in a sum of Rs.45,000/- per kanal, is a loud besides an apparent disclosure qua the mandate of the Hon'ble Apex Court qua any reliance placed upon Ex.PW3/A being unbereft of any stain of vitiation unless evidence stands adduced in portrayal of the market value of the relevant lands at the stage contemporaneous to the issuance of the apposite notification upto the execution of the post notification executed sale exemplar comprised in Ex.PW3/A not unraveling fluctuations or escalations since therefrom upto the execution of Ex.PW3/A, whereas, with hereat stark noticeable fluctuations besides steep hikes in the value of the relevant lands since the stage contemporaneous to the issuance of the apposite notification upto the execution of Ex.PW3/A are vividly apparent thereupon the mandate of the Hon'ble Apex Court for reliance being placed upon a post notification executed sale exemplar comprised in Ex.PW3/A stands infracted, rendering reliance placed thereupon by the Reference Court to hold no vigour. Necessarily when reiteratedly the market value of the relevant lands located in proximity to the lands brought to acquisition display a visible escalation contrarily when there was a surging ahead of the market value of lands occurring in proximity to the land(s) brought to acquisition, the principle envisaged in the relevant paragraph of the aforesaid citation qua a post notification executed sale exemplar being amenable for reliance being placed thereupon only on evidence surging forth in personification qua the market value of lands prevailing in the locality whereat the lands of the landowners brought to acquisition stood located at the time contemporaneous to the issuance of the apposite notification or in close preceding proximity prior thereof remaining upto the occurrence of execution of Ex.PW3/A stable besides unfluctuated, hence, standing visibly transgressed. Moreover, infraction of the principle encapsulated in the aforesaid citation qua a post notification executed sale exemplar holding probative sinew for reliance being placed thereupon for determining compensation amount qua the apposite lands as stood prior thereto subjected to initiation of acquisition proceedings in respect thereof, on eruption of evidence qua since the issuance of the apposite notification upto the execution of the apposite post notification executed sale exemplar there occurring no visible steep hike in the value of lands located in proximity to the relevant lands, stands also reiteratedly triggered, by the factum of RW-1 testifying qua the five year average market value of the lands located in proximity to the lands of the landowners as stood brought to acquisition at the stage contemporaneous to the issuance of the apposite notification standing detected to be in a sum of Rs.14,974/- per kanal whereas with the relevant apposite post notification executed sale exemplar comprised in Ex.PW3/A depicting therewithin the market value of the land borne thereon to hold a value of Rs.45000/- per kanal does hold a stark display qua the prices of the relevant lands prior to or at the stage contemporaneous to the issuance of the apposite notification under the Act upto the execution of Ex.PW3/A noticing a steep hike rather than there occurring no apposite fluctuations since the issuance of the apposite notification under Section 4 of the Act upto the execution of Ex.PW3/A, whereupon imputation of reliance upon the apposite post notification executed sale exemplar Ex.PW3/A, is bereft of sanctity. Paragraph No.13 of the aforereferred verdict of the Hon'ble Apex Court reads as under:-

> "This Court in Administrator General of W.B. v. Collector, Varanasi (1988)2 SCC 150 has held:
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> > "13. ....Such subsequent transactions which are not proximate in point of time to the acquisition can be taken into account for purposes of determining

whether as on the date of acquisition there was an upward trend in the prices of land in the area. Further under certain circumstances where it is shown that the market was stable and there were no fluctuations in the prices between the date of the preliminary notification and the date of such susbequent transaction, the transaction could also be relied upon to ascertain the market value. This Court in State of U.P. v. Major Jitendera Kumar, (19082)2 SCC 382 observed:

"3..... It is true that the sale deed, Ex. 21 upon which the High Court has relied is of a date three years later than the notification under Section 4 but no material was produced before the court to suggest that there was any fluctuation in the market rate at Meerut from 1948 onwards till 1951 and if so to what extent. In the absence of any material showing any fluctuation in the market rate the High Court thought it fit to rely upon Ext. 21 under which the Housing Society itself had purchased land in the neighbourhood of the land in dispute. On the whole we are not satisfied that any error was committed by the High Court in relying upon the sale deed, Ext. 21."

But this Principle could be appealed to only where there is evidence to the effect that there was no upward surge in the prices in the interregnum. The burden of establishing this would be squarely on the party relying on such subsequent transaction." (emphasis supplied)." ....(p.122).

7. The further effect of the landowners not adducing evidence within the ambit of the aforesaid exception to the normal rule qua an apposite post notification executed sale exemplar not warranting imputation of reliance thereupon, is qua also an inference standing erected qua the apposite;y executed post notification sale exemplar holding a vice of rigidness also the sale consideration embodied therein being unamenable for any apposite reliance standing placed thereon, significantly, when it stood evidently executed with the executants thereto while perceiving the impending launching of acquisition proceedings qua lands occurring in proximity thereof, theirs inflating the sale consideration pronounced therein merely for begetting qua the lands of the landowners determination of an unfair and unjust compensation amount. In formulating the aforesaid expostulation of law, this Court is supported by a verdict of the Hon'ble Apex Court reported in ***K. Posayya and others versus Special Tahsildar, (1955)5 SCC 233***, relevant paragraph No.4 whereof stands extracted hereinafter:-

"4. The question, therefore, is what is the correct principle of law to be applied in determining the market value of vast extent of lands acquired for a project. Admittedly, Ex. A-1 dated 31.12.1980 is the torchlight for the claimants to lay higher claim. It is a post notification sale of the land situated in Chakrdevrapalli. According tot he claimants, it is situated at a distance of 3 to 4 kms from Village Alivelu. According to Land Acquisition Officer, the distance between the two villages is 30 kms. Possession of these lands admittedly was taken between 15.4.1977 i.e. prior to the notification under Section 4(1) and 14.7.1980, shortly after the notification under Section 4 (1). It would, thus, be clear that the sale deed was brought into existence after the notification and possession was taken of the lands. This is the notorious document relied in all the subsequent references. Only the attestor was examined in proof of the documents. It would be obvious that it was a brought-up document to inflate the market value of the lands under acquisition not only in this village but in the surrounding villages. The High Court, therefore, was right in rejecting the said document and refusing to place reliance for determination of the compensation, Exhibit !-2, judgment of the Single Judge of the High Court in AS No. 2500 of 1986 arising out of OP No.49 of 1984 of the same reference court. The lands therein were acquired for Vengalrayasagar project. They are the wet lands. Since the counsel for the Government did not appear and no material was placed on record and since in earlier cases, award was confirmed for a sum of Rs.22,000 per acre, the Single Judge enhanced the compensation to Rs.22,000. That is obviously

an illegal approach adopted by the High Court in determining the market value of project area i.e. large tracts of lands covered by the project. It would appear that the other references were not brought to the notice of the learned Judges. Therefore, it cannot be formed the basis to fix the market value at higher rate, though the judgment may be wrong." ...(p.236)

8. Be that as it may, the non existence at the apposite stage of sale exemplar(s) executed prior to or in contemporaneity to the issuance of the apposite notification under the Act whereupon alone the learned Reference Court held the requisite facilitation for its thereupon assessing a just, reasonable and fair compensation amount vis-a-vis the lands of landowners, was not a sufficient factor for it to rely upon a legally frail Ex.PW3/A rather it was enjoined to mete reverence to the award of the Land Acquisition Collector, who while determining compensation amount qua the lands of the landowners meted deference to the apposite market value as stood approved by the District Collector concerned.

9. The learned Senor Counsel appearing for the respondents herein has concerted to validate the verdicts recorded by the Reference Court by making an espousal qua with the learned Reference Court meteing 50% deduction from the value of the land borne in Ex.PW3/A, renders the apposite verdicts recorded on the land reference petitions constituted therebefore by the landowners to fall within the ambit of the principle enshrined by this Court in a decision reported in ***Bhakra Beas Management Board & Anr. Versus State of H.P. & others, Latest HLJ 2003(H)) 1202*** wherein this Court has proceeded to mere 40% deduction qua the value of the land(s) borne on the sale exemplar existing therebefore, wherefrom this Court assessed compensation qua the lands of the landowners, arrayed as respondents therein. The pronouncement recorded by this Court in the aforereferred case would hold vigour only when Ex. Px which existed therebefore as a recoknable sale exemplar for assessment of compensation qua the lands of the landowners therein alike Ex.PW3/A embodying therein a post notification executed sale exemplar. However, an incisive, close circumspect reading of the pronouncement relied upon by the learned Senior Advocate appearing for the respondents herein unveils qua Ex. Px which constituted therebefore the relevant sale exemplar standing executed six year's prior to the issuance of the apposite notification under the Act whereunder the lands of the landowners therein stood brought to acquisition. The aforesaid factum per se brings-forth a visible distinctivity inter se Ex. Px vis-a-vis Ex.PW3/A. Consequently, when thereat Ex. Px stood executed prior to the issuance of the apposite notification under the Act whereas with hereat Ex.PW3/A evidently comprising a post notification executed sale exemplar, thereupon the verdict relied upon by the learned Senior Counsel for the respondents herein does not fall within the ambit of the rule encapsulated in the binding judgments of the Hon'ble Apex Court for thereupon reliance thereon holding any validation.

10. Consequently, with Ex.PW3/A being wholly unreliable rather warranting its standing discarded, the mere factum of the learned Reference Court meteing 50% deduction vis-a-vis the price of land comprised therein for thereupon its awarding compensation amount qua the lands of the landowners herein neither falls within the ambit of the ratio propounded in the judgment relied upon by the learned Senior Counsel appearing of the respondents herein nor also thereupon the relevant material pronouncing upon the market value borne by the lands of the landowners at the apposite stage in contemporaneity vis-a-vis the issuance of the apposite notification under the Act depicting therein the relevant reliable approved assessment meted thereto by the District Collector warranted any disimputation of credence as untenably done by the learned Reference Court. Reiteratedly when Ex.PW3/A is wholly discardable also when for reasons aforestated reliance thereupon by the learned Senior Counsel when stands hinged on anvil of an evident inapplicable pronouncement hereat recorded previously by this Court in the afore referred citation renders any reliance thereupon to be grossly untenable, corollary whereof is the mere factum of meteing of a 50% deduction from the value of the land borne therein vis-a-vis the lands of the landowners herein for thereupon assessing compensation amount qua the respondents herein would not validate any reliance placed thereupon by the learned Reference Court. The learned Senior Counsel has remained grossly unmindful qua in the citation relied

upon by him, this Court has meted a 40% deduction from the value of lands borne in Ex. Px, a pre-notification executed sale exemplar therein, whereupon it determined the compensation amount therein merely on the anvil of disproportionateness in size of land borne therein vis-a-vis the size of acquired lands therein, his unmindfulness qua the gravity of the aforestated ratio propounded therein has led him to misespouse qua parity emerging in the factual matrix prevailing therein vis-a-vis the factual matrix herein whereupon naturally he mis espouses qua its applicability hereat.

11. Furthermore, the learned Reference Court has held qua landowners standing entitled to 20% per anum increase on the market value assessed on the anvil of Ex.PW3/A by him qua the lands of the landowners, entitlement whereof stands concluded by it commence from 28.6.1999 whereat the apposite notification issued, upto 16.11.2011 whereat the relevant award(s) stood pronounced by it. However, the aforesaid benefit bestowed by the learned Reference Court upon the landowners is ridden with a gross vice of untenability arising from the factum of it bestowing the aforesaid benefit upon the landowners/respondents herein on the anvil of the aforesaid discradable post notification executed sale exemplar embodied in Ex.PW3/A also its thereupon detracting from the trite expostulation of law qua the judicially determined market value of lands prevalent at the stage contemporaneous to the issuance of the apposite notification alone constituting the anvil wherefrom the statutory price hike was meteable.

12. For the reasons aforestated, the award(s) of the Reference Court suffers from a gross illegality spurring from gross mis-appreciation of the import of Ex.PW3/A besides its undermining the impact thereon of the mandate of the verdicts of the Hon'ble Apex Court referred to hereinabove. Consequently, the instant appeals are allowed and the award(s) rendered by the learned Reference Court are set aside. In sequel, the award(s) of the Land Acquisition Collector is maintained and affirmed.

CMP No. 9535 of 2016 in RFA No.352 of 2011.

13. During the pendency of the aforesaid RFA, CMP No. 9535 of 2016 stands filed herebefore by the applicants, namely, Vipin Kumar, Bhupinder Kumar and Ravinder Kumar claiming therein a relief qua theirs being permitted to be impleaded as party(ies) in the array of respondents, on ground of the impugned rendition assessing compensation qua the respondent(s) therein standing constituted in a sum in gross disproportion qua his entitlement thereto, entitlement whereof stands borne in the apposite revenue record. However, in the face of an averment standing recorded therein qua Civil Suit bearing No. 56/2014, titled as Bhupinder Kumar & others versus Neeru Ram and others pending before the Civil Court concerned for rendition of a decree for declaration, permanent prohibitory injunction and mandatory injunction, qua the facet aforesaid, thereupon the relief for impleading of the applicants herein in the apposite array of the parties to the lis hereat also in-consequence to their impleadment any pronouncement thereupon would forestall the Civil Court concerned to record its apposite verdict on the relevant issue(s) raised therebefore. For obviation whereof the application stands dismissed. However, for not prejudicing the rights canvassed in the Civil Suit by the applicants herein, it is directed qua till the Civil Court concerned records its decision in the aforesaid Civil Suit, the compensation amount, if any, which remains undisbursed qua the respective landowners in RFA No. 352 of 2011 shall not be released in their respective favour.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Ganga Devi ....Petitioner.

Versus

Om Prakash ....Respondent.

C.R. No. 66 of 2016.

Date of decision: 29th November, 2016.

Code of Civil Procedure, 1908- Order 9 Rule 13- Applicant filed an application for setting aside ex-parte decree on the ground that she was not properly served – the application was dismissed by the Trial Court- an appeal was filed, which was also dismissed – held, that process server had made the endorsement on the back of the summons regarding the personal service along with the copy of plaint – the endorsement was not proved to be false – the service was properly effected – appeal dismissed.(Para-3 to 5)

For the Petitioner: Mr. P.S. Goverdhan, Advocate.
For Respondent : Mr. Dinesh Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

Under Ex. AW1/D, the learned Civil Judge (Junior Division), Solan, ex-parte decreed the suit of the plaintiff. The pronouncement of the Civil Court aforesaid occurred on 23.8.2011. On 7.03.2012, the defendant/petitioner herein motioned the learned trial Court under an application constituted there before under Order 9, Rule 13 of the CPC, wherein, she concerted to beget quashing of the ex-parte pronouncement recorded by the learned trial Court, on anvil of hers not coming to be properly served in consonance with the mandate of Order 5, Rule 2 of the CPC constituted in the factum of the process server concerned in transgression thereof while proceeding to effectuate personal service of the apposite summons upon her, the latter remaining unappended with a copy of plaint nor obviously the process server concerned delivering its copy to the defendant at the stage when he effectuated personal service of summons upon her in Civil Suit No. 47/1 of 2010.

2. The aforesaid ground stood discountenanced by the learned trial Court. In an appeal carried therefrom by the defendant before the learned District Judge, the latter affirmed the pronouncement recorded by the learned trial Court on the application moved therebefore by the defendant/petitioner herein under Order 9, Rule 13 of the CPC. Consequently, the defendant standing aggrieved by the concurrently recorded renditions of both the learned Courts below has instituted the instant revision petition whereby she concerts to beget their reversal hereat.

3. As aforestated with the defendant in her apposite application constituted under Order 9, Rule 13 of the CPC before the learned trial Court canvassing therein qua the copy of summons at the relevant stage when the process server effectuated personal service of summons upon her, remaining unappended with a copy of plaint, is an abundant portrayal of the defendant acquiescing to the factum of the process server concerned effectuating personal service of summons upon her. In sequel, thereto, the trite factum warranting adjudication is whether the contention of the learned counsel for the defendant qua the reason assigned in the concurrently recorded renditions of both the learned Courts below qua at the relevant time whereat the process server concerned effectuated upon her personal service of summons, the latter standing accompanied by a copy of the plaint also the latter standing delivered to the defendant not holding any tenacity acquires any succour.

4. The counsel for the defendant/petitioner in making the aforesaid submission qua it not holding any tenacity hinges it upon the factum qua with the process server concerned recording an endorsement on the reverse of the relevant summons wherewithin a display is held qua his at the relevant time also delivering a copy of the plaint to the defendant enjoined the plaintiff/respondent herein to examine the process server concerned for thereupon facilitating unearthings from him qua the veracities of the recitals occurring on the reverse of the summons, whereas the plaintiff omitting to examine the process server rendered the endorsement made on the reverse of the summons by the process server concerned to not hold any validity or authenticity. However, the aforesaid contention holds no force as apparently the onus in proof qua the factum of the defendant standing not come to be properly served arising from the factum

of the summons at the relevant time they stood uncontrovertedly delivered to her theirs remaining unaccompanied by a copy of the plaint nor the latter standing delivered upon her, was squarely cast upon the defendant/petitioner herein. Also the defendant/petitioner herein stood enjoined to by adducing emphatic sustainable evidence hence discharge the onus qua the aforesaid issue. In sequel, thereto, obviously, the plaintiff/respondent herein was not enjoined to discharge the onus on the aforesaid issue. In aftermath, with the onus qua the aforesaid issue remaining undischarged by the defendant/petitioner herein comprised in hers summoning the process server concerned for hers thereupon subjecting him to examination for making apposite elicitations from him for belying the efficacy of the endorsement made by him on the reverse of the summons wherein recitals stood embodied qua his alongwith personally serving a copy of summons upon the defendant his also thereat delivering a copy of the plaint to her, besides when the aforesaid endorsement would stand belied by the defendant by hers procuring the relevant apposite records available with the establishment of the learned trial Court. However, the defendant/petitioner omitted to make the aforesaid efforts for belying the efficacy of the endorsement made by the process server on the reverse of the summons wherein echoings are held qua his along with the summons delivering also a copy of the plaint to her, whereupon the apt sequel is of it holding validity. In aftermath, the argument addressed by the counsel for the petitioner before this Court qua the mandate of Rule (2) of Order 5 of the CPC standing infringed whereupon he submits qua no proper service standing effectuated upon the defendant holds no force also thereupon he cannot espouse qua the ex-parte decree pronounced upon the defendant wanting in efficacy. .

5. For the foregoing reasons, there is no merit in the instant petition, which is accordingly dismissed. The renditions impugned before this Court are maintained and affirmed. All pending applications also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Hem Ram & Another ....Appellants-Defendants

Versus

Bhagwan Dass & Others ....Respondents-Plaintiffs

Regular Second Appeal No.428 of 2006.
Judgment Reserved on: 21.11.2016
Date of decision: 29.11.2016

Transfer of Property Act, 1882- Section 60- Plaintiffs filed a civil suit for redemption of mortgage pleading that the land was mortgaged for Rs.240/- defendants pleaded that mortgagor had lost the right of redemption – the suit was dismissed by the Trial Court – an appeal was filed, which was allowed – held in second appeal that the land was mortgaged in the year 1930 and the period of redemption expired in 1971- however, Debt Redemption Act, 1976 furnished a fresh opportunity for getting the relief – mere expiry of 30 years from the date of mortgage does not extinguish the right of mortgagor- appeal dismissed. (Para-10 to 26)

Cases referred:

Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and Others, AIR 2014 SC 3447
Kanshi Ram and Another vs. Lachhman (Dead) Through LRs and Others, (2001)5 SCC 546
Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and others, AIR 2014 SC 3447
Ram Kishan & Ors. vs. Sheo Ram & Ors., AIR 2008 Punjab & Haryana 77
Bhandaru Ram vs. Sukh Ram, AIR 2012 HJP 1

For the Appellants: Mr.G.R. Palsra, Advocate.

For the Respondents: Mr.Ajay Kumar, Sr.Advocate with Mr.Dheeraj K. Vashishta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellants-defendants against the judgment and decree dated 5.8.2006, passed by the learned District Judge, Solan, District Solan, H.P., reversing the judgment and decree dated 05.12.2005, passed by the learned Civil Judge(Senior Division) Kasauli, District Solan, H.P, whereby the suit filed by the appellants-plaintiffs has been dismissed.

2. Briefly stated facts, as emerged from the record, are that the respondents-plaintiffs *(hereinafter referred to as the 'plaintiffs')* filed a suit for possession by way of redemption of the mortgage to the effect that the land measuring 1-7-18 bighas and land measuring 1-1-11 Bigha comprised in Khata/Kthatauni No.28/55 and 13/16, total measuring 2-9-9 bighas, situated in Mauza Bandh and Bani, Pargana Ghar, Sub Tehsil Krishangarh was earlier owned by one Ram Baksh and thereafter on his death by his legal heirs Shiv Ram, Kanchnoo, Thankiya etc. out of whom Gopala successor-in-interest of Thankiya, one of the sons of Ram Baksh, had mortgaged his 1/5th share in this land in favour of one Shangaru for a sum of Rs.240/- in the year 1930. It is averred by the plaintiffs that on the death of Shangaru, he was succeeded by Chet Ram and on the death of Chet Ram by his wife Banto, who was recorded as mortgagee in possession of the entire suit land. It is further averred by the plaintiffs that in the year 1974 Banto sold her mortgagee rights in favour of appellants-defendants *(hereinafter referred to as the 'defendants')* 1 and 2 and mutation to this effect was accordingly attested by revenue authorities. The plaintiffs alongwith other share holders claiming to have succeeded to the entire land filed a suit for redemption of the mortgage in the trial court.

3. Defendants by way of filing written statement denied the locus standi of the plaintiffs to file the suit and their right and title to the property. It is averred by the defendants that they have purchased the land through registered sale deed. However, it is admitted that Shingaru was mortgagee of the suit land and after his death his estate was succeeded by Chet Ram and on his death Banto stepped into his shoes. It is denied that Banto had remarried after his death in 1953 and she had no right or interest in this suit land. It is also denied that Gopala had mortgaged 1/5th share out of the suit land. It is also alleged by the defendants that the mortgager had lost right, title or interest in the land in the year 1970, therefore, no question of redemption arose. In the aforesaid background, the defendants claimed themselves to be the owners of the suit land and sought dismissal of the suit.

4. On the pleadings of the parties, the learned trial Court framed the following issues for determination:-

"1. Whether the plaintiff is entitled to a decree of redemption and possession, as alleged? OPP.

2. Whether the sale deed No.136 dated 24.8.1974 is wrong, illegal and without jurisdiction and consequently mutation No.224 and 125 are null and void, as alleged? OPP.

3. Whether the plaintiff is entitled to a consequential relief of permanent prohibitory injunction ? OPP.

4. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged ? OPD.

5. Whether the plaintiff has no locus standi to file the present suit, as alleged ? OPD.

6. Whether the suit lacks material better particulars, as alleged? If so its effect? OPD.

7. Whether the suit is not maintainable in the present form, as alleged? OPD.

8. Whether the suit is barred by limitation ? OPD.

9. Whether the defendants have spent more than Rs.75,000/- on the development of land, as alleged? If so, its effect? OPP.

10. Relief."

5. Subsequently vide judgment and decree dated 5.12.2005 learned trial Court dismissed the suit of the plaintiffs. Being aggrieved and dis-satisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiffs preferred an appeal before the learned District Judge, Solan, which came to be registered as Civil Appeal No.8-S/13 of 2006. Learned District Judge allowed the appeal and set aside the judgment passed by the learned trial Court. Resultantly, the suit of the plaintiffs for possession by redemption of the mortgage is decreed and the defendants are ordered to deliver the possession of the suit land, description whereof has been given above. Hence present Regular Second Appeal has been preferred by the appellants-defendants praying therein for setting aside the impugned judgment and decree dated 5.8.2006 passed by the learned appellate Court below.

6. This Court vide order dated 11.5.2007 admitted the appeal on the following substantial questions of law:-

"1. Whether the ld.first appellate court has misread the provisions of The H.P. Debt Reduction Act, 1976, which has materially prejudiced the case of the appellants?

2. Whether the provisions of Limitation Act, 1963 have overriding effect over The H.P. Debt Reduction Act, 1976?"

7. Mr.G.R. Palsra, learned counsel appearing for the appellants-defendants, vehemently argued that judgment passed by the first appellate Court is not sustainable in the eyes of law as the same is not based upon the proper appreciation of facts as well as law on the point and as such same deserves to be quashed and set aside. Mr.Palsra contended that learned first appellate Court misread the provisions with regard to redemption of mortgage and wrongly placed reliance upon the provisions of H.P. Debt Reduction Act, 1976 *(hereinafter referred to as 'Debt Reduction Act')* which was not applicable and attracted in the present case. While inviting the attention of this Court to the judgment passed by learned trial Court, Mr.Palsra strenuously argued that learned trial Court rightly came to the conclusion that the provisions of the *'Debt Reduction Act'* are not applicable in the present case since the plaintiffs had lost their right of redemption in the year 1970 i.e. prior to commencement of *'Debt Reduction Act'* in the year 1976. He further invited the attention of this Court to Section 6 of the Act to suggest that same was prospective in nature and in no situation could be made applicable in the case of plaintiffs who had admittedly lost their right to redeem the mortgage in the year 1970. He further invited the attention of this Court to Section 27 of the aforesaid Act to suggest that provisions contained in the Act referred to hereinabove could not be made applicable in the present case, especially in view of the fact that loan in terms of Act was advanced to the plaintiffs by predecessor-in-interest of the defendants prior to commencement of this Act and as such judgment passed by learned first appellate Court deserves to be quashed and set aside.

8. Mr.Palsra further argued that by no stretch of imagination provisions contained in the aforesaid Act could override the provisions of Limitation Act, 1963, wherein specific period of limitation of redemption of mortgage is prescribed for 30 years and grace period of 7 years has further been provided for old cases and as such, findings of the learned first appellate Court that the plaintiff was entitled to file suit at any time after commencement of the aforesaid Act deserves to be quashed and set aside being contrary to the provisions contained in the Act itself. While concluding his arguments, Mr.Palsra forcefully contended that bare perusal of judgment passed by learned first appellate Court itself suggests that appellate Court restricted its findings only qua

the issue of limitation, whereas all the other material points, as raised in the ground of appeal, were ignored. Whereas, being last fact finding Court, learned first appellate Court was expected to return findings qua all the issues and as such, judgment, totally being contrary to the provisions of law, as alleged, deserves to be quashed and set aside. He further stated that sale deed was executed in the year 1974, but there is nothing on record to suggest that it was challenged by the plaintiffs till 3rd June, 1996, when they filed suit which was completely time barred because limitation for challenging the sale deed is three years, but this aspect of the matter has been totally ignored by the learned first appellate Court and as such judgment deserves to be quashed and set aside.

9. In the aforesaid background, Mr.Palsra prayed that instant appeal may be accepted and judgment passed by learned first appellate Court may be quashed and set aside.

10. Mr.Ajay Kumar Sood, learned Senior Counsel duly assisted by Mr.Dheeraj K.Vashishta, Advocate, supported the judgment passed by learned first appellate Court. Mr.Sood, while referring to the judgment passed by learned first appellate Court, vehemently argued that same is based upon correct appreciation of facts as well as law on the point and as such there is no scope of interference, whatsoever, in any manner, as the learned first appellate Court has dealt with each and every aspect of the matter very meticulously. While refuting the contentions, having been put forth by Mr.Palsra, Mr.Sood invited the attention of this Court to the judgment passed by Hon'ble Apex Court in case titled: ***Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and Others, AIR 2014 SC 3447*** to demonstrate that special right of usufructuary mortgagor under Section 62 of the Transfer of Property Act to recover possession commences when mortgage money is paid out of rents and profits or partly by payment or deposit by the mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. Mr.Sood, while placing reliance upon judgment *supra*, forcefully contended that an usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. Mr.Sood further contended that it is undisputed that mortgage of land in favour of predecessor-in-interest of the defendants had been effected in the year 1930 and it was usufructuary mortgage as the possession of the property was delivered to the mortgagee with authority to enjoy all rights of the owner. He further stated that earlier period of 30 years was provided for redemption of usufructuory mortgage under Limitation Act, but with the introduction of *'Debt Reduction Act'* debtor could file the suit for redemption of mortgage or for accounts at any time after the commencement of the Act, which admittedly came into force in the year 1953 and as such learned first appellate Court, while accepting the appeal having been preferred by plaintiffs, rightly came to the conclusion that plaintiffs had right to file suit for redemption by virtue of provisions of aforesaid Act because the amount taken under mortgage by the mortgagee was nothing but a loan as defined in definition of land in *'Debt Reduction Act'*.

11. Lastly, Mr.Sood strenuously argued that now, in view of latest judgment *supra*, there is no force in the present appeal having been preferred by the appellants-defendants because it has been specifically held in the aforesaid case that mere expiry of period of 30 years from the date of mortgage does not extinguish the right of the mortgagor under Section 62 of the Transfer of Property Act. In the aforesaid background, Mr.Sood prayed for dismissal of the appeal.

12. I have heard learned counsel appearing for the parties and gone through the record of the case carefully.

13. After carefully perusing the pleadings on record as well as provisions of law applicable in the present case, this Court deems it fit to take both the substantial questions of law together for adjudication, as they are closely linked to each other.

14. It clearly emerges from the record that plaintiffs mortgaged the suit land in favour of predecessor-in-interest of appellants-defendants in 1930 and there is no dispute that it was usufructuary mortgage because possession of the property was delivered to mortgagee with

the authority to enjoy all rights of the owner. There is also no dispute with regard to the fact that earlier period of redemption of mortgage was 60 years, but, on coming into operation the Limitation Act, 1963, it was reduced to 30 years. But, in the cases where old Limitation Act applied, period of 7 years was given as grace period.

15. In the present case, as per defendants, period of limitation of 30 years is provided under Limitation Act after adding grace period of 7 years, which came to an end in the year 1971 and as such suit filed in the year 1996 by the plaintiffs was rightly dismissed being time barred by learned trial Court. Defendants further claimed that provisions of *'Debt Reduction Act'* cannot be made applicable in the present case because the same was applicable to only to that mortgage which was subsisting at that time and no benefit, if any, could be taken by mortgagee whose right to redeem has expired prior to commencement of provisions of *'Debt Reduction Act'*. Learned trial Court, while dismissing the suit of the plaintiffs being time barred, came to the conclusion that mortgagee had lost his right for redemption in the year 1970 i.e. 26.6.1970, after expiry of 30 years of period provided under Limitation Act. Learned trial Court further concluded that the provisions of *'Debt Reduction Act'* cannot be made applicable in the case of plaintiffs because this Act itself came in existence in the year 1976 and by that time right of mortgagor to redeem the mortgage had already extinguished. As per trial Court, provisions contained in *'Debt Reduction Act'* were not applicable in the case because it was prospective in nature. Accordingly, learned trial Court dismissed the suit of the plaintiffs being time barred by observing that a dead relief cannot be revived by coming into existence the provisions of *'Debt Reduction Act'* which already came into force in 1976.

16. Learned first appellate Court, taking contrary view, came to the conclusion that as per Section 6 of the *H.P. Debt Reduction Act, 1953,* mortgagor could file suit for redemption at any time after commencement of this Act because at that relevant time property mortgaged on 1930 was subsisting at the time of commencement of the Act. Apart from above, learned first appellate Court came to the conclusion that admittedly mortgagee Banto had transferred her mortgage rights in favour of defendants No.1 and 2 in the year 1974 vide sale deed Ex.DW-2/A in favour of appellants-defendants, which clearly suggests that, while making sale of mortgagee rights in favour of defendants, she made acknowledgement of her mortgagee right. Perusal of Ex.DW-2/A i.e. mortgage clearly suggests that mortgagee Banto transferred her mortgagee right in favour of defendants No.1 and 2 in the year 1974 vide sale deed. Perusal of aforesaid document Ex.DW-2/A clearly suggests that Banto had not sold the land as an absolute owner, rather she clearly stated in the sale deed that she has the mortgagee right in the landed property and selling the land as mortgagee, meaning thereby that defendants No.1 and 2 entered her shoes as a mortgagee. By no stretch of imagination, they became absolute owners as claimed by them. Now in view of aforesaid background, this Court would proceed to specifically answer the substantial question of law and it would be profitable to reproduce here Section 6 of H.P. Debt Reduction Act, 1976:-

> "6. Debtor's right to sue.-Notwithstanding the terms of any contract regarding the date or dates on which a debt shall become due, a suit to which this Act applies for the redemption of a mortgage or for accounts may be instituted by a debtor at any time after the commencement of this Act."

17. The use of expression *"at any time"* for filing a suit clearly indicates the intention of legislature to provide a fresh opportunity to the debtor for getting relief under the Act and as such, in no situation, it can be concluded that the aforesaid provision is prospective in nature. After carefully perusing the aforesaid provision of law, it is not understood as to how learned trial Court concluded that provision of this Act is applicable prospectively and debtors, who had taken loan as defined under the Act by mortgaging their property prior to commencement of this Act, had no right to institute a suit under Section 6 of this Act. Judgment passed by learned trial Court though suggest that during arguments, having been made by the parties before the trial Court, attention of the trial Court was invited to the judgment passed by the Hon'ble Apex Court in ***Kanshi Ram and Another vs. Lachhman (Dead) Through LRs and Others, (2001)5 SCC***

546, but learned trial Court was of the view that same is not applicable in the facts and circumstances of the case. However, this Court, after carefully perusing the law *supra* laid down by Hon'ble Apex Court, is of the view that the view taken by trial Court, while dismissing the suit, was blatantly incorrect, especially in view of aforesaid law laid down by Hon'ble Apex Court wherein, in the aforesaid case Hon'ble Apex Court, while setting aside the judgment passed by High Court, categorically observed that reason given by High Court in support of the findings that the suit was barred by limitation is that more than 30 years had elapsed since the date of mortgage when the suit was filed and as such mortgagor lost his right to redeem the property mortgaged is fallacious because it defeats the object and the purpose of the statute enacted by the legislature especially to give relief to debtors in the State.

18. At this stage, it would be profitable to reproduce the following paras of the judgment in ***Kanshi Ram's*** case *supra*:

> "8. Chapter III in which sections 5 to 9 are included deals with "Suits and Decrees". The sections in the chapter contain non-obstante clauses giving the provisions therein overriding effect over any law for the time being in force or decree or contract or agreement to the contrary.
>
> 9. Section 6 provides that notwithstanding the terms of any contract regarding the date or dates on which a debt shall become due; a suit to which this Act applies for the redemption of a mortgage or for accounts may be instituted by a debtor at any time after the commencement of this Act. (emphasis supplied).
>
> 15 The object of the Act and the scheme underlying it as obtained from the provisions made therein is to grant relief to debtors and enable them to get back properties mortgaged by them with possession for a loan. The use of expression "at any time" for making an application or filing a suit is indicative of the legislative intent that the Act provides a fresh opportunity to the debtor for getting relief under the Act. The legislature has taken care to make the relevant provisions of the Act granting relief to debtors by giving overriding effect over any law, agreement, contract or decree contrary to the provisions of the Act. It was not disputed before us during hearing of the case that the plaintiffs filed the suit under provisions of the Act for restoration of the possession of the mortgaged property. Undisputedly there is no decree for foreclosure in favour of the creditor/mortgagee.
>
> 16. In the backdrop of the above the question of limitation is to be considered. The reason given by the High Court in support of the finding that the suit was barred by limitation is that more than 30 years had elapsed since the date of the mortgage (February, 1946) when the suit was filed in 1981. Therefore the mortgagor had lost his right to redeem the property mortgaged. The provisions in section 27 of the Limitation Act have been considered in support of the finding. This reasoning appears to us to be fallacious. It defeats the object and the purpose of the statute enacted by the legislature specially to give relief to debtors in the State. The first appellate Court had given cogent reasons in support of its finding in favour of the appellants. The Court held and in our view, rightly that the suit was one for recovery of possession from the mortgagee who was in unauthorised possession of the mortgaged property after the mortgage loan was satisfied. The cause of action for filing such a suit under the Act arose when the enactment was enforced in 1979. Viewed from that angle the suit was filed in time and the trial court and the first appellate Court rightly recorded the findings to that effect. The High Court erred in reversing the concurrent finding of the courts below on the erroneous assumption that the suit was one for redemption of the mortgage simpliciter. It is relevant to note here that the present suit is not one filed under section 60 or 62 of the Transfer of Property Act. It is a suit filed for relief on the basis of the Himachal Pradesh Debt Reduction Act, 1976." (pp.548-551)

19. After carefully perusing the aforesaid law laid down by Hon'ble Apex Court, this Court sees no force in the contention put forth by the counsel representing the appellants-

defendants that the learned first appellate Court mis-read the provisions of *'Debt Reduction Act'*, rather judgment passed by learned first appellate Court is strictly in conformity with the view taken by the Hon'ble Apex Court in the aforesaid judgment and learned first appellate Court has rightly come to conclusion that suit for redemption under Section 6 of the *'Debt Reduction Act'* could be filed at any time after commencement of the Act. Moreover, mortgage made in the year 1930 was subsisting at the time of coming into force the aforesaid Act because there is nothing on record suggestive of the fact that decree, if any, for foreclosure in favour of mortgage was ever passed by any competent Court of law. Hence, this Court sees no illegality in the findings returned by the learned first appellate Court that the plaintiffs had right to file suit for redemption by virtue of provisions of aforesaid Act as undisputedly plaintiffs had taken amount under mortgage by mortgaging land.

20. As far as substantial question of law No.2 is concerned, undoubtedly Limitation Act, 1963 provides limitation for filing the suit, if any, for redemption of mortgage. But, with the introduction of *'Debt Reduction Act'* State Government intended to grant relief to debtors and to enable them to get back properties mortgaged by them with the possession for a loan. Perusal of *'Debt Reduction Act'* clearly suggests that Legislature, while invoking aforesaid Act, has specifically taken care to make the relevant provisions of the Act granting relief to debtors by giving over-riding effect over any law, agreement, contract or decree contrary to the provisions of the Act. Though, after perusing the aforesaid Act, this Court is of the view that after promulgation of the same debtors, as defined in the aforesaid Act, could file suit for redemption at any time after commencement of the Act, but perusal of aforesaid Act suggests that no limitation was provided in the Act; meaning thereby that for determining limitation, if any, for filing suit under *'Debt Reduction Act',* ultimately parties were to fall back upon Limitation Act, 1963. It is settled law that special Act brought by legislature has over-riding effect over any law. But in the present facts and circumstances of the case, wherein Hon'ble Apex Court has specifically held that usufructuary mortgagor right under Section 62 of the Transfer of Property Act continuous till mortgage money is paid and mere expiry of period of 30 years from the date of mortgage does not extinguish right of mortgagor under Section 62 of the Transfer of Property Act, provisions of Limitation Act, 1963 may not be applicable in the present case.

21. Hon'ble Apex Court in ***Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and others, AIR 2014 SC 3447,*** has upheld the view taken by Full Bench of Punjab and Haryana High Court in ***Ram Kishan & Ors. vs. Sheo Ram & Ors., AIR 2008 Punjab & Haryana 77,*** and over-ruled the judgment passed by Full Bench of this Court in ***Bhandaru Ram vs. Sukh Ram, AIR 2012 HJP 1,*** wherein Full Bench of this Court had held that for redemption of usufructuary mortgage, where no time fixed for redemption of mortgage money, limitation period would be 30 years as prescribed under Article 60 of Limitation Act.

22. At this stage, it would be apt to reproduce the view taken by Full Bench of Punjab and Haryana High Court in ***Ram Kishan's*** case supra:-

> "Since the mortgage is essentially and basically a conveyance in law or an assignment of debt or for discharge of some other obligation for which it is given, the security must, therefore, be redeemable on the payment or discharge of such debt or obligation. Fact that at one point of time the mortgagor for one or the other reason mortgaged his property to avail financial assistance on account of necessities of life, the mortgagor's right cannot be permitted to be defeated only on account of passage of time. The mortgagee remains in possession of the mortgaged property; enjoys the usufruct thereof and, therefore, not to lose anything by returning the security on receipt of mortgage debt.
>
> The limitation of 30 years under Article 61(a) beings to run "when the right to redeem or the possession accrues". The right to redemption or recover possession accrued to the mortgagor on payment of sum secured in case of usufructuary mortgage, where rents and profits are to be set off against interest on the mortgage debt, on payment or tender to the mortgagee, the mortgage money or balance thereof

or deposit in the Court. The right to seek foreclosure is coextensive with the right to seek redemption. Since right to seek redemption accrues only on payment of the mortgage money or the balance thereof after adjustment of rents and profits from the interest thereof, therefore, right of foreclosure will not accrue to the mortgagee till such time the mortgagee remains in possession of the mortgaged security and is appropriating usufruct of the mortgaged land towards the interest on the mortgaged debt. Thus, the period of redemption or possession would not start till such time usufruct of the land and the profits are being adjusted towards interest on the mortgage amount. In view of the said interpretation, the principle that once a mortgage, always a mortgage and, therefore, always re-deemable would be applicable. The plea that after the expiry of period of limitation to sue for foreclosure, the mortgagees have a right to seek declaration in respect of their title over the suit property would not be tenable. The mortgage cannot be extinguished by any unilateral act of the mortgagee. Since the mortgage cannot be unilaterally terminated, therefore, the declaration claimed is nothing but a suit for foreclosure. It is equally well settled that it is not title of the suit, which determines the nature of the suit. The nature of suit is required to be determined by reading all averments in plaint. Such declaration cannot be claimed by an usufructuary mortgagee. Therefore, in case of usufructuary mortgage, where no time-limit is fixed to seek redemption, the right to seek redemption would not arise on date of mortgage but will arise on date when mortgagor pays or tenders to the mortgagee or deposits in Court, the mortgage money or the balance thereof. Thus, it was held that once a mortgage always a mortgage and is always redeemable."

23. Hon'ble Apex Court in view of conflicting decision on the point having been rendered by Full Benches of two High Courts, referred hereinabove, laid down law in ***Singh Ram's*** case *supra* affirmed the view taken by Full Bench of Punjab and Haryana High Court asunder:-

"10. We have given our anxious consideration to the question of law arising in the cases.

11. We are in agreement with the view taken in the impugned judgment that in a usufructuary mortgage, right to recover possession continues till the money is paid from the rents and profits or where it is partly paid out of rents and profits when the balance is paid by the mortgagor or deposited in Court as provided under Section 62 of the T.P. Act.

12. It will be appropriate to refer to the statutory provisions of the T.P. Act and the Limitation Act:-

"T.P. Act

58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined.

(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage-Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the

mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale-Where, the mortgagor ostensibly sells the mortgaged property-

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

PROVIDED that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

(e) English mortgage-Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re- transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title- deeds.

(g) Anomalous mortgage - A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

60. Right of mortgagor to redeem At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage- money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court.

xxx xxx xxx

62. Right of usufructuary mortgagor to recover possession

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,-

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money, when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in court hereinafter provided.

xxx xxx xxx

Limitation Act:-

Art. 61 By a mortgagor

a)	*To redeem or recover possession of immovable property mortgaged.*	*Thirty years*	*When the right to redeem or to recover possession accrues*
b)	*xxxxxxxxx*	*xxxxxx*	*xxxxxxxxx*

(emphasis supplied)

A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the T.P. Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as 'right to recover possession' is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the T.P. Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the T.P. Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition under Section 62 of the T.P. Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary

mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the T.P. Act.

13. We may now refer to decisions of this Court.

(i) In Prabhakaran & Ors. vs. M. Azhagiri Pillai & Ors., (2006) 4 SCC 484, suit of mortgagor for redemption was held to be within limitation. However, in para 13, it was observed:-

"13. Article 148 of the Limitation Act, 1908 (referred to as "the old Act") provided a limitation of 60 years for a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged. The corresponding provision in the Limitation Act, 1963 ("the new Act" or "the Limitation Act" for short), is Article 61(a) which provides that the period of limitation for a suit by a mortgagor to redeem or recover possession of the immovable property mortgaged is 30 years. The period of limitation begins to run when the right to redeem or to recover possession accrues. In the case of a usufructuary mortgage which does not fix any date for repayment of the mortgage money, but merely stipulates that the mortgagee is entitled to be in possession till redemption, the right to redeem would accrue immediately on execution of the mortgage deed and the mortgagor has to file a suit for redemption within 30 years from the date of the mortgage. Section 27 of the Limitation Act provides that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished". This would mean that on the expiry of the period of limitation prescribed under the Act, the mortgagor would lose his right to redeem and the mortgagee would become entitled to continue in possession as the full owner."

The above observations do not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession which commences after mortgage money is paid out of rents and profits or partly out of rents and profits and partly paid or deposited by mortgagor. Thus, we are unable to accept the same as correct view in law.

(ii) In Jayasingh Dhyanu Mhoprekar & Anr. vs. Krishna Babaji Patil & Anr., 1985 (4) SCC 162, the question of limitation for redemption was not involved. Question was whether mortgagor's right of redemption was affected when mortgaged land was allotted to mortgagees by way of grant under the provisions of the Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950, it was observed:-

"6. The only question which arises for decision in this case is whether by reason of the grant made in favour of the defendants the right to redeem the mortgage can be treated as having become extinguished. It is well settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee who has entered into possession of the mortgaged property under a mortgage will have to give up possession of the property when the suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be dismissed on some other valid ground. This flows from the legal principle which is applicable to all mortgages, namely "Once a mortgage, always a mortgage". It is no doubt true that the father of the first defendant and the second defendant have been granted occupancy

right by the Prant Officer by his order dated February 5, 1964 along with Pandu, the uncle of Defendant 1. But it is not disputed that the defendants would not have been able to secure the said grant in their favour but for the fact that they were in actual possession of the lands. They were able to be in possession of the one-half share of the plaintiffs in the lands in question only by reason of the mortgage deed. If the mortgagors had been in possession of the lands on the relevant date, the lands would have automatically been granted in their favour, since the rights of the tenants in the watan lands were allowed to subsist even after the coming into force of the Act and the consequent abolition of the watans by virtue of Section 8 of the Act. The question is whether the position would be different because they had mortgaged land with possession on the relevant date."

Apart from judgments mentioned in reference order, reference may be made to some other judgments dealing with the issue. (iii) In Harbans vs. Om Prakash, (2006) 1 SCC 129, this Court upheld the view that limitation for redemption does not start from date of mortgage in a usufructuary mortgage and held that view in State of Punjab & Ors. vs. Ram Rakha & Ors., (1997) 10 SCC 172 was contrary to earlier view in Seth Gangadhar vs. Shankar Lal, 1959 SCR 509. It was observed:-

"7. Reference may be made to certain paragraphs in Seth Gangadhar v. Shankar Lal, 1959 SCR 509 which read as follows:

"[4.] It is admitted that the case is governed by the Transfer of Property Act. Under Section 60 of that Act, at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage money to require the mortgagee to reconvey the mortgaged property to him. The right conferred by this section has been called the right to redeem and the appellant sought to enforce this right by his suit. Under this section, however, that right can be exercised only after the mortgage money has become due. In Bakhtawar Begam v. [pic]Husaini Khanam,ILR (1914) 36 All 195 (IA at p. 89) also the same view was expressed in these words:

'Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period.'

Now, in the present case the term of the mortgage is eighty-five years and there is no stipulation entitling the mortgagor to redeem during that term. That term has not yet expired. The respondents, therefore, contend that the suit is premature and liable to be dismissed.

* * *

[6.] The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley, M.R. In Santley v. Wilde, (1899) 2 Ch. 474 in these words:

'The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is

therefore void. It follows from this, that "once a mortgage always a mortgage".'

[7.] The right of redemption, therefore, cannot be taken away. The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for 'once a mortgage always a mortgage' and therefore always redeemable. The same result also follows from Section 60 of the Transfer of Property Act. So it was said in Mohd. Sher Khan v. Seth Swami Dayal, AIR 1922 PC 17:

'An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in [pic]satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under Section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

[14.] In comparatively recent times Viscount Haldane, L.C. repeated the same view when he said in G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd, 1914 AC 25 (AC at pp. 35-36):

'This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple would revest in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land forever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending money, on mortgage or otherwise, was looked on with suspicion, and the court was on the alert to discover want of conscience in the terms imposed by lenders.'

[15.] The reason then justifying the Court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. [pic]Putting it in more familiar language the Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any

difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

[16.] We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty-five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect.'

[17.] First then, does the length of the term — and in this case it is long enough being eighty-five years itself lead to the conclusion that it was an oppressive term? In our view, it does not do so. It is not necessary for us to go so far as to say that the length of the term of the mortgage can never by itself show that the bargain was oppressive. We do not desire to say anything on that question in this case. We think it enough to say that we have nothing here to show that the length of the term was in any way disadvantageous to the mortgagor. It is quite conceivable that it was to his advantage. The suit for redemption was brought over forty-seven years after the date of the mortgage. It seems to us impossible that if the term was oppressive, that was not realised much earlier and the suit brought within a short time of the mortgage. The learned Judicial Commissioner felt that the respondents' contention that the suit had been brought as the price of landed property had gone up after the war, was justified. We are not prepared to say that he was wrong in this view. We cannot also ignore, as appears from a large number of reported decisions, that it is not uncommon in various parts of India to have long-term mortgages. Then we find that the property was subject to a prior mortgage. We are not aware what the term of that mortgage was. But we find that that mortgage included another property which became free from it as a result of the mortgage in suit. This would show that the mortgagee under this mortgage was not putting any pressure on the mortgagor. That conclusion also receives support from the fact that the mortgage money under the present mortgage was more than that under the earlier mortgage but the mortgagee in the present case was satisfied with a smaller security. Again, no complaint is made that the interest charged, which was to be measured by the rent of the property, was in any manner high. All these, to our mind, indicate that the mortgagee had not taken any unfair advantage of his position as the lender, nor that the mortgagor was under any financial embarrassment.

[18.] It is said that the mortgage instrument itself indicates that the bargain is hard, for, while the mortgagor cannot redeem for eighty-five years, the mortgagee is free to demand payment of his dues at any time [pic]he likes. This contention is plainly fallacious. There is nothing in the mortgage instrument permitting the mortgagee to demand any money, and it is well settled that the mortgagee's right to enforce the mortgage and the mortgagor's right to redeem are coextensive."

8. On the contrary, learned counsel for the respondent submitted that in Panchanan Sharma v. Basudeo Prasad Jaganani, 1995 Supp (2) SCC 574 it was clearly held that when there is no stipulation regarding period of

limitation it can be redeemed at any time. It was, inter alia, held as follows: (SCC p. 576, para 3)

"The sale certificate, Ext. C-II does not bind the appellant and, therefore, the mortgage does not stand extinguished by reason of the sale. It is inoperative as against the appellant."

9. Though the decision in State of Punjab case prima facie supports the stand of the appellant, the decision rendered by a three-Judge Bench of this Court in Ganga Dhar case according to us had dealt with the legal position deliberately and stated the same succinctly."

(iv) In Parichhan Mistry (Dead) by L.Rs. & Anr. vs. Acchiabar Mistry & Ors., (1996) 5 SCC 526, it was observed:-

"2. The High Court came to the conclusion that the mortgagors having failed to pay a portion of the rent for realisation of which the landlord had filed a suit and obtained a decree and that said decree being put to execution and the mortgagee having paid up the decretal dues, the mortgagor loses his right of redemption and, therefore the suit for redemption must fail. The [pic]learned Judge came to the conclusion that the equity of redemption, in the facts and circumstances of the case was extinguished and, therefore, the mortgagor is not entitled to redeem. The short question that arises for consideration is whether in the facts and circumstances of the case the High Court was right in coming to a conclusion that right of redemption got extinguished and the mortgagor had no right of redemption. It is true that a right of redemption under a mortgage deed can come to an end, but only in a manner known to law. Such extinguishment of right can take place by contract between the parties or by a decree of the court or by a statutory provision which debars the mortgagors from redeeming the mortgage. The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and at the proper place, of the mortgage money. When it is extinguished by the act of the parties the act must take the shape and observe the formalities which the law prescribes. The expression "act of parties" refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction. A usufructuary mortgagee cannot by mere assertion of his own or by a unilateral act on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner. It is no doubt true that the mortgagee would be entitled to purchase the entire equity of redemption from the mortgagor. The mortgagee occupies a peculiar position and, therefore, the question as to what he purchases at a court sale is a vexed question, but being in an advantageous position where the mortgagee availing himself of his position gains an advantage he holds, such advantage is for the benefit of the mortgagor. It has been so held by this Court in the case of Sidhakamal Nayan Ramanuj Das v. Bira Nayak, AIR 1954 SC 336 and Mritunjoy Pani v. Narmanda Bala Sasmal, (1962) 1 SCR 290. This being the position of law if for some default in payment of rent a rent decree is obtained and the mortgagee pays off the same even then the mortgage in question is liable to be redeemed at the option of the mortgagor. The mortgagee cannot escape from his obligation by bringing the equity of redemption to sale in execution of a decree on the personal covenant. By virtue of purchase of the property by the mortgagee in court sale, no merger takes place between the two rights nor the mortgage stands extinguished."

(v) In Achaldas Durgaji Oswal (Dead) Thr. L.Rs. vs. Ramvilas Gangabisan Heda (Dead) Thr. L.Rs. & Ors., (2003) 3 SCC 614, this Court upheld the view that right of redemption was not lost despite failure of a mortgagor in a

usufructuary mortgage to make deposit in terms of a preliminary decree for redemption. It was observed:-

"7. Mr Mohta, learned Senior Counsel appearing on behalf of the respondents on the other hand, would submit that whereas Order 34 Rule 7 would apply both in respect of the suit for foreclosure and redemption of mortgage, Order 34 Rule 8 thereof refers to final decree in redemption suit only. The learned counsel would contend that having regard to the well-established rule "once a mortgage always a mortgage", the right of a mortgagor to redeem the mortgage would continue unless the same is extinguished either by reason of a decree passed by a court of law or by an agreement of parties. The learned counsel pointed out that in this case the application for drawing up of a final decree was filed within a period of three years from the date of making the deposit and thus the same was not barred by limitation.

Findings

8. Usufructuary mortgage is defined in Section 58(d) of the Transfer of Property Act in the following terms:

"58. (d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in [pic]lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

9. Mortgagor, despite having mortgaged the property might still deal with it in any way consistent with the rights of the mortgagee. He has an equitable right to redeem the property after the day fixed for payment has gone by but his right or equity of redemption is no longer strictly an equitable estate or interest although it is still in the nature of an equitable interest. (See Halsbury's Laws of England, 4th Edn., Vol. 32, p.264.)

10. The right of the mortgagor, it is now well settled, to deal with the mortgaged property as well as the limitation to which it is subject depends upon the nature of this ownership which is not absolute, but qualified by reason of the right of the mortgagee to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed or the estate is sold. The equitable right of redemption is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem and on his fully performing his obligations under the mortgage.

11. The doctrine of redemption of mortgaged property was not recognised by the Indian courts as the essence of the doctrine of equity of redemption was unknown to the ancient law of India. The Privy Council in Thumbasawmy Mudelly v. Mohd. Hossain Rowthen called upon the legislature to make a suitable amendment which was given a statutory recognition by reason of Section 60 of the Transfer of Property Act which reads thus:

"60. Right of mortgagor to redeem.—At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to

the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has [pic]been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money."

12. A right of redemption, thus, was statutorily recognized as a right of a mortgagor as an incident of mortgage which subsists so long as the mortgage itself subsists. The proviso appended to Section 60, as noticed hereinbefore, however, confines the said right so long as the same is not extinguished by an act of the parties or by a decree of court.

13. In the Law of Mortgage by Dr Rashbehary Ghose at pp. 231-32 under the heading "Once a mortgage, always a mortgage", it is noticed:

"In 1681 Lord Nottingham in the leading case of Howard v. Harris4 firmly laid down the principle: 'Once a mortgage, always a mortgage'. This is a doctrine to protect the mortgagor's right of redemption: it renders all agreements in a mortgage for forfeiture of the right to redeem and also encumbrances of or dealings with the property by the mortgagee as against a mortgagor coming to redeem. In 1902 the well-known maxim, 'once a mortgage, always a mortgage', was supplemented by the words 'and nothing but a mortgage' added by Lord Davey in the leading case of Noakes v. Rice5 in which the maxim was explained to mean 'that a mortgage cannot be made irredeemable and a provision to that effect is void'. The maxim has been supplemented in the Indian context by the words 'and therefore always redeemable', added by Justice Sarkar of the Supreme Court in the case of Seth Ganga Dhar v. Shankar Lal.

It is thus evident that the very conception of mortgage involves three principles. First, there is the maxim: 'once a mortgage, always a mortgage'. That is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, modus et conventio vincunt legem (custom and agreement overrule law). Secondly, the mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first another principle may be deduced, namely, 'once a mortgage, always a mortgage, and nothing but a mortgage'. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.

The maxim 'once a mortgage always a mortgage' may be said to be a logical corollary from the doctrine, which is the very foundation of the law of mortgages, that time is not of the essence of the contract in such transactions; for the protection which the law throws around the mortgagor might be rendered wholly illusory, if the right to redeem could be limited by

contract between the parties. Right to redeem is an incident of a subsisting mortgage and is inseparable from it so that the right is coextensive with the mortgage itself. The right subsists until it is [pic]appropriately and effectively extinguished either by the acts of the parties concerned or by a proper decree of the competent court."

4. In The Law of Mortgages by Edward F. Cousins at p. 294, in relation to protection of the right to redeem, it is stated:

"But the protection of embarrassed mortgagors could not be achieved by the mere creation of the equitable right of redemption. As soon as the practice in equity to allow redemption after the contract date became known, mortgagees sought to defeat the intervention of equity by special provisions in the mortgage-deed. These provisions were designed either to render the legal right to redeem illusory, and thus prevent the equity of redemption from arising at all, or to defeat or clog the equity of redemption after it had arisen. For example, the mortgage contract might provide for an option for the mortgagee to purchase the mortgaged property, thus defeating both the legal and equitable right to redeem, or might allow redemption after the contract date only upon payment of an additional sum or upon performance of some additional obligation. Consequently, the Chancellor began to relieve mortgagors against such restrictions and fetters on the legal and equitable rights to redeem imposed by special covenants in the mortgage.

The protection of a mortgagor against all attempts to defeat or clog his right of redemption involved the creation of subsidiary rules of equity, invalidating the various contrivances which ingenious conveyancers devised. These rules are sometimes summed up in a maxim of equity 'once a mortgage always a mortgage'. This means that once a contract is seen to be a mortgage no provision in the contract will be valid if it is inconsistent with the right of the mortgagor to recover his security on discharging his obligations. Provisions offending against the maxim may either touch the contractual terms of redemption, rendering the right to redeem illusory, or they may touch only the equitable right to redeem after the passing of the contract date, hampering the exercise of the right. Provisions of the latter kind are termed 'clogs' on the equity of redemption. Greene, M.R. in Knightsbridge Estates v. Byrne7 emphasized that provisions touching the contractual right to redeem are not properly to be classed as clogs on the equity of redemption. But it is evident that such provisions are in substance clogs on the equity of redemption, since they tend to defeat it altogether."

15. In Fisher and Lightwood's Law of Mortgage, the nature of the right of redemption is stated thus:

"The rights of redemption.— The right to redeem a mortgage was formerly conferred on the mortgagor by a proviso or condition in the mortgage to the effect that, if the mortgagor or his representative should pay to the mortgagee the principal sum, with interest at the rate fixed, on a certain day, the mortgagee, or the person in whom the estate was vested, would, at the cost of the person redeeming, reconvey to him or as [pic]he should direct (a). This is still the practice in the case of a mortgage effected by an assignment of the mortgagor's interest (b). A proviso for reconveyance was no longer appropriate after 1925 for a legal mortgage of land [which has to be made by demise (c)], and it is not necessary to have a proviso for surrender of the term in such a mortgage, since the term ceases on repayment (d). Nevertheless, in order to define the rights of the mortgagor and the mortgagee, a proviso is inserted expressly stating that the term will cease at the date fixed (e).

It has been seen (f) that, at law, whatever form the mortgage took, upon non-payment by the appointed time, the estate of the mortgagee became absolute and irredeemable, but that equity intervened to enable the mortgagor to redeem after the date of repayment.

There are, therefore, two distinct rights of redemption — the legal or contractual right to redeem on the appointed day and the equitable right to redeem thereafter (g). The equitable right to redeem, which only arises after the contractual date of redemption has passed, must be distinguished from the equity of redemption, which arises when the mortgage is made (g)."

16. The question which falls for consideration in this appeal must be considered keeping in view the statutory right of the mortgagor in terms of Section 60 of the Transfer of Property Act. By reason of Article 61 of the Limitation Act, 1963, the limitation provided for a suit to redeem or recover the possession of immovable property mortgaged by a mortgagor is thirty years from the date of accrual of right to redeem or recover possession. Article 137 which is a residuary provision provides for limitation of three years in a case where no period of limitation is provided.

20. The statutory provisions, as noticed hereinbefore, are required to be construed having regard to the redeeming features of usufructuary mortgage, namely, (a) there is a delivery of possession to the mortgagee, (b) he is to retain possession until repayment of money and to receive rents and profits or part thereof in lieu of interest, or in payment of mortgage- money, or partly in lieu of interest and partly in payment of mortgage- money, (c) there is redemption when the amount due is personally paid or is discharged by rents or profits received, and (d) there is no remedy by sale or foreclosure.

21. Order 34 Rules 7 and 8 do not confer any right upon the usufructuary mortgagee to apply for final decree which is conferred on the mortgagee on other types of mortgages. By reason of sub-rule (1) of Rule 8 of Order 34, a mortgagor is entitled to make an application for final decree at any time before a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this Rule. No such application is again contemplated at the instance of the usufructuary mortgagee. By reason of sub-rule (1) of Rule 8 of Order 34, a right of redemption is conferred upon the mortgagor of a usufructuary mortgage. Such a provision has been made evidently having regard to the right of redemption of a mortgagor in terms of Section 60 of the Transfer of Property Act and further, having regard to the fact that a usufructuary mortgagee would be entitled to possess the property in question till a final decree of redemption is passed.

22. The right of redemption of a mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to Section 60 of the Act which is extinguished either by a decree or by act of parties. [pic]Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor has such right come to an end by act of the parties.

23. A right for obtaining a final decree for sale or foreclosure can be exercised only on payment of such money. Such a right can be exercised at any time even before the sale is confirmed although the final decree might have been passed in the meanwhile. The mortgagee is also not entitled to receive any payment under the preliminary decree nor is the mortgagor required to make an application to recover before paying the same.

24. Even, indisputably, despite expiry of the time for deposit of the mortgaged money in terms of the preliminary decree, a second suit for redemption would be maintainable."

(vi) In Prithi Nath Singh vs. Suraj Ahir, (1963) 3 SCR 302, this Court approved the observations of Allahabad High Court in Rama Prasad vs. Bishambhar Singh, AIR 1946 All 400, that Sections 60 and 62 of T.P. Act make distinction in right of a usufructuary mortgagor and other mortgagor as follows:-

"11. In Ramprasad v. Bishambhar Singh, AIR 1946 All 400, the question formulated for determination was whether the suit being a suit to recover possession of the mortgaged property after the mortgage money had been paid- off was a suit "against the mortgagee to redeem" or "to recover possession of immovable property mortgaged". Braund, J., said, at p. 402:

"Now, it is quite obvious that that section (Section 60 of the Transfer of Property Act) can only refer to a case in which a mortgagor under a subsisting mortgage approaches the Court to establish his right to redeem and to have that redemption carried out by the process of the various declarations and orders of the Court by which it effects redemption. In other words, Section 60 contemplates a case in which the mortgage is still subsisting and the mortgagor goes to the Court to obtain the return of his property on repayment of what is still due. Section 62, on the other hand, is in marked contrast to Section 60. Section 62 says that in the case of a usufructuary mortgage the mortgagor has a right to "recover possession" of the property when (in a case in which the mortgagee is authorised to pay himself the mortgage money out of the rents and profits of the property) the principal money is paid-off. As we see it, that is not a case of redemption at all. At the moment when the rents and profits of the mortgaged property sufficed to discharge the principal secured by the mortgage, the mortgage came to an end and the correlative right arose in the mortgagor "to recover possession of the property". The framers of the Transfer of Property Act have clearly recognised the distinction between the procedure which follows a mortgagor's desire to redeem a subsisting mortgage and the procedure which follows the arising of a usufructuary mortgagor's right to get his property back after the principal has been paid-off."

(vii) In Hamzabi & Ors. vs. Syed Karimuddin & Ors., (2001) 1 SCC 414, it was observed:-

"2. The right of the mortgagor to redeem had its origin as an equitable principle for giving relief against forfeiture even after the mortgagor defaulted in making payment under the mortgage deed. It is a right which has been jealously guarded over the years by courts. The maxim of "once a mortgage always a mortgage" and the avoidance of provisions obstructing redemption as "clogs on redemption" are expressions of this judicial protection. (See: Pomal Kanji Govindji v. Vrajlal Karsandas Purohit (1989) 1 SCC 458 in this context.) As far as this country is concerned, the right is statutorily recognised in Section 60 of the Transfer of Property Act. The section gives [pic]the mortgagor right to redeem the property at any time after the principal money has become due by tendering the mortgage money and claiming possession of the mortgaged property from the mortgagee. The only limit to this right is contained in the proviso to the section which reads:

"Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a court."

3. While the expression "decree of court" is explicit enough, the phrase "act of parties" has given rise to controversy. One such act may be when the mortgagor sells the equity of redemption to the mortgagee. This Court in Narandas Karsondas v. S.A. Kamtam, (1977) 3 SCC 247 has said that: (SCC p. 254, para 34)"

(viii) Contrary view has been expressed in Sampuran Singh & Ors. vs. Smt. Niranjan Kaur (smt.) & Ors., (1999) 2 SCC 679 as follows:-

"14. Submission was, as aforesaid, that right to redeem only accrues when either the mortgagors tender the amount of mortgage or the mortgagees communicate satisfaction of the mortgage amount through the usufruct from the land. This submission is misconceived, as aforesaid, if this interpretation is accepted, then till this happens the period of limitation never start running and it could go on for an infinite period. We have no hesitation to reject this submission. The language recorded above makes it clear that right of redemption accrues from the very first day unless restricted under the mortgage deed. When there is no restriction the mortgagors have a right to redeem the mortgage from that very date when the mortgage was executed. Right accruing means, right either existing or coming into play thereafter. Where no period in the mortgage is specified, there exists a right to a mortgagor to redeem the mortgage by paying the amount that very day in case he receives the desired money for which he has mortgaged his land or any day thereafter. This right could only be restricted through law or in terms of a valid mortgage deed. There is no such restriction shown or pointed out. Hence, in our considered opinion the period of limitation would start from the very date the valid mortgage is said to have been executed and hence the period of limitation of 60 years would start from the very date of oral mortgage, that would be from March 1893. In [pic]view of this, we do not find any error in the decision of the first appellate court or the High Court holding that the suit of the present appellants is time-barred."

However, facts mentioned in para 3 show that possession remained with mortgagor and it was not a case of usufructuary mortgage.

14. We need not multiply reference to other judgments. Reference to above judgments clearly spell out the reasons for conflicting views. In cases where distinction in usufructuary mortgagor's right under Section 62 of the T.P. Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of right of redemption after 30 years.

15. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly.

16. On this conclusion, the view taken by the Punjab and Haryana High Court will stand affirmed and contrary view taken by the Himachal Pradesh High Court in Bhandaru Ram (D) Thr. L.R. Ratan Lal vs. Sukh Ram (supra) will stand over-ruled." (pp.3452-3464)

24. Since Hon'ble Apex Court has held that mere expiry of period of 30 years from the date of mortgage does not extinguish the right of the mortgagor under Section 62 of the

Transfer of Property Act, there may not be any application of provisions of Limitation Act, 1963 and as such substantial question of law is answered accordingly.

25. Perusal of judgment passed by learned trial Court clearly suggests that suit of the plaintiffs was dismissed being time barred and as such this Court sees no force much less substantial force in the contention of Mr.Palsra that learned first appellate Court failed to deal with the other relevant issues apart from limitation, while accepting the appeal having been preferred by the plaintiffs because perusal of judgment passed by learned first appellate court clearly suggests that learned first appellate Court has dealt with each and every aspect of the matter meticulously.

26. Consequently, in view of the detailed discussion made hereinabove, this appeal is dismissed. The judgment passed by the learned first appellate Court below is upheld and that of the learned trial Court is set aside and the suit filed by the plaintiffs is decreed.There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

ICICI Lombard General Insurance Company Ltd., ...Applicant.

Versus

Smt. Leela Devi & others ....Respondents.

CMP(M) No. 1204 of 2015
Decided on : 29.11.2016

Limitation Act, 1963- Section 5- An appeal was filed against the award of Workmen Compensation Commissioner filed, which was barred by limitation – an application for condonation of delay in filing the appeal filed- held that appellant had deposited the amount before the Commissioner on 24.1.2011, which shows that it had notice regarding the award – the appeal was filed in the year 2015- no satisfactory explanation for the delay has been given – delay cannot be condoned- application dismissed. (Para-3)

For the applicant: Mr. Jagdish Thakur, Advocate.
For the respondents: Mr. P.P Chauhan, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral)

Respondent No. 3 despite service, omitted to appear either in person or through counsel. Hence, proceeded against ex-parte.

2. Respondent No.1 stands served through publication under an apposite notice published in "Divya Himachal", notice whereof is placed on record. However respondent No.1 despite service standing effectuated upon her through substituted mode omits to record her appearance before this court either in person or through counsel. Hence she is proceeded against ex-parte.

3. In the impugned rendition recorded by the learned Commissioner under the Workmen's Compensation Act, he fastened liability upon the insurer qua the compensation amount assessed thereunder vis-à-vis the claimants. The impugned rendition stood recorded on 17.3.2009 whereas the insurer has belatedly concerted to beget its reversal by preferring in the year 2015 an appeal therefrom before this Court. The insurer in the instant application has made a painstaking effort to purvey the good and sufficient cause which precluded it to earlier within

limitation institute an appeal herebefore against the impugned judgment recorded on 17.3.2009 by the learned Commissioner. The appeal stands instituted herebefore with a gross besides with an inordinate delay occurring since the recording of the impugned judgment by the learned commissioner yet the immensity of delay would not constrain this Court to allow this application unless tangible material in portrayal of the insurer only nowat acquiring knowledge of the impugned judgment stood evinced. However a perusal of the judgment impugned hereat displays qua the insurer impleaded as respondent No.2 therein standing represented therebefore by its Counsel besides a receipt personificatory of the insurer in discharge of its liability fastened upon it under the impugned judgment depositing cheque No. 051589 before the learned Commissioner wherefrom an inference is erectable qua the insurer holding the apposite knowledge at the time contemporaneous to the recording of the impugned judgment by the learned Commissioner also an inference stands aroused qua its holding knowledge on 24.1.2011 whereat in discharge of its liability it deposited cheque bearing No. 051589 before the learned Commissioner. Consequently though with the insurer acquiring knowledge thereat qua the impugned judgment its yet omitting to assail it within limitation cannot at all render its belated apposite concert standing engendered by it standing beset with bonafide constraints or fetters in its relevant omission. Contrarily it stands concluded qua the insurer deliberately omitting to assail the impugned judgment. In aftermath, there is no merit in the application and the same is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Krishna Devi. ....Petitioner

Versus

State of H.P. & others. ....Respondents

CWP No. 4601 of 2010

Date of decision: 29.11.2016

Constitution of India, 1950- Article 226- Petitioner challenged the appointment of respondent No.6 as Part Time Water Carrier – petitioner claims that she belongs to an IRDP family and has been included in the National Health Insurance Scheme – she had submitted an application and her name was recommended by Gram Panchayat – however, respondent No.6 was appointed – respondents No.1 to 4 stated that approval was granted for appointment of respondent No.6 as Part Time Water Carrierbefore the consideration of the case of the petitioner - held, that Rule 12 empowers the State to make the appointment on compassionate ground without following the selection process from amongst widow, women deserted by their husbands, or otherwise destitute, handicapped persons if such candidate falls below the poverty line - the petitioner had applied for recruitment under this Rule – the Rule was subsequently quashed but the appointment was made prior to the quashing- respondent No.6 is a widow and has placed on record BPL certificate – no document establishing the claim of the petitioner was filed – the appointment of respondent No.6 cannot be faulted- writ petition dismissed. (Para-12 to 16)

For the Petitioner: Mr.Anil Kumar, Advocate.

For the Respondents: Mr.Varun Chandel, Additional Advocate General with Mr.Pankaj Negi, Deputy Advocate General, for respondents No. 1 to 4.

None for respondent No. 6.

The following judgment of the Court was delivered:

Vivek Singh Thakur J. (Oral).

In present petition, appointment of respondent No. 6 as Part Time Water Carrier (herein after referred to as PTWC) in Government Primary School, Tipp, Education Block Dehra, District Kangra, H.P. has been challenged.

2. I have heard learned counsel for parties and perused the documents placed on record.

3. Clause/Rule 12 of Recruitment Scheme for the appointment of Part Time Water Carriers in schools of Education Department (herein after referred to as 'Scheme') (Annexure P-1) empowers respondent-State to appoint PTWC on compassionate grounds, without following the selection process, amongst widows, women deserted by their husbands or otherwise destitute, handicapped persons if such candidate falls below the poverty line as defined by Rural Development Department from time to time.

4. Petitioner claims that she belongs to an IRDP family and no member of her family is serving in Government Department or Public Sector Undertaking and since she belongs to below poverty line family, thus has been included in the National Health Insurance Scheme. Therefore, as per Scheme she was most suitable person to be appointed as PTWC in Government Primary School, Tipp.

5. As per claim of the petitioner, post of PTWC in Government Primary School, Tipp was advertised by respondents No. 3 to 5 and in response to the said advertisement, she had submitted her application and her name was recommended by Gram Panchayat, Surani by passing an unanimous resolution dated 4.4.2010 (Annexure P-4).

6. It is contended on behalf of petitioner that name of respondent No. 6 was neither recommended nor was she eligible for appointment as PTWC under the provisions of Scheme (Annexure P-1), whereas, name of petitioner was recommended for appointment as water carrier in the Government Primary School, Tipp as her name was included in list of approved candidates. For substantiating her plea, she has relied upon Annexure P-5, claiming the same as list of candidates approved/recommended for appointment as PTWC in the schools mentioned against their names. In this list, name of petitioner has been shown at Sr. No. 6 against Government Primary School, Tipp.

7. It is further alleged by the petitioner that respondent No. 6 is joint owner of about 112 Kanal land in her village and her husband was working in a private firm/concern at Ludhiana Punjab, who expired in an accident during the course of his employment and as such, respondent No. 6 had received more than Rs. 3,00,000/- under Workmen Compensation Act and therefore, she was not eligible to be appointed under clause/Rule 12 of the Scheme.

8. Respondents No. 1 to 4 have filed reply to the petition, justifying appointment of respondent No. 6 as PTWC on compassionate grounds under clause/Rule 12 of the Scheme, as respondent No. 6 was below poverty line and a widow. It has further been clarified by respondent-State that Annexure P-5 is not a list of candidates approved or recommended for appointment as PTWC, but the same is list of candidates whose names were referred to the office of Deputy Director of Elementary Education for examination and prior to examination and approval for appointment of petitioner, approval for appointment of respondent No. 6 was granted and as such she was appointed as PTWC who joined her duties after completing all codal formalities under Clause/Rule 12 of the Scheme.

9. In reply, respondents 1 to 4 have denied claim of petitioner that post of PTWC in Government Primary School, Tipp was advertised for filling up through interview and it is stated that case of petitioner was received for examination, whereas in the meantime name of respondent No. 6 was approved by Government, in pursuance to which respondent No. 6 was appointed and allowed to join her duty.

10. Respondent No. 5, Gram Panchayat has not chosen to contest the petition and no reply has been filed on its behalf.

11. Respondent No. 6 has filed separate reply stating therein that being a widow and belonging to BPL family, she was eligible and entitled to be appointed on compassionate grounds under Clause/Rule 12 of the Scheme. She has placed on record copy of BPL certificate and certificate of income below Rs. 10,500/- per annum as Annexures R-6/A and R-6/B. Respondent No. 6 has also alleged concealment of material facts by petitioner by stating that

petitioner is working as cook under Mid Day Meal Scheme in the same school, i.e. Government Primary School, Tipp. Respondent No. 6 has also clarified in reply that she was not only recipient of amount of compensation under Workmen Compensation Act on account of death of her husband, but it was disbursed amongst all dependents of deceased and share of respondent No. 6 in joint holding is meager one. It is also alleged that to the contrary, Sh. Braham Dass father-in-law of the petitioner being an ex-serviceman is receiving substantially handsome amount of pension.

12. Petitioner has not preferred to file rejoinder and also averments of replying respondents No. 1 to 4 and 6 have been otherwise rebutted Learned counsel for petitioner has also relied upon judgment dated 15.5.2015 passed by Division Bench of this Court in CWP No. 7498 of 2014, titled as Mangla Devi Vs. State of H.P. and others, vide which Clause/Rule 12 of the Scheme has been quashed and set aside being ultra virus and thus he has prayed for quashing and setting aside the appointment of respondent No. 6, made exercising power under Clause/Rule 12 of the Scheme.

13. In judgment rendered by Division Bench in CWP No. 7498 of 2014 Clause/Rule 12 of Scheme has been struck down by declaring it ultra virus. In present case petitioner has not challenged the vires of clause/rule 12 of the Scheme, rather has claimed right under the same Clause/Rule 12 itself and clause/rule 12 of the Scheme was struck down on May 15, 2015 without any direction with respect to appointments made before striking down of the said Clause/Rule 12 of the Scheme as all appointments made prior to 15.5.2015 under this clause/Rule were neither in question in that petition nor the candidates appointed prior to the said date were party before the Court. Therefore, candidates appointed under Clause/Rule 12 of Scheme prior to striking down of the said Clause/Rule will not be liable to be ousted automatically or otherwise on the basis of ratio laid down by the Division Bench in judgment referred supra, unless their appointments are assailed on that ground.

14. In present case, petitioner herself is banking upon provisions of Clause/Rule 12 of the Scheme. Therefore, striking down of Clause/Rule 12 of the Scheme is not advantageous to her, rather it has adverse effect on her claim as except claiming her entitlement for appointment under provisions of Clause/Rule 12 of the Scheme, there is no other ground for her appointment to the post of PTWC against which respondent No. 6 has been appointed.

15. Respondent No. 6 is serving till date and concealment of appointment of petitioner as Mid Day Meal worker has also not been disputed. At the time of appointment of respondent No. 6 Clause/Rule 12 of Scheme was in force and she was considered and found within criteria fixed for appointment under the said Clause/Rule. It is admitted fact that respondent No. 6 is widow and she has also placed on record BPL certificate Annexure P-6/A and Income Certificate Annexure P-6/B, whereas petitioner, though, has claimed her belonging to below poverty line family but no document substantiating her claim has been placed on record. Petitioner has not questioned power of respondent-State to appoint a candidate under Clause/Rule 12 of Scheme but has claimed her right for appointment in exercise of power under Clause/Rule 12 of the Scheme.

16. In view of above discussion, present petition, being devoid of merits is dismissed, along with pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Kusum Lata .....Petitioner

Versus

State of Himachal Pradesh and others .....Respondents

CWP No. 6472 of 2014
Decided on : November 29, 2016

Constitution of India, 1950- Article 226- Petitioner applied for the post of PGT English along with other candidates – respondent No.5 was selected – petitioner claimed that marks were wrongly awarded to respondent No.5 – held, that as per the communication made by Secretary, Gram Panchayat and Revenue Authorities, respondent No.5 is not a permanent resident of patwar circle – 10 marks were wrongly awarded to him- writ petition allowed – appointment of respondent No.5 set aside and respondent/State directed to offer appointment to the petitioner.

(Para-4 to 13)

For the petitioner : Mr. K.C. Sankhyan, Advocate.

For the respondents : Mr. Ramesh Thakur, Deputy Advocate General for respondents No.1 to 3.
Respondents No.4 and 5 ex parte.
Mr. Rajinder Singh Dogra, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of present petition under Article 226 of the Constitution of India, petitioner has prayed for following main reliefs:

"i) That the selection and appointment of respondent No.5 Sh. Paras Ram as PGT (Eng) SMC issued vide order dated 18th July,2014 (Annexure P-9) may kindly be quashed and set aside and the respondents may kindly be directed to appoint the petitioner as PGT(Eng) under SMC Govt. SSS Gadagussain, Distt. Mandi forthwith.

ii). That the respondents particularly respondent No. Director, Hr.Edu. HP Shimla be directed to conduct detailed enquiry into the matter and panelize the respondent concerned for the act of commission & omission in deliberately ignoring the petitioner for her appointment."

2. Briefly stated the facts, as emerge from record are that the School Management Committee of Government Senior Secondary School Gadagussain (in short, 'SMC') advertised one post of PGT (English) as per "policy to engage Teacher(s) through the School Management Committee purely on period basis in Elementary/Higher Education Department of Himachal Pradesh in Tribal/Difficult areas" (annexure P-6 dated 17.7.2012). Petitioner being eligible candidate also applied for the post of PGT (English) on SMC basis for GSSS Gadagussain alongwith other fourteen candidates. As per record, interview was conducted on 26.6.2014 by respondents No.2 and 3, wherein eight candidates including petitioner and respondent No.5 appeared. On the basis of aforesaid interview held on 26.6.2014, SMC declared result on 18.7.2014, wherein respondent No.5 was declared selected. After the selection of respondent No.5, petitioner procured copy of appointment letter issued in favour of respondent No.5 and also the result sheet of the interview held on 26.6.2014, under Right to Information Act. On the perusal of result sheet procured by the petitioner under Right to Information Act, petitioner came to know that respondent No5. has been given 10 marks being permanent resident of Patwar Circle Gadagussain, whereas respondent No.5 was permanent resident of village Pattan, Mohal Seraj, Tehsil Banjar, District Kullu (Annexure P-7). Since respondent No. 5 was awarded 10 marks for his being permanent resident of Patwar Circle, he had procured 35.17 marks in total, whereas petitioner who was actually resident of Patwar Circle Gadagussain procured 33.99 marks. As per the petitioner, if 10 marks awarded to respondent No. 5 on account of his being permanent resident of Patwar Circle Gadagussain are deducted as per policy, he could not have been at Sr. No. 1 and selected to the post of PGT (English) in the School concerned, as such, selection of respondent No. 5 deserves to be quashed and set aside being contrary to the recruitment procedure as laid down under the Policy. Petitioner, after coming to know of aforesaid illegality having been committed by the interview committee, made a representation to respondent Nos. 3 and 4 praying therein for reviewing the wrong selection but when no action was taken, he

got issued a legal notice (Annexure P-11) on 7.8.2014 under Section 80 CPC, to the respondents calling upon them to review selection of respondent No.5. Since no action whatsoever, pursuant to issuance of legal notice was taken by the respondent, she was compelled to file instant writ petition before this Court.

3. Pursuant to issuance of notice by this Court, respondent No. 5 i.e. selected candidate Paras Ram, filed reply, wherein he refuted the claim of the petitioner by stating that he was also permanent resident of village Thachadhar, Gram Panchayat Thachadhar, PO Gadagussain, Sub-tehsil Balichowki, District Mandi, which falls within Patwar Circle, Gadagussain, as per certificate, annexure R-5/A. He further claimed that he was rightly awarded 10 marks on the basis of his being resident of Patwar Circle Gadagussain.

4. Respondents No.1 to 4 failed to file any reply. However, during the course of hearing today, learned Deputy Advocate General, made available copy of communication sent by the Principal, Government Senior Secondary School Gadagussain, District Mandi, enclosing therein written statement/para-wise reply on behalf of respondent No.3, which is taken on record. Aforesaid communication also enclosed therewith communication dated 23.5.2015 sent by Naib Tehsildar Sub Tehsil Balichowki, and certificate issued by Gram Panchayat, Thachadhar, Development Block Seraj, Mandi, HP. Perusal of aforesaid communication/ proposed reply sent by the Principal, GSSS suggests that the matter regarding awarding of 10 marks on the basis of local Patwar Circle was taken up with the revenue authorities i.e. Naib Tehsildar/Tehsildar of the area concerned for clarification. Naib Tehsildar Balichowki District Mandi, HP and Secretary Gram Panchayat concerned, i.e. Thachadhar have clarified that Paras Ram (respondent No. 5) was not bonafide resident of Patwar Circle Gadagussain. It would be apt to reproduce para-7 of the aforesaid communication /proposed reply as under:

> "7. With reference to the office letter No. EDN-H(19)B(1)-14/2012-SMC-CC dated 30-04-2015 pertaining to para No. 7 of CWP No. 6472 of 2014 the matter regarding awarding of 10 marks on the basis of local Patwar Circle was taken up with the revenue authorities i.e. Tehsildar/Naib Tehsildar of the Area concerned for clarification. The Naib Tehsildar Balichowki District Mandi (HP) and Secretary, Gram Panchayat concerned (i.e. GP Thachadhar) clarified that Sh. Paras Ram was not Bonafide resident of Patwar Circle Gadagusain Tehsil Balichowki District Mandi (HP) on the date interview (i.e. 26-06-2014) for the post of PGT English. Hence 10 marks cannot be awarded to him. The copy of letter No. NT/Balichowki/dk0dk0/2014-830 dated 23/05/2015 of the Naib Tehsildar Balichowki District Mandi (HP) and certificate issued by the Secretary of Gram Panchayat Thachadhar, are enclosed herewith for ready reference please."

5. Further perusal of communication dated 23.5.2015 of Naib Tehsildar, Sub Tehsil Bali Chowki, annexed with the communication sent by Principal, GSSS, suggests that respondent No.5, Paras Ram was not permanent resident of Patwar Circle Gadagussain till 8.5.2015 . Similarly, certificate dated 8.5.2015 suggests that the name of respondent No.5 Paras Ram son of Atma Ram, was not entered in the *Parivar Register* of Gram Panchayat Thachahar.

6. Perusal of annexure P-6 provides for appointment of teachers by the School Management Committee, relevant portion whereof reads as under:

> " Procedure for the appointment of a Teacher by the SMC to the educational institutions of Tribal/ difficult Areas"
>
> The School Management Committees of the educational Institutions located in the Tribal/Difficult areas have requested to fill up vacant posts of teachers in their schools. The Government is making all efforts to fill up all the vacant posts in the educational institutions in the State but even then some posts in the Tribal/Difficult areas remain vacant due to retirement, transfers, promotions etc. As such the studies of the students suffers badly. Keeping in view the betterment

of the study of students in these areas, it has been decided by the Government to permit the School Management Committees of educational institution situated in Tribal/Difficult areas as notified by the Department of Personnel (Annexure-I), to provide the teachers against vacant post as per the clause 15 of the "Right of Children to Free and Compulsory Education Act, 2009".

The Government hereby frames the following procedure for the appointment of teachers through the SMCs purely on period basis:

1. ...
2. ...
3. ...
4. Member of the selection committee will be as under:-
    1. President SMC
    2. Head of the Institution-cum-Member Secretary of SMC
    3. Subject expert from outside the concerned Institution.
    4. Senior most Regular Teacher of the concerned Institution, (if the regular Teacher is not available, in the concerned institution, the same be called from the adjoining institution).
    5. The SMC will conduct an interview and follow distribution of Marks for evaluation during the course of Selection Process as per Annexure-II. Preference will be given to local eligible candidates."

7. Further, the scheme for evaluation of SMC's during the course of selection process suggests that 10 marks can be awarded to a candidate on account of his/her being permanent resident of Patwar Circle, where School is located. In this regard relevant portion of the scheme providing for Distribution of Marks* for evaluation of SMCs during the course of Selection Process, is reproduced herein below:

ANNEXURE-II

Distribution of Marks* for evaluation of SMCs during the course of Selection Process.

	Qualification	PGT	TGT	LT Shastri	JBT
1.	Matric	-	-	5	5
2.	10+2	-	-	5	5
3.	Graduation/Shastri	10	10	10	10
4.	B.Ed. for PGT TGT JBT Certificate for JBT posts	10	10	-	-
5.	Post-Graduation	10	5	10	-
6.	TET	-	10	10	10
7.	Ph.D	10			
8.(a)	Permanent resident of the concerned Panchayat where the Primary /Middle School located.	-	10*	10*	10*
8.(b)	Permanent resident of the concerned Patwar Circle where the High Senior Secondary School located.	10*	-	-	-

9	Interview	10	10	10	10
		60	60	60	60

8. Perusal of clause 8 (b) suggests that 10 marks can only be awarded to those candidates, who are permanent residents of concerned Patwar Circle where higher/senior secondary school is situated. In the present case, as emerges from record, respondent No.5 was not permanent resident of concerned Patwar Circle Gadagussain and as such he could not be awarded 10 marks on account of his being permanent resident of Patwar Circle Gadagussain where School was located. In the instant case, perusal of annexure P-10 (result sheet) suggests that respondent No.5 was awarded 10 marks for being permanent resident of Patwar Circle Gadagussain, as a result of which he secured 35.17 marks in total, whereas petitioner secured 33.99 marks in total.

9. By way of present petition, petitioner claimed that if 10 marks wrongly awarded to respondent No.5 under aforesaid head are deducted, she comes at Sr. No.1 of merit list and deserves to be appointed as PGT (English).

10. It duly stands proved on record that respondent No.5 was wrongly awarded 10 marks on account of his being permanent resident of Patwar Circle Gadagussain because, admittedly, at that time, he was not the resident of Patwar Circle Gadagussain. As such, this Court has no hesitation to conclude that he was wrongly awarded 10 marks.

11. In view of detailed discussion herein above, present petition is allowed and appointment order of respondent No.5 (annexure P-9 dated 18.7.2014, as PGT (English) in Government Senior Secondary School Gadagussain on period basis is hereby quashed and set aside. Respondent-State is directed to offer appointment as PGT (English) in Government Senior Secondary School Gadagussain to the petitioner., who was next in merit.

12. Pending applications are disposed of.

****

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Narain Singh .....Petitioner

Versus

State of Himachal Pradesh and others .....Respondents

CWP No. 2865 of 2011
Decided on : November 29, 2016

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged on daily wage basis- his services were terminated- he filed original application before Administrative Tribunal, which was allowed – the services of the petitioner were disengaged without following the procedure – the Labour Court dismissed the reference – held, that the petitioner had worked for three days in July, 2001- the plea of the petitioner that he had completed 240 days and his services were illegally terminated was not proved – the Labour Court had rightly dismissed the reference – writ petition dismissed. (Para-5 to 14)

Cases referred:

Relip Nagarpalika Vs. Babuji Gabhaji Thalore and others reported in 2009 (120) FLR 1007
Ocean Creations Vs. Manohar Gangaram Kamble 2013 SCC Online Bom 1537:2014)140 FLR 725
D.K. Yadav vs J.M.A. Industries Ltd reported in 1993 (3) SCC 259

For the petitioner : Ms. Taman Rana and Ms. Kiran Bala, vice Counsel.

For the respondents : Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of present petition under Article 226 of the Constitution of India, petitioner has prayed for following main reliefs:

> "(a) to issue a writ of certiorari or direction in nature thereof, quashing, quashing the impugned award dated 01/10/2010 being Annexure P-4 of the writ petition, as unconstitutional and illegal and contrary to the law;
>
> (b) to issue a writ of mandamus, appropriate writ, order or direction in nature thereof, directing the respondent to re-engage the petitioner with full back wages wef illegal termination of services alongwith interest on the arrears @ 18% pa;
>
> (c) to issue an appropriate writ, order or direction in nature thereof to give full justice to the petitioners in the circumstances of the case and may pass such further writ, order or orders as this Hon'ble Court may deem fit, proper, just and expedient in the circumstances of the case;"

2. Briefly stated the facts of the case are that petitioner was initially engaged as daily wager with effect from 3.10.1998 at Rohnat. He further claimed that he worked for 240 days in each calendar year, prior to his alleged termination. One Shri Bir Singh filed an Original Application before the Hon'ble Tribunal i.e. OA No. 2604/1999 wherein petitioner was impleaded as respondent No.5. Since Bir Singh in his Original Application claimed that the present petitioner, who was junior to him, has been retained, department, in order to defeat the claim of the applicant Bir Singh, also disengaged his services being junior without complying with the mandatory provisions of law. Petitioner being aggrieved, filed an OA No. 2968/2000 titled Narain Singh vs. State of Himachal Pradesh and others before the Himachal Pradesh Administrative Tribunal. The learned Tribunal vide order dated 30.11.2000, held his disengagement to be *void ab initio* and directed to re-engage the petitioner in the same capacity at the same place or in the vicinity where the work was available, with the direction that his services may not be disengaged save and except in accordance with law. Pursuant to aforesaid direction issued by the Tribunal, Department re-engaged the petitioner. Petitioner further claimed that the respondents solely with a view to harass him, repeatedly called him to join duties but at no point of time, he was allowed to mark his attendance so as to deprive him from claiming regularization in future. Petitioner also claimed that the department had been giving fictional breaks in service and ultimately in August, 2006, his services were disengaged without resorting to statutory provisions of Industrial Disputes Act, despite the fact that he had completed 240 days in a calendar year. Petitioner claimed that since his services were disengaged in violation of provisions of Sections 25F, 25G and 25H of Industrial Disputes Act, he deserves to be reinstated with all consequential benefits. Petitioner raised industrial dispute before appropriate Government, which in turn made following reference to the learned Industrial Tribunal-cum-Labour Court, for adjudication:

> "Whether the termination of services of Shri Narain Singh S/o Shri Singhe Ram workman by the Divisional Forest Officer, Forest Division, Renukaji, District Sirmour, HP w.e.f. 1.8.2006 without complying the provisions o the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of back wages, seniority, pas service benefits and amount of compensation, the above aggrieved workman is entitled to?

3. Respondent-State, by way of filing reply, contested the aforesaid claim of the petitioner-workman (hereinafter, 'workman') by stating that during October, 1998, petitioner was engaged as a seasonal/casual worker and one Bir Singh filed OA No. 2604/1999. But the respondents specifically denied that the services of the petitioner were disengaged with a view to

defeat the claim of Bir Singh, who had filed aforesaid Original Application. Department further refuted the claim of the petitioner that he had completed 240 days in each calendar year except 1999. Rather, respondents claimed that pursuant to the direction passed by the Himachal Pradesh Administrative Tribunal, in OA No. 2968/2000, filed by the petitioner, he was re-engaged but he himself left the job and as such there was no occasion for them to resort to the provisions of Industrial Disputes Act before disengaging the petitioner. Learned Industrial Tribunal, on the basis of material on record, came to the conclusion that the petitioner has miserably failed to prove that after his re-engagement upon order of Himachal Pradesh Administrative Tribunal, his services were again disengaged/ terminated in the month of August, 2006. Learned Tribunal below further came to the conclusion that it is abundantly clear from the Man Day's chart that in the year 1998, petitioner worked for 89 days, in 1999 for 256 days and in 2000 for 191 days and for 3 days in 2001 (July), as such respondents were not required to comply with the provisions of Section 25 of the Act. Learned Tribunal below also came to the conclusion that the Department has been able to prove on record that the workman himself left the job and as such there was no such requirement of resorting to the provisions of Section 25 of the Act, as claimed by the petitioner. Petitioner being aggrieved and dissatisfied with the aforesaid findings recorded by the Learned Tribunal below vide Award date 1.10.2010, preferred the present petition, praying therein for the main reliefs as have been reproduced herein above.

4. It is ample clear from the Award passed by the learned Tribunal below that dispute prior to 30.10.2001 raised by the petitioner qua his disengagement of his services was adjudicated by the Himachal Pradesh Administrative Tribunal by holding the disengagement to be *void ab initio* in OA No. 2968/2000, filed by the petitioner and as such Industrial Tribunal-cum-Labour Court was only required to adjudicate whether termination of services of petitioner by Divisional Forest Officer, Renukaji, with effect from 1.8.2006 without complying Section 25 of the Industrial Disputes Act, is legal or not. Petitioner before the learned Tribunal below claimed that his services were disengaged by the respondent in August, 2006 without complying the provisions of the Act ibid and as such his disengagement deserves to be quashed and set aside. Petitioner claimed before Industrial Tribunal-cum-Labour Court that pursuant to order passed by Himachal Pradesh Administrative Tribunal in OA No. 2968/2000, he was called for duty but his attendance was not marked.

5. Respondents, by way of written statement, refuted the aforesaid claim of the petitioner and claimed that consequent to order passed by Himachal Pradesh Administrative Tribunal on 30.11.2000, services of petitioner were re-engaged but he himself abandoned the job.

6. It emerges from the impugned award that no documentary evidence worth the name was placed on record by the petitioner in support of his claim that his services were disengaged in contravention of the provisions of the Act ibid and that in the preceding calendar months i.e. before the date of termination, he had completed 240 days. Perusal of impugned award suggests that the petitioner tendered affidavit Ext. PA and copy of order passed by Himachal Pradesh Administrative Tribunal Ext. PB, wherein admittedly he did not file any Man Days chart to demonstrate that he had worked till August, 2006, when his services were terminated by the respondents without resorting to the provisions of the Act. Learned Tribunal below also observed that no steps were taken by the petitioner to get relevant record summoned from the Department, with a view to substantiate that he had worked till August, 2006 and that in every calendar year, he had completed 240 days. It is settled law that burden of proof lies on the workman to show that he has worked continuously for 240 days in the preceding year and in this regard, workman is/was under obligation to adduce positive documentary evidence apart from examining himself to prove the factum of his being in service. In this regard, reliance is placed upon **Relip Nagarpalika Vs. Babuji Gabhaji Thalore and others** reported in 2009 (120) FLR 1007.

7. Respondents have examined RW-1 Vijay Pal, who has categorically stated that petitioner had never completed 240 days in any calendar year and in support of their claim, they produced Man Days chart Ext. RA. Perusal of Man Days chart suggests that the petitioner has

worked for 89 days in 1998, 256 days in 1999 and 151 days in 2000 and 3 days in July 2001. It further suggests that prior to the illegal, termination of petitioner, as claimed by him, he has worked for 3 days that too in July 2001. Since the Himachal Pradesh Administrative Tribunal had ordered for re-engagement of petitioner vide order dated 30.11.2000, this Court sees no force in the contention put forth by the petitioner that though he was re-engaged but was not allowed to mark his presence in the attendance register. Learned Tribunal below rightly concluded that had the petitioner been attending his duties, and his attendance was not marked, he could have complained to the higher officers or could file contempt petition before the Himachal Pradesh Administrative Tribunal for non-compliance of order dated 30.11.2000. Similarly, it can not be believed that the petitioner kept on working till 2006 from 2001 without there being any payment of wages to him. Perusal of Ext. RA, Man Days chart clearly suggests that the petitioner has not actually worked after 2001 and he only worked for 3 days in July 2001.

8. In view of above, this Court sees no illegality in the findings recorded by the learned Tribunal below that since petitioner failed to prove on record that he had completed 240 days in a calendar year preceding the date of termination, there was no requirement for the Department to resort to the provisions of Industrial Disputes Act before disengaging the petitioner.

9. As far as plea of abandonment having been taken by respondent is concerned, same needs to be examined. Undisputedly, as emerges from impugned award, while refuting claim of the petitioner, specific stand of the department before learned Tribunal below was that the petitioner was re-engaged pursuant to order dated 30.11.2000 passed by Himachal Pradesh Administrative Tribunal in OA No. 2968/2000, filed by the petitioner. Respondents further claimed that pursuant to his re-engagement, petitioner only worked for 3 days in July 2001 and thereafter he, himself, abandoned the job and as such there was no requirement for the Department to issue notice under Section 25F of the Industrial Disputes Act. This Court, while deciding issue with regard to non-compliance of provisions of Industrial Disputes Act, especially in view of plea taken by the petitioner that he had complete 240 days in preceding calendar year, examined entire evidence led on record by both the parties, perusal whereof nowhere suggests that any evidence was led on record by the respondent-State in support of their claim of abandonment of job by the petitioner. Though this Court, after perusing evidence available on record, is satisfied and convinced that the workman had only worked for 3 days in 2001 after his re-engagement pursuant to order passed by Himachal Pradesh Administrative Tribunal, but there is nothing on record suggestive of the fact that before allegedly terminating services of the workman on account of his having abandoned the job, respondents at any point of time, issued notice specifically calling upon the workman to explain why his services may not be dispensed with since he has failed to join his duties. Respondents categorically, in their reply before learned Tribunal below stated that the petitioner himself abandoned the job and as such there was no requirement of issuance of notice in terms of Industrial Disputes Act before terminating his services but as has been discussed above, this Court was unable to lay hand on any document suggestive of the fact that respondent issued communication/notice, if any, asking/advising the workman to join duty, failing which he would be inviting termination.

It is settled law that plea of abandonment taken by employer may not be sufficient to prove abandonment, rather it is necessary for the employer to place on record that specific notice was issued to the workman before alleged abandonment asking the workman to join duty within a stipulated period. In this regard, reliance is placed upon the judgment passed by Bombay High Court in case titled **Ocean Creations Vs. Manohar Gangaram Kamble** 2013 SCC Online Bom 1537:2014)140 FLR 725. It is profitable to reproduce paras No.8,9 and 10 of the judgment herein:-

> "8. The legal position is also settled that 'abandonment or relinquishment of service' is always a question of intention and normally such intention cannot be attributed to an employee without adequate evidence in that behalf. This is a question of fact which is to be determined in the light of surrounding

circumstances of each case. It is well settled that even in case of abandonment of service, unless the service conditions make special provisions to the contrary, employer has to give notice to the workman calling upon him to resume duties and where he fails to resume duties, to hold an enquiry before terminating services on such ground.

9. In somewhat similar circumstances a Division Bench of this court comprising P.B.Sawant, J.(as he then was) and V.V.Vaze, J. in the case of Gaurishanker Vishwakarma v. Engle Spring Industries Pvt. Lted. Observed thus:

> ".....it is now well settled that even in the case of the abandonment of service, the employer has to give a notice to the workman calling upon him to resume his duty and also to hold an enquiry before terminating his service on that ground. In the present case the employer has done neither. It was for the employer to prove that the workman had abandoned the service..... It is therefore difficult to believe that the workman who had worked continuously for six to seven years, would abandon his service for no rhyme or reason. It has also to be remembered that it was the workman who had approached the Government Labour Officer with a specific grievance that he was not allowed to join his duty. It was also his grievance that although he had approached the company for work from time to time, and the company's partner Anand had kept on promising him that he would be taken in service, he was not given work and hence he was forced to approach the Government Labour Officer. In the circumstances, it is difficult to believe that he would refuse the offer of work when it was given to him before the Labour Officer...."

10. Again a learned Single Judge of this court R.M.Lodha, J(as he then was) in the case of Mahamadsha Ganishah Patel v. Mastanbaug Consumers' Co-op. Wholesale & Retail Stores Ltd. Observed thus:-

> "....The legal position is almost settled that even in the case of abandonment of service, the employer has to give notice to the employee calling upon him to resume his duty. If the employee does not turn up despite such notice, the employer should hold inquiry on that ground and then passs appropriate order of termination. At the time when employment is scarce, ordinarily abandonment of service by employee cannot be presumed. Moreover, abandonment of service is always a matter of intention and such intention in the absence of supportable evidence cannot be attributed to the employee. It goes without saying that whether the employee has abandoned the service or not is always a question of fact which has to be adjudicated on the basis of evidence and attending circumstances. In the present case employer has miserably failed to discharge the burden by leading evidence that employee abandoned service. The Labour Court has considered this aspect, and, in my view rightly reached the conclusion that the employer has failed to establish any abandonment of service and it was a clear case of termination. The termination being illegal, the Labour Court did not commit any error in holding the act of employer as unfair labour practice under Item-I, Schedule IV of the MRTU & PULP Act....."

10. Apex Court in **D.K. Yadav vs J.M.A. Industries Ltd** reported in 1993 (3) SCC 259, has held that it is fundamental rule that no decision must be taken, which will affect right of any person without first being informed of the case and giving him/her opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice. The Apex Court has held as under:

> "9. It is a fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and be given him/ her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural

justice. In Mohinder Singh Gill & Anr. v. The Chief Election Commissioner & Ors. [1978] 2 SCR 272 at 308F the Constitution Bench held that 'civil consequence' covers infraction of not merely property or personal right but of civil liberties, material deprivations and non- pecuniary damages. In its comprehensive connotion every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th Edition, page 1487 defined civil rights are such as belong to every citizen of the state or country they include rights capable of being enforced or redressed in a civil action. In State of Orissa v. Dr. (Miss) Binapani Dei & Ors., this court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice.

10. In State of West Bengal v. Anwar Ali Sarkar [1952] SCR 289, per majority, a seven Judge bench held that the rule of procedure laid down by law comes as much within the purview of Art. 14 of the Constitution as any rule of substantive law. In Maneka Gandhi v. Union of India,. [1978] 2 SCR 62 1, another bench of seven judges held that the substantive and procedural laws and action taken under them will have to pass the test under Art, 14. The test of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to he reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice."

11. Apex Court has further concluded that the management had power under Clause 13 of the Certified Standing Order to terminate the services of the appellant but principles of natural justice must be read into with the Standing Order, otherwise it would become arbitrary, unjust, unfair and violative of Article 14 of the Constitution of India. The Apex Court has held as under:

"15. In this case admittedly no opportunity was given to the appellant and no enquiry was held. The appellant's plea put forth at the earliest was that despite his reporting to duty on December 3, 1980 and on all subsequent days and readiness to join duty he was prevented to report to duty, nor he be permitted to sign the attendance register. The Tribunal did not record any conclusive finding in this behalf. It concluded that the management had power under Cl. 13 of the certified Standing Orders to terminate with the service of the appellant. Therefore, we hold that the principles of natural justice must be read into the standing order No. 13 (2) (iv). Otherwise it would become arbitrary. unjust and unfair violating Arts. 14. When so read the impugned action is violative of the principles of natural justice.

16. This conclusion leads us to the question as to what relief the appellant is entitled to. The management did not conduct any domestic enquiry nor given the appellant any opportunity to put forth his case. Equally the appellant is to blame

himself for the impugned action. Under those circumstances 50 per cent of the back wages would meet the ends of justice. The appeal is accordingly allowed. The award of the Labour Court is set aside and the letter dated December 12, 1980 of the management is quashed. There shall be a direction to the respondent to reinstate the appellant forthwith and pay him back wages within a period of three months from the date of the receipt of this order. The appeal is allowed accord- ingly. The parties would bear their own costs."

12. In the instant case, as has been mentioned above, no evidence, be it ocular or documentary, has been led on record by the respondents in support of their claim that petitioner himself abandoned job, whereas petitioner in his claim petition specifically alleged that after his re-engagement in the year 2001, he was not allowed to mark his attendance. In the judgment referred to herein above, it has been repeatedly held that abandonment of service is a matter of intention and such intention in the absence of supportive evidence, can not be attributed to the employee. Whether the employee has abandoned service, is a question of fact which needs to be adjudicated on the basis of evidence. In the present case, respondents have failed to discharge the burden by leading evidence that employee abandoned service and as such respondents failed to establish abandonment of service and it is clear cut case of termination.

13. In the instant case, it may be noticed that petitioner was initially engaged by the respondents as daily wager in 1998 i.e. 3.10.1998. He kept on working as daily wager till his disengagement. On 30.11.2000, Himachal Pradesh Administrative Tribunal passed interim order in OA No. 2968/2000 directing the respondents to re-engage the workman in the same capacity and same place and vide order dated 30.10.2001, disposed of Original Application by affirming interim order and by holding termination of workman *void ab initio,* learned Administrative Tribunal vide aforesaid order, also directed to count period served by him in view of interim order for the purpose of seniority, meaning thereby petitioner was held entitled to seniority with effect from initial engagement i.e. 3.10.1998. Since respondents never assailed order dated 30.10.2001 passed by Himachal Pradesh Administrative Tribunal, it attained finality, meaning thereby that petitioner rightly claimed benefit of re-instatement alongwith all consequential benefits by way of claim before the Industrial Tribunal-cum-Labour Court.

14. Consequently, in view of aforesaid discussion, this Court sees force in the contention put forth on behalf of the workman that he never abandoned job after his reinstatement pursuant to order passed by Himachal Pradesh Administrative Tribunal and impugned award passed by the Industrial Tribunal-cum-Labour Court deserves to be quashed and set aside.

15. Accordingly, in view of detailed discussion as well as law discussed herein above, impugned award dated 1.10.2010 passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla in Reference No. 39 of 2009 is set aside. Respondents are directed to reinstate the workman from the date of termination, with seniority and continuity in service, but without back wages.

16. Pending applications are disposed of.

****

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Nishu .....Petitioner.

Versus

State of Himachal Pradesh. .....Respondent.

Cr.MMO No. 353 of 2015

Date of decision: 29th November, 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 498-A and 506 read with Section 34 of I.P.C – the police sought cancellation of FIR – the Court ordered the cancellation of the FIR with liberty to file a private complaint- held, that after the cancellation of FIR, filing of criminal complaint would amount to abuse of the process of the Court – order set aside and case remanded to the Trial Court with a direction to decide the same afresh. (Para-2 to 4)

For the petitioner: Mr. N.S. Chandel, Advocate.
For the respondents: Mr. Neeraj K. Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)**.**

Complaint herein is that learned trial Court vide impugned order dated 03.09.2015, Annexure P-4 has went wrong while ordering the cancellation of FIR No. 173/14 registered against her husband and his relations under Section 498-A, 506 read with Section 34 of the Indian Penal Code in Police Station, Manali, District Kullu, H.P.

2. The petitioner herein is the complainant in FIR, Annexure P-1. She was married to accused Vinay Kumar as per Hindu Rites and Customs. She, however, later on was turned out from the matrimonial home allegedly after being tortured by her husband and his relations at the pretext of demand of dowry. At her instance, FIR, Annexure P-1 was registered against her husband Vinay Kumar and his father Kashmir Singh. The police on completion of the investigation has filed the report under Section 173 of the Code of Criminal Procedure and sought thereby cancellation of the FIR. The petitioner-complainant was summoned and associated by the Court below before passing the impugned order, Annexure P-4 qua cancellation of the FIR.

3. The perusal of impugned order reveals that FIR was ordered to be cancelled and liberty reserved to the complainant to file private complaint, if so advised. As a matter of fact, no such order could have been passed nor in view of the FIR already registered in the matter, the liberty in favour of the petitioner-complainant to file a criminal complaint could have been reserved, because in view of the cancellation of FIR any criminal complaint filed afresh would amount to abuse of process of the Court. The appropriate course available to learned trial Court was to have taken on record any other and further details pertaining to the occurrence and it is thereafter the matter considered afresh for passing an appropriate and reasoned order. In the event of any other details qua occurrence furnished by the petitioner-complainant to have considered the same while passing the order qua cancellation of FIR or otherwise in the cancellation report. In the event of any substance find out in the additional material/details if so furnished by the petitioner-complainant the matter could have been returned to the investigating agency for conducting further investigation in terms of the provisions contained under Section 173(8) of the Code of Criminal Procedure. The impugned order, in the considered opinion of this Court, is, therefore, not legally sustainable and as such, quashed and set aside. Learned trial Court to decide the fate of cancellation report afresh after affording opportunity of being heard to the petitioner-complainant and in the light of material/details if any furnished by her in the trial Court. The parties through learned counsel representing them are directed to appear in the trial Court on ***30th December, 2016***. The record be sent back along with a copy of this judgment so as to reach in the trial Court well before the date fixed.

4. The petition is according allowed and stands disposed of. Pending application(s), if any, shall also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Raj Kumari ....Appellant-Defendant
Versus
Sheela Devi & Others ....Respondents-Plaintiffs

Regular Second Appeal No.109 of 2008.
Judgment Reserved on: 04.11.2016
Date of decision: 29.11.2016

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that suit land was jointly owned and possessed by the parties – mutation wrongly attested in favour of defendant No.1 exclusively - the defendant No.1 pleaded that land belonged to H who had sold some portion of the suit land and had executed a Will in her favour – the suit was decreed by the Trial Court – an appeal was preferred, which was dismissed- held in second appeal that no attesting witness was examined to prove the execution of the Will- however, the execution of the sale deed was duly proved – the Courts had correctly appreciated the evidence and no interference was warranted with the same – appeal dismissed.(Para-13 to 36)

Cases referred:
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443
Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529
Daulat Ram and Others vs. Sodha and Others, (2005)1 SCC 40

For the Appellant: Mr.Subhash Sharma, Advocate.
For Respondents 1 to 3: Mr.N.K. Thakur, Sr.Advocate with Ms.Jamuna, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellant-defendant *(hereinafter referred to as the `defendant')* against the judgment and decree dated 17.9.2007, passed by learned Additional District Judge, Fast Track Court, Una, District Una, H.P. affirming the judgment and decree dated 8.9.2000, passed by learned Sub Judge 1st Class, Court No.II, Amb, District Una, H.P., whereby the suit filed by the respondents-plaintiffs *(hereinafter referred to as the `plaintiffs')* for declaration with permanent injunction and in the alternative suit for possession was partly decreed and they were declared joint owners in possession of suit land i.e. land measuring 2-19-70 Hects being 1/3rd share out of land measuring 6-59-11 Hects comprised in Khewat No.72, Khatauni No.131 to 134 and at present Khasra Nos.897, 900, 904, 909, 1197, 1558, 1684, 896, 905, 907, 1205, 1207, 1208, 895, 896/1, 906, 908, 1198, 1199, 898, 899, 901 to 903, 1203 and 1204 as entered in the Missalhaquiat Settlement for the year 1988-89, situated in village Pirthipur, Tehsil Amb, District Una, H.P. except the land measuring 0-56-74 Hects being 1/3rd share out of land measuring 1-70-22 Hects as it has been sold by Hari Singh to defendant vide sale deeds Ex.D-1 and Ex.D-3 to the extent of 1/5th share each and defendant was restrained from ousting the plaintiffs from joint possession, raising any construction till partition.

2. Briefly stated facts, as emerged from the record, are that the respondent-plaintiff Sheela Devi filed a suit for declaration to the effect that land measuring 2-76-44 Hects., description whereof has been given in the head-note of the plaint, situated in village Pirthipur, Tehsil Amb, District Una, H.P. is jointly owned and possessed by the parties to the extent of 1/5th share each, and mutation Nos.35 and 75, dated 21.10.1991 of the estate of Shri Hari Singh son

of Shri Jallu deceased exclusively in the name of defendant No.1 are absolutely, wrong, false, frivolous, baseless, illegal, at the back of the plaintiff, null and void and confer no valid title on the defendant No.1, consequential suit for issuance of permanent injunction restraining defendant No.1 from ousting the plaintiff from joint possession, raising any construction, transferring or alienating the suit land in any manner till partition, in the alternative suit for joint possession. Plaintiffs averred in the plaint that the suit land was owned and possessed by Hari Singh son of Shri Jallu and he died intestate leaving behind the parties i.e. plaintiff and defendants who succeeded him after his death and are joint owners in possession of the same. Plaintiff claimed that defendant No.1, who is a headstrong and influential lady, in connivance with the revenue staff got sanctioned mutation Nos.34 and 75 dated 21.10.1991 from Assistant Collector 2nd Grade exclusively in her name as the successor of deceased Hari Singh. Plaintiff further claimed that at the time of sanctioning of aforesaid mutations, she was never informed and as such, these mutations are wrong, illegal, baseless as Hari Singh died intestate and after his death all the parties are entitled to succeed him. Plaintiff further claimed that despite there being several requests, defendant No.1 refused to admit her claim as a result of which she filed suit for declaration to the effect that the suit land is jointly owned and possessed by the parties to the extent of 1/5th share each.

3. Defendant No.1, by way of filing written statement, refuted the claim of the plaintiffs on the ground of maintainability and estoppel. On merits defendant claimed that her late father Shri Hari Singh was residing with her and she was looking after him. She further claimed that Shri Hari Singh sold some portion of the suit land to her as the plaintiffs had refused to look after him and to take his property. Defendant No.1 further averred that since the deceased was living with her, he, out of love and affection, disposed of whole of his property in favour of defendant No.1 by way of registered Will dated 9.3.1990. Defendant No.1 further averred that the Will was executed with the consent of the plaintiffs, but the plaintiffs at the instance of one Duni Chand, who intended to purchase the suit property, filed this suit against defendant No.1. In the aforesaid background the defendant sought dismissal of the suit.

4. By way of replication, the plaintiffs, while denying the allegations made in the written statement, reaffirmed the averments made in the plaint and controverted the contrary averments made in the written statement. It is specifically averred by the plaintiffs that there is neither any such sale deed nor Will which was ever executed by late Shri Hari Singh in favour of the defendant during his life.

5. On the pleadings of the parties, the learned trial Court framed the following issues for determination:-

"1. Whether the suit land is owned and possessed by the parties as alleged? OPP.

2. Whether the plaintiffs are entitled to the relief of injunction as prayed for? OPP.

3. Whether deceased Hari Singh executed a valid Will dated 9.3.1990 in favour of defendant as alleged? OPD.

4. Whether the suit is not maintainable in the present form? OPD.

5. Whether the plaintiffs are estopped to file this suit by their acts and conduct? OPD.

6. Relief."

6. Subsequently, vide judgment and decree dated 8.9.2000 learned trial Court decreed the suit of the plaintiffs declaring the parties to the suit joint owners in possession of the suit land to the extent of 1/5th share each except the land which was sold by Hari Singh to defendant No.1 vide sale deeds Ex.D-1 and Ex.D-3.

7. Being aggrieved and dis-satisfied with the aforesaid judgment and decree passed by learned trial Court, defendant preferred an appeal before the learned Additional District Judge, Fast Track Court, Una, which came to be registered as Civil Appeal No.192/2K RBT 153/04/2000, but fact remains that appeal preferred by the defendant was dismissed as a result

of which judgment and decree passed by the trial Court came to be upheld. Hence, present Regular Second Appeal has been preferred by the defendant praying therein for setting aside the judgment and decree passed by both the Courts below.

8. This Court vide order dated 9.11.2010 admitted the appeal on the following substantial questions of law:-

> "1. Whether the learned courts below were correct in accepting the validity ofthe execution of the sale deed Ext.D-1 and out-rightly rejecting the validity and authenticity of the registered Will i.e. Ext.D-2 when the same were executed in the same circumstances?
>
> 2. Whether the learned courts below could have ignored the due registration of the Will Ext.D-2 wherein the marginal witnesses had clearly identified the status of testator before Sub Registrar?"

9. Shri Subhash Sharma, learned counsel appearing for the appellant-defendant, vehemently argued that judgments passed by both the Courts below are not sustainable and same are not based upon correct appreciation of evidence adduced on record by the respective parties as well as law and as such same deserve to be quashed and set aside. While referring to the judgments passed by both the Courts below, Mr.Sharma forcefully contended that bare perusal of the same suggests that evidence led on record by the defendant was not appreciated in its right perspective. Rather, judgments are based upon conjectures and surmises and as such same cannot be allowed to sustain. Mr.Sharma further argued that bare perusal of evidence led on record by the defendant would go to show that defendants were able to prove on record by leading cogent and convincing evidence that deceased Hari Singh had executed a Will bequeathing his entire property in favour of defendant. With a view to substantiate his aforesaid arguments, he invited the attention of this Court to the depositions made by defendant witnesses to demonstrate that all the defendant witnesses in no uncertain terms stated that Will in question was duly executed by late Shri Hari Singh in favour of defendant and as such judgment which is not based upon correct appreciation of evidence adduced on record deserves to be quashed and set aside. Mr.Sharma further argued that being a propounder of Will defendant No.1 discharged his onus by proving on record that Will in question was executed by late Shri Hari Singh in sound and disposing state of mind bequeathing his entire property in favour of defendant No.1, but despite that Courts below returned erroneous findings as a result of which great prejudice has been caused to the defendant. While referring to the statement of DW-1, who is deed writer, Mr.Sharma stated that Court below itself appreciated his statement because bare perusal of statement suggests that two documents i.e. sale deed, Ex.D-1 and Will Ex.D-2 have been written on the direction of deceased Shri Hari Singh and thereafter it has been read over to the executant, who upon hearing and admitting the contents to be correct, put his signatures in Urdu upon the documents and the witnesses also put their signatures on the documents. He further stated that Ex.D-3 also being a sale deed finds mention at the relevant place. He forcefully contended that both the learned Courts below have applied different yardsticks while accepting the execution of sale deed Ex.D-1 and rejecting the authenticity, if any, of Will Ex.D-2. He further stated that the Courts below have come to believe the execution of the said sale deed and at the same time have not believed the veracity of the said registered Will executed by deceased Hari Singh in favour of his daughter i.e. appellant-defendant. He stated that both the documents were duly recorded in the register maintained by DW-1 and as such there is no occasion with the learned Courts below to believe veracity of the sale deed and to disbelieve the veracity of the said registered Will. While concluding his arguments, Mr.Sharma stated that there was no suspicious circumstance, as has been held by the learned trial Court, with which Will was termed to be shrouded, rather there was overwhelming evidence available on record suggestive of the fact that Will was free from suspicion and was executed by deceased Hari Singh in sound and disposing state of mind without there being any coercion and undue influence. In the aforesaid background, Mr.Sharma, prayed for acceptance of appeal after setting aside the judgment and decree passed by the Courts below.

10. Mr.N.K. Thakur, learned Senior Counsel appearing for the respondents-plaintiffs, supported the judgment passed by both the Courts below. Mr.Thakur, vehemently argued that bare perusal of the judgment and decree passed by both the Courts below suggests that the same are based upon correct appreciation of evidence available on record and there is no scope, whatsoever, of interference of this Court. While referring to the judgment passed by both the Courts below, Mr.Thakur argued with full vehemence that bare perusal of impugned judgments suggest that both the Courts below have dealt with each and every aspect of the matter meticulously and as such there is no scope, whatsoever, to re-appreciate the evidence especially in view of concurrent findings of fact and law recorded by both the Courts below. While refuting the contention put forth on behalf of the learned counsel representing the appellant-defendant that there is total misreading and mis-appreciation of evidence, Mr.Thakur invited the attention of the Court to the evidence led on record by the respective parties to demonstrate that at no point of time defendant was able to prove on record byleading cogent and convincing evidence that Will Ex.D-2 was duly executed by deceased Shri Hari Singh. At this stage he invited the attention of this Court to the provisions of Section 63 of the Indian Succession Act and Section 68 of Indian Evidence Act to demonstrate that it was incumbent upon the defendant being propounder of the Will to cite either of two marginal witnesses as a witness in support of valid execution of Will. He contended that it is undisputed that no marginal witness was cited as a witness in support of Will Ex.D-2 and as such there is no illegality and infirmity in the judgment passed by both the Courts below.

11. Mr.Thakur, learned Senior Counsel appearing for the respondents-plaintiffs, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

12. I have heard learned counsel for the parties and have gone through the record of the case.

13. Keeping in view the text and nature of the substantial questions of law reproduced hereinabove, this Court would be taking up both the questions together for consideration. During proceedings of the case, this Court had an occasion to peruse the impugned judgments as well as evidence led on record, be it ocular or documentary, by respective parties, perusal whereof nowhere suggests that there is any illegality and infirmity in the judgments passed by both the Courts below, rather same appear to be based upon correct appreciation of evidence led on record by the respective parties. However, this Court, solely with a view to explore the answer to the aforesaid substantial questions of law, criticallyanalysed the evidence on record.

14. In the instant case, plaintiff Smt.Sheela Devi filed a suit for declaration and permanent prohibitory injunction that suit land, as described above, is jointly owned and possessed by the parties being successor of Hari Singh son of Jallu and mutation No.75, dated 21st October, 1991 exclusive in the name of defendant No.1 is baseless, wrong, frivolous, null and void. Plaintiff claimed that suit land was owned and possessed by Hari Singh and he died intestate leaving behind the parties as his successor-in-interest to succeed his moveable and immovable propertyand as such after his death they are joint owners in possession of the property, whereas, defendant, though not disputed the relationship with the plaintiff, claimed that suit land was disposed of by the deceased by way of sale deed in her favour and since she was looking after the deceased and was living with him, he (deceased Hari Singh) out of love and affection bequeathed the entire property in her favour and as such plaintiffs are not entitled to

any share in the land as being claimed in the plaint. Defendant also claimed herself to be in possession of the property left by deceased by way of Will and by way of purchase.

15. Since plaintiffs claimed themselves to be the joint owners in possession of the suit land being successors of deceased Hari Singh, question which arises for consideration of this Court is, *"whether findings returned by both the Courts below that Will Ex.D-1 is not a valid, legal and genuine Will of the deceased Hari Singh, is sustainable in view of the evidence adduced on record or not?"* Defendant, while refuting the claim of the plaintiff set up a case that vide Will Ex.D-1 and Sale Deed Ex.D-2, deceased Hari Singh bequeathed and sold his property in her favour. She further claimed in written statement that deceased Hari Singh executed a Registered Will dated 9.3.1990, on account of love and affection, in sound and disposing state of mind, in favour of the defendant and Will was executed with the express and implied consent of the plaintiffs and the husband of plaintiff Urmila Devi was an attesting witness to the Will and the Will was executed with his consent.

16. Needless to say that law regarding nature and onus of the proof of the Will is by way of propounder and in that regard the manner, in which the evidence is required to be appreciated, has been duly prescribed in the judgment passed by the Hon'ble Apex Court in ***H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443***.

17. Guidelines framed in ***H.Venkatachala Iyengar*** case (*supra*) were further reiterated by Constitutional Bench of Hon'ble Apex Court in ***Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529.*** The Court held:

> "4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and Rani Purniama Devi v. Khagendra Narayan Dev, 1962 (3) SCR 195 : 1962 AIR(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no. such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested. (Page-531)

18. Though normally onus to prove the execution and validity of the Will lies upon the propounder but in case when it is alleged by the opposite party that Will is not genuine document, onus shifts on the person who alleges the Will to beforged, to prove the same.

19. In ***Daulat Ram and Others vs. Sodha and Others,*** (***2005)1 SCC 40,*** the Hon'ble Apex Court held:

> "10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so." (Page 43)

20. In the present case, defendant with a view to prove valid execution of the Will examined eight witnesses and placed documents Ex.D-1 to Ex.D-3 on the record. DW-1 is the scribe of the documents Ex.D-1 to D-3. DW-2 to DW-4 and DW-6 have been examined to prove the registration of Will Ex.D-2. DW-3 and DW-5 are the marginal witnesses to the sale deed Ex.D-3. DW-7 is the Secretary, Gram Panchayat, Dangoh, who was examined to prove a copy of family register Ex.DW-7/A of late Shri Hari Singh. DW-8 is the defendant herself.

21. As per defendant, Will Ex.D-2, dated 9.3.1990 was executed by late Shri Hari Singh in her favour. While perusing aforesaid documents, this Court found that there were two marginal witnesses; namely; Bal Kishan Namberdar and Hardeep Singh. But, unfortunately, none of these aforesaid marginal witnesses i.e. attesting witnesses were ever examined by the defendant as a witness in the Court to prove the execution of Will Ex.D-2. Similarly, none of the defendant witnesses, as have been detailed hereinabove, has stated anything with regard to non-citing of marginal witnesses. There is no explanation, worth the name, on record that why these marginal witnesses were not examined to prove the valid execution of Will Ex.D-2. At this stage, it would be profitable to reproduce Section 63 of the Indian Successions Act, 1925 as well as Section 68 of Indian Evidence Act:

> "Section 63 of Indian Succession Act, 1925
>
> "63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [12] [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

"Section 68 of Indian Evidence Act, 1872"

"68 Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

22. Bare perusal of the aforesaid provisions of law clearly suggests that execution of Will needs to be proved by examining at-least one of attesting witnesses. In the instant case, as has been noticed above, none of marginal witnesses i.e. Bal Kishan Namberdar and Hardeep Singh have been examined to prove the valid execution of the Will and as such Courts below rightly came to the conclusion that defendant was not able to prove on record valid execution of Will Ex.D-2.

23. Similarly, as per Section 68 of the Indian Evidence Act once existence of some documents is denied, same cannot be taken into consideration in evidence unless one attesting witness is called/examined to prove the execution of the document, if alive. At the cost of repetition, it may be mentioned that there is no explanation, if any, with regard to absence of attesting witness; there is no whisper, if any, with regard to the whereabouts of the attesting witnesses. None of defendant witnesses have stated anything whether attesting witnesses were alive or not at the time of proving the same in the Court of law. Since defendant miserably failed to prove the valid execution of the Will Ex.D-2 strictly in terms of Section 63 of the Indian Succession Act and 68 of Indian Evidence Act, this Court sees no illegality and infirmity in the judgment passed by both the Courts below.

24. True, it is that in the case at hand defendant by way of examining scribe of the Will as well as Sub Registrar before whom the Will in question was registered and Registration Clerk, made an attempt to prove the valid execution of Will Ex.D-2, but, as has been noticed and observed above, that no marginal witness, who had appendedtheir signatures at the time of scribing of Will has been examined and as such there is no force much less substantial in the contention raised on behalf of learned counsel representing the defendant that defendant was able to prove on record, by leading cogent and convincing evidence, that the Will ExD-2 was validly executed by deceased Hari Singh.

25. As far as execution of sale deed i.e. Ex.D-1 is concerned, it emerge from the record that defendant though relied upon same set of evidence, which was applied in the case of proving the Will Ex.D-2, but in that case defendant successfully proved on record that sale deed Ex.D-1 was validly executed in her favour by deceased Shri Hari Singh.

26. DW-1 Amin Chand, while deposing in the witness box, stated that he prepared two documents, entered in his register at Sr.No.84 and 25, in favour of defendant Raj Kumari and both these documents were witnessed by two witnesses; namely; Bal Kishan and Hardeep Singh. He stated that documents i.e. sale deed Ex.D-1, Will Ex.D-2 and sale deed Ex.D-3 were written by him at the direction of executant Hari Singh. But, as has been noticed above, defendant has not

examined any of the aforesaid marginal witnesses to prove the valid execution of Will Ex.D-2. He has further stated that documents Ex.D-1 and Ex.D-2 were written by him at the direction of late Shri Hari Singh (executant) and thereafter it was read-over to him and after hearing and admitting the contents of same correct, the executant put his signatures in Urdu upon the documents and the witnesses had also put their signatures on the same. He further stated that he has seen sale deed dated 19.10.1990, Ex.D-3, which was also written by him.

27. DW-2 Gurbachan Singh, Registration Clerk, deposed on oath before the Court that on document Ex.D-1, he has seen endorsement Ex.DW-2/A, which was signed by Sub-Registrar. Ex.DW-2/B and Ex.DW-2/C were also signed by Shri Ratti Ram Sharma, Registrar (Naib Tehsildar). It also emerge from the record that on the same day defendant No.1 got executed a sale deed Ex.D-1 of same land in favour of defendant from late Shri Hari Singh and both these documents i.e. sale deed Ex.D-1 and Will Ex.D-2 were executed on 9.3.1990.

28. Similarly, DW-3 Bakil Chand also deposed on oath that he was witness to tatima sale deed Ex.D-3 and he also put his signatures on the document which was also read over to them by the person who has written it. He also admitted his signatures under red circle in Ex.D-3 on endrosment Ex.DW-2/B.

29. DW-4 Shri S.L. Negi also stated that he has seen documents Ex.D-1, Ex.D-2 and Ex.D-3 and his signatures are not appearing on these documents and signatures of Ratti Ram appear on the said documents as he recognize his signatures.

30. DW-5 Renu Devi deposed on oath before the Court that she is Numberdar of village Anora. She stated that she has seen Tatima sale deed Ex.D-3 upon which she put her signatures as witness and petition writer also read-over the contents of said documents to Hari Singh and he put his signatures in Urdu upon the said documents after admitting it to becorrect. She further stated that Tehsildar also obtained the signatures of parties on the sale deed endorsement Ex.DW-2/B and Hari Singh executant also put his signatures on the same. She further admitted that police case pertaining to false identification is under trial in the Court at Dehra.

31. DW-6 Ratti Ram deposed before the Court that in the year 1990 he was posted as Naib Tehsildar-cum-Sub Registrar, Amb. Will Ex.D-2 came to him for registration on 9.3.1990 which was presented by Hari Singh testator. He further stated that Hari Singh testator was identified by witnesses Bal Kishan Numberdar and Hardeep Singh.

32. DW-2 Gurbachan Singh, Registration Clerk in the office of Sub-Registrar also stated that endorsement Ex.DW-2/A has been made by Sub Registrar, Amb and Sub-Registrar obtained the signatures of the witnesses and parties on Ex.D-1. He further stated that documents Ex.D-1 and Ex.DW-2/B and Ex.DW-2/C were signed by Shri Ratti Ram, Naib Tehsildar.

33. Conjoint reading of aforesaid evidence led on record by the defendant suggests that the defendant was able to prove on record that sale deed Ex.D-1 was registered but admittedly, as has been noticed above, defendant was not able to prove on record by way of pleadings, cogent and reliable evidence that Will Ex.D-2 in question was validly executed. At the cost of repetition it may be stated that there is non-compliance of provisions contained in Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act and as such both the Courts below rightly came to the conclusion that defendant was not able to prove on record that Will was validly executed. But if evidence led on record by defendant is read in its entirety, it stands duly proved on record that defendant was able to prove on record that sale deed Ex.D-1 was duly executed by Shri Hari Singh in her favour and same was registered with the Sub Registrar, Amb, who before registering the same, read over and explained the same to Hari Singh, who lateron appended his signatures upon the same in the presence of witnesses. Moreover, careful perusal of plaint filed by the plaintiff nowhere suggests that there was challenge, if any, to the sale deed, rather plaintiff, while terming mutation Nos. 34 and 75, dated 21.10.1991 wrong, false, frivolous has only stated that deceased Hari Singh died intestate and as such there was no

occasion to enter mutation in the name of defendant. Defendant by way of written statement claimed herself to be owner of the land on the strength of sale deed Ex.D-1 and Will Ex.D-2 executed in her favour by the deceased Hari Singh.

34. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter, since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)

35. As has been noticed above, it was essential for thedefendant being propouder of the Will to cite one of the marginal witness to prove the valid execution of Will in terms of Section 63 of the Indian Succession Act and Section 68 of Indian Evidence Act and requirement of law could not be overlooked or filled up solely in viewof the statement of Sub Registrar who registered the Will Ex.D-2, wherein he stated that marginal witnesses had identified the status of testator before him. Hence, in view of detailed discussion made hereinabove, this Court sees no illegality and infirmity in the judgment passed by both the Courts below.

36. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which was further upheld by the first appellate Court, do not warrant any interference of this Court as finding given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appears to be based on correct appreciation of oral as well as documentary evidence, moreover, as has been discussed in detail that the defendant has not been able to make out a case to persuade this Court that document Ex.D-2 is a validly executed Will by deceased Hari Singh in sound disposing state of mind. Hence, present appeal fails and is dismissed, accordingly. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Amrish Kamal & another. .....Petitioners.

Versus

State of Himachal Pradesh. .....Respondent.

Cr.MP(M) No. 1349 of 2016.
Date of decision: November 30, 2016.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 147, 148, 149, 307, 323 and 506 of I.P.C – the petitioners are students, who had assaulted the members of rival students' union – held, that the violence in the University campus has become a permanent feature due to frequent fights between the members of rival unions- the petitioners have committed heinous offences and stringent conditions are required to be imposed to ensure cordial atmosphere – the petitioners are the permanent residents of Himachal Pradesh- hence, they are ordered to be released subject to conditions. (Para-6 to 13)

For the petitioners	Mr. Virender Thakur, Advocate.
For the respondent	Mr. Pramod Thakur, Addl. Advocate General. Mr. D.W. Negi, S.P. Shimla with Mr. ASI Ashwani Sharma, P.P., Summerhill in person.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Petitioners are accused in FIR No. 236 of 2016 registered against them and their co-accused in Police Station, West, Shimla under Sections 147, 148, 149, 307, 323 and 506 of the Indian Penal Code.

2. Accused-petitioner Amrish Kamal is pursuing his studies in Law department of Himachal Pradesh University, whereas accused-petitioner Jeewan Singh is a student of Tribal studies. On 1.10.2016, an information qua clash between student organizations having taken place was received in Police Post, Summerhill. The Incharge, Police Post rushed to the spot. The victim of the occurrence Shri Ashish Kumar has reported that 25-30 students belonging to Student Federation of India (SFI) who were reinstated by the University Authority only on that day assaulted the complainant and his companion with Khukri, Darat, Rods and Dandas in a planned manner and as a result therefof the members of the complainant party Pankaj Kumar, Ramesh Bisht, Praynjal Joshi, Rahul Sudan, Fakir Chand, Akshay, Vishal Verma, Deepak, Ashish and others had sustained injuries on their person. The complainant allegedly was thrown out from Y.S. Parmar hostel by the assailants. He was found to have received multiple grievous injuries on various part of his body. The accused party allegedly threatened the complainant party to do away with their lives and also proclaimed "have you forgotten past incidents". The names of the assailants were disclosed to be the co-accused of the accused-petitioners. The complainant did not disclose the name of the accused-petitioners being the assailants in the report he lodged with the police. On the basis of the report lodged by Ashish Kumar aforesaid the police has lodged the FIR and started conducting investigation in the case. The names of the assailants disclosed by the complainant in the report were arrayed as accused in the FIR.

3. During the investigation, it transpired that the accused persons after forming an unlawful assembly attacked the complainant party and had threatened to do away with their lives to achieve the common objective of the unlawful assembly. The accused-petitioners as such were arrested on the next day i.e. 2.10.2016. The injured Pankaj Kumar, Ramesh Bisht, Vishal Verma and Praynjal Joshi had disclosed the names of the accused-petitioners being also the assailants in their statements recorded on 3.10.2016. Being so, accused-petitioner Amrish Kamal was arrested on 3.10.2016, whereas accused-petitioner Jeewan Singh on 4.10.2016. They both are now lying confined in judicial custody.

4. This petition has been sought to be dismissed on the grounds, inter-alia, that the accused-petitioners are involved in the commission of a heinous crime. Also that past criminal history is in their credit as FIR No. 219/2014 was registered against accused-petitioner Amrish Kamal under Sections 143, 149 and 34 of the Indian Penal Code at Police Station, Sadar Solan, whereas FIR No. 147/2016 under Sections 143 and 188 of the Indian penal Code against

accused-petitioner Jeewan Singh in Police Station, Sadar Shimla. Criminal cases so registered against them are now pending disposal in the Court. It has also been urged that both accused are habitual offenders and previously also were found to have indulged in committing violence and rioting in the University campus.

5. While Mr. Thakur, learned Counsel representing the accused-petitioners has argued that the accused-petitioners are not hardened criminals and that they being the students of University were pursuing their studies sincerely may be dealt with leniently in the matter of grant of bail. Mr. Pramod Thakur, learned Additional Advocate has, however, urged that the on account of repeated incidents of violence and rioting in the University campus, it has become a great challenge to the University authorities and also the local police to maintain peace and congenial atmosphere in the University. The accused-petitioners and their companions are frequently indulging in the incidents of violence and rioting in the University campus. They have spoiled the teaching atmosphere and as a result thereof the career of other students who want to pursue their courses has been affected adversely.

6. I find considerable force in the submissions made by learned Additional Advocate General because due to frequent fights between the members of different students organizations, the violence in the University campus has become a permanent feature. This Court feels that the office bearers of various student organizations are not fighting for common cause i.e. to maintain congenial atmosphere in the University nor keeping in mind the welfare of the students and rather settling their scores with each other and perhaps at the behest of some outside forces. Being so, though to enlarge an offender like the accused-petitioners on bail, some time may amount to a misplaced sympathy, however, at the same time the Court has also to strike out balance between the magnanimity of offence allegedly committed and the liberty of a person booked as an offender in connection with the commission of such offence.

7. True it is, that the offence the accused-petitioners allegedly have committed is not only serious but heinous in nature. However, the only distinction in their case as compared to their co-accused is that the victim of the occurrence Ashish Kumar aforesaid did not disclose their names at the first available opportunity i.e. at the time of reporting the occurrence to the police of Police Post, Summerhill being also the assailants. Their names were rather disclosed by the injured witnesses Pankaj, Ramesh Bisht, Vishal Verma and Praynjal Joshi when their statements were recorded on the third day of the occurrence i.e. 3.10.2016. Undoubtedly, stringent conditions are required to be imposed upon both accused-petitioners in the event of they are admitted on bail. Order which reads as follows to this effect was passed in this application on 15.11.2016:

> "Learned Deputy Advocate General has placed on record the status report. ASP, Shimla Arjit Sen and Inspector/SHO Sanjeev Kumar, Police Station (East), Shimla have produced the record. Heard for sometime. This Court feels that in the event of the accused-petitioners are ordered to be admitted on bail, stringent conditions are required to be imposed upon them in order to ensure that there is no breach of peach in the University and teaching atmosphere is also not spoiled. Learned Counsel representing the petitioners sought adjournment to have instructions. Allowed. List on 21st November, 2016."

8. Not only this, but as per the order passed on 21.11.2016 fathers of both accused-petitioners were called upon to attend this Court in person. The order reads as under:

> "Heard further. Let Sh. Rattan Singh Kamal, father of accused-petitioner No. 1 and Sh. Narayan Singh, father of accused-petitioner No. 2 to attend this Court in person on the next date. List on 24th November, 2016."

9. Consequently, Satish Pal, elder brother of accused-petitioner Amrish Kamal and Narayan Singh, father of accused-petitioner Jeewan Singh had attended this Court on 24.11.2016.

10. The respondent-State was also called upon through learned Additional Advocate General to assist this Court as to what should be the appropriate conditions to be imposed upon the accused-petitioners so that they being student can be ordered to be admitted on bail and the teaching atmosphere in the University can also be maintained. Mr. D.W. Negi, the Superintendent of Police, Shimla district remained associated during the course of hearing in this petition and he is present in person even today also.

11. The situation in the University campus may be tense. It can also be believed reasonably that the administration had deployed sufficient manpower to take stock of the situation in the University campus and avert an untoward incident. However, this Court is seized of this petition filed by the accused petitioners, two in number for the grant of bail on the ground that their names were never disclosed by the complainant to be the assailants and that they have been falsely implicated by the police after the occurrence i.e. 1.10.2016. They are in custody from the date of their arrest. They belong to district Sirmour and district Mandi respectively. They are students of Himachal Pradesh University. Being so, there is no likelihood of their jumping over the bail or ultimately non-availability at the time of trial. They are, therefore, ordered to be admitted on bail subject to their furnishing personal bond in the sum of Rs. 50,000/- each with 2-2 sureties each out of whom one shall be in their close relations i.e. father/brother to the satisfaction of learned Chief Judicial Magistrate, Shimla district at Shimla. They shall further abide by the following conditions:

1. If they are still students of University and not disqualified to be a student of University and if they intend to pursue their further studies, shall have to disclose the proof of their place of abode in Shimla town to the satisfaction of learned Chief Judicial Magistrate at the time of furnishing bail bonds and in the event of pursuing their respective courses further they shall have to visit the University campus from such place of abode in Shimla town;
2. They are directed to report to Incharge, Police Post Summerhill before going to their respective department to attend the classes and shall also apprise the said Incharge of Police Post of their departure from the campus after attending classes. The Incharge of Police Post shall maintain record in this regard;
3. This arrangement shall continue for one month from the date the accused-petitioners are released on bail and shall be subject to review by learned Chief Judicial Magistrate thereafter on a report in this regard to be filed by the Incharge of police post;
4. The entries of the accused-petitioners in any of hostel of the University shall remain banned either in the capacity of a hosteller or guest of any other inmate who has been allotted hostel by the University;
5. They shall not be the member of any procession, dharana or of any unlawful assembly in the University campus;
6. On their release from custody they shall not attend any welcome party/function or any procession by their fellow students/organization inside or outside the University campus;
7. They shall not displace any party symbol or sticker except for identity card issued by the Competent authority in the University nor shall stand on the main gate of the University or any department wearing such stickers or badges showing their affiliation to a particular student organization or political party while in the University campus;
8. The sureties i.e. father/brother, as the case may be, shall keep on visiting the Dean/head of the department concerned to find out that the accused-petitioners are attending their classes regularly and also their performance in study once in a month;

9. The Dean/head of department shall maintain record of such visits so that the same is readily available if requisitioned by this Court or the Court of learned Chief Judicial Magistrate, Shimla for perusal.

10. shall join the investigation of the case as and when called upon to do so & on filing of challan against them regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

11. shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

12. shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Investigating Officer;

13. shall not leave the territory of India without the prior permission of the Court.

12. It is clarified that if the accused-petitioners misuse their liberty or violate any of the conditions imposed upon them; the Investigating Agency shall be free to move this Court for cancellation of the bail.

13. The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case. The application stands disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

RSA Nos.367 and 368 of 2007.
Judgment Reserved on :11.11.2016
Date of decision: 30.11.2016

1. RSA No.367 of 2007

Baldev Singh ....Appellant-Defendant
Versus
Chet Ram & Ors. ....Respondents-Plaintiffs

2. RSA No.368 of 2007

Baldev Singh ....Appellant-Plaintiff
Versus
Chet Ram & Ors. ....Respondents- Defendants

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they are recorded as gairmaurusi tenants and had become the owners after the commencement of H.P. Tenancy and Land Reforms Act – the defendant threatened to encroach upon the land – the defendant pleaded that revenue entries in favour of the plaintiffs were wrong – a counter-claim was also filed by the defendant – the Trial Court decreed the suit and dismissed the counter-claim – an appeal was filed, which was dismissed – held in second appeal that the original owner had not challenged the revenue entries – it was duly proved that plaintiffs were recorded as tenants, who had become the owner on the commencement of H.P. Tenancy and Land Reforms Act- separate appeals should have been filed against the decree of the suit and dismissal of the counter-claim- appeal dismissed.(Para-17 to 35)

Cases referred:

Rajni Rani and Another vs. Khairati Lal and Others, (2015)2 SCC 682
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant: Mr.C.N. Singh, Advocate, in both the appeals.
For the Respondents: Mr.G.D. Sharma, Advocate, in both the appeals.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Both these appeals are being disposed of by a common judgment as they call for determination of common question of law. Moreover, the identity of the parties in both the appeals is the same.

RSA No.367 of 2007

2. Plaintiffs (respondents herein), namely; Chet Ram, Sewak Ram and Devi Chand sons of late Shri Kirpa Ram, by way of suit for permanent prohibitory injunction filed under Section 38 of Specific Relief Act, prayed for decree of permanent injunction restraining the defendant (appellant herein) from causing any sort of interference in their peaceful ownership and possession and also from cutting trees or changing nature of the land and causing any damage and waste to land comprised in Khata/Khatauni No.16/44, Khasra Nos.220 min, 223, 224, 225, 227, 229, 230, 233 and 234, kittas 9, measuring 7 bighas 3 biswas, situated at Mauja Bhaget, Pargana Chail, Tehsil Kandaghat, District Solan *(hereinafter referred to as `suit land')*.

3. Plaintiffs-respondents pleaded that they are recorded as "Gair Maurusi Tenant" over the suit land as per latest Jamabandi, but they have become owners of the land in dispute by operation of law. It was further pleaded that the plaintiffs-respondents are successors-in-interest of deceased Kirpa Ram, who has been shown in possession of land in dispute as tenant on the share of deceased Shonkia. Plaintiffs-respondents claimed that they have become owners of the suit land by virtue of operation of law after H.P. Tenancy and Land Reforms Act, 1972 came into operation. Since defendant with malafide intention started advancing threats to encroach upon the land of the plaintiffs-respondents, they were compelled to file the suit as referred hereinabove.

4. Defendant-appellant also, by way of written statement, refuted the claim put forth on behalf of the plaintiffs-respondents by stating that neither plaintiffs nor their predecessor-in-interest were ever inducted as tenant over the suit land. The revenue entries existing in favour of the plaintiffs-respondents have been incorporated illegally and in unauthorized manner and as such same are void ab-initio. Defendant-appellant further averred that he is successor of the suit land and plaintiffs-respondents have no right, title or interest over the same. Defendant also filed a counter claim alongwith the written statement pleading therein that he is owner in possession of the suit land alongwith other co-owners and the revenue entries in favour of late Kirpa Ram and the plaintiffs have been incorporated wrongly and behind the back of the defendant and his predecessor-in-interest. Defendant-appellant also claimed that the plaintiffs-respondents are trying to dispossess him on the basis of the wrong revenue entries and in case they succeed in dispossessing the defendant from the suit land or the Hon'ble Court comes to the conclusion that the defendant is out of possession then in that eventuality the defendant may be held entitled for possession of the suit land on the basis of title.

5. In the aforesaid background, defendant also sought consequential relief against the plaintiffs-respondents by restraining them from interfering in ownership and possession of the defendant in any manner whatsoever.

6. On the settled issues, learned trial Court decreed the suit of the plaintiffs-respondents and restrained the defendant-appellant from causing any sort of interference in the peaceful ownership and possession of the plaintiffs and also from cutting trees or changing the nature of the suit land, described hereinabove. While decreeing the aforesaid suit of the respondents-plaintiffs, trial Court below dismissed the counter claim of the defendant.

7. Being aggrieved and dis-satisfied with the aforesaid judgment and decree, decreeing the suit of the plaintiff and dismissing the counter claims of defendant-appellant, defendant-appellant approached the learned first appellate Court by way of Civil Appeal No.65-S/13 of 2006, laying challenge therein to the decree of suit by the learned trial Court as well as

dismissal of the counter claim filed by the defendant-appellant. However, fact remains that the aforesaid appeal preferred by the appellant-defendant was dismissed and the judgment and decree of learned trial Court was affirmed.

8. In the aforesaid background, appellant-defendant approached this Court praying therein for quashing and setting aside of the judgment passed by both the Courts below. This Court vide order dated 28.8.2008 admitted the instant appeal on following substantial questions of law:

> "a. Whetherthe judgment/decree dated 26.4.2007 passed by the court below is perverse, as the findings are contrary to pleadings, evidence, admissions on record and the law, as the relevant material have been ignored and irrelevant/ inadmissible material/evidence have been taken into consideration, which has led to miscarriage of justice?
>
> b. Whether the first appellate court below misread, misconstrued, misinterpreted the provisions of the law and failed to appreciate the fact that the trial court by not framing the material issue have caused prejudice to the appellant, in law and the appellant have been deprived of just and proper opportunity to prove and contest the case, which procedure adopted by the trial court was perverse and illegal?

9. Before proceeding to decide the aforesaid substantial questions of law, it may be noticed that during arguments having been advanced by counsel representing the appellant-defendant, he was confronted with the judgment passed by the Hon'ble Apex Court in ***Rajni Rani and Another vs. Khairati Lal and Others, (2015)2 SCC 682,***which was followed by this Court **in RSA No.293 of 2006, titled as: Piar Chand & Others vs. Ranjeet Singh & Others, decided on 16.9.2016**, whereby it has been categorically held that counter claim, if any, dismissed by trial court needs to be challenged by way of affixing separate requisite court fee.

10. Mr.C.N. Singh, learned counsel representing the appellant-defendant, after perusing the judgment, referred hereinabove, fairly stated that at this stage, he would not be pressing his appeal regarding counter claim. This Court, solely with a view to ascertain the genuineness and correctness of arguments having been advanced by Mr.C.N. Singh, whereby he stated that there has been total mis-appreciation and mis-reading of evidence led on behalf of the respective parties by both the Courts below, perused the entire evidence, be it ocular or documentary, led on record by the parties.

11. After carefully perusing the material available on record, this Court finds it difficult to accept the aforesaid contention made by Mr.Singh that first appellate Court failed to appreciate the evidence in its right perspective and trial Court failed to frame material issues, as a result of which great prejudice is caused to the appellant-defendant.

12. Close scrutiny of the pleadings adduced on record by the parties nowhere suggests that learned trial Court failed to frame proper issues. Admittedly, plaintiffs-respondents filed a suit for permanent prohibitory injunction praying therein for restraining the defendant from causing any sort of interference in the peaceful possession and ownership of the plaintiffs. Plaintiffs in their plaint specifically averred that they are recorded as "Gair Maurusi Tenant" over the suit land as per latest Jamabandi and they are owners in possession of the suit land as per law, whereas, appellant-defendant by way of written statement refuted the aforesaid claim by stating that the respondents-plaintiffs were never inducted as tenant over the suit land. In view of aforesaid pleadings, learned trial Court framed the following issues:

> "1. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction as claimed? OPP.
>
> 2. In case Issue No.1 is proved in affirmative, whether the plaintiffs are entitled for a decree of possession of the suit land as alleged ? OPP.

3. Whether the entry showing the plaintiffs as tenant over the suit land is incorrect, as alleged? OPD.

4. Whether the plaintiffs have no right, title or interest over the suit land as alleged? OPD.

5. Whether the defendant is entitled for relief of declaration that he alongwith other persons is owner in possession of the suit land as alleged ? OPD.

6. Relief."

13. Perusal of aforesaid issues framed by learned trial Court clearly suggest that all the material issues, which were required to be framed in light of pleadings available on record, were duly framed by Court and as such this Court sees no force in the contention put forth on behalf of the appellant-defendant that no material issues were framed by the trial Court. Moreover, if at all defendant-appellant was aggrieved with non-framing of proper issues they had remedy under law to get the additional issues framed. Similarly, evidence led on record by respective parties, especially Ex.DX-1 and Ex.DX-2, i.e. Jamabandies for the years 1952-53 and 1956-57 suggests that predecessor-in-interest of appellant-defendant was recorded as owner, but revenue record placed on record by the plaintiffs-respondents in support of their claim is Jamabandi for the year 1960-61, perusal whereof clearly suggests that they were inducted as tenants over the suit land in the year 1960-61. Plaintiffs by way of placing on record ample evidence in shape of documentary evidence Ex.PW-1/A and Jamabandies Ex.PW-1/B to Ex.PW-1/D and copy of mutations Ex.PW-1/E and Ex.PW-1/F, have successfully proved on record that Shri Kirpa Ram, their predecessor-in-interest, was inducted as "Gair Maurusi Tenant" over the suit land by Shri Shonkia Ram, predecessor-in-interest of appellant-defendant and admittedly there is no document placed on record by the appellant-defendant to rebut the continuous entries showing the respondents-plaintiffs as "Gair Maurusi Tenant" over the suit land. Similarly, this Court finds that in all these aforesaid revenue entries, plaintiffs have been shown to be paying rent @ Rs.80/- to the landlord till 1980.

14. At this stage, Shri C.N. Singh, counsel representing the appellant-defendant, stated that change in revenue entries was effected at the back of appellant-defendant and as such same are not binding upon the appellant-defendant. He also argued that since respondents-plaintiffs were unable to place on record any order, issued by revenue authorities, ordering the change in revenue entries, change made in revenue entries has no legal sanctity and same could not be looked into by the Courts below. Mr.Singh, in support of his aforesaid contention that change in revenue entries made at the back of appellant-defendant, who has been coming in possession continuously before effecting illegal change, placed reliance on the judgments passed by our own High Court in ***Tej Ali vs. Charag Deen & Others, RSA No.6 of 2002, decided on 9.9.2015, Desh Raj alias Deshi vs. Joginder Singh and another, RSA No.500 of 2002, decided on 27.3.2014, Smt.Nirmala Devi and Others vs. The Financial Commissioner (Appeals), & Others, CWP No.1312 of 2007, decided on 3.1.2013 and Shiam Singh and Others vs. Chaman Lal and Others, RSA No.261 of 1996, decided on 5.4.2010.***

15. Mr.G.D. Sharma, learned counsel representing the respondents in both the appeals, supported the judgments passed by both the Courts below. Mr.Sharma, while inviting the attention of this Court to the judgments passed by both the Courts below, strenuously argued that same are based upon correct appreciation of evidence available on record and as such there is no scope of interference, whatsoever, of this Court in the present facts and circumstances of the case. He further stated that close scrutiny of the judgment passed by both the Courts below clearly suggests that Courts below have dealt each and every aspect of the matter meticulously and all the relevant material placed on record by the respective parties has been taken note of at the time of passing impugned judgment and as such this Court has no occasion, whatsoever, to interfere with the well reasoned concurrent findings returned on fact and law by both the Courts below. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment

passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264.**

16. I have heard learned counsel for the parties and gone through the record of the case carefully.

17. In the instant case, after perusing documentary evidence led on record by respondents-plaintiffs, it clearly emerge that Shri Shonkia Ram, predecessor-in-interest of the appellant-defendant, had inducted Shri Kirpa Ram as "Gair Maurusi Tenant" over the suit land on the rent of Rs.80/-. It is also undisputed that Shri Shonkia Ram, predecessor-in-interest of the appellant-defendant, was alive till the year 1999. It is not understood that why original owner i.e. Shonkia Ram did not lay challenge, if any, to aforesaid entries effected in favour of Kirpa Ramduring his life time. It stands duly proved on record that since 1960-61, predecessor-in-interest of the respondents-plaintiffs, has been coming in continuous possession of the suit land till filing of suit in 2001. There is no evidence led on record by appellant-defendant suggestive of the fact that at any point of time they had applied for correction of revenue entries in terms of provisions contained in H.P. Land Revenue Act. It is only after the death of original owner Shonkia Ram, appellant-defendant staked claim qua the suit land by refuting the claim put forth on behalf of respondents-plaintiffs.

18. At this stage, it needs to be taken note of the fact that prior to filing of instant suit by respondents-plaintiffs, appellant-defendant nowhere claimed himself to be owner in possession of the suit land. In the written statement filed to the plaint in the present suit, appellant-defendant denied the assertions made by respondents-plaintiffs that they were inducted as "Gair Maurusi Tenant" over the suit land. Interestingly, in the written statement appellant-defendant, while denying that the respondents-plaintiffs are owners in possession of the suit land, stated that on the basis of wrong revenue entries, respondents-plaintiffs are trying to dispossess the appellant-defendant. Defendant in thecounter claim having been filed by him claimed that by filing the suit, the plaintiffs-respondents have threatened the title of defendant qua the suit land and as such the defendant has a cause to prefer counter claim. But, interestingly in prayer clause appellant-defendant, while praying for dismissal of the suit also prayed that the entries in favour of the plaintiffs qua the suit land are wrong, illegal, null and void and plaintiffs have no right, title or interest over the same in any manner, whatsoever and consequently prayed that in case respondents-plaintiffs are found to have been in possession of the suit land, decree for possession in his favour and against the plaintiffs may be passed.Counter claims were dismissed and no independent appeal was preferred before first appellate Court and at this stage defendant has not pressed his counter claims.

19. At this stage, it may be noticed that subsequently, after one year of the filing of the instant suit by the plaintiffs-respondents, appellant-defendant filed another suit bearing Civil Suit 58-K/1 of 2002 on 23.12.2002 laying therein challenge to the revenue entries showing respondents-plaintiffs and their predecessor-in-interest to be in possession of the suit land, but, interestingly in that suit appellant-defendant, plaintiff therein, stated, *"That the cause of action for filing the suit arose to the plaintiff against the defendants on 25.5.2002 when the defendants on the basis of wrong revenue entries in their favour in the column of possession, started interfering in the suit land and threatened to change the nature of the suit land and to cause damage to the same and also threatened to raise construction thereon and prior to it the cause of action arose when the wrong entries were incorporated in the revenue record and the cause of action is still continuing."*

20. Aforesaid assertion qua the cause of action, having been accrued to the appellant-defendant, is totally contrary to stand taken by him in Civil Suit No.78-K/1 of 2001 filed by the respondents-plaintiffs in the present case. Apart from examination of aforesaid overwhelming evidence led on record by the plaintiffs suggestive of the fact that his predecessor-in-interest was inducted as "Gair Maurusi Tenant" by Shri Sonkia Ram, predecessor-in-interest of appellant-defendant, this Court also perused oral evidence led on record by appellant-defendant to prove that respondents-plaintiffs were never inducted as "Gair Maurusi Tenant". Perusal of oral evidence led on record by the appellant-defendant nowhere rebuts the entries showing

respondents-plaintiffs as "Gair Maurusi Tenant" of the suit land. None of the appellant-defendant's witnesses stated anything with regard to induction of Kirpa Ram, predecessor-in-interest of respondents-plaintiffs as "Gair Maurusi Tenant" over the suit land, rather they all stated that Kirpa Ram was a spiritual person and he never used to cultivate the land and they saw appellant-defendant Baldev Singh in possession. Apart from above, there is nothing much in their statements/depositions which could persuade this Court that appellant-defendant by way of leading cogent and convincing evidence was able to rebut the entries made in the revenue record after 1960-61 showing predecessor-in-interest of the respondents-plaintiffs as "Gair Maurusi Tenant" over the suit land. Rather, it emerged from the perusal of oral evidence led on record by the respective parties that suit land on which Kirpa Ram, predecessor-in-interest of the plaintiffs-respondents, was inducted as "Gair Maurusi Tenant", situated at village Bhaget, whereas, Shonkia Ram original owner used to reside at village Dehar, which was 35 kilometers away from the suit land. None of the defendant witnesses stated that they are residents of village in which suit land is situated, rather they admitted that they belong to other village which is at far distance from village Bhaget. Though appellant-defendant termed the entry in favour of Kirpa Ram as a stray entry, but, as has been observed above, no cogent and convincing evidence was led on record to rebut the latest entries made in favour of respondent-plaintiffs. Moreover, Jamabandies placed on record for the years 1952-53 and 1956-57, Ex.D-X1 and Ex.D-X2, pertain to period prior to 1960-61, when Kirpa Ram, predecessor-in-interest of respondents-plaintiffs, was inducted as "Gair Maurusi Tenant". Once respondents-plaintiffs themselves claimed that they were inducted as "Gair Maurusi Tenant" over the suit land after 1960-61, it was incumbent upon the appellant-defendant to place on record entries, if any, in his favour after 1960-61 suggestive of the fact that they were shown as owners in possession of the suit land and as such any Jamabandi pertaining prior to 1960-61 was rightly not considered by Courts below.

21. True, it is that it is settled law that presumption of truth is attached to the latest entries and same are rebuttable if it is proved on record that entries, if any, were not effected in accordance with law. In the present case, respondents-plaintiffs by way of placing convincing evidence successfully proved on record that since they were owners in possession of the suit land after having been inducted as "Gair Maurusi Tenant" by Shri Shonkia Ram, predecessor-in-interest of respondents-plaintiffs, they were rightly shown as "Gair Maurusi Tenant" over the suit land in the Jamabandi for the year 1960-61. While going throughthe evidence on record, this Court could lay its hand to report of Patwari given at the time of Girdawari dated 2nd December, 1959, which clearly suggests that change in the revenue entries was effected in the subsequent Jamabandi for the year 1960-61 by Patwari after noticing the change of possession and as such there is no force in the contention put forth by Shri C.N. Singh that change in entry was made without any basis and without any authority. Apart from above, it stands duly proved on record that since 1960-61 respondents-plaintiffs were recorded as "Gair Maurusi Tenant" over the suit land, they have acquired the status of owners by virtue of Section 104 of H.P. Tenancy and Land Reforms Act, 1972.

22. After carefully perusing the evidence led on record by respective parties, this Court sees no reason to differ with the judgment passed by both the Courts below that the respondents-plaintiffs were in possession of the suit land as tenants and they have become owners by operation of law. Hence, this Court really finds it difficult to conclude that Courts below misread and mis-appreciated and mis-construed the evidence led on record. Since there is proper appreciation of evidence, pleadings and law, by no stretch of imagination judgments passed by Courts below can be termed to be perverse. Substantial Questions of law are answered accordingly.

RSA No.368 of 2007

23. The suit out of which instant appeal arises was instituted by appellant-plaintiff Baldev Singh for declaration and injunction to the effect that revenue entries showing the respondents-defendants and their predecessor-in-interest in possession of suit land comprised in Khata No.20, Khatauni No.51, Khasra Nos.42 min, 101 min, 103 min and 118 min, measuring 4 bighas 6 biswas, situated at Mauza Tikkar, Pargana Chail, Tehsil Kandaghat, District Solan

(hereinafter referred to as the `suit land') are totally wrong, illegal, null and void ab-initio and are not binding on the rights of the appellant-plaintiff.

24. Since facts contained in the plaint in the present suit is virtually repetition of stand taken by appellant-plaintiff in the written statement filed by himin the Civil Suit No.78-K/1 of 2001, which was subject matter of RSA No.367 of 2007, this Court deems it not necessary to narrate the same here for sake of brevity. Similarly, respondents-defendants have taken same stand as they had taken in Civil Suit No. 78-K/1 of 2001 filed by them, whereby they claimed themselves to be the owners of the suit land being "Gair Maurusi Tenant" having been inducted by Shri Shonkia Ram, predecessor-in-interest of the plaintiff-appellant.

25. By way of instant suit i.e. Civil Suit No.58-K/1 of 2002, which was admittedly filed after one year of filing of Civil Suit No. 78-K/1 of 2001, appellant-plaintiff prayed for decree of permanent prohibitory injunction restraining the defendants (respondents herein) from interfering in the suit land and changing its nature and raising any type of construction and to declare revenue entries showing defendants-respondents and their predecessor-in-interest Kirpa Ram in the column of possession ofthe suit land as wrong, illegal, null and void ab-initio and not binding on the rights of the plaintiff-appellant.

26. Learned trial Court on the basis of pleadings of the parties framed the following issues:

> "1. Whether the plaintiff is owner-in-possession of the land and the revenue entries are incorrect as alleged? OPP.
>
> 2. In case the plaintiff proves in issue No.1, whether the plaintiff is entitled for the relief of permanent prohibitory injunction as alleged? OPP.
>
> 3. Whether the status of the defendants is that of owner qua the land by operation of law as alleged? OPD."

27. Subsequently, learned trial Court vide judgment and decree dated 31.8.2006 dismissed the suit of the appellant-plaintiff by holding that plaintiff is neither owner nor in possession of the suit land and as such he was declined relief of permanent prohibitory injunction.

28. Being aggrieved and dis-satisfied with the aforesaid judgment and decree, appellant-plaintiff filed an appeal before learned District Judge, Solan, which came to be registered as Civil Appeal No.66-S/13 of 2006. However, aforesaid appeal preferred by appellant-plaintiff was dismissed.

29. In the aforesaid background, appellant-plaintiff approached this Court praying therein for decreeing the suit after setting aside the judgment passed by both the Courts below. This Court vide order dated 28.5.2008 admitted the instant appeal on the following substantial questions of law:-

> "1. Whether the first appellate court below was right in ignoring the law well settled that the revenue entries cannot be changed behind the back of owner i.e. the father of the appellant-plaintiff, that to in favour of late Shri Kirpa Ram, who was a sanayasi & the successors in-interest i.e. the respondent-defendants, have no right under law to claim any right, if any, on the basis of illegal revenue entries and such change is against, the law and the procedure to be adopted under HP Land Revenue Act and HP Lands Record Manual, 1992?
>
> 2. Whether the revenue entries which have been changed in an unauthorized manner carries no presumption of truth in the eyes of Law and are automatically replaced by previous entries, and if that being the legal position then all revenue entries in favour of late Sh.Kirpa Ram who was a sanayasi (Admitted position on record) and further to the respondents (predecessor-in-interest) was void-ab-initio and do not

create any right, title or interest in favour of the respondents/Defendants?

3. Whether the first appellate court below acted contrary to the principles of law of evidence by giving its findings contrary to the evidence, and law which very well supported the case of the appellant/respondent/counter claimant?

30. Keeping in view the text and contents of questions No.1 and 2, this Court would be taking up these questions together for consideration. True it is that revenue entries cannot be changed behind the back of the owner and change, if any, can be effected in revenue record on the orders, if any, passed by the revenue authorities. In both the connected appeals facts are common and dispute is qua the suit land which is subject matter of both the appeals and parties had led similar evidence, as has been led in Civil Suit No.78-K/1 of 2001, which was subject matter in RSA No.367 of 2007. While deciding RSA No.367 of 2007, this Court minutely perused the evidence led on record by appellant-plaintiff to demonstrate that Shri Kirpa Ram, predecessor-in-interest of respondents-defendants, was never inducted as "Gair Maurusi Tenant" over the suit land by Shri Shonkia Ram. At the cost of repetition, it may be stated that appellant-plaintiff nowhere successfully proved by leading cogent and convincing evidence on record that entries made in favour of Shri Kirpa Ram, predecessor-in-interest of respondents-defendants, showing himas "Gair Maurusi Tenant" over the suit land are wrong, illegal and void abinitio. Appellant-plaintiff only placed on record two Jamabandies pertaining to the years 1952-53 and 1956-57, suggestive of the fact that their predecessor-in-interest Shri Shonkia Ram was entered in the column of possession qua the suit land, but, as has been discussed in earlier RSA No.367 of 2007, decided by this Court, there is no document placed on record by appellant-plaintiff suggestive of the fact that Kirpa Ram, predecessor-in-interest of respondents-defendants, was wrongly shown as "Gair Maurusi Tenant" over the suit land. Since respondents-defendants specifically claimed that they were inducted as "Gair Maurusi Tenant" by Shonkia Ram in the year 1960-61, appellant-plaintiff ought to have placed on record documentary evidence, if any,suggestive of the fact that even after 1960-61 they were shown as owners in possession of the suit land. Similarly, this Court, while perusing the record of another case, could lay its hand to the document Ex.DX-3 i.e. Rapat Roznamcha made by Patwari concerned during Girdawari, perusal whereof clearly suggests that entry made in Jambandi pertaining to the year 1960-61 was not mere a stray entry, rather same was effected on the report of Patwari who vide Rapat Roznamcha for the year 1959-60 found Kirpa Ram, predecessor-in-interest of respondents-defendants, in possession of the land and as such there is no force in the contention raised on behalf of appellant-plaintiff that change made in the revenue entry in the Jamabandi for the year 1960-61 is without any basis.

31. Similarly, in the present case also no sufficient oral evidence was led on record by appellant-plaintiff to demonstrate that Shri Kirpa Ram, predecessor-in-interest of respondents-defendants, was never inducted as a "Gair Maurusi Tenant" over the suit land because none of the plaintiff witness has stated anything with regard to induction of Kirpa Ram as "Gair Maurusi Tenant", rather they all have stated that since Kirpa Ram was a *sanyasi,* there was no occasion to induct him as a "Gair Maurusi Tenant". Moreover, as has been observed in earlier case also that original owner Shonkia Ram, who was alive till the year 1999, never laid challenge, if any, to the continuous entries in revenue record in favour of predecessor-in-interest of respondents-defendants. Apart from above, filing of present suit by appellant-plaintiff itself suggests that prior to filing of the instant suit he had not taken any steps to get the revenue entries corrected, hence it may not be open for him to file suit after 45 years for correction of revenue entries that too after filing the suit by respondents-defendants seeking permanent prohibitory injunction against the appellant-plaintiff from interfering in the suit land. Since there is evidence in shape of Ex.DX-3 suggestive of the fact that change in entries was made pursuant to Rapat Roznamcha made by Patwari, who found respondents-defendants in possession of the suit land, this Court sees no force in the contention put forth on behalf of the appellant-plaintiff that change in revenue entries was made without any basis and at his back. Moreover, at this

stage, this Court finds that counter claims, filed by the present appellant-plaintiff in the suit filed by the respondents-defendants, wherein challenge was laid to the revenue entries showing the respondents-defendants as "Gair Maurusi Tenant", were dismissed by the trial Court.

32. Appellant-plaintiff by way of common appeal laid challenge to the judgment passed by learned trial Court in favour of respondents-defendants decreeing their suit and dismissing counter claim of the appellant-plaintiff and the same was dismissed. Since there was no separate legally constituted appeal preferred by the appellant-plaintiff qua the dismissal of counter claim, no composite appeal could be entertained by the first appellate Court, as has been done in the present case. Moreover, in the present appeal since counsel representing the appellant-plaintiff has stated that he may not be pressing counter claim, finding already returned by trial Court qua counter claim has attained finality. Since there was already finding of trial Court qua the alleged wrong entries having been effected in the revenue record in favour of respondent-defendant by the trial Court in Civil Suit No.78-K/1 of 2001, while dismissing the counter claim, the Court belowought to have not entertained the instant suit preferred by present appellant-plaintiff, wherein he again laid challenge to the revenue entries showing respondent-defendant as "Gair Maurusi Tenant" over the suit land.

33. Hence, this Court, after carefully perusing/ examining the evidence led on record in both the cases, is fully convinced that respondents-defendants were able to show on record by leading cogent evidence that they were inducted as tenants by predecessor-in-interest of appellant-plaintiff and they had been paying regular rent to the original owner and thus relationship of landlord and tenant. As far as change in revenue entries is concerned, it has already been discussed in detail that those were changed on the basis of report submitted by Patwari in the shape of RoznamchaEx.D-3 to effect that he after seeing the possession of the predecessor-in-interest of the respondents-defendants over the suit land effected change in record. In view of the above, substantial questions of law are answered accordingly.

34. This Court is fully satisfied that both the courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter, since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." ***(p.269)***

35. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appear to be based on correct appreciation of oral as well as documentary evidence. Hence, both

the aforementioned appeals fail and are dismissed, accordingly. There shall be no order as to costs.

36. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Ramesh Chand & Others ...Appellants-Defendants

Versus

Roop Singh (since deceased) Through his LRs.Smt.Pushpa Devi & Ors. ...Respondents-Plaintiffs

Regular Second Appeal No.446 of 2007.
Judgment Reserved on: 28.11.2016
Date of decision: 30.11.2016

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is co-owner in possession of the suit land – defendants were threatening to interfere in the ownership and possession of the plaintiff and to discharge the water of their taps and rainy water in the suit land and to create passage over the same – they had encroached upon part of the suit land- the defendants denied the claim of the plaintiff- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that the demarcation was obtained during the pendency of the suit- no objection was filed to the report of demarcation – the report was duly proved – the demarcation was conducted in accordance with law – the right of passage was not established by the defendants- the Courts had rightly appreciated the evidence.(Para-19 to 35)

Cases referred:

State of H.P. vs. Laxmi Nand and Others, 1992(2) Sim.L.C. 307

Kamal Dev and another vs. Hans Raj, 2000(1) Shim.L.C. 192

Rattan Chand son of Lachho Ram vs. Pushpa Devi widow of Shri Balwant Singh and others, 2014 ILR HP 145

Krishan Singh alias Kishan Singh vs. Balram Singh, 2010(3) Shim.L.C. 548

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264.

Raja Ram vs. Ram Sarup, 1979 P.L.J. 12

Radha Soami Satsang Beas vs. State of Himachal Pradesh and another, 1984 S.L.J. 378

For the Appellants: Mr.Neeraj Gupta, Advocate.
For the Respondents: Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellants-defendants *(hereinafter referred to as the `defendants')* against the judgment and decree dated 29.12.2006, passed by learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, District Kangra, H.P. affirming the judgment and decree dated 28.9.2002, passed by learned Sub Judge 1st Class, Court No.2, Dehra, District Kangra, H.P., whereby the suit filed by the respondent-plaintiff *(hereinafter referred to as the `plaintiff')* has been decreed.

2. Briefly stated facts, as emerged from the record, are that the respondent-plaintiff claimed himself to be owner in possession alongwith other co-owners of the suit land. It is averred by the plaintiff that the defendants have got no right or title over the land comprised in

Khata No.13 min, Khatauni No.24 min, Khasra No.207, area measuring 0-07-02 hects. situated in Mohal Thal, Mauza Guler, Tehsil Dehra, District Kangra as per Jamabandi for the year 1991-92, *(hereinafter referred to as the 'suit land'),* but they are threatening to interfere in the peaceful ownership and possession of the plaintiff and are also threatening to throw the water of their water taps and rainy water in the suit land. It is further averred by the plaintiff that the defendants are also threatening to carve out a path to pass through the suit land without any right, title or interest. It is further averred by the plaintiff that during the pendency of the suit, defendant Ramesh Chand encroached upon part of the suit land comprised in Khasra No.207/1, area measuring 0-00-36 hects. and defendants No.2 and 3 have also encroached upon part of suit land i.e. land comprised in Khasra No.207/2, measuring 0-00-40 hects., which was also found during demarcation taken by the plaintiff on 7.2.1995 and this plea of possession was added by way of amendment to the plaint. It is further averred by the plaintiff that the defendants having encroached upon part of suit land and threatening to throw dirty water as well as rainy water towards his plaintiff, the suit be decreed.

3. Defendants by way of filing written statement raised various preliminary objections qua cause of action, maintainability, estoppel and limitation. It is averred by the defendants that allegations of the plaintiff regarding throwing of dirty and rainy water towards the suit land are wrong. It is further averred that there is no outlet for the natural flow of rainy water and that the parties are agriculturists and have got every right to use the passage on suit land from over the *Maind (hedge)* of suit land as per their custom and by way of easement of necessity. The defendants have also averred that they have neither cut nor removed any trees nor they have any intention to change nature of suit land. It is further averred by the defendants that they have got their own water tap for the last more than 20 years and no irreparable loss had ever been caused to the plaintiff. They have also denied the alleged encroachment upon the part of suit land and it has been averred that the report of the Local Commissioner, who was Field Kanungo, is not in accordance with rules. In the aforesaid background, the defendants prayed for the dismissal of the suit.

4. By way of replication, plaintiff while denying the allegations made in the written statement, re-affirmed and reasserted the stand taken in the plaint.

5. Learned trial Court on the basis of aforesaid pleadings, framed the following issues:-

"1. Whether the plaintiff is entitled to the relief of injunction? OPP.

2. Whether the plaintiff is entitled to the relief of possession ? OPP.

3. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD.

4. Whether the defendants are using the Meand of the suit land as per custom ? OPD.

4-a Whether the suit is not maintainable in the present form? OPD.

5. Relief."

6. The learned trial Court on the basis of the evidence adduced on record by the respective parties, decided all the issues in favour of the plaintiff and against the defendants and decreed the suit of the plaintiff for permanent prohibitory injunction.

7. Feeling aggrieved and dissatisfied with the impugned judgment and decree dated 28.9.2002, passed by learned trial Court, respondents/defendants filed an appeal in the Court of learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, i.e., Civil Appeal No.41/G/05/03, however fact remains that learned Additional District Judge, Fast Track Court, Kangra at Dharamshala vide judgment and decree dated 29.12.2006 dismissed the appeal preferred by the appellants-defendants and affirmed the judgment and decree, dated 28.9.2002, passed by learned trial Court.

8. In the aforesaid background, present appellants-defendants being aggrieved and dis-satisfied with the judgment and decree passed by learned trial Court as affirmed by learned appellate Court approached this Court by way of instant Regular Second Appeal, praying therein for quashing and setting-aside the judgment and decree dated 28.9.2002 passed by learned trial Court as affirmed by learned appellate Court vide judgment dated 29.12.2006.

9. This Regular Second Appeal was admitted on the following substantial questions of law:-

"(1) Whether both the Courts below have committed grave error of law and jurisdiction in relying upon report Ex.PW-1/B and Tatima PW-1/C which was not proved in accordance with law by producing the Field Kanungo who allegedly carried out the demarcation and Patwari who prepared the Tatima. Merely the fact that the file of demarcation was consigned for want of presence of the defendants-appellants vide Order Ex.PW-1/A, could have been sufficient to hold the said documents admissible in evidence?

(2) Whether the Trial Court has wrongly dismissed the application filed by defendants-appellants for demarcation? Have not both the Courts below ignored the provisions of Chapter I-M of High Court Rules and Orders whereby it was imperative on both the Courts below to have appointed the Local Commissioner for demarcation of respective boundaries of the parties as the dispute between the parties in the suit was mainly the boundary dispute?

(3) Whether both the Courts below have wrongly rejected the plea of the customary right of using the maind of the neighbour for carrying out the agricultural production which fact has duly been acknowledged in the Judicial pronouncements of this Hon'ble Court?

10. Mr.Neeraj Gupta, learned counsel representing the appellants-defendants, vehemently argued that the judgment passed by both the Courts below are not sustainable as the same are not based upon correct appreciation of evidence available on record. Rather, the same are based on mere conjecture and surmises and as such same deserves to be quashed and set aside.

11. Mr.Gupta, further contended that both the Courts below have acted with material illegality and irregularity while placing reliance upon demarcation Report Ex.PW-1/B and its Tatima Ex.PW-1/C to conclude that appellant-defendant encroached upon the suit land as alleged in the plaint. Mr.Gupta strenuously argued that the bare perusal of demarcation report itself suggest that demarcation was not conducted in accordance with law and instructions of Financial Commissioner as well as High Court Rules and Orders and as such same could not be taken into consideration by the Courts below while decreeing the suit of the plaintiff.

12. Apart from above, Mr.Gupta, further contended that both the Courts below have miserably failed to take note of the fact that demarcation report Ex.PW-1/B and Tatima Ex.PW-1/C could not be read in evidence since Field Kanungo, who allegedly carried out demarcation, was never produced as a witness before the Court and as such by no stretch of imagination demarcation report placed on record by the plaintiff could be deemed to have been proved in accordance with law. Mr.Gupta also contended that since Ex.PW-1/B and Ex.PW-1/C were inadmissible evidence and as such order of Assistant Collector consigning the file to record room was of no consequence and as such both the Courts below acted beyond their jurisdiction while placing reliance upon inadmissible evidence to pass decree of possession against defendants-appellants and as such same deserves to be quashed and set aside.

13. Mr.Gupta, while referring to the judgment passed by both the Courts below, invited the attention of this Court to the fact that on two occasions defendants-appellants had moved an application under Order 26 Rule 9 of the Code of Civil Procedure *(hereinafter referred to*

as `CPC') praying therein for appointment of Local Commissioner, keeping in view the boundary dispute involved in the matter, but on both the occasions, Courts below, without assigning plausible reason, dismissed the same and as such great prejudice has been caused to the appellants. Mr.Gupta further stated that both the Courts below ought to have appointed Local Commissioner in terms of prayer made in application under Order 26 Rule 9 CPC, keeping in view the dispute being boundary dispute as defined under Chapter-IM of the High Court Rules and Orders so that controversy at hand could be determined effectively for all times to come. Learned lower appellate Court in mechanical manner proceeded to affirm the judgment and decree of the trial Court, which was solely based upon demarcation report placed on record by the plaintiff, which at no point of time was proved in accordance with law. While concluding his arguments, Mr.Gupta also argued that both the Courts below committed material illegality and irregularity while deciding the issue of easement of necessity as raised by the plaintiff, especially in view of various pronouncements made by this Court that agriculturists in order to cultivate their fields, to take their cattle and to carry out agricultural operations during the season are entitled to use maind of neighbourers.

14. Mr.Gupta, placed reliance on the judgments of our own High Courts in ***State of H.P. vs. Laxmi Nand and Others, 1992(2) Sim.L.C. 307, Kamal Dev and another vs. Hans Raj, 2000(1) Shim.L.C. 192, Shri Rattan Chand sn of Lachho Ram vs. Pushpa Devi widow of Shri Balwant Singh and others, 2014 ILR HP 145,*** and ***Krishan Singh alias Kishan Singh vs. Balram Singh, 2010(3) Shim.L.C. 548,*** to suggest thatdemarcation, if not carried out in accordance with law/rules, same cannot be read in evidence and this Court by molding relief can order for demarcation even at this stage for settling theboundary dispute between the parties.

15. In the aforesaid background, Mr.Gupta prayed for acceptance of the appeal after setting aside the judgment and decree passed by both the Courts below.

16. Mr.Ajay Sharma, learned counsel representing the respondent-plaintiff supported the judgment passed by both the Courts below. Mr.Sharma strenuously argued that perusal of judgments passed by both the Courts below suggest that the same are based upon correct appreciation of evidence adduced on record by the plaintiff and as such there is no scope of interference, whatsoever, of this Court, especially in view of concurrent findings of fact and law recorded by both the Courts below. Mr.Sharma while referring to the judgment passed by both the Courts below, forcefully contended that there is overwhelming evidence adduced on record by the plaintiff suggestive of the fact that defendants encroached upon the suit land and caused nuisance/interference by throwing dirty water. While refuting the contention put forth on behalf of counsel representing the appellants-defendants that Courts below wrongly placed reliance on the demarcation report Ex.PW-1/B, Mr.Sharma vehemently argued that since defendants started encroaching upon certain portion of suit land during the pendency of suit, respondent-plaintiff applied for demarcation which was conducted on 7.2.1995 in the presence of the parties including appellants-defendants. While invitingattention of this Court to demarcation report Ex.PW-1/B, Mr.Sharma contended that bare perusal of the same suggests that demarcation of the site was conducted in accordance with law and instructions of Financial Commissioner as well as High Court Rules and Orders and as such there is no illegality and infirmity in the judgment passed by both the Courts below. To substantiate aforesaid arguments, he also invited the attention of this Court to the statement, especially cross-examination conducted on the defendant, who appeared as DW-1, wherein he himself admitted that demarcation was conducted in his presence by the Field Kanungo on the basis of *Mussabi* and before conducting demarcation, he ascertained/fixed three pucca points. Mr.Sharma further contended that after carrying out demarcation by Field Kanungo, same was confirmed by Tehsildar and no objection, whatsoever, at any point of time was ever filed by the appellants-defendants before Kanungo, as a result of which, same was confirmed by him.

17. Mr.Sharma, vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. He also urged that scope

of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others*, (2015)4 SCC 264.**

18. I have heard learned counsel for the parties and gone through the record of the case.

Question No.1

19. In the present case, respondent-plaintiff filed suit for permanent prohibitory injunction and for possession claiming himself to be the owner in possession alongwith other co-owners of the suit land. Plaintiff also claimed that healongwith his brother Kashmir Singh is in exclusive possession over the suit land and defendants, whohave no right, title and interest over the suit land, were threatening to interfere in the peaceful ownership and possession of the plaintiff and were also threatening to throw the water from their water taps and rainy water in the suit land. During the pendency of the suit, defendant Ramesh Chand encroached upon part of suit land comprised in Khasra No.207/1, area measuring 0-00-36 hects., whereas defendants No.2 and 3 encroached upon part of suit land comprised in Khasra No.207/2, measuring 0-00-40 hects., therefore, plaintiff applied for demarcation which was carried out on 7.2.1995 by the Field Kanungo. After aforesaid demarcation having been carried out by Field Kanungo, plaintiff amended his suit, whereby he raised plea of possession by alleging that defendants have encroached upon part of the suit land and threatening to throw dirty water as well as rainy water towards the land of plaintiff. Plaintiff, with a view to establish his ownership and possession qua the suit land, tendered in evidence documents Ex.P-1 and Ex.P-2, which are the copies of Jamabandi for the year 1991-92 and *Aks Sazra Kistbar*. Similarly to prove encroachment over the suit land plaintiff placed on record demarcation report given by Kanungo i.e. Ex.PW-1/B. Learned Courts below, while placing reliance upon demarcation report Ex.PW-1/B, Tatima attached with the same Ex.PW-1/C as well as statement of parties, who were present on the spot, i.e.Ex.PW-1/D, came to the conclusion that the defendants were found to be in possession of part of the suit land i.e. some portion of the suit land bearing Khasra No.207/1 was encroached by defendant No.1, whereas land shown in Khasra No.207/2 was found to beencroached upon by defendants No.2 and 3.

20. Learned counsel representing the appellants-defendants vehemently argued that no reliance, whatsoever, could be placed upon aforesaid demarcation report Ex.PW-1/B and Tatima attached with the report Ex.PW-1/C by Courts below, while decreeing the suit especially in view of the fact that same was not proved in accordance with law. As per Mr.Gupta, since Field Kanungo, who had carried out demarcation, was not produced as a witness by the plaintiff, defendants had no opportunity, whatsoever, to cross-examine this witness as a result of which great prejudice has been caused to the defendants. Had defendants got the opportunity to cross-examine the Field Kanungo, who had carried out the demarcation, the defendants would have got opportunity to prove on record that demarcation was not carried out in accordance with law as well as instructions of Financial Commissioner and High Court Rules and Orders.

21. The aforesaid argument, having been made by Mr.Gupta, needs to be rejected out rightly. It is undisputed that demarcation report dated 7.2.1995 was procured by respondent-plaintiff during the pendency of the suit. It is also undisputed that after procuring the aforesaid demarcation report, plaintiff amended his suit, whereby plea of possession was added by way of amendment to the plaint. It is not understood that if demarcation report dated 7.2.1995 was not in accordance with law what prevented the defendants from filing objection, if any, to the demarcation report allegedly not carried out in accordance with law by the Field Kanungo. Though defendants in reply to the amended written statement have stated that demarcation report dated 7.2.1995 is not in accordance with law but itnowhere suggest that in what manner demarcation report is not in accordance with law. Mere bald allegation that demarcation report is not in accordance with law may not be sufficient to conclude that demarcation was not carried out in accordance with law.

22. It is also not disputed, as emerged from the record, that at the time of demarcation wife of defendant No.1 as well as other defendants were present and their statements were also recorded by the Local Commissioner, who had carried out the demarcation. As has been noticed above, DW-1 in his cross-examination has admitted that demarcation dated 7.2.1995 was carried out by Field Kanungo on the basis of *Mussabi* after ascertaining three pucca points, which itself suggest that demarcation dated 7.2.1995 was carried out in accordance with law after summoning of the effected parties including all the defendants. It also emerge from the record that subsequent to demarcation carried out on 7.2.1995, the report was affirmed by Naib Tehsildar on 30.9.1995 Ex.PW-1/A.Perusal of Ex.PW-1/A i.e. order dated 30.9.1995, passed by Tehsildar, suggests that despite there being sufficient opportunities, nobody, including the defendants, came forward to file objection, if any, to the demarcation report dated 7.2.1995 and as such same was accepted by Tehsildar. Similarly, perusal of document Ex.PW-1/D suggests that the statement of parties, were recorded at the time of demarcation. Perusal of aforesaid document clearly suggests that defendants Mukesh Kumar and Inder Singh were present and the wife of defendant namely Vijay Guleria was also present.

23. This Court, with a view to ascertain the genuineness and correctness of submissions having been made by Mr.Gupta with regard to the correctness and validity, if any, of demarcation report Ex.PW-1/B, perused demarcation report dated 7.2.1995, which clearly suggests that same was carried in accordance with law in the presence of all the parties. Local Commissioner, who carried out demarcation, has categorically reportedthat demarcation is being carried out on the basis of *Mussabi* and there were three pucca points fixed before conducting the demarcation and hence this Court sees no force in the contention put forth on behalf of the appellants-defendants that the demarcation was not carried out in accordance with law and as such same could not be considered in evidence by the Courts below.

24. As far as non-examination of Local Commissioner, who carried out demarcation, is concerned, it is settled law that party who assail the demarcation report is to examine the Local Commissioner. In this regard reliance is placed upon the judgment of the Punjab & Haryana High Court in ***Raja Ram vs. Ram Sarup, 1979 P.L.J. 12***. Though, as has been discussed above, defendants had ample opportunity to file objection, if any, to the demarcation report after amendment of suit by the plaintiff whereby plea of possession was added while placing reliance upon the demarcation report dated 7.2.1995, but, despite that it is not understood what prevented the defendants-appellants for applying to the Court below to summon Local Commissioner who had carried out the demarcation dated 7.2.1995 Ex.PW-1/B. Defendants being effected party and dis-satisfied with the demarcation report dated 7.2.1995, were well within its rights to examine Local Commissioner by citing him as a witness by following theprocedure of law. In the instant case, plaintiff successfully proved on record demarcation report Ex.PW-1/B by placing reliance on other document Ex.PW-1/A i.e. confirmation order dated 30.9.1995, passed by the Tehsildar, which clearly suggests that despite various opportunities, defendants failed to file any objectionto the demarcation report.

25. Apart from above, PW-1 and PW-2, in no uncertain terms, proved that demarcation was conducted in accordance with law. Both the aforesaid plaintiff witnesses in their cross-examination categorically stated that demarcation was carried out on the basis of *Mussabi* by Field Kanungo after ascertaining the pucca points and there is nothing in their cross-examination, which could suggest otherwise.

26. Moreover, DW-2 himself in his cross-examination admitted that demarcation was obtained by plaintiff during the pendency of the suit and at that time he was present. He also stated that demarcation was conducted on the basis of *Mussabi* by Field Kanungo after ascertaining the pucca points and as such this Court sees no illegality and infirmity in the conclusion drawn by both the Courts below that the demarcation report Ex.PW-1/B was carried out in accordance with law.

27. It is also settled law that once land is demarcated, no further demarcation can be carried out unless previous is set aside. In this regard reliance is placed on the judgment of this

High Court in ***Radha Soami Satsang Beas vs. State of Himachal Pradesh and another, 1984 S.L.J. 378.***

28. After carefully examining the entire evidence and the reasoning given by the Courts below vis-à-vis documentary evidence adduced on record by the plaintiff, this Court sees no illegality and infirmity in the findings returned by both the Courts below. This Court has no hesitation to conclude that Courts below have rightly appreciated the documentary evidence placed on record in the shape of Ex.PW-1/B by the plaintiff to conclude that defendants have encroached upon the suit land, admittedly, owned and possessed by the plaintiff-respondent. In view of above detailed discussion, substantial question of law is answered accordingly.

Question No.2

29. It emerges from the record that appellants-defendants had applied for appointment of Local Commissioner to carry out demarcation but the same was rejected by the Court below. At the cost of repetition, it may be reiterated that plaintiff had applied for demarcation during the pendency of the suit and Local Commissioner had carried out demarcation on 7.2.1995 in the presence of all the parties, including the defendants. By way of placing demarcation report dated 7.2.1995 Ex.PW-1/B, plaintiff successfully proved on record that demarcation in question was carried out in accordance with law by associating all the defendants.

30. In view of above, this Court is of the view that once trial Court had accepted the demarcation report duly submitted by Field Kanungo, it had no occasion to call for fresh demarcation report at the instanceof defendants. Moreover, as has been discussed hereinabove in detail, demarcation report Ex.PW-1/B, placed on record by the plaintiff, was carried out strictly in accordance with law, as per own admission of the defendant, and as such, this Court sees no illegality and infirmity in the rejection of application under Order 26 Rule 9 CPChaving been preferred by defendants by the trial Court.

31. True, it is that in the event of there being boundary dispute between the parties, Courts below should appoint Local Commissioner for demarcation of respective boundaries of the parties as per provisions of Chapter I-M of High Court Rules and Orders. In the instant case, as has been observed above, trial Court had no occasion to appoint Local Commissioner when demarcation report dated 7.2.1995 Ex.PW-1/B was already on record. Therefore, the substantial question of law is answered accordingly.

Question No.3

32. Now, adverting to the plea of customary right of using *Maind* of the neighbour for carrying out agricultural production, this Court finds that no evidence worth the name was led on record by the defendants to prove such right by way of easement of necessity as well as custom. Though defendants by way of written statement claimed that they have easementary right by way of easement of necessity but there is no evidence led on record by the defendants to substantiate the aforesaid plea having been taken in the written statement. To prove the plea of easementary right by way of custom or by the easement of necessity, it was incumbent upon the defendants to prove on record that the land of defendants is situated beyond the land of plaintiff and there is no alternative passage leading to their land except from the land of the plaintiff. In the present case, there is no site plan, whatsoever, attached with the written statement, suggestive of the fact that defendants had no alternative path to their land, save and except, the one that is from the land of plaintiff. Substantial question of law is answered accordingly.

33. As far asjudgments having been relied upon by the counsel representing the appellants, there can be no quarrel that if the demarcation is not carried out in accordance with law/rules, same cannot be read in evidence and Courts while adjudicating the boundary dispute, if any, between the parties can always order for appointment of Local Commissioner in terms of Order 26 Rule 9 CPC. But in the instant case, as has been discussed in detail, demarcation report placed on record by the plaintiff is in accordance with law and instructions of the Financial Commissioner and as such this Court sees no illegality and infirmity in the judgments passed by

both the learned Courts below. In view of above, judgments cited by learned counsel representing the appellants may not have any application in the present case.

34. This Court is fully satisfied that both the courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***(p.269)***

35. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which was further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appears to be based on correct appreciation of oral as well as documentary evidence. Hence, present appeal fails and is dismissed, accordingly.

36. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Kishori Lal & another .....Respondents.

Cr. Appeal No. 766 of 2008
Decided on : 30.11.2016

Indian Penal Code, 1860- Section 379 read with Section 34- Accused were found in possession of small pieces of aluminum wire, 6 blades, two hacksaw blades, bundle of aluminum wire and small pieces of ladder – they failed to account for the same- informant filed an application stating that one ladder was stolen – he identified the ladder as his own – the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused were acquitted – held in appeal that the copy of seizure memo was not supplied to the accused- testimony of PW-8 was contrary to the contents of the seizure memo- the theft was reported by the informant after delay for which no explanation was given - the Appellate Court had rightly acquitted the accused- appeal dismissed.(Para- 9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondents: Mr. Divay Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 25.8.2008 rendered by the learned Sessions Judge, Chamba Division Chamba (Himachal Pradesh) in Criminal Appeal No. 15/2008, whereby it while reversing the findings of conviction recorded by the learned trial Court acquitted the respondents (for short "accused") for the offences charged.

2. Brief facts of the case are that on 3.11.2001 HC Raj Kumar, Incharge Police Post Holi was on patrolling at place Tiyari Bridge alongwith HHC Dharam Chand No. 91, HHC Prithi Chand No. 144 and B.O Sh. Makholi Ram, Jagdish Kumar Guard and Gian Chand forest worker. At about 5.00 a.m. when the police party was at Tiyari Bridge three persons came from Holi side, out of which two persons had been carrying on sack each in their hands and on seeing the police party they tried to fled away. Two persons were carrying sack and on seeing the police party they tried to flee away, but accused No.1 and 2, present appellants, were apprehended while one person fled away from the spot. On checking the sack of accused No.1, it was found containing pieces of aluminum wire in small pieces, six blades and two hacksaw blades while the sack of accused No.2 was found containing one bundle of aluminum wire and small pieces of ladder. The accused persons failed to account for the above-said articles which were taken into possession through a seizure memo. The investigating Officer prepared Rukka and sent the same to the police Station Bharmour on the basis of which FIR was registered. On 8.11.2001 the complainant had given an application to the police that one ladder which was kept by him behind his residence has been stolen and the complainant identified the pieces of ladder belonging to him. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court qua theirs committing offence punishable under Section 379/34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication. However, they did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction qua the accused. However in an appeal preferred by the respondents herein before the learned Sessions Judge Chamba, the latter Court returned findings of acquittal in their favour.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the learned Appellate Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. Vide recovery memos comprised in Ex.PW-1/A and PW-1/B recovery of items/property allegedly stolen by the accused/respondents stood effectuated also with PW-1 a witness thereto testifying in corroboration to the contents which occur therewithin thereupon it stands canvassed by the learned Deputy Advocate General qua the aforesaid constituting formidable pieces of evidence for reversing the findings of acquittal recorded by the learned Sessions Judge, Chamba. The aforesaid submission for its standing construed to be holding immense potency it is enjoined to be read in conjunction with the testification of PW-8 besides in coagulation with the factum of the Investigating Officer concerned testifying qua his not purveying copies thereof to the accused though he stood enjoined to purvey them to the accused. A combined reading whereof purveys no conclusion than of their preparation standing engineered besides invented at the instance of the Investigating Officer hence his concert to hide them arouse-able from his not purveying them to the accused renders any reliance thereupon for nailing findings of conviction against the accused to be grossly inapt.

10. Moreover an allusion to the testification of the Investigating Officer who deposed as PW-8 is imperative for unearthing therefrom whether the relevant recovery memos aforesaid hold efficacy, conspicuously when recovery of the relevant stolen items stood effectuated thereunder from the accused on theirs standing nabbed by the investigating Officer concerned at the place and time enumerated therein. In the event of the investigating Officer hence omitting to underscore in his testification held in his examination-in-chief the trite factum of his effectuating recovery of the relevant stolen items from the possession of the accused in the manner reflected in the recovery memos, the invincible conclusion therefrom would be qua the contents reflected therein suffering erosion.

11. A close analysis of the testimony of PW-8 unveils qua in his testimony comprised in his examination-in-chief his though making a communication therein in tandem with the recitals occurring in the recovery memos yet his testification holding bespeakings therein qua his nabbing the accused at the place and time reflected therein gets blunted when analyzed in consonance with the hitherto erected inference qua the relevant memos being discardable. With the efficacy of Ex. PW-1/A and PW-1/B standing negated whereupon hence it has to be concluded of the best evidence in proof of the charge not acquiring any immense potency.

12. Be that as it may the veracity of recovery memos stands enfeebled by the factum of a disclosure occurring therewithin qua the recovery of stolen items standing effectuated from the possession of the accused on 3.11.2001 in the manner reflected therewithin even when the aforesaid factum stood detected by PW-6 on 2.11.2001 yet he omitted to promptly thereat lodge a complaint qua the case property standing stolen. The effect of recovery memos aforesaid standing prepared on 3.11.2001 whereas PW-6 despite detecting the relevant theft to occur on 2.11.2001 his belatedly on 7.11.2001 lodging a report qua the relevant theft with the police station concerned constrains a conclusion qua the preceding effectuation of recovery of the relevant items from the possession of the accused under the memos aforesaid arising not in sequel to the lodging of the apposite complaint rather hence their preparation not holding any connectivity with the alleged theft which occurred at the relevant site whereat the relevant stolen items were kept, conspicuously when their preparation occurred not subsequent to the lodging of the report rather contrarily occurred prior thereto. The inference qua Ex.PW-1/A and PW-1/B for reasons afore-stated remaining unproven by the prosecution nor thereupon hence the begetting any connectivity vis-à-vis the theft of the relevant items from the relevant site whereat they stood kept or stored stands enhanced by the factum of the prosecution witnesses acquiescing to the suggestions put to them by the learned defence counsel while he held them to cross-examination qua all the items which stood purportedly recovered thereunder being easily available in the market besides strength to the aforesaid inference stands garnered by the factum of PW-6 besides other relevant prosecution witnesses not making any vivid disclosure in their respective testifications qua any mark existing on the relevant property/items whereupon they stood rendered to be distinguishably the property of the complainant also thereupon the factum of the relevant items/property standing owned by the complainant standing emphatically established

remains unproven rendering hence the relevant charge to which the accused stood subjected to founder.

13. A wholesome analysis of evidence on record portrays that the appreciation of evidence as done by the learned Appellate Court does not suffer from any perversity and absurdity nor it can be said that the learned Appellate Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned Appellate Court merit interference.

14. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned Appellate Court is maintained and affirmed. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE.

State of H.P. ....Appellant.
Versus
Sant Ram & another .....Respondents.

Cr. Appeal No. 528 of 2008
Decided on : 30.11.2016

Indian Penal Code, 1860- Section 341,323 and 325 readwith Section 34- Accused B gave blow of chain on the nose of the informant due to which he suffered injuries on his eyes- accused S caught hold of the informant from his neck- the accused were tried and acquitted by the Trial Court – held in appeal that PW-1 had improved upon his previous version- the person who had rescued the informant from the accused was not examined – there are contradictions in the testimony of PW-3- the blood on the clothes was not connected to the informant – the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 14)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondents: Mr. Lovneeesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 8.4.2008 rendered by the learned Additional Chief Judicial Magistrate, Sarkaghat in Police Challan No. 185-II/2002, whereby the learned trial Court acquitted the respondents (for short "accused") for the offences charged.

2. Brief facts of the case are that on 30.3.2002 at about 9.30 p.m. complainant Hem Chand alongwith his brother Krishan Chand was going to his house from the house of one Sukh Ram at village Gharwasra. On the way both the accused met to the complainant. Accused Bakshi alias Inder Singh gave blow of chain on the nose of the complainant due to which complainant suffered injuries on his eyes. Accused Sant caught hold of the complainant from his neck. The complainant was rescued from the clutches of the accused by Krishan Chand and Ananat Ram. Report to this effect was made to the police on the next date by the complainant and FIR was registered. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court qua theirs committing offences punishable under Sections 341,323 and 325 readwith Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication. However, they did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The prosecution case would succeed only when the prosecution witnesses depose a version qua the genesis of the prosecution case bereft of any taint qua theirs rendering a version qua it holding underscorings qua each of them while testifying in Court not either improving or embellishing upon their previous statements recorded in writing nor theirs while standing subjected to cross-examination theirs contradicting their respective testifications occurring in their respective examinations-in-chief besides when the testifications of the prosecution witnesses underscore qua theirs rendering a version qua the prosecution case with utmost consistency besides intra-se harmony. Contrarily when the testifications of the prosecutions witnesses unveil qua theirs therein not rendering a version qua the genesis of the prosecution case with intra-se corroboration thereupon the prosecution would not succeed in proving the relevant charges qua the accused/respondents.

10. In testing whether the prosecution witnesses testify qua the genesis of the prosecution version bereft of any taints afore-stated, an allusion to the testimony of PW-1 is imperative. In his testification PW-1 apparently has embellished besides improved upon his previous statement recorded in writing comprised in the factum of his communicating therein qua one Sukh Ram also accompanying the accused at the relevant time whereupon his testification visibly acquires a taint of his improving and embellishing upon his previous statement recorded in writing rendering hence thereupon the genesis of the prosecution case is construable to be incredible. However PW-1 has testified qua accused Bakshi Ram delivering a blow of chain upon him in sequel whereto he suffered injuries on his nose and eyes. The communication aforesaid echoed by PW-1 in his testification occurring in his examination-in-chief though is neither improved nor embellished vis-à-vis his previous statement recorded in writing given the aforesaid factum also standing embodied in the apposite FIR yet thereupon it would not be apt to conclude qua his rendering a truthful version qua the aforesaid facet significantly when in the apposite MLC comprised in Ex.PW-6/A there is no reflection therein qua the complainant begetting injuries on his eyes in sequel to his purportedly standing delivered a blow of chain thereon by accused Bakshi Ram. In sequel thereto his testification qua the aforesaid facet holds no probative sinew also the testification of the complainant qua accused Bakshi Ram delivering a blow of chain on his person though is neither an improvement nor an embellishment vis-à-vis his previous statement recorded in writing conspicuously when the factum aforesaid stands also narrated in the apposite FIR yet with the Investigating Officer not

effectuating recovery of chain renders the ascription by the complainant qua accused Bakshi Ram delivering its blow on his eyes and nose to not hold any creditworthiness.

11. Moreover PW-1 testifies qua his at the relevant site standing rescued by one Sh. Ananat Ram from the belaborings perpetrated on his person by the accused yet the said Ananat Ram neither stood cited as a witness nor stands examined whereas this witness was an un-interested witness also thereupon when he would lend an unbiased besides un-interested version qua the prosecution version. In sequel his non-examination is fatal to the success of the prosecution case. Also his non-examination by the prosecution is fatal to the emergence of truth qua the genesis of the prosecution case.

12. Be that as it may the prosecution examined PW-3 the brother of the complainant for meteing corroboration to the testification of the complainant which for the reasons afore-stated is ridden with stark taints of embellishments besides improvements also it is un-creditworthy on account of dichotomy occurring intra-se his testimony vis-à-vis the apposite MLC also for non-effectuation of recovery of chain by the investigating officer concerned , chain whereof stood allegedly used by accused Bakshi Ram for delivering blows on his nose and eyes, yet the effect of the taints afore-stated gripping the testification of PW-1 may stand belittled if PW-3 brother of PW-1 stands concluded by this court to be an eye witness qua the occurrence. For determining the aforesaid factum, it is imperative to gauge from his testimony whether he was present at the relevant site of occurrence at the stage contemporaneous to its taking place thereat. In gauging the aforesaid factum this Court stands enjoined to on an incisive reading of his testification discern therefrom qua his rendering a version in conformity with the one rendered by PW-1. However when PW-3 testifies qua accused Sant Ram belaboring PW1 with kick and fist blows factum whereof remaining un-corroborated by PW-1 in his testification renders the testification of PW-3 to be in stark contradiction vis-à-vis the testification of PW-1 whereupon it cannot be concluded of his meteing corroborative vigor to the testimony of PW-1 wherefrom it is to be concluded of his being a concocted witness to the occurrence rendering his testimony to be incredible.

13. Furthermore the factum of PW-3 omitting to testify in his examination-in-chief qua the presence of Ananat Ram at the relevant site of occurrence whereas PW-1 testifies qua the presence of Ananat Ram at the relevant site of occurrence at the relevant time also begets an inference of PW-3 deposing contradictory qua the aforesaid factum vis-à-vis PW-1 whereupon it has also to be concluded with accentuated vigor qua his being an engineered witness to the occurrence whereupon no credence is imputable to his testification.

14. The learned Deputy Advocate General has contended with vigor qua with PW-1 a witness to recovery memo Ex.PW-1/A whereunder blood stained clothes of PW-1 were taken into possession admitting the factum of occurrence of his signatures on Ex.PW-1/A purveys sound and tangible proof qua the prosecution lending cogent proof qua effectuation of blood stained clothes of the complainant occurring thereunder yet the vigor of his submission wanes, for absence on the part of the prosecution to send the blood stained clothes of the complainant recovered under memo Ex.PW-1/A to the FSL concerned for eliciting therefrom an apposite opinion qua it holding the blood of the complainant. Contrarily the aforesaid omission rears an inference qua the blood occurring on the clothes recovered under memo Ex.PW-1/A not belonging to the accused wherefrom it is to be concluded qua their recovery not connecting the accused in the commission of the alleged offence.

15. A wholesome analysis of evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit interference.

16. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Union of India .....Appellant.
Versus
Vivek Bhardwaj & Another .....Respondents.

CMP(M) No. 284 of 2015 & RSA No. 532 of 2016.
Decided on: 30th November, 2016

Limitation Act, 1963- Section 5- An application for condonation of delay of 256 days was filed pleading that the matter remained pending before various authorities in the department – held, that the memo of appeal was returned by Assistant Solicitor General of India in the month of May, 2014 for signatures and was filed in the month of January, 2015 – no explanation for the delay was given – no sufficient cause exists for condonation of delay- application dismissed.

(Para-5)

For the appellant : Mr. Ashok Sharma, ASGI with Mr. Angrej Kapur, Advocate.
For the respondents : Mr. J.L. Bhardwaj, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Heard.

2. Main appeal, which has been filed against the judgment and decree dated 20.1.2014, passed by learned Additional District Judge-II, Una, District Una, is barred by 256 days. The explanation as set out in the application is bureaucratic style of functioning in the Government Offices as the matter allegedly remained pending for consideration before various authorities in the Department of Defence, Government of India for seeking approval. The District Attorney, Una has advised the applicant-appellant vide communication dated 10.2.2014 to seek opinion of the Law Department for filing of appeal in this Court against the impugned judgment and decree. The approval was finally received in the first week of May, 2014. The matter thereafter was processed in the office of learned Assistant Solicitor General of India and the memorandum of appeal drafted in the month of May itself. The same after obtaining the signature of the competent authority was sent to the office of learned Assistant General of India on 23rd May, 2014 for filing the appeal in this Court. The appeal along with this application, however, was filed on 19.1.2015 i.e. after about seven months. It is in this backdrop while hearing this application for sometime on 13.7.2016, the applicant, Union of India, was directed to file supplementary affidavit clarifying therein as to where the matter remained held up during the period 23.5.2014 to 18.1.2015. This order reads as follows:-

> "Heard for sometime. Interestingly enough the memorandum of appeal, in view of the averments in the application, was delivered in the office of learned Assistant Solicitor General of India on 23rd May, 2014 for being filed in the Registry of this Court. The same, however, has been filed on 19.1.2015 after a period over seven months. No explanation is forth coming as to why the memorandum of appeal, which was ready for being presented in this Court on 23.5.2014, has been filed on 19.1.2015. Learned Assistant Solicitor General of India to clarify the position in this regard in the rejoinder, which shall be filed within three weeks. List on ***10th August, 2016***."

3. Irrespective of 4-5 opportunities granted for the purpose, supplementary affidavit has not been filed. On the previous date, last and final opportunity was granted to the applicant-appellant to file the same with a rider that in case the affidavit is not filed even within the extended period also, the application shall be disposed of finally.

4. Learned Assistant Solicitor General of India, on instructions, submits that despite efforts made, no one has turned up to file the supplementary affidavit as directed by this Court.

5. It is seen that the memorandum of appeal returned by learned Assistant Solicitor General of India in the month of May, 2014 for signature on this application and also attestation of affidavit etc., was returned by the applicant-appellant in the month of January 2015. The affidavit filed in support of this application was got attested on 16.1.2015 at Delhi. The memorandum of appeal and this application, no doubt, was thereafter delivered in the office of learned Assistant Solicitor General of India and thereafter, it has been filed on 19.1.2015 in the Registry of this Court i.e. within 2-3 days, however, the fact remains that there is no explanation qua the delay as occurred in filing the appeal from 23.5.2014 to 18.1.2015. The applicant-appellant could have explained the same in the supplementary affidavit, however, failed to do so, irrespective of more than sufficient time granted for the purpose. True it is that in the case where the State Government or Central Government is a party, in the matter of condonation of delay, in view of the bureaucratic style of functioning, a pragmatic approach of the matter should be taken, however, in the case in hand the applicant-appellant has miserably failed to file supplementary affidavit and to offer explanation as to where the matter remained held up during the period 23.5.2014 to 18.1.2015. Therefore, sufficient cause has not been shown, which is paramount consideration, while considering an application of this nature. I, therefore, find no merit in this application and the same is accordingly dismissed. Consequently, the appeal does not survive and the same is accordingly disposed of, so also the pending application, if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Dinesh Chander Sharma .....Appellant

Versus

Swaran Singh and others .....Respondents

Cr. Appeal No. 31 of 2010
Reserved on 02.09.2016
Decided on: 1st December, 2016

Indian Penal Code, 1860- Section 447, 323, 342, 506-II and 367 read with Section 34- Complainant had given the contract of construction of his house to the accused S- the accused had used his shuttering material as well as the material of the complainant- the accused started carrying the shuttering material of the complainant to which the complainant objected- accused M and J arrived at the spot- all the accused gave beatings to the complainant- complaint and charge-sheet were filed before the Court – the accused were tried and acquitted of the commission of offences punishable under Sections 447, 342, 506 and 367 read with Section 34 of I.P.C but were convicted and sentenced to pay Rs.1,000/- each as fine for the commission of offence punishable under Section 323 of I.P.C- held in appeal that testimonies of the witnesses only lead to the conclusion that some scuffle had taken place between the complainant and the accused S – subsequently, accused J and accused M joined the scuffle – it was not explained as to who was the aggressor – simple injuries were found on the person of the complainant, whereas, no such injuries were found on the person of accused – however, it was duly proved that the accused had administered beatings to the complainant- hence, the accused were rightly convicted by the trial Court- appeal dismissed.(Para-11 to 16)

Cases referred:
Lochan Ahir V. State of West Bengal, AIR 1963 SC 1074
State of Maharashtra V. Annappa Bandu Kavatage, AIR 1979 SC 1410
Jamatraj Kewalji Govani V. State of Maharashtra, AIR 1968 S.C. 178
Raunki Saroop V. State, AIR 1970 Punjab and Haryana, 450
Panna and others V. State of Rajasthan, 1987 Cri.L.J. 997 (Rajasthan High Court)
State of Madhya Pradesh V. Saleem @ Chamaru and another, 2005(3) Criminal Court Cases 330 (S.C.)
Adu Ram V. Mukna 2005(2) RCR (Criminal) 64

For the appellant:	Appellant in person.
For the respondents:	Mr. Vikrant Thakur, Advocate for respondents No. 1 to 3. Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs for respondent No.4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Victim of the occurrence and complainant in FIR No. 470/01 is in appeal before this Court. He is aggrieved by the impugned judgment dated 23.03.2009 passed by learned Additional Sessions Judge, Una, District Una, H.P. in Sessions Case No. 18/06 having arisen out of FIR No. 470/01 and Sessions Case No. 19/06 out of the complaint he filed, whereby the respondents (hereinafter referred to as the accused persons) have been acquitted of the charge framed against each of them for the commission of an offence punishable under Section 447, 342, 506-II and 367 read with Section 34 of the Indian Penal Code and the sentence awarded against each of them under Section 323 of the Indian Penal Code is also stated to be on lesser side.

2. The prosecution case as disclosed from the statement Ext. PW-11/A of the appellant-complainant shortly stated is that he had given the contract of construction of his house to accused Swaran Singh. The said accused in order to lay slab (lintel) of the house besides his own shuttering material used some planks and 'Ballies' belonging to the complainant also. On 8.09.2011 around 10.15 a.m. the said accused started opening the shuttering and to take the same to house. He noticed that the accused had been carrying shuttering material belonging to him also to his house. He objected to it. On this, accused Swaran Singh has called his co-accused Joginder Singh @ Dannu to identify shuttering. The said accused revealed that the shuttering being carried by accused Swaran Singh to his house was that of the said accused. On finding that accused Joginder Singh was telling lie, the complainant asked him as to why he did so. In the meanwhile, accused Mohinder Singh also arrived there though he had gone to the house and started interference in the conversation going on between complainant and accused Joginder Singh. Accused Mohinder Singh asked the complaint as to what he had to do with that 'Balli' which he was claiming to be his. On this, accused Swaran Singh made utterances that he had to take the same in his (sic.), to which obscene language according to complainant he objected to. On this, he was caught hold by both accused Joginder Singh and Swaran Singh. Accused Swaran Singh hit his left side buttocks with "Jhabbal" in his hand which he had been using to open the shuttering. Their co-accused Mohinder Singh administered beatings to the complainant. PW-3 and PW-4 were also present and not made any effort to save him from the clutches of the accused persons.

3. Not only this, all the three accused had dragged him from backside gate of their house to the adjoining 'Galli' (street). He was made to lie on the heap of grits there also. He was also beaten by them with kicks and fisty cuffs. He thereafter was taken by them to the house of accused Swaran Singh. There he was pushed and thrown on a cot. Due to the people gathered

there, the accused did not administer further beating to him there. His mother Smt. Krishna Devi (PW-16) and his sister-in-law came for his rescue and saved him from the clutches of the accused persons.

4. The police was informed by PW-16. The investigation was conducted by PW-17 ASI Prem Chand, the then I.O. Police Post, Santokgarh. It is he who had recorded the statement Ext. PW-11/A of the complainant and also made the application Ext. PW-17/A for getting the complainant medically examined in the hospital. He prepared the spot map Ext. PW-17/B and recorded the statements of prosecution witnesses. He had taken into possession the iron rod, Ext. P-1 and shirt of complainant, Ext. P-2 vide recovery memo Ext. PW-12/A. He has also taken in possession two 'Ballies' Ext. P-3 and Ext. P-4 and one garder Ext. P-5 vide recovery memo Ext. PW-10/A. He got recorded the statements of PW-3 and PW-4 under Section 164 of the Code of Criminal Procedure in the Court of learned Additional Chief Judicial Magistrate, Una vide memo Ext. PW-17/C. Statement of Angad Singh Ext. PW-17/D, statement of Sonu Ext. PW-17/E, and that of S/Shri Ram Murti, Prem Lal, Usha Rani and Ashutosh, Ext. PW-17/F, PW-17/G, PW-17/H and PW-17/I respectively were also recorded as per version of the said witnesses. He has also recorded the statement Ext. PW-17/J of PW Moti Ram. The Medico Legal Certificate Ext. PW-1/A and Ext. PW-12/B were also collected from the hospital.

5. On the completion of the investigation, challan under Section 447, 342, 323, 506-II, 367 read with Section 34 of the Indian Penal Code was filed against all the accused. In view of offence punishable under Section 367 of the Indian Penal Code is triable by the Court of Sessions, therefore, not only the challan but the complaint filed by the complainant was also sent to Sessions Court for trial.

6. As pointed out at the out set, learned trial Judge has framed the charge under Section 447, 342, 323, 506-II, 367 read with Section 34 of the Indian Penal Code against each of the accused. Since they pleaded not guilty, therefore, the prosecution was called upon to produce the evidence in support of the charge so framed against the accused persons. The prosecution in turn has examined 17 witnesses in all. The material prosecution witnesses, however, are PW-12, the complainant, his mother Smt. Krishna Devi (PW-16), Sh. Ashutosh (PW-9) nephew of complainant, Sh. Hardeep Singh (PW-4), nephew of accused Swaran Singh, Swaran Kaur (PW-5), mother of the said accused whereas, Sh. Ram Murti (PW-6), Sh. Prem Lal (PW-7) (owner of the cart hired for carrying shuttering by accused Swaran Singh), Smt. Usha Rani (PW-8) and Sh. Moti Lal (PW-10), the eye witnesses. The remaining witnesses are PW-1 Dr. N.K. Angra and PW-15 Dr. Indu Bhardwaj. The remaining witnesses including the I.O. Prem Chand PW-17 are police officials.

7. On the other hand, the accused in their statements recorded under Section 313 of the Code of Criminal Procedure have admitted that the complainant had given the contract of construction of his house to accused Swaran Singh, however, according to said accused not in a sum of Rs. 45,000/- but Rs. 60,000/-. It is also admitted that on 8.9.2001 in the morning, accused Swaran Singh started removing unfinished shuttering, however, according to them the said accused was accompanied by Mohinder Singh and not Sonu and Angad, his nephews. The rest of the prosecution case has either been denied by them being incorrect or for want of knowledge. In their defence, while answering second last question, it was stated that a false case has been registered against them at the instance of complainant who still owe a sum of Rs. 40,000/- towards the complainant.

8. As pointed out at the out set, learned trial Judge has acquitted all the accused of the charge framed under Section 447, 342, 506-II, 367 read with Section 34 of the Indian Penal Code as was framed against each of them, however, convicted and sentenced to pay Rs. 1,000/- each as fine for the commission of an offence punishable under Section 323 of the Indian Penal Code.

9. The impugned judgment has been sought to be quashed on the grounds inter-alia that the same has been passed without application of mind. There was ample evidence on record to show the involvement of the accused persons in the commission of offence punishable under Section 342, 367, 451, 504, 506-II, of the Indian Penal Code, however, they were erroneously acquitted form the charge framed against each of them. The lesser sentence awarded against accused-respondents has caused more harm to the complainant as well as the society as a whole and thereby caused miscarriage of justice to him.

10. The complainant as appellant while in person has strenuously contended that all ingredients of commission of an offence punishable under Section 342 and 367 of the Indian Penal Code stand established. The statements of PW-3 and PW-4 recorded under Section 164 of the Code of Criminal Procedure itself demonstrate that the complainant was taken by the accused persons to their place, however, for settlement of accounts. Whereas according to the complainant, he was kidnapped by the accused. The explanation that he has received injuries on his person by way of fall on shuttering material is wrong. The lesser sentence of fine under Section 323 IPC awarded against the accused is also stated to be against the public policy.

11. We have carefully analyzed the oral as well as documentary evidence. As a matter of fact, as rightly pointed out by learned trial Judge, there are two sets of witnesses i.e. one set which includes the kith and kin of the accused, whereas, the other that of the complainant. PW-3 Angad Singh, PW-4 Hardeep and PW-5 Swaran Kaur, as noticed supra, are the nephews and mother of accused Swaran Singh. Their testimony amply demonstrates that the complainant and the accused quarreled at such a stage when accused Swaran Singh was in the process of removing the shuttering from the lintel of the house (under construction) of the complainant. Hot exchanges took place between the complainant and the accused on the issue of ownership of 'Ballie' (wooden plank meant for giving support to the shuttering). The statements Ext. PW-3/A and Ext. PW-4/A of PW-3 and PW-4 recorded by learned Additional Chief Judicial Magistrate under Section 164 of the Code of Criminal Procedure not at all implicate the accused persons and rather as per the same it is the complainant who assaulted accused Swaran Singh. It has also come on record by way of the testimony of PW-3 and PW-4 that the complainant though was taken by accused Swaran Singh to his house, however, for settlement of accounts. The close scrutiny of testimony of PW-3 to PW-5 lead to the only conclusion that some scuffle had taken place between the complainant and accused Swaran Singh. Subsequently, accused Joginder Singh and accused Mohinder Singh also joined that scuffle. Though it remained unexplained as to who was the aggressor, however, the fact remains that no injuries were there on the person of accused persons, whereas, the MLC Ext. PW-1/A and Ext. PW-12/B reveal that there were injuries corresponding to the time of occurrence in existence on the person of complainant. The nature thereof, of course, was simple in nature. The accsued as such were convicted under Section 323 of the Indian Penal Code. They have not assailed the findings of their conviction and sentence any further by way of filing an appeal may be because only the sentence of fine has been awarded against them.

12. Now if coming to the own testimony of complainant, who has stepped into the witness box as PW-12 and that of his mother PW-16, it is apparent that some fight between him and the accused had taken place on the spot. The prosecution case to this effect finds corroboration from the MLC Ext. PW-1/A. The accused, no doubt, have denied the prosecution story being wrong as according to them the complainant in order to avoid the payment of balance amount i.e. Rs. 40,000/- has engineered and fabricated this case against them falsely. The facts, however, remain that evidence as has come on record by way of the testimony of two sets of witnesses as aforesaid, some scuffle had taken place on the issue of ownership of one 'Ballie'. Irrespective of there being no clinching evidence as to which of the party was aggressor, it would not be improper to conclude that it is the accused who had administered beatings to the complainant and caused thereby injuries simple in nature on his person. Being so, it is only a case under Section 323 IPC is made out against the accused persons and not under Section 342 or 367 read with Section 34 IPC, as no evidence cogent and reliable has come on record to show

that the complainant was wrongfully confined by the accused persons within the meaning of Section 342 of the Code and that he was kidnapped by them within the meaning of Section 367 of the Code. He, no doubt, was taken by the accused to their home, however, to settle the accounts and not with malafide intention to harm him. It is for this reason, he himself has stated in his statement Ext. PW-11/A, which finds mention the very first version qua the manner in which the occurrence had taken place in their house, the accused had not administered beatings to him. Though, according to him, he was thrown on the cot, however, it seems that he was made to sit on the cot. Similarly, no evidence has come on record to show that he was threatened by the accused persons to do away with his life because independent witnesses PW-6 Ram Murti, PW-7 Prem Raj, PW-8 Usha Rani and PW-10 Moti Ram have not supported the prosecution case and rather turned hostile to the prosecution. The own testimony of complainant for want of corroboration from any independent source cannot be relied upon. His mother (PW-16) arrived at the place of accused and saved him from their clutches, therefore, her testimony that she witnessed the occurrence is also false. Even the complainant has also not said that the occurrence was witnessed by his mother. His testimony that she appeared on the scene of occurrence and tried to save him from the clutches of the accused rather reveals that PW-16 arrived there later on.

13. The ratio of the judgments of the Hon'ble Apex Court in ***Ram Lochan Ahir*** V. ***State of West Bengal, AIR 1963 SC 1074***, ***State of Maharashtra*** V. ***Annappa Bandu Kavatage, AIR 1979 SC 1410***, ***Jamatraj Kewalji Govani*** V. ***State of Maharashtra, AIR 1968 S.C. 178***, ***Raunki Saroop*** V. ***State, AIR 1970 Punjab and Haryana, 450*** and ***Pannaand others*** V. ***State of Rajasthan, 1987 Cri.L.J. 997 (Rajasthan High Court)*** is not attracted in the given facts and circumstances of this Case, hence need not to be referred in detail in this judgment.

14. True it is that in view of the ratio of judgments of the Hon'ble Apex Court in ***State of Madhya Pradesh*** V. ***Saleem @ Chamaru and another, 2005(3) Criminal Court Cases 330 (S.C.)*** and in ***Adu Ram*** V. ***Mukna 2005(2) RCR (Criminal) 64*** inadequate sentence would do more harm and that the sentence should be in conformity with the atrocity and brutality with which the crime has been committed. One should also not lose sight of the fact that while determining the quantum of sentence against a convict, it is the magnitude of the crime committed, gravity and heinousness thereof as well as the manner in which it is committed, weigh in the mind of the Court.

15. In the given facts and circumstances, the complainant raised the issue of ownership of one 'Ballie' and it is on this both parties enraged and scuffled with each other and it is in that process, the complainant seems to have received injuries on his person. The offence cannot be said to be grievous in nature warranting for award of severe punishment to the accused. Otherwise also, for the commission of an offence punishable under Section 323 IPC, an offender can either be imprisoned for a term which may extend to one year or fine which may extend to Rs. 1,000/- or both. Since the accused/convicts have been sentenced by learned trial Court with fine of Rs. 1,000/- each, therefore, in view of there being no past criminal history in their credit, the sentence so awarded against each of them is just and reasonable. The law laid down by the Hon'ble Apex Court in the judgments (supra) is, therefore, distinguishable in the given facts and circumstances of this case.

16. In view of re-appraisal of the oral as well as documentary evidence on record, in our considered opinion, the trial Court has not committed any illegality or irregularity while passing the judgment under challenge in this appeal. The same, as such, is affirmed and the appeal is dismissed. Personal bonds furnished by the accused persons shall stand cancelled and sureties discharged.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Budhi Singh ....Petitioner.
Versus
State of H.P. and others ... Respondents.

CWP No. 4548 of 2009.
Decided on: 02.12.2016.

Constitution of India, 1950- Article 226- Revision petition has been dismissed by a non-speaking order- no findings were recorded on the grounds raised in the revision petition- recording of reasons is necessary, in case of a decision affecting anyone prejudicially – the order set aside and case remanded to the revisional Court for afresh decision. (Para-2 to 5)

For the petitioner. Mr. Ramakant Sharma, Advocate.
For the respondents Mr. Vikram Thakur and Ms. Parul Negi, Dy. AGs for respondents No. 1 to 3.
Mr. Arvind Sharma, Advocate for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this revision petition, the petitioner has prayed for the following relief.

i) *"That the order dated 27.10.2009 at Annexure P-7 passed by the learned Divisional Commissioner, Mandi Division, Mandi exercising powers of Director of Consolidation under the H.P.Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 in case No. 1/2009 may very kindly be quashed and set aside.*

ii) *That the order dated 24.5.2007 passed by the Consolidation officer at Annexure P-5 in Revenue Apeal No. 75/2006, titled Parkash Singh v. Budhi Singh may also be quashed and set aside.*

iii) *That the respondent may very kindly be directed to produce the entire record pertaining to the case of the petitioner for the kind perusal of this Hon'ble Court."*

2. The grievance raised by way of the writ petition is that feeling aggrieved by an order which was passed by Consolidation Officer, Hamirpur dated 24th May, 2007, the petitioner had preferred a revision petition under Section 54 of the Consolidation of Holdings Act, which revision petition stands dismissed by the Revisional Authority i.e. Divisional Commissioner, Mandi Division, Mandi by way of the impugned order which is not sustainable in the eyes of law as the impugned order is an unreasoned and non-speaking order and no findings have been returned in the said order on the grounds which were taken in the revision petition by the petitioner while assailing the order of Consolidation Officer.

3. I have heard the learned counsel for the parties and also gone through the pleadings of the case. A perusal of the impugned order demonstrates that it prima facie is a non-speaking order as no findings have been returned by the learned Revisional Authority on the grounds which were raised in the revision petition filed against order dated 24.05.2007 passed by the Consolidation Officer, Hamirpur. The only reasoning which has been assigned by the Divisional Commissioner to uphold the order passed by the Consolidation Officer is that Consolidation Officer, Hamirpur had visited the spot in the presence of parties and before passing the impugned order, the Consolidation Officer had gone through the record. In my considered view, this reasoning is not sufficient to uphold the order passed by the Consolidation Officer as the Revisional Authority after due application of mind should have had returned findings also on

the grounds which were taken in the revision petition against the order passed by the Consolidation Officer.

4. It is settled law that recording of reasons is necessary if decisions affect any one prejudicially. Even a quasi-judicial authority has to record reasons in support of its conclusion and insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done but it must also appear to have been done. Besides this, recording of reasons operates as a restraint of any possible arbitrary exercise of judicial and quasi judicial power. It can only be inferred from the reasons assigned in the order as to whether discretion has been exercised by the decision maker on relevant ground and by disregarding extraneous consideration. Besides this, reasons facilitate the process of judicial review by superior Courts and insistence of reasons is a requirement for both judicial accountability and transparency. These settled principles of law have not been taken into consideration by the Revisional Authority while passing the impugned order.

5. Accordingly, order dated 27th October, 2009 passed by the Revisional Authority in case No. 1/2009, dated 27.10.2009, is set aside and the case is remanded back to the said authority to decide the same afresh after affording an opportunity of being heard to the parties. It is made clear that said authority shall dispose of the matter by passing a reasoned and speaking order. Keeping in consideration the fact that the revision petition is pertaining to the year 2007, this Court hopes and expects that the Revisional Authority shall decide the same, as expeditiously as possible, but not later than six months from today.

6. With these observations, the writ petition is disposed of. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO Nos.239 & 379 of 2014, 476 & 577 of 2016.
Date of decision: 02.12.2016

1. **FAO No.239 of 2014**
   Divisional Manager, Oriental Insurance Co. Ltd. .....Appellant
   Versus
   Ram Kali & others ..... Respondents
2. **FAO No.379 of 2014**
   Ram Kali & others. .....Appellants
   Versus
   Manohar Singh Thakur & others ..... Respondents
3. **FAO No.476 of 2016**
   Manorma Thakur and others .....Appellants
   Versus
   Manohar Singh Thakur and others ..... Respondents
4. **FAO No.577 of 2016**
   Oriental Insurance Company Ltd. .....Appellants
   Versus
   Manorma Thakur and others ..... Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was travelling as a labourer while deceased N was traveling as owner of goods –they died in an accident- the fact that the deceased were travelling as labourer and owner, respectively was admitted in the reply- it was also proved by PW-4, occupant of the vehicle- the delay is not sufficient to dismiss the petition- the compensation was rightly assessed- the rate of interest were wrongly granted as 9% and 7% - rate of interest modified to 7.5% per annum. (Para-11 to 19)

Cases referred:

Dhannalal vs. D.P. Vijayvargiya and others, AIR 1996 Supreme Court 2155

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

Presence for the parties:

Mr.Deepak Bhasin, Advocate, for the insurer.

Mr.Suneet Goel, Mr.Y.K. Thakur and Mr.Lakshay Thakur, Advocates, for the claimants, owner and driver, in respective appeals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

All these appeals are the outcome of one vehicular accident, therefore, the same were clubbed and are being disposed of by this common judgment.

FAO Nos.239 & 379 of 20114

2. These appeals have been filed against the common award, dated 25th March, 2014, passed by the Motor Accident Claims Tribunal (III), Shimla, H.P., (for short, the Tribunal), in MAC Petition No.117-S/2 of 12/10, titled Ram Kali and others vs. Manohar Singh Thakur and others, whereby compensation to the tune of Rs.10,58,440/-, with interest at the rate of 9% per annum from the date of filing of the petition till realization, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short, the impugned award).

3. Feeling aggrieved, the claimants have questioned the impugned award by the medium of FAO No.379 of 2014, while the insurer has challenged the same by way of FAO No.239 of 2014, on the grounds taken in the memos of appeals.

FAO Nos.476 & 577 of 2016

4. These appeals are directed against the common award, dated 1st July, 2016, passed by the Motor Accident Claims Tribunal (II), Shimla, H.P., (for short, the Tribunal), in MAC Petition No.26-S/2 of 2014, titled Manorma Thakur and others vs. Manohar Singh Thakur and others, whereby compensation to the tune of Rs.45,86,912/-, with interest at the rate of 7% per annum from the date of filing of the petition till realization, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short, the impugned award).

5. The claimants have questioned the impugned award by way of FAO No.476 of 2016 and the insurer has laid challenge to the impugned award by filing FAO No.577 of 2016, on the grounds taken in the memos of appeals.

6. In order to determine all the appeals, it is expedient to have a glance of the facts of the case. It has been averred that on 15th November, 2009, at about 6.30 p.m., deceased

Meena Ram was traveling as labourer, while deceased Narinder Thakur was traveling as owner of the goods, in Tipper bearing No.HP-63-2466, which met with an accident due to the rash and negligent driving of the driver of the offending Tipper, namely, Bhupinder Singh, as a result of which both – Meena Ram and Narinder Thakur – lost their lives. The claimants filed two separate claim petitions. Claim Petition No.117-S/2 of 12/10, titled Ram Kali and others vs. Manohar Singh Thakur and others, was filed by the dependants of deceased Meena Ram and Claim Petition No.26-S/2 of 2014, titled Manorma Thakur and others vs. Manohar Singh Thakur and others, was filed by the legal heirs of deceased Narinder Thakur, claiming compensation to the tune of Rs.15.00 lacs and Rs.50.00 lacs, respectively, as per the break-ups given in the claim petitions.

7. The Tribunal determined both the claim petitions by the medium of two different awards, as detailed above, are the subject matter of instant appeals.

8. During the course of hearing, the learned counsel for the insurer/appellant in FAO No.239 of 2014 and FAO No.577 of 2016 argued that the Tribunal has fallen into an error in holding that, at the time of accident, the offending Tipper was being driven by Bhupender Singh. In fact, the offending Tipper was being driven by Narender Thakur. In support of his submission, he relied upon the FIR recorded in regard to the accident, which was lodged against Narender Thakur. The learned counsel for the insurer further submitted that the amount awarded by the Tribunal, in both the claim petitions, is excessive. He also argued that the claimants, in Claim Petition No.26-S/2 of 2014, filed the same after a long gap, i.e. after about seven years of the accident, therefore, the same is liable to be dismissed on account of delay. It was also submitted that the Tribunal has awarded interest at higher rate, is not commensurate with the prevailing rate of interest.

9. Mr.Suneet Goel and Mr.Lakshay Thakur, learned counsel for the appellants/claimants in FAO Nos.476 of 2016 and 379 of 2014, respectively, submitted that the amount of compensation awarded by the Tribunal is inadequate and needs to be enhanced.

10. Heard learned counsel for the parties and gone through the record.

11. The claimants in claim petitions have specifically pleaded that the deceased Meena Ram and Narender Thakur were traveling in the offending vehicle as labourer and as owner of goods, respectively, which fact has been admitted by the owner in his replies filed to the claim petitions. Accordingly, there was no necessity to lead evidence to prove that the deceased were traveling as labourer and owner of goods in the offending Tipper. Still, the claimants in Claim Petition No.117-S/2 of 2012/2010, have examined PW-4 Mohan Singh, who was one of the occupants in the offending vehicle. He deposed that at the time of accident, the offending vehicle was being driven by Bhupinder Singh rashly and negligently. Further stated that in the FIR Ext.PW-1/A, it was wrongly mentioned that the offending vehicle, at the time of accident, was being driven by Narinder Thakur. This witness was cross-examined by the learned counsel for the insurer, but failed to extract anything and was not able to shatter his statement. The Tribunal has rightly made discussion in paragraphs 10 to 28 of the award impugned in FAO Nos.239 and 379 of 2014 and has rightly come to the conclusion that Bhupinder Singh was driving the offending vehicle at the time of accident.

12. The insurer has not led any evidence to prove that the driver Bhupinder Singh was not having a valid and effective driving licence at the time of accident, has failed to discharge the onus. Accordingly, the findings returned by the Tribunal, on the above issues are upheld.

13. To Deal with the next ground urged by the learned counsel for the insurer that the claim petition was filed after a long delay, it is apt to record herein that the Motor Vehicles Act, 1988, (for short, the Act), has gone through a sea change and rigours of Limitation Act have been taken away. Prior to coming into force the amended Act, limitation was prescribed for filing the claim petitions by the victims of a vehicular accident. However, after noticing that the prescribing of limitation was operating harsh and in many cases was likely to cause injustice, the Act was amended and Sub Section (3) of Section 166 of the Act came to be deleted, which

amendment came into force w.e.f. 14th November, 1994. The consequence of the above said amendment was that the Claim Petition, in a vehicular accident, could be filed by the victim at any time.

14. The Apex Court in **Dhannalal vs. D.P. Vijayvargiya and others, AIR 1996 Supreme Court 2155,** while examining the effect of omitting Sub-section(3) of Section 166 of the Act, has held that there is no limitation prescribed for filing claims before the Tribunal in respect of any accident. It was also held that where a claim petition was filed, while sub section (3) of Section 166 of the Act was operative, the same could not be dismissed on the ground that at the time of its filing it was barred by limitation under Sub-Section (3) of Section 166 of the Act:

> *"6. Before the scope of sub-section (3) of Section 166 of the Act is examined, it may be pointed out that the aforesaid sub-section (3) of Section 166 of the Act has been omitted by Section 53 of the Motor Vehicles (Amendment) Act, 1994, which came in force w.e.f. 14-11-1994. The effect of the Amendment Act is that w.e.f. 14-11-1994, there is no limitation for filing claims before the Tribunal in respect of any accident. It can be said that Parliament realised the grave injustice and injury which was being caused to the heirs and legal representatives of the victims who died in accidents by rejecting their claim petitions only on ground of limitation. It is a matter of common knowledge that majority of the claimants for such compensation are ignorant about the period during which such claims should be preferred. After the death due to the accident, of the bread earner of the family, in many cases such claimants are virtually on the streets. Even in cases where the victims escape death some of such victims are hospitalised for months if not for years. In the present case itself the applicant claims that he met with the accident on 4-12-1990, and he was being treated as an indoor patient till 27-9-1991. According to us, in its wisdom the Parliament, rightly thought that prescribing a period of limitation and restricting the power of Tribunal to entertain any claim petition beyond the period of twelve months from the date of the accident was harsh, inequitable and in many cases was likely to cause injustice to the claimants. The present case is a glaring example where the appellant has been deprived by the order of the High Court from claiming the compensation because of delay of only four days in preferring the claim petition.*
>
> *7. In this background, now it has to be examined as to what is the effect of omission of sub-section (3) of Section 166 of the Act. From the Amending Act it does not appear that the said sub-section (3) has been deleted retrospectively. But at the same time, there is nothing in the Amending Act to show that benefit of deletion of sub-section (3) of Section 166, is not be extended to pending claim petitions where a plea of limitation has been raised. The effect of deletion of sub-section (3) from Section 166 of the Act can be tested by an illustration. Suppose an accident had taken place two years before 14-11-1994, when sub-section (3) was omitted from Section 166. For one reason or the other no claim petition had been filed by the victim or the heirs of the victim till 14-11-1994. Can a claim petition be not filed after 14-11-1994, in respect of such accident ? Whether a claim petition filed after 14-11-1994, can be rejected by the Tribunal on the ground of limitation saying that the period of twelve months which had been prescribed when sub-section (3) of Section 166, was in force having expired the right to prefer the claim petition had been extinguished and shall not be revived after deletion of sub-section (3) of Section 166 w.e.f. 14-11-1994 ? According to us, the answer should be in negative. When sub-section (3) of Section 166 has been omitted, then the Tribunal has to entertain a claim petition without taking note of the date on which such accident had taken place. The claim petitions cannot be thrown out on the ground that such claim petitions were barred by time when sub-section (3) of Section 166 was in force. It need not be impressed that Parliament from time to time has introduced amendments in the old Act as well as in the new Act in order to protect the interest of the victims of the accidents and their heirs if the victims die. One such amendment has been introduced in the Act by the aforesaid Amendment Act 54 of 1994, by substituting sub-section (6) of Section 158, which provides :*

"As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner of such report, forward the some to such Claims Tribunal and Insurer".

In view of sub-section (6) of Section 158 of the Act the officer incharge of the police station is enjoined to forward a copy of information / report regarding the accident to the Tribunal having jurisdiction. A copy thereof has also to be forwarded to the concerned insurer. It also requires that where a copy is made available to the owner of the vehicle, he shall within thirty days or receipt of such copy forward the same to the Claims Tribunal and insurer. In this background, the deletion of sub-section (3) from Section 166 should be given full effect so that the object of deletion of said section by the Parliament is not defeated. If a victim of the accident or heirs of the deceased victim can prefer claim for compensation although not being preferred earlier because of the expiry of the period of limitation prescribed, how the victim or the heirs of the deceased shall be in a worse position if the question of condonation of delay in filing the claim petition is pending either before the Tribunal, High Court or the Supreme Court. The present appeal is one such case. The appellant has been pursuing from Tribunal to this Court. His right to get compensation in connection with the accident in question is being resisted by the respondents on the ground of delay in filing the same. If he had not filed any petition for claim till 14-11-1994, in respect of the accident which took place on 4-12-1990, in view of the Amending Act he became entitled to file such claim petition, the period of limitation having been deleted, the claim petition which has been filed and is being pursued up to this Court cannot be thrown out on the ground of limitation."

15. Having said so, the contention of the learned counsel for the insurer qua delay is negatived.

16. Now coming the plea whether the impugned awards are excessive or inadequate, deceased Meena Ram was a labourer. The Tribunal, after taking into account all the factors, assessed the income of the deceased at Rs.7,800/- per month and after deducting 1/3rd, the Tribunal has rightly held that the claimants lost source of dependency to the tune of Rs.6,240/- per month. The deceased, at the time of accident, was 45 years of age. In view of the law laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120** read with the 2nd Schedule attached with the Act, the Tribunal has rightly applied the multiplier of 13.

17. Having said so, the amount of compensation awarded by the Tribunal vide award impugned in FAO Nos.239 of 2014 and 379 of 2014, is upheld.

18. As far as the award, impugned in FAO Nos.476 and 577 of 2016, is concerned, the Tribunal, after referring to the material on record, has rightly assessed the monthly income of the deceased Narinder Thakur, at Rs.42,902/-. After deducting 1/3rd amount towards the personal expenses of the deceased, the Tribunal has rightly assessed the loss of source of dependency to the claimants at Rs.28,602/-. The deceased, at the time of accident, was 48 years of age, thus, in view of the law laid down by the Apex Court in **Sarla Verma's case (supra)** read with the 2nd Schedule attached with the Act, the Tribunal has rightly applied the multiplier of 13.

19. Different rates of interest have been awarded by the Tribunal in both the claim petitions i.e. at the rate of 9% in one claim petition and at the rate of 7% in the other. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in** ***(2002) 6 Supreme Court***

Cases 281; Santosh Devi versus National Insurance Company Ltd. and others, **reported in** ***2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,*** **reported in** ***(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,*** **reported in** ***2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,*** **reported in** ***2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,*** **reported in** ***(2015) 4 Supreme Court Cases 433,*** **and** ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,*** reported in ***(2015) 4 Supreme Court Cases 434,*** and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,*** being the lead case, decided on **19.06.2015**.

20. Accordingly, it is held that the amount of compensation, in both the awards, shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petitions till realization.

21. In view of the above discussion, the impugned awards are modified, as indicated above. The Registry is directed to release the amount, alongwith interest as above, in favour of the claimants in FAO Nos.239 & 379 of 2014, forthwith, through their bank accounts, strictly in terms of the impugned award and the excess amount, if any, be released in favour of the insurer through payee's account cheque. In FAO Nos.476 & 577 of 2016, the insurer is directed to deposit the amount of compensation with interest at the rate of 7.5% per annum, within six weeks from today, and on deposit, the amount be released in favour of the claimants through their bank accounts forthwith, strictly in terms of the impugned award, after proper identification.

22. Both the appeals stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Employees Provident Fund Organization and another .....Petitioners.

Versus

Gian Chand and another .....Respondents.

CMPMO No. 83 of 2013.

Decided on: 2nd December, 2016.

Limitation Act, 1963- Section 5- There was delay of 125 days in filing the appeal – an application for condonation of delay was filed, which was dismissed – held, that the counsel for the applicant had not obtained the copy from the copying agency – there is no requirement of intimating the counsel on the preparation of the copy – the time till the collection of the copy cannot be deducted – the delay was not explained properly- appeal dismissed.(Para-3 to 6)

For the Petitioners: Mr. Rahul Mahajan, Advocate.

For Respondent No.2: Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishant Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The learned Civil Court decreed the apposite suit of the plaintiff. The defendants/petitioner herein made a endeavour before the learned First Appellate Court by belatedly instituting an appeal therefrom thereat to assail the verdict recorded by the Civil Court by appending therewith an application under Section 5 of the Limitation Act, wherewithin an espousal was made for condoning the delay of 125 days which occurred in the institution of an appeal therebefore by the defendants/petitioner herein. The application was contested by the

plaintiff/respondent herein. On the contentious pleadings of the parties, the learned First Appellate Court struck issues whereupon in discharge of the onus cast on the relevant issues upon the contesting parties, each lead their evidence thereon. On a perusal of the evidence adduced before the learned First Appellate Court, it recorded a conclusion qua the application instituted therebefore under Section 5 of the Limitation Act for begetting condonation of delay which occurred in the institution of an appeal therebfore against the impugned judgment recorded by the Civil Court, warranting dismissal arousable from the relevant delay standing not satisfactorily explained.

2. I have heard the learned counsel for either sides at length and have also traversed through the entire record.

3. The defendants/petitioners herein stood represented before the learned Civil Court. The learned Civil Court had made a pronouncement upon the suit of the plaintiff/respondent No.1 herein on 10.09.2010 whereat also the counsel for the defendants/petitioners herein recorded his presence therebefore. The counsel for the petitioners/defendants within limitation applied on 18.09.2010 for a copy of the apposite verdict recorded by the Civil Court. As apparent from a perusal of the record, the relevant copy as stood applied for by the counsel for the defendants/petitioners herein, stood attested on 22.09.2010. However, despite the Copying Agency readying the relevant copies of the relevant judgment and decree as stood applied for by the counsel for the petitioners/defendants for their onward transmission to him yet the counsel for the defendants/petitioners herein did not thereat obtain the relevant copies from the Copying Agency, rather he upto 10.11.2010 inordinately procrastinated their collection from the relevant Copying Agency. The factum of the relevant copies standing collected on 10.11.2010 by the counsel for the petitioner herein evinces an inference of his being throughout since 18.09.2010 whereat he applied for the relevant copies upto 10.11.2010, his recording his presence in the premises of the Civil Court concerned, significantly, when no evidence stands adduced qua since his applying for the relevant copies on 18.9.2010 upto his collecting the relevant copies on 10.11.2010, his being unavailable in the premises of the relevant Court, whereupon a concomitant inference stands sprouted qua his deliberately omitting to make their collection therefrom despite theirs standing readied for their delivery to him. Also the learned counsel for the petitioner has not placed on record any document showing the existence besides prevalence of any rule enjoining the ministerial staff manning the Copying Agency concerned to on the relevant copies standing readied for their onward transmission to the counsel theirs holding an obligation to purvey information qua the aforesaid facet to him. Consequently, in the absence of prevalence of the aforesaid rule casting the aforesaid injunction upon the ministerial staff manning the Copying Agency, contrarily, a conclusion spurs qua an obligation standing cast upon the counsel for the petitioner herein to visit the Copying Agency for ensuring their timely collection therefrom, especially when he for reasons aforestated was throughout since the recording of the apposite pronouncement on 10.9.2010 by the Civil Court upto 10.11.2010 remained present in the premises of the Court concerned. Consequently, his omission to make a timely collection of the copies of the relevant documents from the Coping Agency concerned is concluded to stand gripped with a vice of deliberateness.

4. The learned counsel appearing for the petitioners/defendants submits before this Court qua the time spent in obtaining the copies from 18.09.2010 whereat he applied for delivery of copies of the relevant documents, upto 10.11.2010 whereat they stood collected by the counsel for the petitioners/defendants being amenable for its standing deducted for computing the relevant period of limitation. However, the aforesaid submission also holds no vigour, conspicuously when despite the counsel for the petitioner/defendant since his applying on 18.09.2010 for delivery of the relevant copies by the relevant Copying Agency concerned till their delivery on 10.11.2010 remained present in the Court premises, whereupon it is to be reiteratedly held qua his deliberately procrastinating their collection therefrom upto 10.11.2010. Also the aforesaid submission would find force with this Court if the counsel or the litigant seeking exclusion of period spent in obtaining the copies from the copying Agency was/were

evidently evinced both diligence besides vigilance in not only making an apposite application within limitation before the quarter concerned, also his/theirs evidently making the relevant collection in prompt sequel to theirs standing readied for the relevant purpose also theirs by visiting the Copying Agency concerned ensuring the relevant fact of their readiness for transmission to him/them. However, since the aforesaid vigilance besides diligence by the counsel for the petitioners/defendants is evidently grossly wanting,hence, the petitioners/defendants are not entitled to seek exclusion of the period spent in obtaining the relevant copies from the relevant Copying Agency for thereupon the relevant computation of the period of limitation standing made.

5. The counsel for the petitioners/defendants submits that the attribution of negligence to the counsel for the petitioners/defendants cannot also stand fastened upon the petitioners herein. However, the aforesaid submission warrants it standing discountenanced arouseable from the petitioner(s) herein being a corporate entity also when the counsel representing them before the learned Court concerned was enjoined to hold constant interaction with the officials of the entity concerned besides when the officials concerned of the entity concerned stood also enjoined to hold constant interaction with the counsel representing them in the Court concerned yet contrarily, it appears qua the officials concerned besides their counsel representing the entity concerned before the relevant Courts omitting to maintain the relevant inter action intra se each other, in sequel thereto, with officials of the corporate entity, hence, holding an alike responsibility with their counsel qua the progress of the case, it appears of each derelicting on the aforesaid facet. Consequently, the sole aforesaid responsibility of the relevant counsel, if any, which stand canvassed by the counsel for the petitioner to not encumber the entity with any hardship is obviously meritless and is rejected. In aftermath, the aforesaid submission holds good only qua individual litigant(s) it does not for reasons aforesaid hold good qua a corporate entity hereat which stands manned by experienced and responsible staff.

6. For the foregoing reasons, there is no merit in the instant petition, which is accordingly dismissed. IN sequel, the order impugned hereat is affirmed and maintained.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

H.P. Housing and Urban Development Authority .....Appellant
Versus
Giani Devi & others .....Respondents

FAO No.461 of 2012
Date of decision: 02.12.2016

Employees Compensation Act, 1923- Section 12- Deceased was an employee of the contractor- H.P. Housing Board was principal employer- principal employer has to pay compensation at the first instance and it is at liberty to recover the same from the contractor – appeal allowed and order modified accordingly. (Para-2 to 4)

For the appellant: Mr.Bhupender Gupta, Senior Advocate, with Mr.Ajit Jaswal, Advocate.
For the respondents: Mr.Gulzar Singh Rathour, Advocate, for respondents No.1 to 5.
Respondent No.6 stated to have expired.
Mr.Narender Sharma, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award, dated 20th September, 2012, passed by the Commissioner, exercising powers under the Employees Compensation Act, 1923, (for

short, the Act), in case RBT No.8-2 of 2011/2003, titled Giani Devi and others vs. Ashok Kumar and another, whereby compensation to the tune of Rs.3,38,880/-alongwith simple interest at the rate of 12% per annum and costs of Rs.1,000/-, came to be awarded in favour of the claimants and the appellant was saddled with the liability (for short the "impugned award").

2. The learned Senior Advocate appearing for the appellant argued that the appellant i.e. H.P. Housing Board is the principal employer and has to pay the compensation, but in terms of the mandate of law, the appellant is entitled to recover the same from respondent No.7 Ashok Kumar, contractor. In support of his submission, the Senior Advocate invited my attention to Sub Sections (2) and (3) of Section 12 of the Act, which are reproduced below:

> "(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor, [2] or any other person from whom the workman could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section he shall be entitled to be indemnified by any person standing to him in the relation of a contractor from whom the workman could have recovered compensation,] and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner.
>
> (3) Nothing in this section shall be construed as preventing a workman from recovering compensation from the contractor instead of the principal."

3. It is admitted case of the parties that the deceased was an employee of the contractor and the principal employer was H.P. Housing Board, thus, has to pay the compensation at the first instance and recover the same from the contractor.

4. Having said so, the appeal is allowed and the impugned award is modified by providing that the appellant has to pay the compensation, as awarded by the Commissioner, at the first instance, however, is at liberty to recover the same from the Contractor.

5. At this stage, the learned counsel for the claimants stated that claimant No.6 has died during the pendency of the appeal and prayed that the compensation in respect of her share be apportioned among other claimants. Prayer allowed.

6. The appeal is disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

H.P. State Forest Corporation through its Divisional Manager ...Appellant/Plaintiff-Corporation

Versus

Kahan Singh since deceased through his LRs Partap Singh and others. Respondents/defendants.

RSA No. 86 of 2008.
Reserved on 25.11.2016.
Decided on: 02.12.2016.

Code of Civil Procedure, 1908- Order 41 Rule 1- Section 11- Plaintiff filed a civil suit for recovery- the defendant filed a counter-claim – the suit was partly decreed while the counter-claim was dismissed- an appeal was filed by the defendant against the judgement and decree – no separate appeals were filed regarding partly decreeing the suit and dismissing the counter- claim- the Appellate Court reversed the judgment and decree and allowed the counter-claim- held in second appeal that non-filing of appeal against the judgment and decree means that it has become final – the dismissal of counter-claim leads to finality of the controversy and even if the decree has not been drawn, it will not take away the effect of the dismissal – the defendant should have filed two appeals and relief could not have been granted to him in one appeal – otherwise the

decree in one suit will operate as res-judicata vis-à-vis the other – appeal allowed and the judgment of the Appellate Court set aside.(Para-16 to 24)

Cases referred:

Ramagya Prasad Gupta and others Vs. Murli Prasad and others, AIR 1974 Supreme Court 1320

Premier Tyres Limited Vs. Kerala State Road Transport Corporation, AIR 1993 Supreme Court 1202

Ram Prakash Vs. Smt. Charan Kaur and another, AIR 1997 Supreme Court 3760

Gangai Vinayagar Temple and another Vs. Meenakshi Ammal and others (2015) 3 Supreme Court Cases 624

Rajni Rani and another Vs. Khairati Lal and others, (2015) 2 Supreme Court Cases 682

For the appellant. : Mr. Bhupender Pathania, Advocate.

For the respondents. :Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this appeal, the appellant/Himachal Pradesh State Forest Corporation has challenged the judgment and decree passed by the Court of learned Addl. District Judge, Mandi in Civil Appeal No. 59 of 2005 dated 30.11.2007, vide which learned appellate court while allowing the appeal so filed before it by the present respondent, dismissed the suit filed by plaintiff-Corporation and decreed the counter claim of defendant for recovery of Rs. 60,031/- with pending and future interest @ 8% per annum from the date of institution of the suit till realization along with costs.

2. Brief facts necessary for adjudication of the present case are that appellant/plaintiff-Corporation (hereinafter referred to as 'the plaintiff-Corporation') filed a suit for recovery of Rs.68,735/- on the ground that in the year 1997 tenders were invited for extraction of resin and its carriage up to the road side Depot, for Lot No. 30/97 which work was allotted to defendant, (Kahan Singh since deceased), vide agreement dated 20.3.1997. It was further the case of the plaintiff-Corporation that for the said work the target was fixed 126 quintal pure resin from 3140 blaze and the rate fixed was Rs. 600 per quintal for extraction of resin and transportation of the same upto Roadside Depot. The total value of the work as per plaintiff-Corporation was Rs. 75,600/- and per section yield in the said lot was fixed at 40 quintal and all these aspects of the matter were made clear in the agreement itself. It was further the case of the plaintiff-Corporation that earnest money in the shape of FDR for an amount of Rs. 7,000/- was deposited and pledged in the name of plaintiff-Corporation for the said lot by the defendant. It was further the case of the plaintiff-Corporation that against the target of 126 quintals, the entire pure resin which could be extracted by the defendant was 86.980 quintals which was 39.020 quintals less than the fixed target which had caused loss to the tune of Rs. 1,28,766 to the plaintiff-Corporation on account of less extraction of resin. It was further mentioned in the plaint that defendant had raised objection that during the said period there was heavy rain as well as other unfavourable circumstances and after taking into consideration his plea, the higher authorities had granted relaxation of 12.600 quintal in favour of the defendant and after giving the said relaxation, the defendant was still liable to pay to the plaintiff-Corporation an amount of Rs. 68,735/- as per calculations given in the plaint along with interest @ 18% per annum and costs of the suit.

3. The claim of the plaintiff-Corporation was resisted by the defendant who stated that reduction of yield was not on account of his acts of omission and commission. It was mentioned in the written statement that in fact the yield which was fixed by the plaintiff-Corporation qua Lot No. 30/97 was arbitrarily fixed in proportion to the yield of previous years

and that yield had been reduced due to heavy rain which in fact was in the knowledge of the plaintiff-Corporation. As per defendant he extracted 86.980 quintals of resin and if the same was worked out on the basis of yield of previous years, the target so achieved was more than the target of the previous year.

4. Defendant simultaneously also filed counter-claim for recovery of Rs.60,031/- with costs and interest @ 18% per annum from November, 1997 onwards. As per defendant he had extracted 86.980 quintal of pure resin, value of which was Rs.52,188/- whereas he had only been paid Rs.1568/- by the plaintiff-Corporation. Defendant thus prayed for recovery of the said amount as well as the earnest money which was deposited by him with costs and interest.

5. On the basis of pleadings of the parties and material placed on record, the learned Trial Court framed the following issues:-

"1. Whether the plaintiff-Corporation is entitled to the suit amount, if so to what extent ? OPP

2. Whether the plaintiff-Corporation has no locus standi to file the present suit ? OPD

3. Whether the plaintiff-Corporation has no enforceable cause of action? OPD

4. Whether the suit of the plaintiff-Corporation is time barred ? OPD

5. Whether the plaintiff-Corporation is estopped by his own act and conduct to file the present suit ? OPD

6. Whether the defendant is entitled to the amount of Rs. 60,031/- by way of counter claim? OPD

7. Relief."

6. Learned Trial Court returned the following findings on the said issues:-

"Issue No.1 :No.

Issue No.2 :No.

Issue No.3 :No.

Issue No.4 :No.

Issue No.5 : No.

Issue No.6 : No.

Relief : Suit is partly decreed with costs and counter claim dismissed as per operative part of judgment"

7. Accordingly, learned trial court vide its judgment and decree dated 1.6.2005 partly decreed the suit of the plaintiff-Corporation by holding the plaintiff-Corporation to be entitled to recover Rs. 27,155/- alongwith interest @ 9% per annum from the date of filing of the suit till its realization from the defendant. However, the counter claim filed by the defendant was dismissed by learned trial court.

8. Feeling aggrieved by the same, defendant filed an appeal before learned appellate court challenging the partial decree of the suit in favour of the plaintiff-Corporation as well as dismissal of his counter claim by learned trial court. The partial decree granted in favour of the plaintiff-Corporation and rejection of his counter claim was challenged by the defendant by way of a single appeal. In other words, no separate appeals were filed by defendant against the judgment and decree which was partly allowed in favour of the plaintiff-Corporation by learned trial court and against the judgment and decree vide which his counter claim was dismissed.

9. In appeal, learned appellate court while allowing the same, reversed the judgment and decree which was passed by learned trial court in favour of the plaintiff-Corporation and also allowed the counter claim of the defendant to the tune of Rs. 60,031/- against the plaintiff-Corporation with interest, which counter claim earlier stood dismissed by the

learned trial court. Learned appellate court granted both these reliefs in favour of the defendant in the same appeal.

10. The said judgment and decree passed by learned appellate court has been assailed by the plaintiff-Corporation by way of this appeal which was admitted by this Court on 28.7.2008 on the following substantial question of law:-

> *"Whether the appellate court below have erred in law in concluding that the contract/agreement exhibit PW-5/A had become impossible and became void when it became impossible. Have not the appellate court below wrongly construed the provisions of section 56 of the Indian Contract Act and have thereby wrongly applied the same in favour of the respondent/defendant. Had the contract become impossible and whether there was sufficient evidence to prove that the agreement had become impossible on record because of rain."*

11. During the course of arguments this Court felt that another substantial question of law arose in the appeal i.e.:-

> "*Whether learned appellate court erred in not appreciating that a single appeal against the judgment and decree passed by learned trial court vide which learned trial court partly decreed the suit of the plaintiff-Corporation for recovery of Rs.27,155/- along with interest and costs and also dismissed the counter claim filed by the defendant for recovery of an amount of Rs. 60,031/- was not maintainable ."*

12. Both learned counsel for the parties were heard on this substantial question of law at length.

13. Mr. Bhupender Pathania, learned counsel for the appellant argued that the judgment and decree passed by learned appellate court is not sustainable because learned appellate court erred in not appreciating that because learned trial court while partly allowing the suit of the plaintiff-Corporation-Corporation for recovery of an amount of Rs.27,155/- along with interest and costs had also dismissed the counter claim so filed by the defendant for recovery of an amount of Rs.60,031/-, in these circumstances the defendant could not have had filed one appeal against the partial allowing of the suit and against the rejection of his counter claim. According to Mr. Pathania, though both these adjudications were made by way of a single judgment and rightly so, however, the partial allowing of the suit of the plaintiff-Corporation as well as dismissal of the counter claim consist two decrees and they ought to have been separately assailed by the defendant before learned first appellate court by filing two appeals. In the absence of two appeals having been filed, as per Mr Pathania, one appeal so filed by the defendant was not maintainable, as both the findings returned acted as 'res judicata' vis-à-vis each other which necessitated the filing of two appeals. According to Mr. Pathania in this view of the matter as the appeal filed before learned appellate court was not maintainable, learned appellate court erred in entertaining and adjudicating upon the appeal so filed by defendant and thereafter in allowing the same.

14. Mr. G.R. Palsra learned counsel for the respondents on the other hand argued that the defendant could not have had filed two appeals because learned trial court had allowed the suit of the plaintiff-Corporation partially and dismissed the counter claim filed by the defendant by way of same judgment and same decree. Mr. Palsra further submitted that it is not as if two judgments and decrees were passed by learned trial court. According to Mr. Palsra in these circumstances the only option available with the defendant was to prefer one appeal against one judgment and decree which was done by defendant before learned first appellate court and no illegality was committed by learned appellate court in entertaining the same and deciding the same vide judgment and decree dated 1.6.2005. Mr. Palsra further argued that even in this Court appellate-Corporation had filed only one appeal against the judgment and decree passed by learned appellate court vide which leaned appellate court while dismissing the suit filed by the

plaintiff-Corporation had allowed the counter claim. On this analogy also it was urged by Mr. Palsra that there was no merit in the contention so raised by learned counsel for the appellant.

15. I have heard learned counsel for the parties and also gone through the records of the case as well as judgments and decrees passed by both the courts below.

16. A three Judges Bench of Hon'ble Supreme Court in **Ramagya Prasad Gupta and others** Vs. **Murli Prasad and others**, AIR 1974 Supreme Court 1320 has held:-

> *"8. It is clear that where a suit has been tried and finally decided on the merits, if the defeated party wishes in another suit between the same parties relating to the same property to have the same questions re-agitated, he cannot be allowed to do so, because his cause of action has passed into a judgment, and the matter has become res judicata. Even where two appeals have been taken from the same judgment by two different parties to which all others are parties either as appellants or respondents and one of the appeals is dismissed either on merits or for any other reasons, it has been held by some of the High Courts, but we express no opinion thereon, that the other appeal has also to be dismissed, because it is barred by the principles of res judicata as otherwise there will be conflict in. the decrees. In the Lahore decision there were two cross suits about the same subject-matter filed simultaneously between the same parties and two decrees were prepared. An appeal being filed in respect of one decree and not in respect of the other, the question was whether the non-filing of the appeal against that decree creates an estoppel against the hearing of the other appeal. In Narhari's case (supra) what this Court held was, where there has been on.-. trial, one finding and one decision, there need not be two appeals even though two decrees may have been drawn up and consequently the fact that one of the appeals was time barred does not bar the other appeal on the ground of res judicata. In this case, these questions need not be considered. Nor is it relevant to consider whether there is any conflict between the decision in this case and Sheodan Singh's case (supra). In Sheodan Singh's case two suits were field in the Court of the Civil Judge, one for a declaration of the title to the suit property and the second for other reliefs and consequently two other suits were filed by the respondents in the Munsif's court against the appellant claiming joint ownership to the suit property and other reliefs. The four suits were tried together by the Civil Judge. Some of the issues were common to all the suits and one of the commons issues relating to the title of the parties was found in favour of the respondent. The Civil Judge dismissed the appellant's title suit, decreed his other suit partly, and decreed the two suits of the respondent. The appellant filed appeals against the decree in each suit. The High Court dismissed the two appeals arising out of the respondent's suits, one as time barred, and the other for failure to apply for translation and printing of the record. As the title of the respondent to the suit property had become final on account of such dismissal, the respondent prayed for the dismissal of the other two appeals also, as the main question involved therein was the same. The High Court agreed that the appeals were barred by res judicate and dismissed them. Against these order of dismissal, the appellant filed appeals to this Court and contended that-(1) title to the property was not directly and substantially it% issue in the respondent's suits (2) the Munsif's Court could not try the title suit filed by the appellant;(3) it could not be said that appeals arising out of the respondent's suits were former suits as such the bar of res judicata will be inapplicable; and (4) the two appeals which were dismissed-one on the ground of limitations and the other on the ground of not printing the records, could not be said to be heard and finally decided. This Court held that the High Court was right in dismissing the appeals as being barred by res indicate inasmuch as the issue as to the title was raised in respondent's suits and it was directly and substantially in issue in those suits also and did arise out of the pleadings of the parties, and further the High Court's decision in*

the two appeals arising from the respondent's appeals were undoubtedly earlier and, therefore, the condition that there should have been a decision in a former suit to give rise to res judicata in a subsequent suit was satisfied in that case. The decision in Narhari's case (supra) was distinguished by this Court in that case so that it could not be said that that decision was in any way in conflict with the decision in Narhari's case (supra). In appeals arising out of a subsequent suit and an earlier suit where there were common issues, common subject-matter and common trial and the appeals arising out of the subsequent suit were dismissed, a question would arise as to whether the appeals from the earlier suit which were pending arc barred by res judicata A question may also arise where the subject-matter is the same and the issues are common in the two suits but some of the parties are different in one suit, whether the bar of res judicata would operate against the parties who are common. All these aspects need not be considered in these appeals because, in our view, the subject-matter of Title Suit No.68 of 1954 and that of Title Suit No. 94 of 1956 are entirely direct. Even if the issues that are common in the two suits, and it has been admitted by the learned .Advocate for the appellants that some of the issues might be common to both the suits, issues Nos. 4, 9, 12, 13 and 14 at any rate survive, and consequently the bar of res judicata would not apply."

17. A three Judges Bench of Hon'ble Supreme Court in **Premier Tyres Limited** Vs. **Kerala State Road Transport Corporation,** AIR 1993 Supreme Court 1202 while dealing with situation where suits are decreed by common judgment and appeal is filed against one judgment and decree whereas appeal is not filed in the connected case held that finality of finding recorded in the connected suit due to non filing of appeal precludes the Court from proceeding with appeal in other suit. It was held by Hon'ble Supreme Court that effect of non filing of appeal against a judgment or decree is that it becomes final and as this finality can be taken away only in accordance with law, therefore, same consequences follows when a judgment or decree in a connected suit is not appealed from.

18. In **Ram Prakash** Vs**. Smt. Charan Kaur and another**, AIR 1997 Supreme Court 3760, Hon'ble Supreme Court has held:-

"2. It would be obvious that since the claims of the petitioner and the respondents have arisen from the same cause of action and the finding of the appellate Court that damages had accurred to the respondents due to misfeasance or malfeasance having been allowed to become final, the decree which is subject matter of the special leave petition cannot be assailed. The self same question was directly in issue and was the subject matter of both the suits. The same having been allowed to become final, it cannot be gone into since the same had attained finality, the petitioner having not filed any appeal against the appeal dismissing the suit. In view of this situation, the High Court was right in concluding that the decree of dismissal of the suit against the petitioner would operate as res judicata under Section 11 CPC in the appeal against which the petitioner has filed the second appeal."

19. In **Sri Gangai Vinayagar Temple and another** Vs. **Meenakshi Ammal and others** (2015) 3 Supreme Court Cases 624, three Judges Bench of Hon'ble Supreme Court has held:-

"27. Procedural norms, technicalities and processal law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute 30 Page 31 becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the Courts by Section 151 of the CPC, as clarified by this

Court in Chitivalasa Jute Mills vs. Jaypee Rewa Cement (2004) 3 SCC 85. In the instance of suits in which common Issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. The statutory law and the processal law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the Tenant diligently filed an appeal against the decree at least in respect of OS No. 5 of 1978, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all."

20. In **Rajni Rani and another** Vs. **Khairati Lal and others,** (2015) 2 Supreme Court Cases 682 the Hon'ble Supreme Court has held that keeping in mind the conceptual meaning given to the counter claim and the definitive character assigned to it, there can be no shadow of doubt that when the counterclaim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. Hon'ble Apex Court further held that in that regard nothing survives as far as the said defendants are concerned and if the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that court is concerned and the determination should conclusively put to rest the rights of the parties in that sphere. It was further held by Hon'ble Supreme Court that a Court may draw up a formal decree or may not, but if by virtue of the order of the court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. It further held that where a counter claim which is in the nature of cross-suit has been dismissed nothing else survives for the defendants who had filed the counterclaim and the order passed by learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee.

21. Similar view has also been taken by a Coordinate Bench of this Court in **Piar Chand and other** Vs. **Ranjeet Sigh and others**, in RSA No. 293 of 2006 decided on 16.9.2016.

22. Reverting back to the facts of this case admittedly learned trial court while partly allowing the suit for recovery filed by plaintiff-Corporation, dismissed the counter claim filed by defendant vide which the defendant had prayed for a decree for recovery of Rs. 60,031/-. In other words, learned trial court held that in lieu of the transaction subject matter of the civil suit, whereas the plaintiff-Corporation was entitled for recovery from the defendant, however, defendant was not entitled for any recovery from the plaintiff-Corporation. Defendant rather than filing two separate appeals, one against the decree which was passed in favour of the plaintiff-Corporation by learned trial court in its civil suit and second against the dismissal of his counter claim, filed only one appeal before the learned appellate court. In my considered view, the defendant erred in doing so because as the partial decreeing of the suit of the plaintiff-Corporation and dismissal of the counter claim of the defendant were two distinct adjudications though made by way of same judgment and decree by learned trial court, both these adjudications assumed the status of a decree and they required to be challenged separately and filing only one appeal against both the said adjudications was not permissible in law. As I have already discussed above, it has been categorically held by Hon'ble Supreme Court in such like

matters that a Court may draw a formal decree or not but if by virtue of the judgment of the Court the rights have finally been adjudicated then the same would assume the status of a decree. As the adjudication on the suit filed by the plaintiff-Corporation and adjudication on the counter claim filed by the defendant assumed the status of two distinct decrees, they were required to be challenged by way of separate appeals by paying the requisite Court fee on each of them. Defendant having failed to do so he could not have been granted the relief which was granted by learned appellate court in one single appeal which was filed by defendant against the decree passed in favour of the plaintiff-Corporation by learned trial court as well as against the dismissal of his counter claim. Learned appellate court failed to appreciate that in the absence of two appeals, one appeal so filed was not maintainable, as the findings returned on plaint and counter claim acted as res judicata vis-à-vis each other which necessitated the filing of two appeals. Learned appellate court also failed to appreciate that non filing of two distinct and separate appeals amounted to having the same effect where no appeal was filed from a decree in connected case and the effect of non filing of appeal against judgment or decree that has become final. In other words because only one appeal was filed, therefore, finality of finding recorded in connected claim on account of non filing of appeal precluded the Court from proceeding with appeal in the other connected claim.

23. To give an illustration, 'A' files a suit for recovery of Rs.100/- against 'B' and 'B' also files a counter claim for recovery of Rs.50/- from plaintiff 'A'. Learned trial court partly decrees the suit of 'A" against defendant 'B' for recovery of Rs.70/- but dismisses the counter claim filed by defendant. In such like circumstance defendant cannot assail the dismissal of his counter claim as well as the partial decree of the suit of the plaintiff by one appeal. The defendant will have to file two separate appeals, one challenging the decree passed in favour of the plaintiff and other challenging the dismissal of his counter claim. However, if plaintiff wants to assail the factum of his suit not being decreed in totality, he is not to file two appeals but he can file only one appeal against the partial allowing of his suit.

24. It is settled law that counter claim has effect of a cross-suit and Court can announce a final judgment both on original claim and on the counter claim. Counter claim filed by defendant has to be treated as a plaint and the effect of counter claim is that even if suit of the plaintiff is stayed, discontinued, dismissed or withdrawn, counter claim can be decided independently on merits. In fact counter claim has to be treated as a plaint and is governed by the Rules applicable to plaint and similarly the reply filed in answer to counter claim is to be treated as written statement and is governed by Rules applicable to written statement.

In view of the findings returned above, this appeal is allowed and the judgment and decree passed by learned appellate court in Civil Appeal No. 59 of 2005 dated 30.11.2007 is set aside by holding that as defendant had not filed two separate appeals against the judgment and decree passed by learned trial court in favour of the plaintiff-Corporation and against the dismissal of his counter claim which findings acted as *res judicata vis-a-vis* each other, single appeal so filed by defendants was not maintainable before the learned appellate court. The Substantial question of law is answered accordingly. In view of findings returned in this appeal, in my considered view there is no necessity of adjudicating upon the other substantial question of law which was framed by the Court on 28.7.2008. No order as to costs. Miscellaneous application(s), if any stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

ICICI Lombard General Insurance Company Limited ...Appellant.

Versus

Parul Sharma and others ...Respondents.

FAO No. 366 of 2012
Reserved on: 25.11.2016
Decided on: 02.12.2016

Motor Vehicles Act, 1988- Section 163-A- Deceased was the son of owner/insured, who died in the accident - the owner had specifically stated in the reply that the vehicle was parked in the garage due to some mechanical defect- the deceased had taken the vehicle in the absence of the owner – the deceased was not engaged as a driver but was driving the vehicle in the capacity of the son of the insured and will step into the shoes of the owner – the insured had paid extra premium insuring the owner to the extent of Rs.2 lacs - representative of the deceased are entitled to the compensation of Rs.2 lacs with interest @ 7.5% per annum.(Para-14 to 24)

Cases referred:

Ningamma and another versus United India Insurance Co. Ltd., 2009 ACJ 2020

Oriental Insurance Co. Ltd. versus Rajni Devi and others, 2008 ACJ 1441

For the appellant:	Mr. Jagdish Thakur, Advocate.
For the respondents:	Mr. Neeraj Gupta, Advocate, for respondents No. 1 to 3. Nemo for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this appeal, the appellant-insurer has called in question award, dated 21st April, 2012, made by the Motor Accident Claims Tribunal-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 26/2010, titled as Parul Sharma and others versus ICICI Lombard Insurance Co. Pvt. Ltd. and another, whereby compensation to the tune of ₹ 4,48,900/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award"), on the grounds taken in the memo of the appeal.

2. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. Deceased-Vijay Sharma, while driving the car, bearing registration No. HP-33 A-9112 on 19th January, 2010, met with an accident at about 10.00 P.M. near Tata Motors Lunapani, while going from Sundernagar to Mandi, due to which he sustained injuries, was taken to Harihar Hospital, Gutkar, from where he was referred to PGI Chandigarh, where he remained admitted and succumbed to the said injuries on 31st January, 2010.

4. The legal representatives of deceased-Vijay Sharma invoked the jurisdiction of the Tribunal under Section 163-A of the Motor Vehicles Act, 1988 (for short "MV Act") and sought compensation to the tune of ₹ 20,00,000/-, as per the break-ups given in the claim petition.

5. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

6. On the pleadings of the parties, following issues came to be framed by the Tribunal on 10th May, 2011:

> *"1. Whether the petitioners being legal representatives/dependants of deceased Sh. Vijay Sharma, are entitled for grant of compensation, if so to what amount and from which of the respondents? OPP*
>
> *2. Whether the petition is not maintainable and sustainable as alleged? OPR-1*
>
> *3. Whether there is any violation of terms and conditions of insurance policy, if so its effect? OPR-1*
>
> *4. Relief."*

7. In support of their claim, one of the claimants, namely Smt. Parul Sharma, stepped into the witness box as PW-1. The owner-insured, namely Shri Dina Nath Sharma, examined Shri Man Singh as RW-2 and himself stepped into the witness box as RW-1. The insurer has not led any evidence.

8. The Tribunal, after scanning the evidence, oral as well as documentary, decided issue No. 1 in favour of the claimants and against the respondents. Issues No. 2 and 3 also came to be decided against the insurer on the ground that it has not led any evidence and compensation to the tune of ₹ 4,48,900/- with interest @ 7.5% per annum from the date of the claim petition till its realization was granted in favour of the claimants.

9. The claimants and the owner-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

10. The appellant-insurer has called in question the impugned award on the ground that the Tribunal has fallen in an error in saddling it with liability.

11. Learned counsel appearing on behalf of the appellant-insurer argued that deceased-Vijay Sharma, who was the son of owner-insured of the offending vehicle, was in possession and control of the offending vehicle, was driving the same at the time of the accident and had stepped into the shoes of the owner. Further argued that deceased-Vijay Sharma was driving the offending vehicle rashly and negligently at the time of the accident, thus, the claim petition was not maintainable.

12. Learned counsel appearing on behalf of claimants-respondents No. 1 to 3 argued that the claimants are the victims of the vehicular accident, the claim petition was maintainable and the Tribunal has rightly passed the impugned award.

13. I have heard the learned counsel for the parties and gone through the record.

14. The owner-insured of the offending vehicle has specifically averred in the reply that he had parked the offending vehicle in his garage due to some mechanical defect. Further averred that he had engaged the services of a mechanic, namely Man Singh (RW-2), who could not repair the same as he had to import some part of the vehicle from outside and had specifically directed not to ply the vehicle till the defect was removed. The owner-insured had gone to his village on 18th January, 2010 and had to return on 20th January, 2010.

15. The fact that deceased-Vijay Sharma had taken the offending vehicle at the relevant point of time without permission of his father, Dina Nath Sharma and was driving the same at the time when it met with an accident, in which he lost his life, is not denied.

16. The question is - whether deceased-Vijay Sharma can be treated as a third party?

17. Admittedly, deceased-Vijay Sharma was driving the offending vehicle at the time of the accident, which belonged to his father and was registered and insured in the name of his father. He was not engaged as a driver of the offending vehicle, thus, was driving the offending vehicle in the capacity of the son of the owner-insured and the vehicle was in his possession and control at the relevant point of time. Meaning thereby, deceased-Vijay Sharma had stepped into the shoes of the owner.

18. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **Ningamma and another versus United India Insurance Co. Ltd.,** reported in **2009 ACJ 2020.** It is apt to reproduce para 18 of the judgment herein:

> *"18. In the case of Oriental Insurance Co. Ltd. v. Rajni Devi, 2008 ACJ 1441, wherein one of us, namely, Hon'ble Justice S.B. Sinha is a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would*

depend upon the terms thereof. It was held in the said decision that Section 163-A of the MVA cannot be said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved. The decision further held that the question is no longer res integra. The liability under Section 163-A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163-A of the MVA. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike."

19. Now, the question is – whether the claimants, being the legal representatives of deceased-Vijay Sharma, are entitled to compensation?

20. The Apex Court in **Ningamma's case (supra)** remanded the matter for rendering the decision in accordance with law after determining certain questions of fact involved in the case including the applicability of the provisions of Section 147 of the MV Act, while holding that the MV Act is a beneficial and welfare legislation and in terms of Section 166 of the MV Act, the Court is duty bound to award just compensation irrespective of the fact whether any plea in that behalf was raised by the claimants or not. It is profitable to reproduce paras 21, 22, 25 and 26 of the judgment herein:

"21. Section 147 of the MVA provides that the policy of insurance could also cover cases against any liability which may be incurred by the insurer in respect of death or fatal injury to any person including owner of the vehicle or his authorised representative carried in the vehicle or arising out of the use of vehicle in the public place.

22. When we analyze the impugned judgment of the High Court in terms of aforesaid discussion, we find that the counsel for the insurance company himself contended before the High Court that the policy of insurance was an Act policy and the risk that is covered is only in respect of persons contemplated under Section 147 of the MVA. It is the finding of fact which we have also upheld in this Judgment that the deceased was authorised by the owner of the vehicle to drive the vehicle. When we examined the facts of the present case in view of the aforesaid submission made, we are of the opinion that such an issue was required to be considered by the High Court in the light of the facts and evidence adduced in the case. On consideration of the Judgment and Order passed by the High Court we find the same to be sketchy on the aforesaid issue as to whether the claim could be considered under the provisions of Section 166 of the MVA. In this connection, reference can be made to a judgment of this Court in the case of Oriental Insurance Company Ltd. v. Rajni Devi and Ors. (supra), wherein, it was held that where compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the insurance company would depend upon the terms thereof.

23. .....

24. .....

25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the

court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court.

26. While entertaining the appeal, no effort was made by the High Court to deal with the aforesaid issues, and therefore, we are of the considered opinion that the present case should be remanded back to the High Court to give its decision on the aforesaid issues. The High Court was required to consider the aforesaid issues even if it found that the provision of Section 163-A of MVA was not applicable to the facts and circumstances of the present case. Since all the aforesaid issues are purely questions of fact, we do not propose to deal with these issues and we send the matter back to the High Court for dealing with the said issues and to render its decision in accordance with law. The High Court will also consider the question of quantum of compensation, if any, to which the claimants might be entitled to, having regard to the earning capacity of the deceased and "Just Compensation", if any. Since the claim is a very old claim, we request the High Court to consider the matter as expeditiously as possible."

21. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Rajni Devi and others,** reported in **2008 ACJ 1441,** held that where compensation is claimed for the death of the owner or another passenger of the vehicle, the claim of the insurance company would depend upon the terms of the insurance policy. It is worthwhile to reproduce paras 6 and 11 of the judgment herein:

"6. It is now a well settled principle of law that in a case where third party is involved, the liability of the insurance company would be unlimited. Where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the insurance company would depend upon the terms thereof.

7 to 10. .....

11. According to the terms of contract of insurance, the liability of the insurance company was confined to Rs. 1,00,000 (rupees one lakh). It was liable to the said extent and not any sum exceeding the said amount."

22. Applying the test to the instant case, the insurance policy of the offending vehicle is on the record as Ext. R-1-E, the perusal of which does disclose that the owner-insured has paid extra premium covering the insurance of the owner to the extent of ₹ 2,00,000/-. As discussed hereinabove, deceased-Vijay Sharma had stepped into the shoes of the owner, thus, his risk was covered to the extent of ₹ 2,00,000/- and the claimants, being the legal representatives of the owner, are entitled to compensation only in terms of the conditions contained in the insurance policy.

23. Viewed thus, it is held that the claimants are entitled to compensation to the tune of ₹ 2,00,000/- with interest @ 7.5% per annum from the date of the claim petition till its finalization.

24. Having glance of the above discussions, the impugned award is modified and the appeal is allowed, as indicated hereinabove.

25. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts after proper identification.

26. Excess amount, if any, be refunded to the appellant-insurer through payee's account cheque.

27. Send down the record after placing copy of thejudgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs No. 319 & 374 of 2012
Decided on: 02.12.2016.

FAO No. 319 of 2012

ICICI, Lombard General Insurance Co. Ltd. Appellant(s)

Versus

Gian Chand & others …Respondents

FAO No. 374 of 2012

ICICI, Lombard General Insurance Co. Ltd. Appellant(s)

Versus

Mohan Lal & others …Respondents

Motor Vehicles Act, 1988- Section 149- Offending vehicle was a tipper, the unladenweight of which is 3680 k.g. and it falls within the definition of light motor vehicle – copy of licence shows that driver was having a valid and effective driving licence at the time of accident – it was for the insurer to plead and prove that the owner had committed willful breach of the terms and conditions of the policy- insurer is to be saddled with liability – thus, the Tribunal had rightly saddled the insurer with liability – however, rate of interest reduced from 9 % to 7.5% per annum.(Para-8 to 21)

Cases referred:

Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd. AIR 1999 SC 3181

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC 217

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the Appellant(s) : Mr. Jagdish Thakur Advocate.

For the Respondents: Mr. Partap Singh Goverdhan, Advocate, for respondent No. 1.
Mr. Mukul Sood, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

A vehicular traffic accident has given birth to both these appeals, thus I deem it proper to determine these appeals by this common judgment.

2. These appeals are outcome of the two awards made by the Motor Accident Claims Tribunal-II, Solan, District Solan, (HP) (hereinafter referred to as 'the Tribunal') in two claim petitions filed by the claimants for grant of compensation, as per the break-ups given in the respective claim petitions (for short 'the impugned awards').

3. **FAO No. 319 of 2012** is directed against the award dated 24th May, 2012, passed in MAC Petition No. 62-S/2 of 2009, titled **Gian Chand versus Dalip Singh & others,** whereby compensation to the tune of Rs. 22,818/- with interest at the rate of 9% per annum was granted in favour of the claimant and the insurer was saddled with liability.

4. By the medium of **FAO No. 374 of 2012**, the appellant-insurer has questioned the award dated 28th June, 2012, passed in MAC Petition No. 38-S/2 of 2010, titled **Mohan Lal versus Dalip Singh & others,** whereby compensation to the tune of Rs. 1,75,345/-with interest at the rate of 9% per annum was granted in favour of the claimant and the insurer-appellant herein was saddled with liability.

5. The claimants, the owner-insured and the driver of the offending vehicle-Tipper have not questioned the impugned awards, on any count, thus, have attained finality so far as the same relate to them.

6. The insurer has questioned the impugned awards on the grounds that the driver was not holding a valid and effective driving licence at the time of accident.

7. Learned Counsel for the appellant-insurer argued that the vehicle involved in the accident was not a 'light motor vehicle'.

8. Admittedly, the driver was driving Tipper bearing registration No. HP-64-1289, the unladen weight of which is 3680 kilograms, as per the Registration Certificate, Ext. R-1, thus falls within the definition of "Light Motor Vehicle" as given in Sections 2 (21) and 2 (28) of the Motor Vehicles Act, for short "the Act".

9. The same issue was raised before the Supreme Court in case titled ***Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.*** reported in ***AIR 1999 SC 3181***. It is apt to reproduce paras 10, 11 and 14 of the said judgment herein:

> *"10. Definition of "light motor vehicle" as given in clause (21) of Section 2 of the Act can apply only to a "light goods vehicle" or a "light transport vehicle". A "light motor vehicle" otherwise has to be covered by the definition of "motor vehicle" or "vehicle" as given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be non-transport vehicle as well.*
>
> *11. To reiterate, since a vehicle cannot be used as transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose, and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question, would remain a light motor vehicle. The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of accident, the vehicle was not carrying any goods, and thought it could be said to have been designed to be used as a transport vehicle or goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.*
>
> *12-13 ....*
>
> *14. Now the vehicle in the present case weighed 5,920 kilograms and the driver had the driving licence to drive a light motor vehicle. It is not that, therefore, that insurance policy covered a transport vehicle which meant a goods carriage. The whole case of the insurer has been built on a wrong premise. It is itself the case of the insurer that in the case of a light motor vehicle which is a non-transport vehicle, there was no statutory requirement to have specific authorisation on the licence of*

the driver under Form 6 under the Rules. It had, therefore, to be held that Jadhav was holding effective valid licence on the date of accident to drive light motor vehicle bearing Registration No. KA-28-567."

10. This Court in **FAO No. 54 of 2012** titled ***Mahesh Kumar and another*** vs**. *Smt. Piaro Devi and others*** decided on 25th July, 2014, held that such type of vehicle is LMV. It is apt to reproduce paras 10,11,14,16,18 and 19 of the said judgment herein:

"10.I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

"2. ……..

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

11. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

12-13. …… …… …..

14. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

15.My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** -*

(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

15- …. ….. …..

16. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

17. ….. ……. …….. …….

18. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as ***Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,*** *reported in* ***2013 AIR SCW 2791,*** *and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:*

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. ……..

21. ……..

22. ……..

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The

definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

19. The Apex Court in another case titled as ***National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,*** *reported in* ***2008 AIR SCW 906,*** *has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:*

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

11. Applying the ratio, the vehicle in question is a "Light Motor Vehicle".

12. Same principles of law have been laid down in FAOs No. 385 of 2007 & 388 of 2007 decided on 14.11.2014, FAOs No. 33 & 55 of 2010, decided on 17.10.2014 and FAO No. 293 of 2006 decided on 4.4.2014.

13. I have gone through the copy of driving licence (Ext. R-2), which does disclose that the driver was having a valid and effective driving licence at the time of accident.

14. In view of the ratio laid down by the Apex Court in the judgments, *supra*, the Tribunal has rightly held that the driver was having a valid and effective driving licence.

15. It was for the insurer to plead and prove that the owner has committed willful breach, failed to do so. The owner has not committed any willful breach. Thus, the insurer is to be saddled with the liability.

16. The Apex Court in a case titled **National Insurance Co. Ltd.** *versus* **Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has also laid down principles, how the insurer can avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

17. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** hereinbelow:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the*

situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

18. Viewed thus, it is held that the Tribunal has rightly saddled the insurer with the liability.

19. The Tribunal has rightly awarded the compensation, but has fallen in an error in awarding interest @ 9% per annum from the date of filing of the claim petitions.

20. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281;Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738;Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053;Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982;Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

21. Having said so, I deem it proper to reduce the rate of interest from 9% per annum to 7.5% per annum from the date of filing of the claim petitions till its realization.

22. Accordingly, the impugned awards are modified, as indicated above and the appeals stand disposed of.

23. Registry is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned awards, after proper identification.

24. Send down the record after placing copy of the judgment on Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Madhu Tomar .... Petitioner.

Vs.

State of H.P. and another .... Respondents.

CWP No. 1172 of 2012.
Reserved on: 10.11.2016
Date of Decision: 02.12.2016

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwari worker – she was absorbed as Supervisor - she claimed the benefit of the service rendered by her asanaganwari worker for pensionary benefits - held, that appointment of the petitioner as

anganwari worker is not against any civil post and cannot be counted towards the pensionary benefits- petition dismissed. (Para- 1 to 3)

For the petitioner: Ms. Jyotsna Rewal Dua, Sr. Advocate with Mr. Shalini Thakur, Advocate.
For the respondents: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.:

The petitioner stood appointed as an Anganwari Worker on 21.10.1982, in capacity whereof she rendered work under the respondents upto 30.08.2005 whereat in consonance with the relevant R & P Rules she stood absorbed as a Supervisor by the respondents. She claims qua the hitherto rendition by her of service under the respondents as an Anganwari Worker standing amalgamated with her subsequent rendition of service as a Supervisor under the respondents, for facilitating computation vis.a.vis her the pensionary benefits. Her initial engagement as an Anganwari Worker under the respondents, as visible from a pronouncement made the Hon'ble Apex Court in State of Karnataka and others vs. Ameerbi and others reported in *(2007) 11 SCC 681,* relevant paragraph whereof stands extracted hereinafter:

> "Appointment made under a scheme and recruitment process being carried out through a committee, in our opinion, would not render the incumbents thereof holders of civil post. Our attention has not been drawn to any rule or regulation governing the mode of their recruitment. Some statements in this behalf have been made by the interveners but for the reasons stated hereinbefore, we cannot enter thereinto."

does not don the mantle of a civil post. Also she manifestly cannot in the aforestated capacity be construed to be holder of a civil post. The effect of the aforesaid pronouncement made by the Hon'ble Apex Court in its verdict reported supra holds a bearing upon the legitimacy of the claim of the petitioner qua the period of her rendition of service as an Anganwari worker under the respondents standing amalgamated with her subsequent rendition of service as a Supervisor under the respondents significantly when the latter capacity whereon she evidently stood absorbed by the respondents dons the mantle of a substantive post especially when she in consonance with the mandate of the relevant R & P Rules stood appointed thereon besides when her appointment thereon stood preceded by the respondents begetting compliance with the rigours of the mandate held in the apposite rules. Uncontrovertedly, the rendition of service by the petitioner against the substantive post of a Supervisor is to be construable to be rendition of service by her against a civil post since 30.08.2005 whereat she stood appointed as a Supervisor. However, reiteratedly her initial appointment since 21.10.1982 upto 30.08.2005 whereon she rendered service under the respondents as an Anganwari Worker does not, for reasons aforestated, hold any trait or characteristic qua her appointment thereon being made against a civil post nor she is to be construable to be since 21.10.1982 upto 30.08.2005 to hold a civil post. Now hereat the effect of the aforesaid inference erected by this Court qua the period from 21.10.1982 upto 30.08.2005 whereon she rendered service as an Anganwari Worker under the respondents being unamenable for it being construable to be rendition of service by her against a civil post is qua its tellingly adverselyimpinging upon her entitlement to seek amalgamation of the aforesaid duration of rendition of service by her under the respondents in the capacity of an Anganwari worker with the period of service subsequent thereto rendered by her under the respondents against the substantive post of a Supervisor, besides also her entitlement qua the facet aforesaid holding any tenacity warrants an allusion to Rule 13 of the CCS Pension Rules, 1972, wherewithin a mandate is held qua the commencement of the qualifying period of service of a Government servant for his standing entitled to therefrom seek computation of pensionary benefits by his employer qua him.

" Commencement of qualifying service

> Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity :
>
> Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post :
>
> Provided further that –
>
> (a) in the case of a Government servant in a Group `D' service or post who held a lien or a suspended lien on a permanent pensionable post prior to the 17th April, 1950, service rendered before attaining the age of sixteen years shall not count for any purpose, and
>
> (b) in the case of a Government servant not covered by clause (a), service rendered before attaining the age of eighteen years shall not count, except for compensation gratuity.
>
> (c) the provisions of clause (b) shall not be applicable in the cases of counting of military service for civil pension under Rule 19."

A circumspect reading thereof, unravels qua the occurrence of commencement of the relevant qualifying period of service occurring besides arising from the date a Government servant takes charge of the post to which he stands first appointed either substantively or in a temporary capacity. Also it holds a proviso qua the temporary besides officiating period of rendition of service by a Government servant if remains unbroken upto his subsequent regular engagement in the relevant capacity rather stands incessantly succeeded upto his standing appointed against a substantive post in the same or in another service, the hitherto period of rendition of service by a Government servant even in an officiating or in a temporary capacity being reckonable besides it being includable for the relevant computation of pensionary benefits standing made qua him. Obviously therefrom the imminent sequel is qua also the entire period of its duration standing enjoined to be amalgamated with the subsequent period of his rendition of service in a substantive capacity against a substantive post unless his preceding rendition of service in an officiating or temporary capacity stands interrupted by a break in service, thereupon the learned counsel for the petitioner contends qua the rendition of service by the petitioner in a non substantive capacity of an Anganwari worker being amenable to a construction of it falling within the ambit of Rule 13 of the CCS Pension Rules, 1972, it acquiring the trait of hers rendering service thereagainst under the respondents in an officiating or in a temporary capacity also with hers in an unbroken succession therefrom upto hers standing appointed against a substantive post of a Supervisor rendering service under the respondents besides when her previous rendition of service in a temporary or in officiating capacity of an Anganwari Worker under the respondents held incessant continuity in time upto her appointment against the substantive post of a Supervisor rendered her to satiate the mandate of Rule 13 of the CCS Pension Rules, 1972, whereupon she canvases of hence the rendition of service as an Anganwari worker by the petitioner under her employers while hence being construable to be rendition of service in an officiating or in a temporary capacity enjoined the respondents to amalgamate the aforesaid period of rendition of service by her alongwith the rendition of service by her against the substantive post of a Supervisor, for thereupon the relevant computation of pensionary benefits being made qua her. The aforesaid submission made before this Court by the learned counsel for the petitioner is not amenable for its standing countenanced by this Court as it stands canvassed unbereft of hers remaining mindful qua therewithin the imperative ingredient(s) warranting satiation is qua the relevant period of service even in an officiating or in a temporary capacity standing performed against a civil post.

2. Now conspicuously, when this Court has pronounced qua any appointment as an Anganwari worker standing not construable to be an appointment against a Civil post nor an appointee thereon being construable to be holder of a Civil post whereupon the inevitable sequel is qua the rendition of service by the petitioner in the capacity of an Anganwari worker, even if

assumably it is construable to be qua her rendering service thereagainst in an officiating or in a temporary capacity not hence satiating the mandate of the relevant rules wherewithin the aforesaid manner of rendition of employment by her under her employer warrants rendition thereon against a civil post, civil post whereof for reasons aforestated stood unadorned by the petitioner at the stage whereat she rendered service as an Anganwari worker under the respondents. Consequently, with the petitioner while performing service as an Anganwari worker under the respondents hers not holding any civil post since 21.10.1982 to 30.08.2005, corollary whereof is qua with hers not throughout the aforesaid period neither performing service under the respondents against a civil post nor hence she being construable to be holder of a civil post whereupon the performance of service thereagainst by her even if construable to be in a temporary or in an officiating capacity does not befittingly render her to be construable to be falling within the ambit of Rule 13 of the CCS Pension Rules. In aftermath, the period of service performed by the petitioner in the capacity of an Anganwari worker since 21.10.1982 upto 30.08.2005 is to be concluded to be not constituting the relevant qualifying service for the purpose of attraction qua hers of the apposite rules nor it is enjoined to be amalgamated with the subsequent rendition of service by her under the respondent against a substantive post of a supervisor.

3. The learned counsel for the petitioner has contended with force before this Court while relying upon a judgement rendered by this Court in Civil Writ Petition No. 8953 of 2013 qua Vidya Upasaks appointed by the respondents under the 'Himachal Pradesh Vidya Upasaks Yojna, 1998' wherein this Court had pronounced qua with the rendition of service on a contractual basis by Vidya Upasaks standing succeeded by theirs standing appointed in a regular capacity thereon also when hence the aforestated ingredients encapsulated in the relevant pension rules stood satiated thereupon this Court held qua the period of rendition of service on a contractual basis by Vidya Upasaks being amenable for reckoning besides being construable to be constituting qualifying service within the ambit of the relevant mandate of the pension rules for thereupon computing the relevant pensionary benefits qua them. However, the reliance as placed by the learned counsel for the petitioner upon the aforesaid verdict of this Court is inapt given the evident gross distinctivity inter se the factual matrix prevailing thereat vis.a.vis the factual matrix visibly prevalent hereat, contradistinction whereof is garnerable from the factum qua therein the engagement on a contractual basis of Vidya Upasaks standing preceded by theirs undergoing the rigours of selection by a duly constituted Board in sequel to the post aforesaid standing advertised whereupon their initial engagement in a contractual capacity by their employer did render their apposite initial engagement being construable to partake the trait qua theirs hence initially standing appointed thereon against a civil post also theirs being construable to be holders of a civil post whereas with an Anganwari worker(s) for reasons aforestated not standing appointed against a civil post nor the appointees thereagainst being construable to be holding a civil post conspicuously also when their engagement stood unpreceded by the relevant post standing advertised visibly renders the decision relied upon by the learned counsel for the petitioner to stand unattracted hereat. There is no merit in the petition and the same is dismissed. The pending applications, if any, also stand dismissed. No costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Manoj Kumar .....Appellant

Versus

Himachal Road Transport Corporation & others .....Respondents

FAO No. 378 of 2012
Decided on : 02.12.2016.

Motor Vehicles Act, 1988- Section 166- Claimant suffered permanent disability to the extent of 55% - medical evidence proved that the injured was victim of the motor vehicle accident and had sustained 55% disability – he remained undertreatment for about 3 months – hence, by guess work, Rs.2 lacs awarded in lump sum under the heads 'pain and sufferings', 'loss of amenities' and 'medical expenses' with interest @ 7.5% per annum. (Para-10 to 16)

For the Appellant : Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. B.N. Sharma, Advocate, for respondents No. 1 & 2.
Mr. Surinder Saklani, Advocate, for respondents No. 3 & 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

By the medium of this appeal, the appellant-claimant-injured has questioned award dated 12th June, 2012, made by the Motor Accident Claims Tribunal-II, Fast Track Court, Hamirpur, H.P. (hereinafter referred to as 'the Tribunal') in MAC Petition No. 18 of 2009, titled as **Manoj Kumar** versus **Himachal Road Transport Corporation & others,**whereby the claim petition came to be dismissed (for short, "the impugned award").

2. The claimant-injured, being victim of the motor vehicular accident, had filed the claim petition before the Tribunal for grant of compensation to the tune of 10,00,000/- as per the break-ups given in the claim petition.

3. Precisely, the case of the claimant-injured was that on 11.10.2006, at about 10.00 a.m., he boarded Bus No. HP-22-0379, which was being driven by its driver-respondent No. 3, rashly and negligently. When the said bus reached near Shivpuri Chowk, Ludhiana, at about 3.45 p.m., the claimant-injured fell down from the bus while alighting, due to the rashness and negligence of driver-respondent No. 3 and conductor-respondent No. 4. He sustained injuries and suffered permanent disability to the extent of 55%. He was taken to S. Nihal Singh, Pawha Charitable Hospital, Ludhiana (Punjab) and thereafter, he was treated at various hospitals at Hamirpur (HP).

4. The respondents resisted and contested the claim petition by filing replies.

5. Following issues came to be framed by the Tribunal:

"1. Whether on 11-10-2006 the petitioner was travelling in Bus No. HP-22-0379 being driven by respondent No. 3 and respondent No. 4 was conductor in the said bus, as alleged? .....OPP

2. Whether with the rash and negligent driving of HRTC Bus No. HP-22-0379 by respondent No. 3, the petitioner had suffered grievous injuries and has become disabled as alleged? ....OPP

3. Whether the respondent No. 4 conductor in HRTC Bus No. HP-22-0379 was also negligent in the performance of his duty as also responsible for the injuries on the person of the petitioner as alleged?....OPP

4. Whether the petitioner is entitled for compensation, if so, to what extent and from whom? ....OPP

5. Whether the petition is not maintainable as alleged?.....OPR-1 & 2

6. Whether the petitioner has no cause of action as alleged? .....OPR-1 & 2

7. Whether no such accident had taken place with Bus No. HP-22-0379? ...OPRs

8. Relief."

6. The claimant examined seven witnesses including himself. Respondents examined Parkash Chand, Superintendent of the Office of Himachal Road Transport Corporation as RW-1 and driver-Kehar Singh stepped into the witness box as RW-2.

7. The Tribunal, after scanning the evidence, oral as well as documentary, held that claimant has failed to prove that driver had driven the offending vehicle, rashly and negligently, as such, dismissed the claim petition.

Issue No. 1.

8. I have gone through the entire record.

9. The claimant has specifically pleaded in the claim petition that the said accident was the outcome of the rashness and negligence of respondents No. 3 & 4, i.e. driver and conductor, respectively. There is no rebuttal to the said evidence except the statement of the driver. Copy of the daily duty register (Ext. RW-1/A), does disclose that driver-Kehar Singh was driver of the offending bus and as per copy of the accident register (Ext. RW-1/B), report of the accident was entered. All the doctors have proved that claimant-injured was victim of the motor vehicle accident. Copy of the Disability Certificate (Ext. PW-1/A) does disclose that the claimant-injured has suffered permanent disability to the extent of 55%. The copies of the Discharge Bills of Sri Krishna Hospital, Hamirpur (Ext. PW-3/A & PW-3/B) and the other documents placed on record, do *prima-facie* prove that the said accident was outcome of the rashness and negligence of respondents No. 3 & 4, i.e., driver and conductor, respectively. Thus, the Tribunal has fallen in an error in deciding this issue against the claimant-injured. Accordingly, the findings returned by the Tribunal on Issue No. 1 are set aside and is decided in favour of the claimant-injured and against the respondents.

Issues No. 2 & 3.

10. These issues are governed by the findings returned on Issue No. 1, *supra.* Accordingly, the findings returned by the Tribunal on Issues No. 2 & 3 are set aside and the said issues are decided in favour of the claimant-injured and against the respondents.

11. Before I deal with Issue No. 4, I deem it proper to deal with with issues No. 5 to 7.

Issues No. 5 & 6.

12. It was for respondents No. 1 & 2 to prove that the claim petition was not maintainable and the claimant-injured had no cause of action.

13. In terms of the provisions of sub-section (4) of Section 166 and sub section (6) of Section 158 of the Motor Vehicles Act, 1988, for short 'the MV Act', Claims Tribunal can treat the report forwarded to it as an application for compensation. Accordingly, Issues No. 5 & 6 are decided in favour of the claimant-injured and against respondents No. 1 & 2.

Issue No. 7.

14. It was for the respondents to prove this issue, have failed to do so. Accordingly, the findings returned by the Tribunal on Issue No. 7 are set aside and the said issues are decided in favour of the claimant and against the respondents.

Issue No. 4.

15. Keeping in view the fact that the claimant has suffered 55% permanent disability and remained under treatment for about three months, by guess work, it can be held that the claimant-injured is entitled to compensation to the tune of Rs. 2,00,000/- in lump sum, under the heads, 'pain and sufferings', 'loss of amenities and 'medical expenses', with interest at the rate of 7.5% per annum from the date of the claim petition till its realization.

16. Accordingly, the impugned award is set aside, the appeal is allowed and the claimant-injured is held entitled to compensation to the tune of Rs. 2,00,000/- in lump sum, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization.

17. The respondents No. 1 & 2 are directed to deposit the compensation amount before the Registry within six weeks from today. On deposit, the Registry is directed to release the entire amount in favour of the claimant, through payees account cheque or by depositing the same in his account.

18. Send down the records after placing a copy of the judgment on the file of the claim petition.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Master Nitish Kumar (Minor) .....Appellant(s)
Versus
Managing Director & another .....Respondents

FAOs No. 434 & 435 of 2012
Decided on : 02.12.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was a house wife – her monthly income cannot be less than Rs.6,000/- / 1/3rd is required to be deducted towards personal expenses of the deceased and claimant has lost source of dependency of Rs.4,000/- per month- multiplier of 15 is applicable and claimant is entitled to compensation of Rs.4000 x 12 x 15= Rs. 7,20,000/- under the head loss of dependency – claimants is also entitled to Rs.10,000/- each under the heads loss of love and affection and funeral expenses- thus, total compensation of Rs.7,20,000 + 20,000= Rs.7,40,000/- awarded along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. (Para-9 to 14)

Cases referred:
Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120
Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105

For the Appellant(s) : Mr. Dibender Ghosh, Advocate.
For the Respondents: Mr. Adarsh Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Claimant-Master Nitish Kumar had filed two Claim Petitions i.e. M.A.C. Petitions No. 17-S/2 of 2010 & 18-S/2 of 2010, both titled as **Master Nitish Kumar versus Managing Director, HRTC and another,** before the Motor Accident Claims Tribunal, Shimla, Himachal Pradesh, (for short 'the Tribunal), for grant of compensation to the tune of Rs. 20,00,000/- each, in both the claim petitions, on account of death of his parents.

2. The aforesaid claim petitions came to be allowed by the Tribunal vide two different awards dated 21.04.2012, whereby compensation to the tune of Rs. 2,00,000/- each in both the claim petitions, was awarded in favour of the claimant, for short 'the impugned awards'.

3. Both these appeals are outcome of the one accident, thus I deem it proper to determine both these appeals by this common judgment.

4. The respondents have not questioned the impugned awards, on any count. Thus, the same have attained finality, so far these relate to them.

5. The claimant has questioned the impugned awards on the ground of adequacy of compensation.

6. Thus, the only question to be determined in these appeals is-whether the amount awarded is adequate? The answer is in the negative for the following reasons:

FAO No. 434 of 2012

7. All the facts are not admitted. As per copy of the Pariwar Register (Ext. PW-3/A), the age of deceased Nisha (mother) was 31 years at the time of accident.

8. The claimant has pleaded in the claim petition that the monthly income of the deceased was Rs.15,000/-, but has failed to prove the same. The Tribunal has awarded compensation to the tune of Rs.2,00,000/- in lump sum, which is not legally correct for the following reasons.

9. Deceased was a housewife. By guess work, it can be safely held that the monthly income of the deceased would not have been less than Rs. 6,000/-.

10. 1/3rd is required to be deducted towards the personal expenses of the deceased, while keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** Accordingly, after deducting 1/3rd amount, it is held that the claimant has lost source of dependency to the tune of Rs.4,000/- per month.

11. The multiplier of '15' is applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act, for short 'the Act' read with the ratio laid down by the Apex Court in view of the judgments, *supra,* read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

12. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 4,000 x 12 x 15 = Rs.7,20,000/- under the head 'loss of dependency'.

13. The claimant is also held entitled to a sum of Rs. 10,000/- each, i.e. Rs. 20,000/- , under the heads 'loss of love and affection' and 'funeral expenses'.

14. Accordingly, the claimant is held entitled to total compensation to the tune of Rs. 7,20,000/- + Rs. 20,000/- = Rs. 7,40,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization.

FAO No. 435 of 2016.

15. Admittedly, the deceased was 36 years of age at the time of accident, was an orchardist by profession.

16. The claimant has pleaded in the claim petition that the deceased was earning Rs. 20,000/- per month, but has failed to prove the same. The Tribunal has wrongly awarded compensation to the tune of Rs. 2,00,000/- in lump sum to the claimant for the following reasons.

17. By guess work, it can be safely held that the deceased would not have been earning less than Rs. 6,000/- per month.

18. 1/3rd is required to be deducted towards the personal expenses of the deceased, while keeping in view the ratio laid down by the Apex Court in ***Sarla Verma's*** and ***Reshma Kumari's*** cases, *supra.* Accordingly, after deducting 1/3rd amount, it is held that the claimant has lost source of dependency to the tune of Rs.4,000/- per month.

19. The multiplier of '15' is applicable in this case, in view of the 2nd Schedule appended to the Act read with the ratio laid down by the Apex Court in view of the judgments

rendered by the Apex Court in ***Sarla Verma's, Reshma Kumari's*** *cases, supra* and case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

20. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 4,000 x 12 x 15 = Rs. 7,20,000/- under the head 'loss of dependency'.

21. The claimant is also held entitled to a sum of Rs.10,000/- each, i.e. Rs.20,000/-, under the heads 'loss of love and affection' and 'funeral expenses'.

22. Accordingly, the claimant is held entitled to total compensation to the tune of Rs. 7,20,000/- + Rs. 20,000/- = Rs. 7,40,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization.

23. The amount of compensation is enhanced in both the claim petitions and the impugned awards are modified, as indicated above.

24. The respondents are directed to deposit the award amount alongwith interest, within a period of six weeks from today before the Registry. On deposit, the Registry is directed to release the entire amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in his account.

25. The appeals are accordingly disposed of.

26. Send down the record after placing a copy of the judgment on each of the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s Federal Mogul Bearing India Ltd. ...Non-Applicant/Petitioner.
Versus
Brij Lal ...Applicant/Respondent.

CMP No. 9696 of 2016 in
CWP No. 2696 of 2016
Decided on: 2nd December, 2016.

Industrial Disputes Act, 1947- Section 17-B- A writ petition was filed assailing the award passed by Industrial Tribunal-cum-Labour Court, Shimla- an application was filed by the workman- held, that Section 17-B has been enacted by the parliament to give relief to a workman who has been ordered to be reinstated under the award of Labour Court or Industrial Tribunal- the object of this provision is to relief the hardship caused to the workman due to delay in implementing the award- workman is entitled to the payment of full wages last drawn as subsistence allowance – employer directed to pay wages from the date of filing of the application.

(Para- 5 to 16)

Cases referred:

Dena Bank vs. Kiritikumar T. Patel (1999) 2 SCC 106

Dena Bank vs. Ghanshyam (2001) 5 SCC 169

Visveswaraya Iron and Steel Ltd. vs. M. Chandrappa (1994) 84 FJR 46

Carona Sahu Co. Ltd. vs.A.K. Munafkhan (1995) 70 FLR 25

For the Non-Applicant/Petitioner: Mr. Rahul Mahajan, Advocate.

For the Applicant/Respondent : Mr. V.D. Khidtta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

This order shall dispose of the application filed by the applicant/respondent (hereinafter referred to as the 'respondent') under Section 17-B of the Industrial Disputes Act, 1947(for short 'Act').

2. It is not in dispute that the non-applicant /petitioner (hereinafter referred to as the 'petitioner') has filed the writ petition No. 2696 of 2016 assailing therein the award passed in favour of the respondent by the learned Industrial Tribunal-cum-Labour Court, Shimla (for short 'Tribunal') on 18.6.2016. It is further not in dispute that even the respondent has filed a separate writ petition claiming full back wages with 9% interest throughout.

3. In terms of the award passed by the Tribunal, the respondent has been ordered to be reinstated in service along with back wages @ 25%. It is claimed by the respondent that he has been dragged into unnecessary litigation from October, 2009 and till date he is not gainfully employed in any establishment during this period and he has also filed a separate affidavit to this effect.

4. The petitioner has filed reply to this application raising therein preliminary objection regarding maintainability of the application on the ground that the order passed by the Tribunal on 18.6.2016 is not an award, but an order under Section 33-2 (b) of the Act and Rule 64(2) of the Industrial Dispute Rules, 1974 (for short 'Rules'). Whereas, Section 17-B of the Act only refers to an award. These contentions have been reiterated in the reply filed to the merits of the application.

I have heard learned counsel for the parties and have gone through the material placed on record.

5. Section 17-B of the Act, reads thus:

> *"**17B.Payment of full wages to workman pending proceedings in higher courts.**- Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:*
>
> *Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be."*

6. Evidently, the operative portion of the award passed by the Tribunal reads thus:

> *"As a sequel to my above discussion and findings on issues No.1 and 2, the application of the applicant for seeking approval for dismissing the respondent from his service is dismissed. Consequently, the respondent is ordered to be reinstated in service along with back wages @ 25%. File, after completion, be consigned to records."*

7. No doubt, the said award has been passed on an application filed by the petitioner under Section 33 (2) of the Act, read with Rule 64(2) of the Rules. However, the petitioner has not been able to show how the application under Section 17-B of the Act in an order for reinstating the respondent in exercise of the aforesaid provision is not maintainable.

8. Indisputably, the aforesaid provisions have been enacted by the Parliament with a view to give relief to a workman who has been ordered to be reinstated under the award of a Labour Court or the Industrial Tribunal during the pendency of the proceedings in which the said award is under challenge before the High Court or Supreme Court. The object underlying the provision is to relieve to a certain extent the hardship that is caused to the workman due to delay in the implementation of the award. (Refer:***Dena Bank vs. Kiritikumar T. Patel (1999) 2 SCC 106).***

9. Following the judgment of ***Kiritikumar's*** (supra), the Hon'ble Supreme Court in the case of ***Dena Bank vs. Ghanshyam (2001) 5 SCC 169*** has held that Section 17-B provides that where the employer prefers any proceedings against an award directing the reinstatement of any workman, the employer shall be liable to said workman during the pendency of the proceedings in the High Court or the Supreme court full wages last drawn by him. Thus, it is obvious that by enacting such provision, the Parliament intended that the workman should get the last drawn wages from the date of the award till the challenge to the award is finally decided. The provision has been enacted so as to prevent the employer from entering into a long drawn battle with the employee i.e. without paying a penny so as to exhaust him and thereby succumb to the illegal demand or enter into unconscionable bargaining with the employee.

10. In ***Kiritikumar's*** case (supra), the Hon'ble Supreme court has held that word "full wages last drawn" must be given plain and material meaning and that they cannot be given any extended meaning as given by the Karnataka High Court in ***Visveswaraya Iron and Steel Ltd. vs. M. Chandrappa (1994) 84 FJR 46*** and Bombay High Court in ***Carona Sahu Co. Ltd. vs.A.K. Munafkhan (1995) 70 FLR 25.***

11. The Karnataka High Court had taken the view that "full wages last drawn" take into their fold the wages drawn on the date of termination of the services plus the yearly increments and the DA to be worked out till the date of the award.

12. Whereas, the Bombay High Court had laid down that the expression "full wages last drawn" means the full wages which the workman was entitled to draw in pursuance of the award and the implementation of which is suspended during the pendency of the proceedings. However, it went further to observe that the proper construction of this section is that the workman is entitled not only to the full wages which the workman would have been entitled to draw but for the pendency of the proceedings in the High Court or Supreme Court. He would further be held entitled to every component of wages payable on the date of the award while determining the wages payable to the workman on the date of the award.

13. As observed earlier, the views taken by the Hon'ble Karnataka High Court and Hon'ble Bombay High Court, were not approved by the Hon'ble Supreme court and it was held that the payment which is required to be made by the employer to the workman under Section 17-B is in the nature of subsistence allowance which would not be refundable or recoverable from the workman even if the award is set-aside by the High Court or Supreme Court. It was further held that since the payment is of such a character, Parliament thought it proper to limit it to the extent of the wages which were drawn by the workman when he was in service and when his services were terminated and therefore used the expression "full wages last drawn". It shall be apt to reproduce the observations as contained in paras 20, 21 and 22 of the said judgment, which reads thus:

> "20. *The first construction give to the words "full wages last drawn" their plain and material meaning. The second as well as the third construction read something more than their plain and material meaning in this words. In substance these construction read the words "full wages last drawn" as "full wages which would have been drawn". Such an extended meaning to the words "full wages last drawn" does not find support in the language of Section 17-B. Nor can this extended meaning be based on the object underlying the enactment of Section 17-B.*

21. As indicated earlier Section 17-B has been enacted by Parliament with a view to give relief to a workman who has been ordered to be reinstated under the award of a Labour Court or the Industrial Tribunal during the pendency of proceedings in which the said award is under challenge before the High Court or the Supreme Court. The object underlying the provision is to relieve a certain extent the hardship that is caused to the workman due to delay in the implementation to the workman is in the nature of subsistence allowance which would not be refundable or recoverable from the workman even if the award is set aside by the High Court or this Court. Since the payment is of such a character Parliament thought it proper to limit it to the extent of the wages which were drawn by the workman when he was in service and when his services were terminated and therefore used the words "full wages last drawn". To read these words to mean wages which would have been drawn by the workman if he had continued in service if the order terminating his services had not passed since it has been by the award of the Labour of Industrial Tribunal, would result in so enlarging the benefit as to comprehend the relief that has been granted under the award that is under challenge. Since the amount is not refundable or recoverable in the even of the award being set aside it would result in the employer being required to give effect to the award during the pendency of the proceeding challenging the award before the High Court or the supreme Court without his being able to recover the said amount in the event of the awarded being set aside. We are unable to constitute the provisions contained in Section 17-B, to cast such a burden on the employer. In our opinion, therefore, the words "full wages last drawn" must be given their plain and material meaning and they cannot be given the extended meaning as given by the Karnataka High Court Visveswarya Iroon & Steel Ltd. [supra] or the Bombay High Court in Carona Sahu Co. Ltd. [supra].

22. Shri Jitendra Sharma has laid emphasis on the word "full" in the expression "full wages last drawn" and has submitted that the said word implies that the last drawn must be the was which the workman would have drawn under the award. We are unable to agree. In our opinion, the expression "full" only emphasis that all the emoluments which are included in "wages" as defined in clause [rr] of section 2 of the Act so as to include in "wages" as referred to in sub-clauses (i) to (iv) are required to be paid. In this context, it may also be mentioned that in Section 17-B Parliament has also used the words "inclusive of any maintenance allowance admissible to him under to him any rule". These words indicate that maintenance allowance that is admissible under any rule is required to be paid irrespective of the amount which was actually being paid as maintenance allowance to the workman. But with regard to wages Parliament has used the words "full wages last drawn" indicating that the wages that were actually paid and not the amount that would be payable are required to be paid."

14. However, the crucial question that arises for consideration is as to whether the order of payment of wages under Section 17-B of the Act should be from the date of award or from the date of filing of the application under Section 17-B by the concerned workman or there should be any other date i.e. date of filing etc.

15. The precise question with which this Court is confronted came up for consideration before the Hon'ble Division Bench of Delhi High Court in ***Municipal Corporation of Delhi and others vs. Santosh Kumari and another,*** LPA No. 165 of 2012, decided on 24.08.2012 and after quoting Section 17-B of the Act, it was observed as under:

19. This provision has repeatedly come up for interpretation in its various hues and facets before the High Courts as well as the Supreme Court. It may not be necessary to take note of all those judgments laying down the ratio and the various aspects which have been clarified in those judgments laying down certain specific principles. Since in these appeals, we are concerned with a limited issue, viz., the

date from which the benefit under Section 17B of the ID Act is to be made available to the concerned workman, our discussion would revolve around this central issue. However, while considering an application under Section 17B of the ID Act, it is necessary to bear in mind that the spirit, intendment and object underlying the statutory provision of Section 17B is to mitigate and relieve, to a certain extent, the hardship resulting to a workman due to delay in the implementation of an award directing reinstatement of his services on account of the challenge made to it by the employer. The preliminary consideration for making available such a relief to a workman is to be found in the benevolent purpose of the enactment. It recognizes a workman''s right to a bare minimum to keep body and soul together when a challenge has been made to an Award directing his reinstatement. The statutory provisions provide no inherent right of assailing an order or an award by an industrial adjudicator by way of an appeal. The payment which is required to be made by the employer to the workman has been held to be akin to a subsistence allowance which is neither refundable nor recoverable from a workman even if the Award in favour of the workman is set aside by the High Court. In Dena Bank Vs. Kiriti Kumar T. Patel [(1999) 2 SCC 106], the Apex Court was of the view that the object under Section 17B of the ID Act is only to relieve to a certain extent, the hardship that is caused to the workman due to the delay in implementation of the Award.

20. Further, the statute requires satisfaction of the following conditions:

> *(i) An award by a Labour Court, Tribunal or National Tribunal directing reinstatement of a workman is assailed in proceedings in a High Court or the Supreme Court;*
>
> *(ii) During the pendency of such proceedings, employer is required to pay full wages to the workman;*
>
> *(iii) The wages stipulated under Section 17B are full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any Rule;*
>
> *(iv) Such wages would be admissible only if the workman had not be employed in any establishment during such period and an affidavit had been filed to such effect.*

21. A Single Bench of this Court in Food Craft Instt. Vs. Remeshwar Sharma and Anr. [(2007) 2 LLJ 350 Del] culled out the following principles, from various judicial pronouncements touching upon various facets for grant of interim relief under Section 17B of the ID Act, in the following manner:

> *"(i) An application under Section 17B can be made only in proceedings wherein an industrial award directing reinstatement of the workman has been assailed.*
>
> *(ii) This Court has no jurisdiction not to direct compliance with the provisions of Section 17B of the Industrial Disputes Act if all the other conditions precedent for passing an order in terms of the Section 17B of the Act are satisfied [Re : (1999) 9 SCC 229 entitled Choudhary Sharai v. Executive Engineer, Panchayati Raj Department & Anr.].*
>
> *(iii) As the interim relief is being granted in exercise of jurisdiction under Article 226 of the Constitution of India, the High Court can grant better benefits which may be more just and equitable on the facts of the case than the relief contemplated by Section 17B. Therefore, dehors the powers of the Court under Section 17B, the Court can pass an order directing payment of an amount higher than the last drawn wages to the workman [Re : (1999) 2 SCC 106 (para 22), Dena Bank v. Kirtikumar T. Patel].*

(iv) Such higher amount has to be considered necessary W.P(C) No.11803/2005 Page 6 of 11in the interest of justice and the workman must plead and make out a case that such an order is necessary in the facts of the case.

(v) The Court can enforce the spirit, intendment and purpose of legislation that the workman who is to get the wages from the date of the award till the challenge to the award is finally decided as per the statement of the objections and reasons of the Industrial Disputes(Amendment) Act, 1982 by which Section 17B was inserted in the Act [Re : JT 2001 (Suppl.1) SC 229, Dena Bank v. Ghanshyam (para 12)].

(vi) An application under Section 17B should be disposed of expeditiously and before disposal of the writ petition [Re : 2000 (9) SCC 534 entitled Workman v. Hindustan Vegetable Oil Corporation Ltd.].

(vii) Interim relief can be granted with effect from the date of the Award [Re : JT 2001 Supplementary (1) SC entitled Regional Authority, Dena Bank v. Ghanshyam; 2004 (3) AD (DELHI) 337 entitled Indra Perfumery Company v. Sudarshab Oberoi v. Presiding Officer].

(viii) Transient employment and self-employment would not be a bar to relief under Section 17B of the Industrial Disputes Act [Re : 2000 (1) LLJ 1012 entitled Taj Services Limited v. Industrial Tribunal; 1984 (4) SCC 635 entitled Rajinder Kumar Kundra v. Delhi Administration; 109 (2004) DLT 1 entitled M/s. Birdhi Chand Naunag Ram Jain v. P.O., Labour Court No. IV & Others].

(ix) The Court while considering an application under Section 17B of the ID Act cannot go into the merits of the case, the Court can only consider whether the requirements mentioned in Section 17B have been satisfied or not and, if it is so, then the Court has no option but to direct the employer to pass an order in terms of the statute. It would be immaterial as to whether the petitioner had a very good case on merits [Re : 2000 W.P(C) No.11803/2005 Page 7 of 11(5) AD Delhi 413 entitled Anil Jain v. Jagdish Chander].

(x) A reasonable standard for arriving at the conclusion of the quantum of a fair amount towards subsistence allowance payable to a workman would be the minimum wages notified by the statutory authorities under the provisions of the Minimum Wages Act, 1948 in respect of an employee who may be performing the same or similar functions in scheduled employments. [Re: Rajinder Kumar Kundra v. Delhi Administration, (1984) 4 SCC 635; Sanjit Roy v. State of Rajasthan, AIR 1983 SC 328;decision dated 3rd January, 2003 in Writ Petition (Civil) Nos. 3654 & 3675/1999 entitled Delhi Council for Child Welfare v. Union of India; DTC v. The P.O., Labour Court No. 1, Delhi & Ors., 2002 II AD (Delhi) 112 (para 12, 13)]

(xi) Interim orders directing payment to a workman can be made even on the application of the management seeking stay of the operation and effect of the industrial Award and order. Such interim orders of stay sought by the employer can be granted unconditionally or made conditional subject to payment or deposits of the entire or portion of the awarded amount together with a direction to the petitioner employer to make payment of the wages at an appropriate rate to the workman. Such an order would be based on considerations of interests of justice when balancing equities.

(xii) For the same reason, I find that there is no prohibition in law to a direction by the Court to make an order directing payment of the wages with effect from the date of the Award. On the contrary, it has been so held

in several judgments that this would be the proper course [Re : Regional Authority, Dena Bank & Anr. v. Ghanshyam, reported at JT 2001 (Suppl. 1) SC 229 and Indra Perfumery Co. Thr. Sudershab Oberoi v. Presiding Officer & Ors., 2004 III AD (Delhi) 337].

(xiii) While passing an interlocutory direction for payment of wages, the Court may also secure the interests of the W.P(C) No.11803/2005 Page 8 of 11employer by making orders regarding refund or recovery of the amount which is in excess of the last drawn wages in the event of the industrial award being set aside so as to do justice to the employer.

(xiv) A repayment to the employer could be secured by directing a workman to given an undertaking or offer security to the satisfaction of the Registrar (General) of the Court or any other authority [Re : para 12, 2002 (61) DRJ 521 (DB), Hindustan Carbide Pvt. Ltd. v. Govt. of NCT of Delhi & Ors.(supra)]

(xv) In exercise of powers under Article 226 and Article 136 of the Constitution, if the requisites of Section 17B of the Industrial Disputes Act, 1947 are satisfied, no order can be passed denying the workman the benefit granted under the statutory provisions of Section 17B of the Industrial Disputes Act, 1947 [Re: 1999 (2) SCC 106, Dena Bank v. Kirtikumar T. Patel (para 23)].

(xvi) Gainful employment of the workman; unreasonable and unexplained delay in making the application by the workman after the filing of the petition challenging the award/order; offer by the employer to give employment to the workman would be a relevant factors and consideration for the date from which the wages are to be permitted.

(xvii) It will be in the interest of justice to ensure if the facts of the case so justify, that payment of the amount over and above the amount which could be directed to be paid under Section 17B to a workman, is ordered to be paid only on satisfaction of terms and conditions as would enable the employer to recover the same [para 13 of Regional Manager, Dena Bank v. Ghanshyam].

(xviii)The same principles would apply to any interim order in respect of a pendent lite payment in favour of the Workman." [emphasis supplied]

22. In respect of the issue, with which we are concerned, the learned Single Judge in the aforesaid judgment held that there was no prohibition in law to a direction by the Court to make an order directing payment of the wages with effect from the date of the Award. At the same time, it was also held that unreasonable and unexplained delay in making the application by the workman after the filing of the petition challenging the award/order; offer by the employer to give employment to the workman would be a relevant factors and consideration for the date from which the wages are to be permitted. Following this judgment, another Single Judge of this Court in the case of Delhi Transport Corporation Vs. Sh. Ramesh Chander [W.P.(C) No.11803/2005, decided on 09.1.2008] granted the wages from the date of application and not from the date of award.

23. Learned counsel for the appellant also referred to the judgment of the Supreme Court in the case of Uttaranchal Forest Development Corpn. and Another Vs. K.B. Singh and Others [(2005) 11 SCC 449] directing entitlement for wages under Section 17B of the ID Act from the respective dates of filing the affidavit in compliance with Section 17B of the Act.

24. However, as pointed out above by Mr. Anuj Aggarwal that this judgment was considered by a Division Bench in Delhi Transport Corporation Vs. Inderjeet

Singh (decided on 29.7.2008) holding that the aforesaid decision of the Supreme Court was a short order, which did not discuss other Supreme Court decisions. The Division Bench in this case also negated the contention that merely by filing delayed application, the workman should be given wages from the date of affidavit and not from the date of the Award. Following discussion contained in the said judgment was relied upon:

> *"5. The decisions in Uttaranchal Forest Development Corporation as well as Raptakos Brett & Co. Limited are short orders that do not discuss either of the above Supreme Court decisions. A reading of the orders would show that they were peculiar to the facts of those cases and did not alter the law as explained in Dena Bank-I and Dena Bank-II. As regards the date from which the amount under Section 17- B ID Act would become payable, the following passage in the decision in Dena Bank-II is a complete answer (SCC p.174):*
>
> > *"12. We have mentioned above that the import of Section 17-B admits of no doubt that Parliament intended that the workman should get the last drawn wages from the date of the award till the challenge to the award is finally decided which is in accord with the Statement of Objects and Reasons of the Industrial Disputes (Amendment) Act, 1982 by which Section 17-B was inserted in the Act. We have also pointed out above that Section 17-B does not preclude the High Courts or this Court from granting better benefits - more just and equitable on the facts of a case than contemplated by that provision to a workman. By an interim order the High Court did not grant relief in terms of Section 17-B, nay, there is no reference to that section in the orders of the High Court, therefore, in this case the question of payment of full wages last drawn" to the respondent does not arise. In the light of the above discussion the power of the High Court to pass the impugned order cannot but be upheld so the respondent is entitled to his salary in terms of the said order."*
>
> *6. As regards the delay by the workman in approaching the Court for relief under Section 17-B ID Act, it requires to be recalled that the workman could have filed such an application only after the DTC filed its writ petition. The object of the provision is that the wages should not be denied to the workman when he has been able to state on affidavit that he has remained unemployed and the employer is unable to show anything to the contrary. In the circumstances, the benefit under Section 17B ID Act cannot be denied to the workman on the ground that he filed the application three years after the writ petition was filed by the DTC. The entitlement of the workman to wages under Section 17B hinges on whether in fact he remained unemployed since his termination. That it is a question of fact. In light of the unrebutted claim of the workman to that effect in the instant case, his application under Section 17B ID Act had to be allowed."*

25. We would like to remark at this stage that there are many judgments cited by both the parties in support of their submissions. However, in none of those judgments, issue arises directly for consideration. In some cases, without discussion, the benefit of Section 17B of the ID Act was given from the date of application/filing of the affidavit as required under Section 17B of the ID Act in some other cases, it was given from the date of award, again routinely and without discussing as to whether in a given case, it could be given from the later date and not from the date of award. In this backdrop, we have to give answer to the issue that has arisen.

26. We may record, at the outset, that normally such a benefit of payment under Section 17B of the ID Act is to be from the date of award which is not only the plain language of the provision, but so recorded in the objects and reasons for enacting this Section. Therefore, when the application is filed by the workman with promptitude after the receipt of the notice of the filing of the petition by the Management, he would be entitled to the benefit of Section 17B of the ID Act from the date of the award. Problem arises when such an application is not filed for years together and by filing a belated application, still the claim is made from the date of the award, which is resisted by the management on the ground that it should be given, if at all, from the date of the application.

27. We are of the considered view that the Single Bench in Food Craft Instt. (supra) gave a balanced interpretation to the aforesaid provision taking into consideration the interest of both the workman as well as the employer. It is the most equitable. What follows from a conjoint reading of Para (xii) and (xvi) enumerated therein that normally, the workman would be paid wages with effect from the date of the award. It should be in those cases where application is filed with promptitude and immediately on notice of writ petition staying the operation of the order of reinstatement or proceedings against such an award. It should be within reasonable period. Thereafter, that would mean that such an application should normally be filed with the filing of the counter affidavit or reply to an application for interim relief and in the case of absence of such counter affidavit or reply, within the reasonable period from the date when workman has appeared himself or through counsel in the writ proceedings. This would be so even when the management has delayed in filing the writ petition challenging the award inasmuch as with such a delay, it cannot deprive the workman under Section 17B from the date of award. Thus, the expression "during the pendency of proceedings before the High Court" under Section 17B of the ID Act would not mean from the date of filing the writ petition. However, if there is a long or abnormal delay in filing application under Section 17B of the ID Act, we are of the opinion that in such an eventuality, it becomes an obligation of the workman to satisfactorily explain the delay. It would become relevant consideration for deciding as to whether the benefit is to be accorded from the date of application or the award. In case, it is unreasonable and unexplained delay, it would be within the discretion of the writ Court to direct payment of wages from the date of the application. There could be several reasons for adopting this course of action. One of us (Rajiv Sahai Endlaw, J.) had taken the justification by providing following reasons:

> *"12.3.....*
>
> *A. Section 17B is in the nature of a subsistence allowance. It is intended to provide to the workman whose reinstatement has been directed by the Industrial Adjudicator, at least minimum wages, during the time that the judicial review of the award of the Industrial Adjudicator is pending consideration before this Court. The payment thereunder is a month by month payment and is not a payment of any lumpsum amount. Further, the said payment is subject to the workman, on affidavit, stating that he is unemployed and/or has been unable to find employment. The employer has a right to rebut the said averment of the workman and if succeeds in rebutting the same, the workman under Section 17B would not be entitled to payment.*
>
> *B. The payment under Section 17B is not an automatic payment which starts running immediately on institution of proceedings to challenge the award. For the workman to be entitled to such payment, he is required to file an affidavit. Thus, payment is dependent upon a positive act of the*

workman. The High Court is not empowered to make the payment till such affidavit has been filed by the workman.

C. Once payment/order requires a positive act of the workman, entitled to such payment of filing in court such affidavit, the ordinary rule of litigation is (as reiterated in Beg Raj Singh Vs. State of U.P. AIR 2003 SC 833) that the right to relief should be decided by reference to the date on which the party approaches the Court. The Supreme Court in Mukund Lal Bhandari Vs. U.O.I. AIR 1993 SC 2127, in relation to the pension of Freedom Fighters also held that the "benefit should flow only from the date of application and not from any date earlier". Thus but for Section 17B providing for payment during pendency of the writ proceeding (and which has been interpreted as not from date of institution of the writ petition but from the date of the award impugned therein) under general law, an order under Section 17B would have been only from the date of the application under Section 17B.

D. However such benefit given to the workman, of direction/order for payment from a date anterior to the filing of application should not be tilted against the employer by interpreting it to mean that the workman can apply under Section 17B at his whim and fancy and at any time. The workman cannot be permitted to apply under Section 17B when the writ petition matures for hearing and be held entitled to payment for several years together. To allow so, would be inequitable to the employer.

E. In most cases, it is impossible for the employer to verify whether the workman is employed in another establishment or not. It would be more so difficult if the employer is required to verify the employment, if any, for say the last 10 years, as the petitioner herein would be required to, to rebut the affidavit filed by the workman.

F. If the application under Section 17B is made within a reasonable time, the employer can make arrangements for the payment. However, non-filing of the application by the workman can reasonably entitle the employer to believe that the employee is employed in another establishment and will not make any claim under Section 17B. The employer may arrange its financial affairs accordingly. An employer who has acted on the basis of such a representation of the workman cannot after a long period, 10 years as in the present case, be burdened with the liability under Section 17B from a back date which as a lump sum may represent an enormous amount and wreck the employer. Moreover it will provide a bounty rather than subsistence.

G. The Supreme Court in Excel Wear Vs. U.O.I. AIR 1979 SC 25 held that principles of socialism and social justice cannot be pushed to such an extreme so as to ignore completely or to a very large extent the interests of the employer."

28. We are quite in agreement with this approach. Applying this principle, we proceed to state the outcome in each of the appeal."

16. Bearing in mind the aforesaid principles, it would be noticed that the award impugned in this writ petition was passed by the Tribunal on 18.6.2016, writ petition came to be filed on 16.9.2016 and whereas the application under Section 17-B of the Act came to be filed on 11.11.2016. Therefore, in the given facts and circumstances, I am of the considered view that the ends of justice would be subserved in case the petitioner is directed to pay the wages last drawn (as clarified above) to the respondent from the date of filing of this petition i.e. 16.9.2016.

The application is accordingly disposed of in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. .....Appellant
Versus
Smt. Daljeet Kaur and others .....Respondents.

FAO (MVA) No. 4 of 2012
Judgment reserved on: 25.11.2016
Date of decision: 02.12.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was a pillion rider of the motorcycle which met with an accident due to the rash and negligent driving of the driver of the bus- it was contended that accident was the result of the contributory negligence of the driver of the motorcycle – held, that in claim petition prima facie proof is required and not strict pleadings and proof - both the drivers had not taken due care and caution while driving their respective vehicles- when two drivers do not take due care and caution while driving their respective vehicles and contribute in causing accident, it is a case of contributory negligence – appellate directed to deposit 50% amount while the insurer of the other vehicle directed to deposit 50% of the amount.(Para-15 to 29)

Cases referred:
Dulcina Fernandes and others versus Joaquim Xavier Cruz and another, (2013) 10 SCC 646
National Insurance Company Ltd. versus Jagtamba and others, I L R 2015 (VI) HP 428
Kamlesh and others versus Attar Singh and others, 2015 AIR SCW 6158
Meera Devi and another versus H.R.T.C. and others, 2014 AIR SCW 1709
Khenyei versus New India Assurance Co. Limited & others, 2015 AIR SCW 3169

For the appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For the respondents: Mr. S.D. Gill, Advocate, for respondents No. 1 to 4.
Nemo for respondents No. 5 and 6.
Mr. Neeraj Gupta, Advocate, for respondents No. 7 and 8.
Mr. Aman Sood, Advocate, for respondent No.9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this appeal, the appellant has thrown challenge to the judgment and award dated 19.10.2011, passed by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P. hereinafter referred to as "the Tribunal", for short, in MAC Petition No. 18-S/2 of 2009, titled *Smt. Daljeet Kaur and others versus Hem Raj and others*, whereby compensation to the tune of Rs.12,74,000/- alongwith interest @ 7.5% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. The claimants, owners, drivers and insurer-respondent No.9, have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The insurer/appellant has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the insurer-appellant argued that it is a case of contributory negligence. Both the drivers were negligent and at the best, the appellant has to satisfy 50% of

the liability. He has further argued that the accident was outcome of rash and negligent driving of motorcyclist.

5. Learned counsel for respondent No. 9, i.e., the insurer of motor cyclist, vide order dated 4.11.2016 was asked to seek instructions to satisfy the award to the extent of 50%. On 11.11.2016, he sought instructions and stated that he is under instructions to contest the *lis*.

6. In order to determine the controversy, it is necessary to give a flash back of brief facts, the womb of which has given birth to the instant appeal.

7. The claimants being the victims of a vehicular accident, have filed claim petition before the Tribunal for the grant of compensation to the tune of Rs.25 lacs, as per the break-ups given in the claim petition on account of death of Vikrant, who died in a motor vehicle accident which took place on 4.10.2007, near village Anji Tehsil and District Solan due to rash and negligent driving of driver of bus bearing registration No. HP-51-3651, as a result of which, the deceased, who was pillion rider on the motorcycle, bearing Registration No. HP-14-A-3841, sustained fatal injuries and succumbed to the injuries in the hospital.

8. The claim petition was resisted by the respondents and following issues came to be framed.

1. *Whether the deceased Vikrant had died in an accident caused due to rash and negligent driving of the respondents No. 2 and 5? OPP.*
2. *If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioners are entitled and from whom? OPP*
3. *Whether the vehicles were plied by the respondents No. 1 and 4 in violation of terms and conditions of the insurance policy and the respondents No. 3 and 6 are not liable to pay the amount of compensation? OPR-3 and 6.*
4. *Relief.*

9. Claimants have examined as many as six witnesses and one of the claimants, namely, Daljeet Kaur also stepped into the witness box as PW4. Respondents have examined four witnesses and motor cyclist, namely, Harinder Grover stepped into the witness box as RW2.

10. The Tribunal, after scanning the evidence held that the accident was outcome of rash and negligent driving of bus driver and accordingly, decided issue No.1 in favour of the claimants.

11. I have gone through the record. The claimants have examined witnesses who have deposed that the accident was outcome of rash and negligent driving of bus driver.

12. The official witnesses, namely, RW1 MHC Chander Mohan and Ramanand Sharma, Summary Clerk of the office of Civil Judge, (Senior Division) Solan have stated that FIR was lodged against motor cyclist Harinder Grover and final charge sheet was also presented against him in the court of competent jurisdiction and was facing trial.

13. While going through the statements of the witnesses, some of the witnesses have stated that bus driver has also not taken due care and caution while driving bus. In para 24 of the claim petition, it is specifically pleaded that the bus driver was rash and negligent in driving the bus. Bus driver and owner have filed the reply. It is apt to reproduce para 24 of the reply filed by respondents No. 1 and 2, i.e., bus driver and owner herein.

> *"24.That the contents of para 24 of the petition are misleading in nature. It is denied that the deceased was sitting as pillion rider on the motor cycle. The manner in which the accident has occurred has not been explained properly in this para of the petition. The deceased himself was driving the motor cycle and the respondent No. 5 was sitting as a pillion rider on the motor cycle. As stated above the motor cycle was being driven by the deceasd himself and the accident had*

occurred when the diver of the motor cycle i.e. the deceased was over taking a standing truck on a sharp curve and while taking the pass from the stranded truck, the motor cycle being driven by the deceased struck against the bus and the deceased caused the accident. Thus, the stand taken in the petition to the effect that the deceased was pillion rider on the motor cycle is wrong, rather he was driving the motor cycle. It is emphatically denied that the accident had occurred due to sole rash and negligent driving of respondent No. 2 as alleged."

[Emphasis added]

14. Some of the witnesses have stated that motor cycle struck with the bus on a sharp curve and some of the witnesses have deposed that bus struck with the motor cycle. PW3 Saravjeet Singh stated that local bus came from Kumarhatti side was being driven in rash and negligent manner and struck with the motor cycle coming from the opposite direction over which there was one pillion rider alongwith motor cyclist, who fell down and suffered fatal injuries.

15. It is beaten law of the land that in claim petitions, the standard of proof is on different footings as compared to the standard of proof required in criminal cases. In a claim petition, only *prima facie* proof is required and strict pleadings and proofs are not required.

16. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **Dulcina Fernandes and others versus Joaquim Xavier Cruz and another,** reported in **(2013) 10 Supreme Court Cases 646.** It is apt to reproduce relevant portion of paras 8 and 9 of the judgment herein:

"8. In United India Insurance Co. Ltd. v. Shila Datta, (2011) 10 SCC 509, while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-Judge Bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow:

"10. (ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.

* * *

(v) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation.....

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry."

9. The following further observation available in para 10 of the Report would require specific note: (Shila Datta case, (2011) 10 SCC 509, SCC p. 519)

"10. .....We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute." (Emphasis added)

17. This Court in FAO No. 530 of 2008 titled ***National Insurance Company Ltd. versus Jagtamba and others***, decided on 27.11.2015 and in series of cases has laid down the similar principles of law.

18. It appears that both the drivers have not taken due care and caution while driving their respective vehicles.

19. The question is-what is contributory negligence? When two drivers have not taken due care and caution while driving their respective vehicles and have contributed in causing the accident, is contributory negligence.

20. The apex Court in case titled ***Kamlesh and others versus Attar Singh and others*** reported in **2015 AIR SCW 6158** in para 8 has held as under:

> *"8. We have heard learned counsel for the parties and perused, inter alia, the evidence on record of Ram Parshad PW2 and Devender PW.3. The method and manner in which the accident has taken place leaves no room for doubt that it was a case of composite negligence of drivers of both the vehicles, that is the driver of Maruti car and driver of tempo. Though Police has registered a case against driver of the tempo Attar Singh and has filed a chargesheet but the same cannot be said to be conclusive. Though, Attar Singh has stated that it was in order to oblige the driver of the Maruti car, a case was registered against him. Be that as it may. It appears both the drivers have tried to save their liability. In such circumstances, the version of eye-witnesses, PW.2 and PW.3 assumes significance. The fact remains that car had dashed the tempo on the middle portion near footstep. Thus the method and manner in which the accident has taken place leaves no room for doubt that both the drivers were negligent. Man may lie but the circumstances do not is the cardinal principle of evaluation of evidence. No effort has been made by the High Court to appreciate the evidence and method and manner in which the accident has taken place. Both the aforesaid witnesses have stated Maruti Car was in excessive speed. However, it appears driver of tempo also could not remove his vehicle from the way of Maruti Car. Thus, both the drivers were clearly negligent. It appears from the facts and circumstances that both the drivers were equally responsible for the accident. Thus, it was a case of composite negligence. Both the drivers were joint "tort-feasors", thus, liable to make payment of compensation."*

21. The apex Court in another judgment in case titled ***Meera Devi and another versus H.R.T.C. and others*** reported in ***2014 AIR SCW 1709*** has laid down the similar principles of law. It is apt to reproduce para 10 of the said judgment herein.

> *"10.To prove the contributory negligence, there must be cogent evidence. In the instant case, there is no specific evidence to prove that the accident has taken place due to rash and negligent driving of the deceased scooterist. In the absence of any cogent evidence to prove the plea of contributory negligence, the said doctrine of common law cannot be applied in the present case. We are, thus, of the view that the reasoning given by the High Court has no basis and the compensation awarded by the Tribunal was just and reasonable in the facts and circumstances of the case."*

22. The Apex Court in ***Khenyei versus New India Assurance Co. Limited & others,*** reported in **2015 AIR SCW 3169** has laid down the same principles of law.

23. Applying the test, it can be safely held that both the drivers have driven the vehicles rashly and negligently and the accident was outcome of contributory negligence.

24. The factum of insurance of both the vehicles is not in dispute. The insurer of both the vehicle have failed to prove that the owners of offending vehicles have committed any willful breach in terms of the insurance policy and issue No. 3 rightly came to be decided in favour of claimants and against both respondents No. 3 and 6 in the claim petition.

25. The adequacy of compensation is not in dispute. Even the claimants have not questioned the adequacy of compensation.

26. Having said so, both the drivers have contributed in causing the accident in which deceased, a pillion rider, sustained injuries and succumbed to the same. Thus, the insurers of both the offending vehicles are saddled with the liability in equal shares.

27. The rate of interest, as awarded by the Tribunal is maintained.

28. Respondent No. 9, i.e., Bajaj Allianz Insurance Company Ltd. is directed to deposit the 50% of the awarded amount alongwith interest in the Registry of this Court within eight weeks from today. On deposit, Registry to release the same in favour of the claimants, strictly in terms of the conditions contained in the impugned award through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

29. Out of the amount already deposited by the appellant-insurer-Oriental Insurance Company, 50% be released to the claimants, strictly in terms of the conditions contained in the impugned award through payees' cheque account, or by depositing the same in their bank accounts, after proper verification and rest of the amount be refunded to the insurer/ Oriental Insurance Company Ltd. through payees cheque account.

30. Viewed thus, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

31. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs No. 441 & 442 of 2012
Decided on: 02.12.2016

FAO No. 441 of 2012

Oriental Insurance Company Ltd. ...Appellant.

Versus

Smt. Sumitra Devi and others ...Respondents.

FAO No. 442 of 2012

Oriental Insurance Company Ltd. ...Appellant.

Versus

Smt. Sunita Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 166- Claimants specifically pleaded that deceased was working as labourer in the offending vehicle and was travelling in the same as a labourer at the time of accident- this fact was admitted in the reply – sitting capacity of the vehicle was 3+1 – premium was paid for the employee - the claimants are 7 in number and 1/5th amount was rightly deducted towards personal expenses- the deceased was 31 years of age at the time of accident and multiplier of 15 is just and appropriate – the amount cannot be said to be excessive – appeal dismissed. (Para-13 to 21)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

FAO No. 441 of 2012

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeevan Kumar, Advocate.

For the respondents: Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 to 7.
Mr. Deepak Kaushal, Advocate, for respondents No. 8 to 10.

FAO No. 442 of 2012

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeevan Kumar, Advocate.

For the respondents: Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 to 6.
Mr. Deepak Kaushal, Advocate, for respondents No. 7 to 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Both these appeals are outcome of one vehicular accident, thus, the same are being clubbed and decided by this common judgment.

2. Challenge in FAO No. 441 of 2012 is to award, dated 30th July, 2012, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 52-N/2 of 2007, titled as Sumitra Devi and others versus Ritesh Aggarwal and others, whereby compensation to the tune of ₹5,34,400/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (hereinafter referred to as "impugned award-I").

3. Subject matter of FAO No. 442 of 2012 is award, dated 30th July, 2012, made by the Tribunal in MAC Petition No. 15-N/2 of 2008, titled as Sunita Devi and others versus Shri Ritesh Kumar Aggarwal and others, whereby compensation to the tune of ₹ 5,01,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (hereinafter referred to as "the impugned award-II").

4. The claimants, driver and owners-insured of the offending vehicle have not questioned the impugned awards on any count, thus, have attained finality so far the same relate to them.

5. Appellant-insurer has called in question both the impugned awards on the grounds taken in the respective memo of appeals.

6. In order to determine both these appeals, it is necessary to give a brief resume of the facts of the cases, the womb of which has given birth to the appeals in hand.

7. The claimants in both the claim petitions invoked the jurisdiction of the Tribunal by the medium of respective claim petitions for grant of compensation, as per the break-ups given in the respective claim petitions, on the ground that they became the victims of the vehicular accident, which was caused by the driver, namely Shri Yash Pal, while driving truck No. HP-51-3277, rashly and negligently on 5th August, 2007, at about 10.30 P.M., at Mandoli, in which deceased-Satpal and Hari Singh sustained injuries and succumbed to the said injuries.

8. The respondents in both the claim petitions resisted the same on the grounds taken in the respective memo of objections.

9. On the pleadings of the parties, a similar set of issues came to be framed by the Tribunal in both the claim petitions on 14th July, 2008. Thus, I deem it proper to reproduce the issues framed in one of the claim petitions, i.e. MAC Petition No. 52-N/2 of 2007 (subject matter of FAO No. 441 of 2012) herein:

> *"1. Whether the deceased Satpal died in an accident which was the result of rash and negligent driving of the vehicle by respondent No. 3, Yash Pal, as alleged? OPP*
>
> *2. If issue No. 1 is proved, to what amount of compensation, the petitioners are entitled to and from whom? OPP*

3. Whether the risk of the deceased was not covered under the Insurance Policy? OPR-4

4. Whether the deceased was an un-autorized passenger in the offending vehicle? OPR-4

5. Whether the driver of the vehicle was not possessed of a valid and effective driving licence at the time of accident? OPR-4

6. Whether the petition has been filed in collusion with respondents No. 1 to 3? OPR-4

7. Relief."

10. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants in the respective claim petitions and saddled the insurer with liability in terms of the impugned awards.

11. Learned Senior Counsel appearing on behalf of the appellant-insurer argued that the Tribunal has fallen in an error in saddling the appellant-insurer with liability in both the claim petitions on three counts:

(i) That the deceased were not labourer/employee or the pedestrian, but were travelling in the offending vehicle as unauthorized passengers;

(ii) That adequate opportunity was not granted to the appellant-insurer to lead evidence; and

(iii) That the amount awarded is excessive;

12. All these grounds are not tenable for the reasons to be recorded hereinafter.

FAO No. 441 of 2012:

13. The claimants have specifically pleaded in the claim petition that deceased-Satpal was working as a labourer with the offending vehicle and was travelling in the same as a labourer at the time of the accident, which stands admitted by the owner-insured and driver of the offending vehicle in their reply.

14. It is apt to reproduce para 11 of the joint reply filed by the owner-insured and driver of the offending vehicle herein:

"11. That the contents of para 23 & 24 of the claim petition are wrong hence emphatically denied except that the deceased was the labourer on the truck. It is also submitted that the accident took place due to the mechanical failure."

(Emphasis added)

15. Hence, it is admission on the part of the owner-insured and driver of the offending vehicle that deceased-Satpal was employed by them with the offending truck as a labourer.

16. I have gone through the registration certificate of the offending vehicle, which is on the record as Ext. R-4, the perusal of which does disclose that the seating capacity of the offending vehicle including the driver is '3+1'.

17. The factum of insurance is admitted. The insurance policy is on the record as Ext. R-3. While going through the details of premium paid, which is contained in the Schedule of Premium of the insurance policy, it is crystal clear that premium has been paid for liability of employee/driver also. Thus, the risk of deceased-Satpal, being the labourer with the offending vehicle, was covered.

18. The insurer has not led any evidence to dislodge the evidence led by the claimants. It is apt to record herein that the claimants' evidence was closed in terms of order, dated 4th March, 2009. Thereafter, the file remained on the dockets of the Tribunal till 25th July, 2012, for recording the respondents' evidence, on which date also no RWs were present despite

the fact that eight opportunities were already granted in their favour and the evidence was ordered to be closed. Thus, it cannot lie in the mouth of the appellant-insurer that adequate opportunities were not granted to it to lead evidence.

19. The claimants are seven in number. The Tribunal, after taking the income of deceased-Satpal to be ₹ 3600/- per month, has rightly deducted one-fifth towards his personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

20. The deceased was 31 years of age at the time of the accident. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the Motor Vehicles Act, 1988 (hereinafter referred to as "MV Act").

21. Viewed thus, the amount awarded cannot be said to be excessive in any way, rather, is meagre. But, the claimants have not questioned the adequacy of the compensation, thus, the same is maintained.

FAO No. 442 of 2012:

22. The claimants have specifically pleaded that deceased-Hari Singh was walking as a pedestrian by the side of the road when he was hit by the offending vehicle. They have also led evidence to substantiate their claim.

23. PW-1, namely Shri Shammi Kumar, has specifically stated that he was present on the spot at the time of the accident and when deceased-Hari Singh was walking alongside the road, he was hit by the offending vehicle. Thus, it can be safely held that deceased-Hari Singh was a third party and his risk was covered in terms of the insurance policy.

24. The insurer has not led any evidence in rebuttal despite various opportunities and the respondents' evidence was ordered to be closed by the Tribunal vide order, dated 25th July, 2012. Thus, it cannot be said that adequate opportunities were not granted to the insurer to lead evidence.

25. The claimants are six in number. The Tribunal, after taking the income of deceased-Hari Singh to be ₹ 3600/- per month, has rightly deducted one-fourth towards his personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

26. The deceased was 32 years of age at the time of the accident. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the MV Act.

27. Having said so, the amount awarded cannot be said to be excessive in any way, rather, is meagre. But, the claimants have not questioned the adequacy of the compensation, thus, the same is maintained.

28. All the three points raised and argued by the learned Senior Counsel appearing on behalf of the appellant-insurer are answered accordingly.

29. Having glance of the above discussions, the Tribunal has rightly made the impugned awards, are well reasoned and legal one, need no interference.

30. Accordingly, the impugned awards are upheld and both the appeals are dismissed.

31. Registry is directed to release the awarded amount in favour of the claimants in both the claim petitions strictly as per the terms and conditions contained in the respective impugned awards through payee's account cheque or by depositing the same in their respective bank accounts after proper identification.

32. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J., HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

Pawan Kumar. ...Petitioner.

Versus

Union of India and another. ...Respondents.

CWP No. 9093/2014, 2145, 2789, 2814, 3131, 3140, 3311, 3467, 3468, 4229 of 2015, 267, 674, 1157, 1163, 1164, 1165, 1166, 1167, 1168, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1279, 1606, 1711, 1725, 1855, 1991 and 2762 of 2016

Reserved on: 26.10.2016

Decided on: 02.12. 2016

Constitution of India, 1950- Article 226- Government of India introduced ex-servicemen contributory health scheme to provide medicare to ex-servicemen and their dependents- scheme was contributory and the appointment of the staff was contractual- petitioners were appointed on different dates on contractual basis- their services were dispensed with on cessation of the contractual service- the petitioners filed writ petitions against the orders – a division bench dismissed some of the writ petitions while another division bench allowed some of the writ petitions- full bench was constituted to resolve the conflict between the judgments of division benches – held, that the petitioners were not appointed on permanent basis but on contractual basis- once the contract came to an end, the person holding the post can have no right for renewal of contract or continuation as a matter of right- services of a contractual employee cannot be equated with the services of ad hoc employee- the scheme was meant not only to provide medical facilities to the ex-servicemen but to adjust the personnels superannuating from the army for a short period – therefore, the persons who were given appointment cannot claim any right of renewal of the employment after the expiry of contract – the respondents had never represented to the petitioners that their services will continue – writ Court can judiciallyreview the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action- judicial review cannot extend to the Court acting as an Appellate Authority sitting in judgment over the decision- the petitioners have failed to place any material on record to show that the action of the respondents is either unreasonable, unfair, perverse or irrational – petitioners had accepted the terms and conditions of the employment and they cannot claim higher rights ignoring the conditions laid down in the scheme- petitioners have no right to continue beyond the period prescribed in the contract- petitions dismissed. (Para- 4 to 36)

Cases referred:

Bir Pal Singh versus Union of India and others I L R 2016 (I) HP 81 (D.B.)

Govind Ram and others vs. Union of India and others, I L R 2015 (VI) HP 963 (D.B.)

State of Haryana and others etc. vs. Piara Singh and others etc., AIR 1992 SC 2130

Gridco Ltd. & Another vs. Sadananda Doloi & Ors, AIR 2012 SC 729

Mohd. Abdul Kadir and another vs. Director General of Police, Assam & others (2009) 6 SCC 611

Secretary, State of Karnataka and others vs. Uma Devi (3) and others, (2006) 4 SCC 1

For the Petitioner(s): Mr. Dilip Sharma, Sr. Advocate with Mr. J.L. Bhardwaj, Mr. Tara Singh Chauhan, Mr. Adarsh K. Vashista, Mr. G.R. Palsara and Mr. Manish Sharma, Advocates for the respective petitioners.

For the Respondents: Mr. Shashi Sirsoo, Central Government Counsel for respondents in CWP Nos. 3468, 4229 of 2015, 1163, 1164, 1157 and 1195 of 2016

Ms. Rita Goswami, Central Government Counsel for respondents/Union of India in CWP Nos. 3311 of 2015, 1168, 1194 and 1855 of 2016.

Mr. Neel Kamal Sharma, Central Govt. Counsel for respondents/Union of India in CWP Nos. 1193 and 1606 of 2016.

Mr. Vikas Rathour, Central Govt. Counsel for respondents/Union of India, in CWP No.1191 of 2016.

Mr. Desh Raj Thakur, Central Govt. Counsel for respondents/Union of India in CWP No. 1189 of 2016.

Mr. Nipun Sharma vice Mr. Vinod Thakur, Central Govt. Counsel for respondents/Union of India in CWP No. 1190 of 2016.

Mr. Ashok Sharma, Asstt. Solicitor General ofIndia with Mr. Angrez Kapoor, Advocate forthe respondents/Union of India in the remaining writ petitions.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

In view of the divergent views in two judgments by the learned Division Benches of this Court, the first being CWP No. 1282/2014, titled as ***Ashok Dutt Sharma***versus ***Union of India and others***, decided on 24.3.2014 and the second being CWP No. 4064/2015, titled as ***Bir Pal Singh*** versus **Union *of India and others*** decided on 1.1.2016, a learned Division Bench of this Court vide order dated 16.3.2016 in CWP No. 9093/2014, referred the matter for consideration to a larger Bench.

2. The order of reference reads thus:

> "Mr. Ashok Sharma, learned Assistant Solicitor General of India, has placed on record photocopies of the two judgments passed by the two Coordinate Benches of this Court and stated that both the judgments, involving the same issue as has been urged in the instant writ petition, are contradictory to each other. We have gone through the judgments and are of the opinion that the instant writ petition is required to be heard by a larger Bench. The matter be processed accordingly on the administrative side."

3. The seminal question that emanates in all these writ petitions is: whether an employee, who is appointed purely on contractual basis for a fixed tenure in accordance with non-statutory Scheme, can claim that his appointment be made co-terminus with the scheme or in the alternative his services be continued till the age of superannuation or would his services be liable to be terminated on the expiry of the period of contract, as is provided for in the Scheme.

4. The Ministry of Defence, Government of India, in the year 2003, introduced the Ex-Servicemen Contributory Health Scheme (hereinafter referred to as the "Scheme"). This scheme aimed to provide medicare to ex-servicemen and their dependants through a network of polyclinics and service medical facilities spread across the country. The Scheme was a contributory Scheme and was to extend the earlier referred benefits on payment of contribution. The appointment of the staff was to be on contractual basis. Para 4 of the Scheme reads as under:

"4. When requisite percentage of ex-servicemen under the reservation quota are not available, specific certificate signed by GOC Area to that effect should be placed on record and thereafter the vacancies utilized by employing a suitable civilian. The GOC Area's sanction for employment of the civilian staff on contract will be valid for a period of twelve months only. During this period efforts will be made to appoint a suitable Ex-Serviceman."

Under the terms and conditions of the contractual appointment, para 8 (d) stipulates duration of employment which reads as under :-

"TERMS AND CONDITIONS FOR CONTRACTUAL EMPLOYMENT

8. The detailed criteria are listed in Appendix-'A' and 'B'. The general terms and conditions for employment of the Medical/Para medical/Non medical staff under the ECHS are listed below:-

XXX XXX XXX

(d) Duration of employment. The employment of the staff will be entirely contractual in nature and will be normally for a period of two years at the maximum subject to review of their conduct and performance after twelve months."

Para 14 relates to contract, wherein tenure of contract appointment has been stated that it is for 2 years and review of appointment after 12 months. Extract of para 14 reads as under :-

"CONTRACT

14. Contractual agreements in the prescribed format will be signed by the Station headquarters with the individual candidates and the contracting agency as the case may be :-

(a) Contract with individual employee. The contractual agreement between the contractual employees and the Station Headquarters will include the following :-

(i) Designation of Appointment.

(ii) Place of appointment.

(iii) Contractual nature of appointment for period of two years.

(iv) Review of appointment after 12 months."

The Scheme also provides for procedure for disciplinary action. Para 15 to 17 reads as under :-

"PROCEDURE FOR DISCIPLINARY ACTION

15. In case an ECHS contractual employee is involved in any act of professional misconduct, unethical practices, medical negligence or administrative negligence, disciplinary action will be initiated against the employee and his contract may be terminated after giving a show cause notice without prejudice to any further action that may be deemed fit and initiated considering the nature of the offence committed.

16. The Station Commander will initiate the action for termination of contract on recommendations of the concerned O I/C Polyclinic. A show cause notice will be given to the employee detailing the nature of offences. An inquiry ordered by the Stn Cdr will go into details of the case including the replies to the show cause notice of the employee. The Station Commander may also take legal action under the existing laws of the land for any act listed in para 15 above.

17. The Appointing authority will be the authority for termination of contract."

5. It is not in dispute that it is in pursuance to the aforesaid Scheme that all the petitioners have been appointed on different dates on contractual basis and on cessation of their

contractual service, their services have been dispensed with and aggrieved thereby have filed these writ petitions.

6. While construing the provisions of the Scheme, a Division Bench of this Court in ***Ashok Dutt Sharma's*** case (supra) dismissed the petition by observing as under:

> "Petitioner's appointment as Lab Assistant was on contract basis. We find that the period of contract has come to an end in the month of February, 2014 and as such we find no illegality with the impugned order dated 14.2.2014 (Annexure P-2), whereby petitioner's contractual employment stands terminated. Petition stands disposed of accordingly, so also pending application(s), if any."

7. Whereas another Division Bench of this Court in ***Bir Pal Singh's***case (supra), and earlier to that in case of ***Govind Ram and others*** vs. ***Union of India and others***, CWP No.4446/2014 decided on 16.12.2015, allowed the petition by observing as under:

> 11. The Hon'ble Apex Court in a catena of decisions has deprecated the endeavours on the part of the employer to displace contractual appointees by substituting them with appointees alike to the petitioners herein. It appears that the diktat of the verdicts of the Hon'ble Apex Court frowning upon the employer resorting to displace or dislodge the services of contractual appointees by concerting to substitute or replace them by appointees whose terms of appointments bear an affinity or are alike to the appointments on a contractual basis of the petitioner herein stands openly irrevered by the respondents herein. The irreverence meted by the respondents herein to the principle aforesaid encapsulated in verdicts of the Hon'ble Apex Court reproaching the employer against its substituting contractual appointees by concerting their replacement by appointments on an alike basis, has led the respondents herein to make an indefensible endeavour to by issuing advertisements elicit applications from desirous aspirants for being considered for selection and appointment against post on a contractual basis which hitherto on an alike contractual basis was or stand manned by the petitioner herein. The said endeavour warrants its being baulked especially when its being permitted to be carried forward would overwhelm the experience gained by the petitioner herein on the post whereon he stood/stand appointed on a contractual basis defeating the salutary purpose of skilled man power manning the polyclinics established under ECHS for hence purveying optimum medical care to the stakeholders."

8. We have heard the learned counsel for the parties and have gone through the material placed on record carefully.

9. Mr. Dilip Sharma, learned Senior Advocate assisted by Mr. Tara Singh Chauhan, Advocate would vehemently contend that *ad hoc* or temporary employee cannot be replaced by other *ad hoc* or temporary employee and would place heavy reliance upon the judgment rendered by the Hon'ble Bench of three Judges of the Hon'ble Supreme Court in ***State ofHaryana and others etc.*** vs. ***Piara Singh and others*** **etc.**, AIR 1992 SC 2130, more particularly, the following observations:

> "[25]. Before parting with this case, we think it appropriate to say a few words concerning the issue of regularisation of ad hoc/temporary employees in government service.
>
> Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee should not be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

10. The aforesaid ratio is not clearly applicable to the facts obtaining in the instant cases as it cannot be disputed that the petitioners herein were selected and thereafter appointed

pursuant to an advertisement, which never envisaged appointment on permanent basis and were to be appointed only on contractual basis.

11. Once the appointments were purely contractual then by efflux of time as envisaged in the contract itself the same came to an end and the persons holding such posts can have no right to continue or renewal of contract of service as a matter of right, and therefore, such cases are clearly distinguishable from repeated and *ad hoc* appointments, which was adopted as a matter of practice by the State Government in case of *Piara Singh's* case (supra).

12. The difference in the fact situation obtaining in the instant cases vis-à-vis *Piara Singh's* case (supra) is stark and clear. In the instant cases, the petitioners were appointed on fixed term contract and after lapse of period of service are claiming continuity of the same, and therefore, their services cannot be equated with the *ad hoc* employment as was in the case of *Piara Singh* (supra). The *ad hoc* appointment against a vacancy by the State repeated with number of vacancies, one after another, was construed to be an unfair practice by the Hon'ble Supreme Court and it accordingly directed the State to frame a scheme for regularization of such employees consistent with the reservation policy, if not already framed. Therefore, the judgment in *Piara Sin*gh's case cannot be blindly applied to the facts of the present cases where the petitioners have been appointed on a fixed term contractual appointment and after lapse of the period of contract, are claiming the continuation of the term by excluding other persons from seeking similar term of appointment.

13. The fixed term contractual appointment, as envisaged under the Scheme, is not only to provide medical facilities to the ex-servicemen but at the same time is a mode of adjusting the personnel superannuating from the Army for a short period so as to enable them to adjust suitably even after the tenure with the ECHS Clinics. Thus, the avowed object is to engage such employment to a large number of persons, therefore, the persons, who are given fixed term service contract, cannot claim any right of renewal of such employment after the period of contract is over. The same can neither be equated with repeated ad hoc employment nor can it be termed as unfair practice. It lies best in the wisdom of the employer to grant such appointments on contract to various terms and unless the decision making process is established to be arbitrary on the face of it, the Court will be loath to exercise its extra-ordinary jurisdiction to quash such appointment of fixed term basis.

14. A careful reading of the letter of appointment as also the Scheme leaves no manner of doubt that the appointment offered to the petitioners was limited one. The respondents at any given time had never offered to the petitioners that they would continue in service till the existence of the Scheme or till the time they did not attain the age of superannuation. It is not even the case of the petitioners that there was any uncertainty or ambiguity in the appointments made by the respondents in so far as the tenure on the post to which they were appointed.

15. There is a clear distinction between public employment governed by the statutory rules and private employment governed purely by contract. No doubt with the development of law, there has been a paradigm shift with regard to judicial review of administrative action whereby the writ court can examine the validity of termination order passed by the public authority and it is no longer open to the authority passing the order to argue that the action in the realm of contract is not open to judicial review. However, the scope of interference of judicial review is confined and limited in its scope. The writ court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract.

16. However, judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the administrator to decide whether more reasonable decision or course of action could have been taken in the circumstances. (Refer ***Gridco Ltd. & Another*** vs. ***Sadananda Doloi & Ors***, AIR 2012 SC 729).

17. The petitioners have failed to place before this Court any material to show that the action of the respondents is either unreasonable or unfair or perverse or irrational. As observed earlier, the scheme placed on record governing the service conditions of the petitioners makes it abundantly clear that petitioners in all these petitions had been appointed on contractual basis, that too, on a non-statutory scheme.

18. Faced with this situation, learned counsel for the petitioners would then contend that the action of the respondents in terminating and re-appointing the petitioners was required to be avoided as the petitioners were entitled to be continued as long as the scheme continued or till the time they did not attain the age of superannuation and as such the action of the respondents being contrary to the principles of service jurisprudence was liable to be quashed.

19. In order to buttress their submission reliance is placed on the judgment of the Hon'ble Supreme Court in ***Mohd. Abdul Kadir and another*** vs. ***Director General of Police, Assam and others*** (2009) 6 SCC 611 wherein it was held as under:

> 18. We are therefore of the view that the learned Single Judge was justified in observing that the process of termination and re-appointment every year should be avoided and the appellants should be continued as long as the Scheme continues, but purely on ad hoc and temporary basis, co-terminus with the scheme. The circular dated 17.3.1995 directing artificial breaks by annual terminations followed by fresh appointment, being contrary to the PIF Additional Scheme and contrary to the principles of service jurisprudence, is liable to be is quashed.
>
> [19] Before parting we may however refer to two aspects. One is with reference to the term of the scheme itself. Second is with reference to the pay.
>
> 20. The PIF Scheme has been in force for nearly five decades. PIF Additional Scheme has been in force for more than two decades. The object of the Scheme is detection and deportation of illegal immigrants/fresh infiltrators/re-infiltrators, establishment of second line of defence on Assam Bangladesh Border to man the areas not covered by Border Security Force and monitoring the occurrences on international border. The staff entrusted with such sensitive functions and duties can work wholeheartedly and with commitment in adverse and hostile conditions only if they have security of tenure, without having to constantly worry about their future. If the task under the scheme is perennial, there is no point in executing it as a "temporary" Scheme, though to start with it might have been thought that the task was a short term task.
>
> 21. Another aspect to be noticed is that duties discharged by the Border staff belonging to Assam Police Border Organization under the PIF Scheme is said to be somewhat similar or parallel to the duties discharged by regular forces like Border Security Force and Assam Special Peace keeping Force. Further, part of the very same Border Organization under PIF Scheme is manned by regular police personnel. Therefore, if those working as ad hoc or temporary staff for decades on, are converted to regular permanent staff, that would boost their morale and efficiency.
>
> 22. We are conscious of the fact that the issue is a matter of policy having financial and other implications. But where an issue involving public interest has not engaged the attention of those concerned with policy, or where the failure to take prompt decision on a pending issue is likely to be detrimental to public interest, courts will be failing in their duty if they do not draw attention of the concerned authorities to the issue involved in appropriate cases. While courts cannot be and should not be makers of policy, they can certainly be catalysts, when there is a need for a policy or a change in policy.

> 23. Another issue requiring consideration by the respondents is the question of pay. The order of appointment in the case of first appellant shows that he was appointed in a time scale of pay. First appellant and similarly placed will therefore be entitled to increments in terms of the pay scale. Second appellant was appointed on a fixed pay. But even in the case of second appellant and others appointed on fixed pay, it is alleged that the State Government had treated their appointments as being in a time scale of pay and claiming reimbursement from the Central Government on that basis.
>
> 24. If the State Government has treated the appointments on fixed salary as appointments on a time scale, and claimed reimbursement from the Government of India on that basis, the State Government should, in all fairness, pass on the benefit of such time-scale of pay to the employees concerned. When persons are engaged under the same Scheme, discriminatory treatment, that is extending benefit of increments to some and denying the said benefit to others, should be avoided.

20. We are unable to agree with the aforesaid contention for the reason already set out hereinabove. Apart from that, it is beyond cavil that the petitioners are contractual employees, and therefore, would have a right to remain in employment only for the period mentioned in the contract, that too, subject to other conditions contained in the Scheme, but in no manner would have a right to claim that their appointments now be treated as co-terminus with the project.

21. It may be noticed that the petitioners had voluntarily accepted the appointment granted to them subject to the conditions clearly stipulated in the scheme. These appointments subject to the conditions have been accepted with their eyes wide open, therefore, now the petitioners cannot turn around claiming higher rights ignoring the conditions subject to which the appointments had been accepted.

22. Indubitably, there is an age of superannuation provided in the Scheme; however, the same is only in the nature of providing outer limit to which the employment or contract could have been extended. It does not suggest that there was any specific or implied condition of employment that the petitioners would continue to serve till they attain the age of superannuation. The extensions given to the petitioners were subject to and in accordance with the terms and conditions stipulated in the scheme. The appointment letters, in favour of the petitioners, specifically stated that their services would be governed under the Scheme. The Scheme itself makes manifest that the appointments under the Scheme were only on contractual basis. That being so, it is difficult to see how the appointments could be continued beyond what was envisaged and provided for therein.

23. Learned counsel for the petitioners would then contend that having undergone a selection process, the petitioners had every right to continue in service as their appointments cannot be said to be backdoor appointments.

24. Indisputably, the Scheme under which the petitioners have been appointed does prescribe a mode of selection but looking to the nature of appointment, more especially, the tenure thereof, it cannot be said that the best talent would apply, and therefore, even though such appointments may not amount to backdoor appointments yet nevertheless they would be side door appointments and depend upon the contract service.

25. Moreover, advertising the posts, as fixed term contractual appointment initially and thereafter permitting the incumbents so appointed to continue and making their appointments co-terminus with the Scheme or permitting them to continue in service till the age of superannuation, would amount to playing fraud with those multitude of people, who would otherwise be eligible to apply and may have skipped the employment process thinking that it is only for a temporary period or a contractual period.

26. In addition to the aforesaid, in case the contention of the petitioners is accepted that their services be made co-terminus with the Scheme or they be continued till the age of retirement, then this would amount to rewriting the contract by way of interpretation, contrary to the terms and conditions, that are agreed by the parties to the contract, besides substituting the very Scheme under which they have been appointed. Obviously, such a course is legally impermissible.

27. Learned counsel for the petitioners would then argue that some of the petitioners have put in 8-10 years of service, and therefore, their services cannot be dispensed with. Even this contention cannot be accepted as the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***Secretary, State of Karnataka and others*** vs. ***Uma Devi (3) and others***, (2006) 4 SCC 1 had clearly held that the courts are not to be swayed by the consideration that the concerned person has worked for some time or for a considerable length of time as the person, who is engaged on such appointment is temporary or casual or contractual, is fully aware of the nature of his employment and having accepted such appointments with eyes open cannot turn around and claim permanency or continuation as this would create another mode of employment, which is not permissible. It is relevant to reproduce relevant observations as under:

> [45] While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain not at arms length since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other, words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the constitution of India.

28. It needs no reiteration that framing of Scheme by the respondents is a policy matter and it is more than settled that it is neither within the domain of the Courts nor the scope

of judicial review to embark upon an inquiry as to whether a particular public Scheme is wise or better public policy can be evolved. Nor are the Courts inclined to strike down a policy at the behest of the petitioner merely because it has been urged that a different policy would have been formulated or more scientific or logical.

29. As a last ditch effort, learned counsel for the petitioners would then contend that they have legitimate expectation to continue in service.

30. As already observed earlier, appointment offered to the petitioners was limited one and the respondents had not at any given time offered to the petitioners that they would continue in service till the existence of Scheme or till the date they attain the age of superannuation. It is not even the case of the petitioners that there was any uncertainty or ambiguity in the appointments made by the respondents insofar as the tenure to which they were appointed. Therefore, the question of legitimate expectation to continue in service does not arise. The petitioners at the time of entering into contractual appointment were fully aware of the consequences of appointments being contractual in nature, therefore, such a person(s) cannot invoke the theory of legitimate expectation for being continued in the post.

31. Identical issue has already been considered by the Constitution Bench in ***Uma Devi's*** case (supra) and it was negated by observing as under:

> [46] Learned senior counsel for some of the respondents argued that on the basis of the doctrine of legitimate expectation, the employees, especially of the Commercial taxes Department, should be directed to be regularized since the decisions in dharwad (supra) , Piara Singh (supra) , jacob, and Gujarat Agricultural University and the like, have given rise to an expectation in them that their services would also be regularized. The doctrine can be invoked if the decisions of the Administrative authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision- maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn {see Lord diplock in Council of Civil Service unions v. Minister for the Civil Service, national Buildings Construction Corpn. v. S. Raghunathan, and Dr. Chanchal goyal v. State of Rajasthan. There is no case that any assurance was given by the government or the concerned department while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. Though, the commissioner of the Commercial taxes Department sought to get the appointments made permanent, there is no case that at the time of appointment any promise was held out. No such promise could also have been held out in view of the circulars and directives issued by the Government after the dharwad decision. Though, there is a case that the State had made regularizations in the past of similarly situated employees, the fact remains that such regularizations were done only pursuant to judicial directions, either of the Administrative Tribunal or of the High Court and in some case by this court. Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they. must be regularized in the service though they had not been selected in terms of the rules for appointment. The fact that in certain cases the Court had directed regularization of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation. The argument if accepted

would also run counter to the constitutional mandate. The argument in that behalf has therefore to be rejected.

[47] When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the state has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

32. In view of aforesaid discussion, the question raised in these petitions is answered by holding that the petitioners who have been appointed purely on contractual basis for a fixed term, in accordance with the non-statutory scheme, have no right to claim higher right than what is envisaged in their contract of the appointment and the same would automatically come to an end by efflux of time in terms of the contract. The petitioners holding such posts have no right to continue or claim renewal of the contract, save and except, if so provided in the scheme itself. Therefore, they cannot lay claim that the appointments be made co-terminus with the scheme or in the alternative the services be continued till they attain the age of superannuation.

33. Moreover, the petitioners having accepted the offer of appointment with eyes open cannot turn around by claiming higher rights ignoring the conditions subject to which the appointments had been accepted. There was no uncertainty or ambiguity in the appointments made by the respondents insofar as the tenure to which they were appointed.

34. Evidently, the petitioners at the time of entering into contractual appointments were fully aware of the appointments being contractual in nature. Therefore, they cannot also invoke the theory of legitimate expectation for being continued in the posts.

35. Having said so, we are of the considered opinion that the view taken by the learned Division Bench in ***Bir Pal Singh's*** and ***Govind Ram's*** cases does not lay down the correct law and are accordingly over ruled and the view taken by Coordinate Division Bench in ***Ashok Dutt Sharma's*** case is affirmed.

36. Now that we have held that the petitioners have no right to continue beyond the period as stipulated in the contract, there is no need to refer these matters back to the learned Division Bench for deciding individual cases as none of these petitions are maintainable and accordingly are dismissed. Pending application(s), if any, also stands disposed of leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Piar Chand ...Petitioner

Versus

Deepika & others ...Respondents

CMPMO No. 378 of 2012

Date of Decision : December 2, 2016

Code of Civil Procedure, 1908- Order 7 Rule 14- Plaintiff filed a civil suit for declaration challenging the revenue entries and the entry of date of birth of defendant No.3 – plaintiff filed an application seeking permission to place on record the date of birth certificate, which was dismissed – plaintiff filed a similar application in the suit after it was remanded by the appellate court, which was dismissed- plaintiff was fully aware of the date of birth of defendant No.3 – birth certificate is a public document and could have been obtained or proved without any difficulty- obtaining a certified copy is not the discovery of a new fact- plaintiff failed to prove as to why he had not placed the document on record with the plaint –no error was committed by the Court in dismissing the application- petition dismissed. (Para-8 to 14)

Cases referred:
Shalini Shyam Shetty & another vs. Rajendra Shankar Patil, (2010) 8 SCC 329
Jai Singh & others vs. Municipal Corporation of Delhi & another, (2010) 9 SCC 385
Braham Dass vs. Onkar Chand & another, 2009 (1) Shim. L.C. 339
Kapil Kumar Sharma vs. Lalit Kumar Sharma & another, (2013) 14 SCC 612

For the petitioner : Mr. Anand Sharma, Advocate, for the petitioner.
For the respondent : Mr. Ramakant Sharma, Senior Advocate, with Mr. Basant Thakur, Advocate, for respondent No. 3.
Mr. Neeraj Gupta, Advocate, for respondents No. 6(a) and 6(b).

The following judgment of the Court was delivered:

Sanjay Karol, J. (Oral)

The plaintiff (petitioner herein), claiming himself to be owner, filed a suit for declaration, challenging revenue entries recorded to the contrary, in favour of defendants No. 1 to 3 (respondents No. 1 to 3 herein) to be null and void as also entry of date of birth of defendant No. 3, in the record maintained by the school, to be illegal.

2. The contesting defendants resisted the suit inter aliaclaiming themselves to have perfected the title by way of statutory provisions.

3. Based on the pleadings of the parties, trial court framed several issues, including the one relating to the said entry of date of birth.

4. It is a matter of record that for establishing the factum of incorrect entry pertaining to the date of birth of defendant No. 3, plaintiff did not place any material, worthy of credence, alongwith the plaint. It is also a matter of record that for establishing such fact, plaintiff filed an application seeking permission to place on record birth certificate, which came to be dismissed by the trial Court vide order dated 9.8.2011, passed in CMA No. 138/11 (Civil Suit No. 78/98/96), titled as *Piar Chand vs. Deepika & others,* operative portion whereof, reads as under:

> "4. Perusal of the case file reveals that the photocopy of certificate of Sh. Vivek Mahajan (matriculation certificate) placed on record. Mere placing on record the photocopy of document cannot be held as perse admissible unless it is upon the applicant to show under which provision of law, it is perse admissible. Perusal of the case file reveals that the suit has been filed in the year 1996, more than fifteen years already stand lapsed. Perusal of the plaint reveals that it is within the knowledge of applicant to prove the said document being photocopy placed on record and the fate of the case is depend upon it. Applicant fails to show any "due diligence" upon his part. As per law laid down in a case titled as *Madan Mohan Singh & Ors. vs. Rajni Kant & Anr.* reported in 2010 (3) APEX COURT JUDGMENTS 196 (S.C.) *"If a person wants to rely on a particular date of birth and wants to press document in service, he has to prove its authenticity in*

terms of S. 32(5) of Evidence Act, by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein".

5. Applying the ratio of this citation, by no stretch of imagination it be held that the photocopy of document is perse admissible and this court to exhibit in the statement of counsel.

6. In view of discussion above, application is not sustainable as applicant fails to show any due diligence on his part as well as photocopy of matriculation certificate cannot be tendered in the deposition being perse admissible. There is no force in the application accordingly, it is rejected. Application, after registration and its due completion be tagged with main case file."

Significantly this order has attained finality.

5. It is a matter of record that though the suit came to be disposed of in terms of judgment dated 31.12.2007, but it stood remanded back to the trial Court and at that stage, plaintiff again filed a similar application, seeking permission to place on record certified copy of the birth certificate so obtained under the provisions of the Right to Information Act, 2005.

6. It is this application which stands dismissed in terms of impugned order dated 17.11.2012, passed by Civil Judge, (Jr. Divn.), Chamba, in Civil Suit No. 78/98/1996, titled as *Piar Chand vs. Deepika & others* (Annexure P-9).

7. Bare reading of the impugned order is reflective of the fact that not only has the trial Court appreciated the statutory provisions but correctly applied the same to the attending fact situation.

8. Perusal of the application in question only reveals that plaintiff was fully aware of the date of birth of defendant No. 3. Birth certificate is a public document and could have been obtained or proved, without any difficulty, at the first opportune time. In any event, between the dismissal of the first application and passing of the impugned order, no new fact has emerged. Obtaining a certified copy is not a discovery of a new fact. The earlier application came to be dismissed not only for the reason that plaintiff had placed photocopy of the document but also for the reason that he had failed to exhibit exercise of due diligence, explaining the delay, in placing the document on record.

9. Even in the instant application, plaintiff has, prima facie, failed to establish as to why such document never came to be filed in the Court alongwith the plaint. Also no steps for summoning the record at the time of trial were ever taken by him.

10. It cannot be said that in the passing of impugned order, trial Court has either exceeded or failed to correctly and appropriately exercise jurisdiction so vested in it, warranting interference by this Court in a petition of the nature so filed by him, scope of interference with which, elaborately stands discussed in *Shalini Shyam Shetty & another vs. Rajendra Shankar Patil,* (2010) 8 SCC 329 and *Jai Singh & others vs. Municipal Corporation of Delhi & another,* (2010) 9 SCC 385, so referred to and relied upon by Sh. Ramakant Sharma, learned Senior Counsel.

11. In fact, parties have been litigating since the year 1996 and the first attempt to place on record the said document was made only in the year 2011. It is not that plaintiff is an illiterate rustic person, having no access to justice delivery system. It is also not that he was misguided or was under some misconception of law or fact. It is also not that he belongs to the lowest strata of the society, which prevented him from taking steps at the earliest. Also issues can be decided on the basis of evidence already led by the parties.

12. It is not the law that under no circumstance document can be taken on record, but then it has to be with the leave of the Court, exercise of which, in any case has to be within the settled parameters of law and unexplained delay, lack of due diligence and furnishing inadequate explanation, inter alia being certain factors not warranting favourable exercise

thereof. Prejudice, if at all, is to be shown by the plaintiff and not the defendant for the statutory provisions under Order VII Rule 14 CPC, mandates plaintiff to prepare a list and produce all documents with the plaint. Now in the instant case, what prevented the plaintiff to do so and wake up from deep slumber after more than 15 years remains unexplained.

13. There is yet another reason for dismissing the plaintiff's application and that being, finality attached to the earlier order.

14. In support of the petition, reliance is sought on the decision rendered by this Court in *Braham Dass vs. Onkar Chand & another,* 2009 (1) Shim. L.C. 339. The said decision stands rendered in the given facts and circumstances, where the case was still at the stage of trial. To the similar effect, is the decision rendered by Hon'ble the apex Court in *Kapil Kumar Sharma vs. Lalit Kumar Sharma & another,* (2013) 14 SCC 612.

In view of the aforesaid discussions, present petition, devoid of any merit is dismissed. Pending application(s), if any, also stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No. 449 of 2012
a/w FAO No. 33 of 2013
Decided on: 02.12.2016

FAO No. 449 of 2012

Prit Pal Singh ...Appellant.

Versus

Smt. Radha Devi and others ...Respondents.

FAO No. 33 of 2013

Smt. Radha Devi and others ...Appellants.

Versus

Shri Amar Singh and others ...Respondents.

Motor Vehicles Act, 1988- Section 166- Claimant specifically pleaded that accident was outcome of contributory negligence – challan was filed against the driver of the truck as well as motorcyclist – drivers of both vehicles had driven the vehicles rashly and negligently and it was a case of contributory negligence – the deceased was bachelor and 50% amount was to be deducted towards personal expenses- the deceased was 21 years of age and multiplier of 15 was applicable – however, multiplier of 16 was applied by the Tribunal, which is maintained – appeal dismissed.

(Para-11 to 26)

Cases referred:

Kamlesh and others versus Attar Singh and others, 2015 AIR SCW 6158
Meera Devi and another versus H.R.T.C. and others, 2014 AIR SCW 1709
Khenyei versus New India Assurance Co. Limited & others,2015 AIR SCW 3169
Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

FAO No. 449 of 2012

For the appellant: Mr. O.C. Sharma, Advocate.

For the respondents: Mr. J.L. Bhardwaj, Advocate, for respondents No. 1 to 5.
Mr. J.S. Bagga, Advocate, for respondent No. 6.
Mr. Praneet Gupta, Advocate, for respondent No. 7.
Name of respondent No. 8 stands deleted.
Nemo for respondent No. 9.

FAO No. 33 of 2013

For the appellants: Mr. J.L. Bhardwaj, Advocate.

For the respondents: Mr. J.S. Bagga, Advocate, for respondent No. 1.
Mr. Praneet Gupta, Advocate, for respondent No. 2.
Mr. O.C. Sharma, Advocate, for respondent No. 3.
Nemo for respondents No. 4, 6 and 7.
Name of respondent No. 5 stands deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Both these appeals are outcome of one vehicular accident and award, thus, I deem it proper to club both these appeals and determine the same by this common judgment.

2. Challenge in both these appeals is to award, dated 28th July, 2012, made by the Motor Accident Claims Tribunal, Fast Track Court, Solan, Himachal Pradesh (hereinafter referred to as "the Tribunal") in MACT Petition No. 1FTC/2 of 2007, titled as Smt. Radha Devi and others versus Shri Lala Ram alias Lal and others, whereby compensation to the tune of ₹ 5,10,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the insurer of offending truck and motorcyclist and the owner of the offending motorcycle were saddled with liability in equal shares (hereinafter referred to as "the impugned award").

3. The motorcyclist, owner-insured, driver and insurer of the offending truck have not questioned the impugned award on any count, thus, the same has attained finality so far it relates to them.

4. Owner of the motorcycle, namely Shri Prit Pal Singh, has questioned the impugned award by the medium of FAO No. 449 of 2012 on the grounds taken in the memo of the appeal.

5. By the medium of FAO No. 33 of 2013, the claimants have called in question the impugned award on the ground of adequacy of compensation.

6. In order to determine both these appeals, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeals in hand.

7. The claimants filed claim petition before the Tribunal for grant of compensation to the tune of ₹ 20,00,000/-, as per the break-ups given in the claim petition, on the grounds taken in the memo of the claim petition, was resisted by the respondents and following issues came to be framed by the Tribunal on 1st March, 2008:

> *"1. Whether Shiv Kumar @ Robin died in a motor vehicle accident which took place on 22-5-2006 due to negligence of respondents No. 1 and 5? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether petitioners are entitled to compensation, if so, to what amount and from whom? OPP*
>
> *3. Whether driver of truck No. HP-11-4331 was not holding a valid driving licence on the date of accident, if so its effect? OPR-3*
>
> *4. Whether vehicle i.e. truck No. HP-11-4331 was not having valid registration certificate, route permit and other documents on the date of accident and was being driven in breach of terms and conditions of policy, as alleged, if so its effect? OPR-3*
>
> *5. Whether respondent No. 4 had sold motor cycle in question bearing No. HR-49-2397 to respondent No. 6 Sanjeev Kumar on 12-5-2006, if so its effect? OPR-4*
>
> *6. Whether the petition is not maintainable? OPR-6*

7. Whether the petitioners have no cause of action against respondent No. 6? OPR-6

8. Whether the petition is bad for non-joinder of necessary parties? OPR-6

9. Relief."

8. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants in terms of the impugned award. Hence, the instant appeals.

FAO No. 449 of 2012:

9. Learned counsel appearing on behalf of the appellant in FAO No. 449 of 2012 argued that the accident was not outcome of the contributory negligence, but was the result of the rash and negligent driving of the offending truck by its driver, namely Shri Lala Ram alias Lal.

10. The argument of the learned counsel for the appellant is not tenable for the following reasons:

11. The claimants have specifically pleaded in the claim petition that the accident was outcome of contributory negligence, which fact has not specifically been denied by the respondents in the claim petition, thus, is held to be an admission on their part.

12. The final report under Section 173 of the Code of Criminal Procedure (hereinafter referred to as "CrPC") is on the record as Ext. RW-1/C, the perusal of which does disclose that the challan has been presented before the Court of competent jurisdiction against the diver of the offending truck as well as the motorcyclist, thus, is a case of contributory negligence.

13. The question is - what is contributory negligence? When the drivers of two vehicles involved in the accident have not taken due care and caution while driving their respective vehicles and have contributed in causing the accident, is contributory negligence.

14. The Apex Court in case titled as **Kamlesh and others versus Attar Singh and others** reported in **2015 AIR SCW 6158,** in para 8 has held as under:

"8. We have heard learned counsel for the parties and perused, inter alia, the evidence on record of Ram Parshad PW2 and Devender PW.3. The method and manner in which the accident has taken place leaves no room for doubt that it was a case of composite negligence of drivers of both the vehicles, that is the driver of Maruti car and driver of tempo. Though Police has registered a case against driver of the tempo Attar Singh and has filed a chargesheet but the same cannot be said to be conclusive. Though, Attar Singh has stated that it was in order to oblige the driver of the Maruti car, a case was registered against him. Be that as it may. It appears both the drivers have tried to save their liability. In such circumstances, the version of eye-witnesses, PW.2 and PW.3 assumes significance. The fact remains that car had dashed the tempo on the middle portion near footstep. Thus the method and manner in which the accident has taken place leaves no room for doubt that both the drivers were negligent. Man may lie but the circumstances do not is the cardinal principle of evaluation of evidence. No effort has been made by the High Court to appreciate the evidence and method and manner in which the accident has taken place. Both the aforesaid witnesses have stated Maruti Car was in excessive speed. However, it appears driver of tempo also could not remove his vehicle from the way of Maruti Car. Thus, both the drivers were clearly negligent. It appears from the facts and circumstances that both the drivers were equally responsible for the accident. Thus, it was a case of composite negligence. Both the drivers were joint "tort-feasors", thus, liable to make payment of compensation."

15. The Apex Court in another case titled as **Meera Devi and another versus H.R.T.C. and others,** reported in **2014 AIR SCW 1709,** has laid down the similar principles of law. It is profitable to reproduce para 10 of the said judgment herein.

> *"10. To prove the contributory negligence, there must be cogent evidence. In the instant case, there is no specific evidence to prove that the accident has taken place due to rash and negligent driving of the deceased scooterist. In the absence of any cogent evidence to prove the plea of contributory negligence, the said doctrine of common law cannot be applied in the present case. We are, thus, of the view that the reasoning given by the High Court has no basis and the compensation awarded by the Tribunal was just and reasonable in the facts and circumstances of the case."*

16. The Apex Court in the case titled as **Khenyei versus New India Assurance Co. Limited & others,**reported in **2015 AIR SCW 3169,** has laid down the same principles of law.

17. Applying the test and while going through the facts of the case and the record, it can be safely held that both the drivers have driven the offending vehicles rashly and negligently and the accident was outcome of contributory negligence.

18. The Tribunal, while making discussions in para 14 of the impugned award, has rightly decided issue No. 1, needs no interference.

19. Viewed thus, the appeal filed by the owner of the motorcycle, i.e. FAO No. 449 of 2012, merits to be dismissed.

FAO No. 33 of 2013:

20. The question to be determined in this appeal is – whether the amount awarded is inadequate? The answer is in the negative for the following reasons:

21. I have gone through the impugned award as well as the record and am of the considered view that the Tribunal has rightly assessed income of the deceased at ₹ 5,000/- per month, i.e. ₹ 60,000/- per annum, from all sources.

22. The deceased was a bachelor. Thus, the Tribunal has rightly made deductions to the extent of 50% towards his personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

23. Admittedly, the deceased was 21 years of age at the time of the accident. The multiplier of '15' was applicable in view of the ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the Motor Vehicles Act, 1988 (hereinafter referred to as "MV Act"). However, the multiplier of '16' applied by the Tribunal is maintained.

24. Viewed thus, the Tribunal has rightly made the discussions in paras 15 to 18 of the impugned award. The amount awarded cannot be said to be inadequate in any way, is upheld accordingly.

25. Having said so, the appeal filed by the claimants, i.e. FAO No. 33 of 2013, deserves to be dismissed.

26. Having glance of the above discussions, the impugned award is upheld and both the appeals are dismissed.

27. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts after proper identification.

28. Send down the record after placing copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Pushpa Devi & others .....Appellants-Plaintiffs.

Versus

Amro Devi and others .....Respondents-defendants.

RSA No.4323 of 2013.
Reserved on: 25th November, 2016.
Date of Decision : 2nd December, 2016.

Specific Relief Act, 1963- Section 5- Plaintiffs filed civil suit pleading that they are owners in possession of the shop – predecessor-in-interest of the defendants had asked the plaintiffs for one room – plaintiffs had permitted him to keep the material – he had not vacated the room – hence, the suit was filed seeking possession – the defendants pleaded that shop was joint family property and was allotted to the predecessor of the defendants – the suit was dismissed by the Trial Court – an appeal was filed, which was also dismissed- held in second appeal that the suit land is recorded to be in the joint ownership of the parties in the revenue record - the land was not partitioned by metes and bounds – Hindi translation of the document in Urdu was not proved and reliance could not have been placed upon the same – however, in absence of partition, plaintiffs were not entitled for any relief – appeal dismissed.(Para-8 to 12)

For the Appellants: Mr. Ajay Sharma, Advocate.
For Respondent No.1: Mr.Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Under the concurrently recorded renditions of both the learned Courts below, the suit of the plaintiffs stood dismissed, whereupon, theirs standing aggrieved, they through the instant appeal constituted herebefore concert to seek their reversal.

2. Briefly stated the facts of the case are that the land comprised in Khata No. 366min, Khatauni NO. 584 min, Khasra No.1724, measuring 0-02-56 hectares situated at Mohal and Mauza Haripur, Tehsil Dehra, District Kangra, H.P, is abadi deh and the plaintiff is also co-sharer of this land. The plaintiff Mangat Ram, predecessor-in-interest of the present appellants had his shop consisting of four rooms on the ground floor and two rooms on the first floor on the above said khasra No. 1724. Previously, it was only one shop single storied slate roofed which was owned and constructed by the father of the plaintiff, Shri Nathu Ram and after his death in family settlement, the shop was given to Mangat Ram, plaintiff. The total value of this shop was fixed as Rs.2400/- and the plaintiff paid Rs.800/- each to Hamir Chand and Minjroo, who were brothers of Mangat Ram. The plaintiff Mangat Ram became absolute owner of the shop in dispute. After getting the shop in the year 1980-81 the plaintiff converted the single storied shop in four rooms by giving partition walls and it was converted into four rooms and similarly second story was also raised where to rooms were constructed. Shri Hamir Chand was serving away and was residing with his family outside the State of H.P., who came back in the village in the year 1990 after his retirement alongwith his family and household articles. Since old joint house was small and was not having sufficient accommodation to keep the articles brought by Hamir Chand, predecessor-in-interest of the defendants, Hamir Chand requested the plaintiff to give the room in dispute to keep the material/articles brought by him after his retirement. The plaintiff agreed and

allowed Hamir Chand to keep the material in disputed room i.e. in one room of the first floor as shown by letters 'CDEF' in the map. The said Hamir Chand had agreed to vacate the accommodation after constructing his own house. The said Hamir Chand constructed his house in the year 1994-95, but even then he did not vacate the accommodation provided to him by Mangat Ram. The decree for possession of the room in question that is mentioned as 'CDEF' in the map in the first floor of the house has been sought.

3. The suit was contested by the defendants by filing written statement wherein preliminary objections of maintainability, cause of action and estoppel have been taken. On merits, it has been submitted that the shop in question was joint family property of Mangat Ram, Hamir Chand and Minjroo Ram, which on 7.6.1982 along with other joint houses has been partitioned in family settlement by owners i.e. Mangat Ram, Hamir Chand, Minjroo Ram and Bishni Devi wife of Minjroo Ram with the help and intervention of respectables of village. The settlement was reduced into writing signed by co-sharers. This family settlement was made to keep peace and harmony among brothers and to enjoy the joint family property. The shop was valued and share of Minjroo Ram amounting to Rs.800/- was given to him which was received by him. Since, 7.6.1982 the plaintiff and defendants are owners of the shop. This shop was earlier having one room below and one room on the 1st floor which after settlement was converted into four rooms so it could be shared by the parties. The plaintiff and Hamir Chand are owners of the shop in equal shares. No amount of Rs.800/- was paid to Hamir Chand. It is the plaintiff who had taken the ground floor of the shop from Hamir Chand on request. Therefore, dismissal of the suit is sought.

4. The plaintiffs/appellants herein filed replication to the written statement of the defendants/respondents herein, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiffs are entitled to the relief of possession, as prayed for? OPP
2. Whether the suit is not maintainable? OPD.
3. Whether the plaintiffs are estopped by their act, conduct and acquiescence from filing the suit? OPD
4. Whether the joint family property including suit property has been partitioned on 7.6.1982, in family settlement by predecessor of parties, as alleged? OPD.
5. Whether the plaintiffs are absolute owners of suit property? OPD.
6. Whether the defendants are co-sharers in the suit property? OPD.
7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the appellants herein/plaintiffs before the learned first Appellate Court, the latter Court dismissed their appeal.

7. Now the plaintiffs/appellants herein have instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgement and decree by the learned first Appellate Court. When the appeal came up for admission on 21.07.2014, this Court, admitted the appeal instituted herebefore by the plaintiffs/appellants against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

1. Whether impugned judgments and decrees passed by Courts below in law stand vitiated on account of misreading and mis appreciating of oral and

documentary evidence with special reference of the statements of PW-1 to PW-5 and DW1 to DW4 and further Exts. PW/1 to Ex.PW5/A and DW2/A to DW1/A, thereby vitiating the impugned judgments and decrees?

Substantial question of Law No.1:

8. One Nathu had three sons,namely, Mangat Ram, predecessor-in-interest of the plaintiffs, Hamir Chand, predecessor-in-interest of the defendants and One Minjroo. The suit property stands located upon khasra No.1724. In the relevant revenue records, the suit property stands reflected to be in the joint ownership of the parties at contest, sequel, whereof is qua thereupon standing aroused the principle of joint tenancy wherewithin the trite legal nuance is held qua until its dismemberment occurs by metes and bounds, the recorded co-owners holding unity of title besides community of possession therein, whereupon any exclusive holding of possession by any of the co-owners of the jointly recorded suit property, renders his holding possession thereof to be construable to be possession also on behalf of the other recorded co-owners, thereupon he stands disabled to despite the factum of exclusivity of his possession, oust the legitimate claim qua joint possession thereof of other co-sharers besides any co-owner holding exclusive possession of joint property not holding any leverage to forestall other co-owners to beget its partition by metes and bounds.

9. Even if, assumingly, the defendants hold exclusive possession of the undivided suit property yet on anvil aforesaid with their possession thereupon in the capacity as co-owners along with the plaintiffs, would also frustrate the relief canvassed by them in their suit qua theirs holding entitlement to seek delivery of its possession vis-a-vis them unless of course on its standing partitioned by metes and bounds, it falls to their share whereupon on any resistance by the defendants to handover its possession to the plaintiffs, the latter would hold the facilitation to through the enjoined legal mechanism seek delivery of its possession from the defendants. The aforesaid inference visibly ousts the concert of the plaintiffs to through the instant appeal upset the concurrently recorded renditions of both the learned Courts below. Nonetheless, the learned Courts below under their concurrently recorded renditions had declined relief to the plaintiffs on the anvil of the defendants successfully proving the factum of Ex.Dx comprising a family settlement holding recitals qua a partition occurring inter se the litigating parties hereat qua the hitherto undivided suit property , whereupon, they concomitantly pronounced qua with the defendants holding exclusive title qua the suit property, it thereupon, hence non suiting the plaintiffs.

10. The original of Ex. Dx stands scribed in Urdu. For Ex. Dx, scribed in Urdu whereupon its contents were unreadable, except by a person who is well conversant in Urdu, enjoined the defendants to obtain an authentic translation thereof from a person well conversant in Urdu also they stood enjoined to lead into the witness box, the translator of Ex. Dx, who carried its translation from Urdu to Hindi whereupon, the translated version of Ex. Dx wasboth readable besides admissible in evidence. The aforesaid injunction cast upon the defendants for theirs thereupon efficaciously proving Ex. Dx stands uncomplied by them. Contrarily only a photo copy of its Hindi translation stood adduced in evidence. The photostated copy of the Hindi translation of Ex. Dx neither discloses therein the name of the translator who carried its apposite translation nor obviously the person who carried the translation of Ex. Dx besides made its translation from Urdu to Hindi stood led into the witness box by the defendants, for facilitating him to during his testification on oath unravel qua his carrying out an authentic Hindi translation of Ex. Dx. The effect of the aforesaid omission of the defendants, in theirs thereupon efficaciously proving Ex. Dx besides its photostated Hindi translation rendered Ex. Dx besides its photostated Hindi translation to be both unreadable and inadmissible in evidence whereas both the learned Courts below visibly misdirected themselves in theirs concurrently imputing sanctity to Ex. Dx also to its photostated Hindi translation, whereupon they inaptly concluded qua with the suit property on its standing subjected to partition by metes and bounds inter se the parties at contest, its falling to the exclusive ownership of the defendants thereupon the suit the plaintiffs warranting dismissal.

11. Be that as it may, with efficacious proof not standing adduced by the defendants in the manner aforesaid qua the recitals embodied in Ex. Dx yet thereupon the suit property is to be construed to be joint besides undivided inter se the litigating parties whereupon exclusivity of possession thereon of the defendant would not till its dismemberment by metes and bounds, facilitate the plaintiffs to reclaim its possession from the defendants.

12. The upshot of the above discussion is though with this Court concluding qua both the learned Courts below not properly appraising the import of Ex. Dx also in theirs imputing sanctity to it, theirs committing a gross error, nonetheless, for reasons aforesaid the suit of the plaintiff would not succeed. Consequently, the substantial question of law is answered in favour of the plaintiffs/appellants herein and against the defendants/respondents herein.

13. Though, In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE.

Rattan Chand (since dead) through LRs & Anr. ...Appellants.

Versus

Julfi Ram ...Respondents.

RSA No.110 of 2005.
Reserved on: 23.11.2016.
Decided on: December 2, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendants threatened to take forcible possession of the same – the suit was opposed by the defendants by pleading that a portion of the suit land was purchased by defendant No.1 vide agreement dated 14.11.1984- defendant No.1 is in possession of the portion of the suit land and has become owner by adverse possession- the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed – held in second appeal that the agreement shows that the father of the minor plaintiff had agreed to sell the suit land to the defendant No.1 for a sale consideration of Rs.2,000/- - the father of the plaintiff was not competent to alienate the property of the plaintiff and the agreement will not bind the plaintiff- Besides, it was established by the Revenue Record that plaintiff is in possession – defendants had not led sufficient evidence to rebut the presumption of the correctness attached to the revenue record- the suit was rightly decreed by the Appellate Court- appeal dismissed.(Para-7 and 8)

For the Appellants: Mr.Anand Sharma, Advocate.
For the Respondent: Mr.Ashwani K.Sharma, Sr.Advocate with Mr. Nishant Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal stands directed against the impugned rendition recorded by the learned first appellate Court whereby the latter Court reversed the pronouncement made by the learned trial Court dismissing the suit for injunction preferred there-before by the plaintiff.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiff is owner in possession of the land comprised in Khata No.13 min, Khatauni No.13 min, Khasra No.279, measuring 0-10-57 hectares as per missal hakiat for the year 2000-2001, situated in Tika Grond, Mauza Kanger, Tehsil Barsar, District Hamirpur, H.P. (herein-after referred to as 'the suit land'). The defendants have no right, title or interest in the suit land. They are strangers. On 17.5.2002 when the plaintiff was ploughing the suit land, the defendants

appeared there and objected to it. They threatened that they will take forcible possession of the suit land and not allow him to plough the same. They also threatened to cut valuable trees from it due to which the plaintiff has filed the instant suit for permanent prohibitory injunction restraining the defendants from interfering in the possession of the plaintiff over the suit land.

3. The suit of the plaintiff was resisted and contested by the defendants. In their written-statement they have taken preliminary objection inter alia of cause of action, maintainability, estoppel and the plaintiff having no locus standi to file the present suit. On merits it is alleged by the defendants that the total area of the suit land is 0-10-57 hectare and out of this land the defendant No.1 has purchased the land measuring 0-0768 hectares vide agreement of 14.11.1984 and since 14.11.1984 he is in continuous possession of the land purchased by him i.e. 2 kenals out of the suit land and now he has become owner of this 2 kanal of land by way of adverse possession. It is further alleged that after the agreement in question the father of the plaintiff had fixed a boundary on the spot with the help of a Patwari. On this ground it is alleged that the suit of the plaintiff is not maintainable in the present form.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties in contest:-

(xi) Whether the plaintiff is the owner in possession of the suit land as alleged? OPP

(xii) Whether the plaintiff is entitled to the injunction prayed for? OPP

(xiii) Whether the plaintiff is entitled to a decree for possession as claimed? OPP

(xiv) Whether the suit is not maintainable in the present form? OPD

(xv) Whether the plaintiff is estopped from filing the suit by his act and conduct? OPD

(xvi) Whether the plaintiff has the locus-standi to sue? OPP

(xvii) Whether the plaintiff has a cause of action? OPP

(xviii) Whether the defendants are entitled to special costs u/s 35A CPC as claimed, if so, their quantum? OPD

(xix) Whether the defendant No.1 has become owner of the suit land by way of adverse possession as alleged. If so, its effect? OPD.

(xx) Whether the suit has not been properly valued for the purpose of the court fee and jurisdiction ? OPD

(xxi) Whether the defendant No.1 purchased the land vide agreement dated 14.11.84 as alleged. If so, its effect? OPD

(xxii) Relief.

5. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff whereas the learned First Appellate Court proceeded to allow the appeal preferred before it by the plaintiff.

6. Now the appellants/defendants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 21.3.2005, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

6. Whether the findings recorded by the learned lower Appellate Court are absolutely perverse and based on complete misreading of the judgment and decree passed by the learned trial Court?

7. Whether the suit filed by the plaintiff was time barred?

8. Whether defendant/appellant was entitled to protect his possession under Section 53-A of the Transfer of Property Act more especially when the agreement dated 14/11/1984 had been duly proved on record an don the

basis of this agreement the defendant/appellant had been put in possession over the suit land.

9. Whether the findings recorded by the learned Appellate Court are otherwise perverse being based on complete misreading and misappreciation of the pleadings and exhibited documents on record?

Substantial questions of law:

7. Ex.DW-2/A stood executed on 14.11.1984 qua the suit land inter-se father of the then minor plaintiff with the defendants. Thereunder the suit land stood agreed to be alienated to defendant No.1. Ex.DW-2/A also therewithin holds a recital qua the suit property standing agreed to be sold for a sale consideration of Rs.2,000/-by the father of the then minor plaintiff vis-à-vis the defendant No.1 also it holds recitals qua the sale consideration standing received thereat on behalf of the then minor thereat by the latter's father. A recital stands also encapsulated therein qua the father of the plaintiff undertaking therein qua on the plaintiff attaining majority the latter executing a sale deed qua the suit land besides it holds a recital qua his holding responsibility qua Julfi Ram on attaining majority his executing a sale deed with the defendant No.1 qua the suit land. In addition recitals stand embodied therein qua on the plaintiff refusing to execute the sale deed with defendant No.1 qua the suit land thereupon the father of the plaintiff undertaking to alienate vis-à-vis defendant No.1 3 kenals of land held in his ownership. The factum of formidable proof emanating qua occurrence of signatures of the father of the plaintiff and of the defendants on the relevant agreement to sell the suit land embodied in Ex.DW-2/A stands unflinchingly evinced besides unearthed from the relevant apposite material. However proof of occurrence thereon of signatures respectively of the father of the plaintiff and of the defendants would not ipso-facto beget an inference of devolution of interest of the minor in the suit property standing validly bestowed upon the defendant conspicuously when at the time contemporaneous to its execution the plaintiff thereat was a minor whereupon emanation stood enjoined to sprout of the relevant evidence holding vivid portrayals therein qua the father of the plaintiff while executing qua the suit property Ex.DW-2/A with the defendants his not thereby harming or jeopardizing the interest of the minor in the suit property rather in his executing DW-2/A with the defendants his ensuring qua thereupon the welfare besides the benefit of the minor standing facilitated. However the aforesaid evidence is amiss. In aftermath lack of the aforesaid evidence constrains a conclusion qua dehors proof standing adduced qua occurrence of signatures thereon of the father of the plaintiff and of the defendants not ipso facto proving the imperative factum of the father of the then minor plaintiff in his executing DW-2/A with the defendants his ensuring qua thereupon the benefit besides interest of the then minor plaintiff in the suit property standing facilitated. Significantly this Court while standing seized of DW-2/A which stood executed at a stage when the plaintiff was a minor stands enjoined to in the capacity of parens patriae vis-à-vis the then minor plaintiff ensure the paramount factum qua its execution not standing gripped with any vice of the minor's interest in the suit property at the relevant stage of its execution standing neither compromised nor adversely affected whereas for reasons aforesaid unflinching evidence for sustaining the aforesaid factum being amiss, prods this Court to reinforcingly with accentuated vigor conclude qua Ex.DW-2/A standing stained with a colour of invalidity whereupon no bestowment of title occurred thereunder vis-à-vis the defendant.

8. Be that as it may even if assumingly dehors the aforesaid inference as stands erected by this Court the defendants for repulsing the apposite endeavor of the plaintiff was enjoined to prove the factum of his holding possession upon the suit property. Even though the defendant No.1 canvasses that in pursuance to Ex.DW-2/A his holding possession of the suit property whereupon he concerts to canvass qua his holding entitlement to receive the benefit of section 53(A) of the transfer of the property Act, espousal whereof for the reasons afore-stated stands blunted yet dehors the vigor of his espousal qua the aforesaid facet getting smothered, nonetheless he stood enjoined to prove by emphatic evidence qua his holding possession of the suit property. However the relevant documentary evidence comprised in copy of missal hakiat bandobast borne on Ex.P-1, Exhibit whereof pertains to the suit land rather holds visible

reflections qua the plaintiff holding possession of the suit property, reflections whereof when hold a presumption of truth hence enjoined the defendants to by adducing cogent evidence dislodge the aforesaid presumption. The defendants in making the aforesaid concert have merely relied upon oral evidence besides relying upon an acquiescence made by the plaintiff in his cross-examination qua his sighting the defendants ploughing the suit land. However therefrom it is unbefitting to conclude qua the presumption of truth carried by the apposite reflections occurring in the apposite revenue record standing dislodged especially when the plaintiff while making the aforesaid acquiescence has omitted to make therein a precise communication qua the defendants ploughing the suit land whereas for the aforesaid acquiescence to give capitalization to the espousal of the defendants qua thereupon theirs standing concluded to hold possession of the suit land an acquiescence holding a precise embodiment therein qua the defendants ploughing the suit land stood enjoined to emanate from the plaintiff whereas his deposing nebulously qua the aforesaid facet constrains an inference qua the nebulously worded acquiescence made by the plaintiff qua his sighting the defendants to plough land being un-relatable to the suit land rather it being relatable to some other land whereupon with hence the presumption of truth enjoyed by the apposite revenue records remained un-eroded rendering reliance thereupon for making a conclusion qua the plaintiff holding possession of the suit land being a tenable ensuing sequel therefrom.

9. Accordingly, there is no merit in the instant appeal and the same is dismissed. Substantial questions of law answered in favour of the plaintiff accordingly. Impugned judgment is maintained and affirmed. All pending application(s) shall also stand disposed of. No costs. The records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Reliance General Insurance Company Ltd. .....Appellant

Versus

Smt. Shiv Rajia & others .....Respondents

FAO No. 429 of 2012
Decided on : 02.12.2016.

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs.4,500/- 1/3rd was to be deducted towards personal expenses and loss of source of dependency would be Rs.3,000/- per month- multiplier of 12 is applicable – thus, claimants are entitled to Rs.3000 x 12 x 12= Rs.4,32,000/- under the head loss of dependency- claimants are also entitled to Rs.25,000/- under the head 'loss of consortium and Rs.25,000/- under the head 'loss of love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs.4,82,000/- along with interest @ 7.5% per annum. (Para-6 to 13)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105

For the Appellant : Mr. Jagdish Thakur, Advocate.

For the Respondents: Mr. Rakesh Thakur, Advocate, for respondents No. 1 & 2.
Ms. Neelam Kaplas, Advocate vice Mr. J.R. Poswal, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Mr. Rakesh Thakur, Advocate, stated at the Bar that claimant-respondent No. 2 has attained the age of majority. His statement is taken on record. Accordingly, guardian is discharged. Registry to make necessary entries in the cause title.

2. Subject matter of this appeal is the award dated 21st April, 2012, made by the Motor Accident Claims Tribunal-1 Solan, Camp at Nalagarh, H.P. (hereinafter referred to as 'the Tribunal') in Claim Petition No. 12NL/2 of 2009, titled as **Smt. Shiv Rajia & others** versus **Shri Munish Kumar & another,**whereby compensation to the tune of 6,38,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition, came to be granted in favour of the claimants and the appellant-insurer was saddled with liability (for short, "the impugned award").

3. The claimants and insured-owner-cum-driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

4. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

5. Learned Counsel for the appellant-insurer argued that the factum of insurance is admitted and insurer is liable to pay the compensation, but the Tribunal has fallen in an error in assessing the compensation and applying the multiplier.

6. The claimants have specifically pleaded in para-6 of the claim petition that deceased was earning Rs. 4,500/- per month and as per the copy of Pariwar Register (Ext. P-A), his age was 47 years at the time of accident.

7. Accordingly, I deem it proper to hold that the monthly income of the deceased was Rs. 4,500/-.

8. 1/3rd is required to be deducted towards the personal expenses of the deceased, while keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** Accordingly, after deducting 1/3rd amount, it is held that the claimants have lost source of dependency to the tune of Rs. 3,000/- per month.

9. The Tribunal has fallen in an error in applying the multiplier of '14'. The multiplier of '12' was applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in view of the judgments, *supra* andthe judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

10. Thus, the claimants are held entitled to compensation to the tune of Rs. 3,000 x 12 x 12 = Rs. 4,32,000/- under the head 'loss of dependency'.

11. The compensation amount awarded by the Tribunal under the other heads is not challenged. Accordingly, the amount awarded under the other heads is maintained.

12. Accordingly, the claimants are held entitled to total compensation under the following heads:

1.	Loss of dependency	Rs. 4,32,000/-
2.	Loss of consortium	Rs. 25,000/-
3.	Loss of love and affection and funeral expenses	Rs. 25,000/-
	Total:	Rs. 4,82,000/-

13. The aforesaid amount of compensation shall carry interest @ 7.5% per annum from the date of filing of the claim petition.

14. The Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in their accounts.

15. The excess amount, if any, be refunded in favour of the appellant-insurer through payees' account cheque.

16. Accordingly, the impugned award is modified and the appeal is disposed of.

17. Send down the records after placing a copy of the judgment on the file of the claim petition.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. & another .....Appellants-respondents.
Versus
Shanti Devi & others .....Respondents/Petitioners.

RFA No. 379 of 2008.
Reserved on: 21.11.2016.
Date of Decision: 2nd December, 2016.

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for the construction of Karara-Chandi Road – land Acquisition Collector assessed the value of cultivable land as Rs.4,000/- per biswa and value of ghasni land as Rs. 500/- per biswa- a reference was made and the compensation was enhanced to Rs.10,000/- per biswa- held in appeal that the exemplar sale deed showed that one biswa of land was alienated for Rs.6,000/- large piece of land was acquired, whereas, exemplar sale deed was regarding one biswa of land, therefore, 20% deduction has to be made from the sale consideration shown in the exemplar sale deed – appeal partly allowed and the value assessed as Rs.6,000/- per biswairrespective of the category of the land-20% amount ordered to be deducted from this amount. (Para-2 to 5)

For the Appellants: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondents: Mr. R. G. Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge .

The instant appeal stands directed by the State of Himachal Pradesh against the rendition recorded by the learned Reference Court on 23.08.2008 in Land Reference Petition No. 12-S/4 of 2006, whereby, it enhanced compensation amount at a uniform rate of Rs.10,000/- per biswa qua the lands of the respondents herein/landowners as stood brought to acquisition.

2. The land of the landowners stood brought to acquisition for construction of Karara Chandi road. The apposite notification for the aforesaid purpose stood issued on 1.09.2003. The land Acquisition Collector had in his relevant award assessed compensation qua the lands of the landowners/respondents herein as stood brought to acquisition in an amount computed at Rs. 4000/- per biswa qua cultivable land whereas he assessed qua ghasni land compensation amount @ of Rs. 500/- per biswa. However, the learned Reference Court under its impugned rendition assessed compensation amount at a uniform rate of Rs.10,000/- per biswa for all categories of land as stood brought to acquisition. In making the aforesaid assessment, the learned reference Court had relied upon a sale exemplar executed on 26.08.2002 whereupon land

holding an area of one biswa stood alienated for a sale consideration of Rs.6000/-, significantly with the land embodied therein standing located in a Mohal/village akin to the location of the lands of the respondents herein as stood brought to acquisition. Also given the factum qua the issuance of the apposite notification for bringing to acquisition the lands of the landowners for the notified purpose occurring in the year 2003 whereas the sale deed aforesaid as stood relied upon by the learned Reference Court standing executed prior thereto, renders it to beget satiation of the relevant parameter of its execution occurring in proximity in time vis-a-vis the issuance of the apposite notification whereupon the reliance as stood placed thereupon is tenable. Also, with no evidence standing adduced by the respondents herein in portrayal qua the location of the land comprised in the sale exemplar of 26.08.2002 holding no proximity in location vis-a-vis the lands of the landowners as stood brought to acquisition begets the sequel qua hence the principle of proximity in location angle inter se the lands occurring in the apposite sale exemplar vis-a-vis the lands of the respondents herein standing satiated whereupon the reliance as stood placed thereupon was tenable. However, in the learned Reference Court contrarily computing the market value borne by the relevant lands at Rs.10,000/- per biswa merely for their relevant acquisition occurring a year subsequent to the execution of the relevant sale exemplar, is grossly unwarranted, significantly since the relevant sale exemplar satiated all the relevant parameters for reliance standing placed thereupon hence only the amount embodied therein constituted the figure wherefrom the relevant assessment of compensation qua the lands of the respondents stood enjoined to occur besides an exorbitant hike standing meted thereto bereft of any sound, firm and credible evidence warrants disapprobation from this Court.

3. Be that as it may, the learned Reference Court had assessed a uniform rate of compensation for all categories of land, assessment whereof does not hold any palpable display of it suffering any vitiation, imperatively when all the distinct categorizations besides classifications borne by all the lands as stood brought to acquisition evidently on theirs standing acquired are all put to common use also when on their acquisition all lands holding distinct classifications evidently stand utilized for a purpose common to each other whereupon their distinct categorization(s) looses its apposite significance.

4. However, the area of land comprised in the relevant sale exemplar as stood relied upon by the learned reference Court is minimal or holds an area of one biswa, whereas, the lands of the landowners holds vis-a-vis it immense tract(s) of land thereupon, it was incumbent upon the learned Reference Court to mete therefrom some percentum of deduction for its thereupon assessing compensation qua the lands of the landowners/respondents herein, yet with its making the relevant omission aforesaid has begotten the sequel of its committing an illegality, whereupon, this Court proceeds to mete a deduction of 20% from the sale consideration borne in the relevant sale exemplar of 26.08.2002.

5. For the foregoing reasons, the instant appeal is partly allowed and the impugned award is modified to the extent that after meteing 20% deduction from Rs.6000/- per biswa, assessed as compensation amount qua all categories of land, thereupon qua all categories of lands as stood brought to acquisition, the sum arrived therefrom shall constitute the compensation amount qua all the categories of lands of the landowners/respondent herein as stood brought to acquisition. It is clarified that qua thereupon all the statutory benefits shall be levied in accordance with law. All pending applications stands disposed of.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Subhash Chand ..Appellant/defendant.

Versus

Bhim Sen and another. ..Respondents/plaintiffs.

RSA No. 310 of 2015.
Reserved on : 22/11/2016
Date of decision: 02/12/2016

Specific Relief Act, 1963- Section 34- Plaintiffs sought declaration that they are owners in possession of the suit land and the entry showing the defendant to be the owner is wrong, illegal, null and void as the defendant was never inducted as a tenant – the defendant pleaded that he was inducted as a tenant on the payment of gallabatai and has become the owner on the commencement of H.P. Tenancy and Land Reforms Act- the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that the plaintiffs had purchased the land in the year 1966 from predecessor-in-interest of the defendant- defendant was a co-owner and therefore cannot be a tenant – the version the defendant was paying gallabatai was not proved – the order was passed in the absence of the plaintiffs and would not bind them – the suit was rightly decreed- appeal dismissed.(Para-7 to 10)

For the appellant: Mr. Anil God, Advocate.
For the respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned Additional District Judge (III), Kangra at Dharamshala, Circuit Court at Baijnath, District Kangra, H.P., whereby she affirmed the rendition of the learned Civil Judge (Jr. Division), Baijnath, District Kangra, Himachal Pradesh. The defendant standing aggrieved by the concurrently recorded renditions of both the learned Courts below, concert through the instant appeal constituted before this Court, to beget reversal of the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision in the instant appeal are that plaintiffs sought declaration to the effect that they are owners of land comprising Khata No. 204, Khatauni No. 275, Khasra No. 223, measuring 0-11-77 hectares, situated at Mohal Chogan, Mouza Bir, Tehsil Baijnath, District Kangra, as per Jamabandi for the year 2007-08 (hereinafter referred to as the suit land) and the entry showing the defendant as owner is wrong, illegal, null and void and not binding upon them as the same were recorded on the basis of mutation No. 486 of 18.08.1999 whereby he was declared to be owner under the H.P.Tenancy and Land Reforms Act. It is contended that defendant was never inducted as tenant over the suit land by the plaintiffs nor their predecessors. Hence, the defendant be restrained by way of permanent prohibitory injunction. Further it is contended that the suit land was purchased by the plaintiffs from father of the defendant to the extent of 333310/63906760 share from suit land out of total land measuring 05-54-59 hectares. It is contended that plaintiffs were living in Punjab due to his service and during settlement joint land was partitioned though they were never summoned and partition was conducted behind their back in which Khasra No. 467 was given to the plaintiffs and they were put in possession which is also evident from the jamabandi. Lateron in 1994-95 when Iatemaal was done and said Khasra No. 467 was given new Khasra No. 223 and the defendant was wrongly shown as tenant and on the basis of this wrong entry defendant got mutation No. 486 attested conferring proprietary rights under H.P.Tenancy and Land Reforms Act. It is contended that this fact came to their knowledge in the month of November, 2009. Thereafter, they asked the defendant to get the wrong entries corrected in the revenue record. He paid no heed to their request. Hence, the present suit.

3. The suit was contested by defendant. He filed written statement, wherein he raised preliminary objections about maintainability of the suit and cause of action, limitation, estoppel and locus standi. On merits, it is averred that he is coming in possession of the suit land even prior to 1971. However, his name was got deleted by the plaintiffs in the revenue record but he continued with possession over the suit land without any interruption. Thereafter, consolidation took place in the village in the year 1994-95 and on his application of 25.11.1995 he was recorded as gair marusi and he has been paying lagan in the shape of galla batai to the

plaintiff and thereafter he was conferred with proprietary rights under H.P.Tenancy and Land Reforms Act and mutation No. 486 dated 8.8.1999 was also attested in this behalf and as such he has now become absolute owner of the suit land. However, the factum of purchasing the land from his father is admitted. It is also averred that the plaintiff No.1 and father of plaintiff No.2 themselves inducted him as tenant over the suit land since 1971 and as such he has rightly been recorded as tenant in the revenue record, as such, the question of taking forcible possession of the suit land does not arise at all. All other contents of the plaint are denied and a prayer is made for dismissal of the suit.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties at contest:-

1. Whether the plaintiffs are owners of the suit land comprised in Khata No. 204 min, Khatauni No. 275, Khasra No.223 leand measuring 0-11-77 hects situated at Mohal Chogan, Mauza Bir, Tehsil Baijnath, District Kangra, H.P., as prayed for? OPP.

2. Whether the revenue entry showing the defendant as owner in possession of suit land are illegal, null and void and is not binding upon to the plaintiffs, as alleged for? OPP.

2A. Whether the entry showing the defendant tenant over the suit land is made at the back of the plaintiffs and as such is wrong, null and void ? OPP.

3. Whether mutation No. 486 dated 18.08.1999 showing the defendant as tenant over the suit land is wrong, null and void, as alleged? OPP.

4. Whether the plaintiff is entitled to the relief of permanent and prohibitory injunction, as prayed for?

5. Whether the plaintiff is entitled for the possession of the suit land, as prayed for? OPP.

6. Whether the defendant was conferred with proprietary rights under Section 104(3) as per H.P.Tenancy and Land Reforms Act, as alleged? OPD.

7. Whether the suit of the plaintiff is not maintainable in the present form? OPD.

8. Whether the plaintiff has no cause of action against the defendant? OPD.

9. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD.

10. Whether the plaintiff has no locus standi to sue? OPD.

11. Whether the suit is barred by limitation? OPD.

12. Relief.

5. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs besides the learned Additional District Judge, affirmed the findings of the learned trial Court.

6. Now the defendant/appellant herein has instituted before this Court the instant Regular Second Appeal wherein he assails the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 8.7.2015, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

"1. Whether both the learned Courts below failed to appreciate that the suit filed by the respondent/plaintiff is barred by limitation?

2. Whether the learned trial Court erred in allowing application under Order 14 Rule 5 CPC and issue No. 3 was amended and issue 2(A) was framed additionally without amending the original suit?

3. Whether the Court below has misinterpreted the oral as well as documentary evidence placed on record?

4. Whether the learned courts below has erred in disbelieving the defence as set up by the present appellant that by virtue of Section 104(3) of the H.P.Tenancy and Land Reforms Act, he has become owner of said land?

5. Whether the adverse inference was received to be inferred against the defendant, if the respondents/plaintiffs have failed to appear at the time of correction of revenue record and the Ld. Courts below have wrongly presumed that same is without jurisdiction and appellant/defendant was recorded as "Gair Marusi"?

6. Whether the learned trial Court had jurisdiction to entertain the suit filed by the present respondents/plaintiffs?

Substantial questions of law.

7. Evidently, the plaintiffs purchased the suit land in the year 1966 from the predecessor in interest of the defendant whereupon they acquired co-ownership alongwith them qua the suit land. However, though with the plaintiffs' acquiring title qua the suit land as co-owners thereon alongwith the defendant, yet the latter on the anvil of revenue entries purportedly depicting him to be holding tenancie(s) upon the suit land hence canvassed qua his by statutory operation of the mandate of Section 104(3) of H.P.Tenancy and Land Reforms Act acquiring absolute title thereto. With the factum of the plaintiffs' holding co-ownership qua the suit land alongwith the defendant thereupon they alongwith the defendant held unity of title besides community of possession with him qua every inch of land borne thereon. The espousal of the defendant qua his holding possession of the suit land as a tenant under the plaintiffs' would be erosive of the salient cannon embodying the principle of joint tenancy wherewithin a fiat aforesaid stands encapsulated. Even if assumingly the aforesaid salient nuance embodying the principle of joint tenancy may stand eroded by categorical depictions emanating from the apposite revenue records personificatory qua one of the co owners qua his rights as a co-owner in the undivided suit land inducting the other co-owner(s) as tenant(s) thereon personifications whereof would erupt from the apposite revenue records reflecting qua one of the co-owners vis-à-vis the other co-owner(s)' share holding it as a tenant on payment of rent in cash or in kind whereupon a construction would stand erected qua the apposite relationship of landlord and tenant standing established inter se co-owners'.

8. In the endeavour aforesaid the defendant has canvassed qua his tendering 'galla batai' to the plaintiff through Shesh Ram, tendering whereof stands espoused to hence connote qua its sustaining the factum of an apposite relationship of a landlord and tenant coming into existence inter se the parties at contest hereat yet with the defendant not adducing any receipt qua his tendering 'galla batai' to the plaintiffs through Shesh Ram does belittle his espousal qua his thereupon holding the share of the plaintiffs in the suit land as a tenant under them.

9. Be that as it may, the defendant had contended qua with an apposite affirmative order standing recorded vis-à-vis him on his application comprised in Ext.DX whereupon mutation No. 486 of 18.08.1999 stood attested in sequel whereto the apposite substitution(s) in the relevant records stood effected qua him rendering him hence to be construable to be holding the share of the plaintiffs' in the joint suit land as a tenant under them whereupon he espouses qua statutory vestment of title standing automatically bestowed upon him qua the suit land. However, the aforesaid submission would hold vigour only when the revenue officer concerned, preceding his recording the apposite order on the application of the defendant comprised in Ext.DX, his eliciting the participation of the plaintiffs'. However, evidently with the order pronounced upon Ext.DX remaining unpreceded by the revenue officer concerned eliciting the participation of the plaintiffs' in the relevant proceedings hence it is construable to stand pronounced behind the back of the plaintiffs also thereupon the plaintiffs are to be construed to stand condemned unheard whereupon an inference is erectable qua in the making of the apposite order recorded by the revenue officer concerned on the application of the defendant comprised in

Ext.DX, it standing stained with a vice of its infracting the rule of audi alteram partem whereupon no sanctity is imputable thereto.

10. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of both the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather they have aptly appreciated the material available on record. I find no merit in this appeal, which is accordingly dismissed and the concurrently recorded judgments and decrees of both the Courts below are maintained and affirmed. Substantial questions of law stand answered against the defendant. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sunil Kanotra. ...Petitioner.

Versus

Indian Oil Corpn and others. ...Respondents.

Arbitration Case No. 44/2008
Decided on: 2.12. 2016

Arbitration and Cancellation Act, 1996- Section 34- The Objector had received the entire amount awarded by the Arbitrator, therefore, objections to the arbitration award are not maintainable- objections dismissed. (Para-1 to 3)

Case referred:
Pooran Chand Nangia vs. National Fertilizers Ltd; (2003) 8 SCC 245

For the Petitioner: Mr. Suneet Goel, Advocate.
For the Respondents: Mr. K.D. Sood, Sr. Advocate with Ms. Ranjana Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge(oral)**:**

When the case was taken up for hearing today, learned counsel for the respondents, questioned the very maintainability of the objections against the award of the Arbitrator. He drew my attention to decision of the Hon'ble Supreme Court in ***Pooran Chand Nangia*** vs. ***National Fertilizers Ltd***; (2003) 8 SCC 245, wherein it has been held that once the person concerned/contractor has received the amount, which was due to him under the award and thereby submitted to the award unequivocally and accepted the same without reservation, it is not open to him to challenge the same. If he desired to challenge the award, he should have reserved the right to do so. The relevant observation reads thus:

> "[3] So far as the first question is concerned, it is not disputed that the appellant had received the money which was due to him under the award and once the appellant had submitted to the award unequivocally and without reservation, it is not open to him to challenge the award. We have looked into the record and find that the appellant had submitted unequivocally to the jurisdiction of the Arbitrator. He also accepted the awarded amount without any reservation. Had the appellant desired to challenge the award, he could have reserved his right to do so, but no such reservation was made in the letters sent by him. In this view of the matter, there remains no manner of doubt

about the fact that the appellant had submitted to the award and it does not lie in the mouth of the appellant to challenge the award. For these reasons, we reject the first argument of the learned counsel for the appellant."

2. In the instant case also, the parties are *ad idem* that the petitioner had received the entire amount before filing the instant petition/objections and has not reserved his right to challenge the award. Therefore, in such circumstances, he cannot be permitted to agitate that he is entitled to the claims, which have been disallowed by the Arbitrator after having accepted the money due under the award without demur or protest at the relevant time.

3. In the given circumstances and following the ratio laid down by the Hon'ble Supreme Court in ***Pooran Chand Nangia's*** case (supra), the instant application under section 34 of the Arbitration and Conciliation Act, 1996 is clearly not maintainable and the same is accordingly dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

The Secretary (PWD) to the Government of Himachal Pradesh and another

...Appellants

Versus

Chaman Lal ...Respondent.

RFA No. 371 of 2011
Reserved on : 17.11.2016
Date of decision: 02/12/2016

Land Acquisition Act, 1894- Section 18- The award pronounced by Reference Court was assailed before the High Court – appeal was disposed of in RFA no.44 of 2009- the award in the present case has arisen from the common notification- the award was common in the present appeal and in RFA no.44 of 2009- therefore, the present appeal disposed of in terms of RFA No.44 of 2009. (Para- 1 to 4)

For the appellants: Mr. Vivek Singh Attri, Dy. A.G.
For the respondent: Mr. Ranvir Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral)

The instant appeal stands directed against the impugned award recorded by the Reference Court in Land Reference No. 11-S/4 of 2007 whereby the learned Reference Court assessed compensation qua the lands of the land owner in the manner as stands reflected therein. The learned counsel appearing for the respondent has placed on record a judgement recorded by this Court in RFA No. 44 of 2009, verdict whereof stands submitted by him to arise from an award recorded by the learned Reference Court qua a notification analogous inter se the land owners therein vis.a.vis the respondent land owner herein besides he submits qua thereupon an award common to the land(s) of the land owners in RFA No. 44 of 2009 vis.a.vis. the respondent land owner herein standing pronounced by the Land Acquisition Collector concerned, lastly he contends qua the learned Reference Court pronouncing a common award inter se the land owners therein vis.a.vis respondent land owner(s) herein whereupon he contends qua the verdict recorded in RFA No. 44 of 2009 while holding attraction with aplomb hereat warrants its standing revered by this Court. The aforesaid submission warrants its standing countenanced by this Court conspicuouslywith this Court, while standing seized of RFA No. 44 of 2009 which stood preferred herebefore by the land owners against the award pronounced by the learned Reference Court qua the lands of the appellants therein whose lands alike the land of the respondent herein stood acquired under a common notification also when thereupon a common

award stood pronounced by the Land Acquisition Collector concerned besides when the learned Reference Court pronounced a common verdict on the apposite reference petition(s) constituted therebefore by the aggrieved land owners wherefrom amongst RFA No 44 of 2009 arose. As a corollary, with this Court while adjudicating RFA No. 44 of 2009 it enhancing compensation amount vis.a.vis. land owners therein in a sum higher than the sum which stood assessed as compensation by the learned Reference Court thereupon with conclusivity standing fastened qua the verdict recorded by this Court in RFA No. 44 of 2009 also thereupon the respondent herein, hence stands entitled to assessment of compensation qua his acquired lands at par therewith. Even if the respondent herein has not preferred cross-objection herebefore against the impugned award of the learned Reference Court nonetheless with the provisions of Order XLI, Rule 33 of the CPC clothing this Court with a plenary jurisdiction to pass or make such further and other decree or order as the case may require. In sequel thereof with the provisions engrafted in Order XLI, Rule 33 of the CPC vesting jurisdiction in this Court to, even in the absence of any of the respondents in the memo of parties herebefore omitting to file any cross appeal or cross-objections ventilating therein their grievance against the award impugned herebefore at the instance of the State, make an equitable befitting just pronouncement, inconsonance therewith this Court for bringing parity inter-se the pronouncement recorded by this Court in RFA No. 44 of 2009 qua the compensation amount assessed thereunder qua the land owners therein vis.a.vis the land of the respondent herein, lands whereof stood subjected to acquisition under a notification common to the appellants therein vis.a.vis the respondent herein, hence proceeds to alike the compensation amount assessed thereunder compute the aforesaid sum of money as compensation amount qua the lands of the respondent herein especially when hence parity inter-se the lands brought to acquisition under a notification analogous qua each stands begotten also when thereupon would stand assessed a just, reasonable and fair compensation amount vis.a.vis the land of the respondent herein whereupon the salutary purpose behind the engrafting of the aforestated provision in Order XLI, Rule 33 of the CPC would stand satiated.

2. Be that as it may when the apposite evidence forcefully portrays the factum qua the lands of the respondent herein and the lands of the appellants in RFA No.44 of 2009 existing in close proximity to each other whereupon this Court stands prodded to form a conclusion qua the rates as stand assessed as compensation qua the lands of the appellants in RFA No. 44 of 2009 being also the computable rates of compensation assessable by this Court qua the lands of the respondent herein, whereupon parity in computation of compensation amount would occur inter-se the verdict recorded in RFA No,. 44 of 2009 vis.a.vis the verdict which stands recorded hereat. Consequently, the award passed by the learned Reference Court, which stands impugned herebefore, stands modified in consonance with the verdict pronounced by this Court in RFA No. 44 of 2009.

3. With RFA No. 181 of 2009 which stood preferred herebefore by the State of Himachal Pradesh assailing therewithin the award of the learned Reference Court holding omnibus analogity on all relevant facets inter se the respondents therein vis.a.vis the respondent herein also when it stood adjudicated alongwith RFA No. 44 of 2009 besides when a perusal of the adjudication recorded therein unveils qua RFA No. 181 of 2009 standing dismissed by this Court, in sequel thereto with the rendition of the learned Reference Court as stood assailed therein holding omnibus analogity on all relevant facets vis.a.vis. the impugned rendition hereat the latter ought to suffer an alike fate of its also warranting dismissal. In sequel, the impugned award stands modified to the extent above.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Vikky Devi and others ...Appellants

Versus

Shri Kuldeep Bhatia and others ...Respondents.

FAO (MVA) No. 103 of 2012.

Date of decision: 2.12.2016.

Motor Vehicles Act, 1988- Section 166- Tribunal dismissed the claim petition on the ground that the driver was acquitted by the criminal Court- held, that mere acquittal in the criminal case is not sufficient to dismiss the claim petition- a claim petition has to be prima facie proved while criminal case has to be proved beyond reasonable doubt - the deceased was a green grocer and was also selling milk – hence, his income cannot be less than Rs.6,000/- per month- the claimants are three in number and 1/3rd was to be deducted towards personal expenses- multiplier of 15 is applicable and claimants are entitled to Rs.4,000 x 12 x 15= Rs.7,20,000/- under the head loss of dependency- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of estate, funeral expenses and loss of consortium- thus, claimants are entitled to total compensation of Rs.7,60,000/- along with interest @ 7.5% per annum. (Para- 6 to 26)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646
N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Oriental Insurance Co. versus Mst. Zarifa and others, re AIR 1995 Jammu and Kashmir 81
Cholamandlan MS General Insurance Co. Ltd. Vs Smt. Jamna Devi and others, ILR 2015 (V) HP 207
Anil Kumar versus Nitim Kumar and others, I L R 2015 (IV) HP 445 (D.B.)
Kusum Kumari versus M.D. U.P Roadways and others, I L R 2014 (V) HP 1205
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. Manohar Lal Sharma, Advocate.
For the respondents: Mr. Rajesh Sharma, proxy counsel for respondents No. 1 and 2.
Ms. Sunita Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 16.11.2011, passed by the Motor Accident Claims Tribunal-II Kangra at Dharamshala, H.P. hereinafter referred to as "the Tribunal", for short, in MACP No.20-P/2006, titled *Vikky Devi and others versus Kuldeep Bhatia and others*, whereby the claim petition filed by the claimants came to be dismissed, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Insurer, owner and driver have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The claimants have questioned the impugned award on the grounds taken in the memo of appeal.

4. Claimants being the victims of a vehicular accident filed claim petition before the Tribunal for the grant of compensation to the tune of Rs. 12 lacs, as per the break-ups given in the claim petition which was resisted by all the respondents and following issues came to be framed by the Tribunal.

1. *Whether the respondent No. 2 was driving the tractor No. HP-37-7665 owned by respondent No.1 in a rash and negligent manner on 19.12.2005 and had hit the said tractor against the deceased Kamaljeet Singh Bhatia, and caused his death? OPP.*
2. *If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP.*
3. *Whether the petition is not maintainable in the present form? OPR-1&2.*

4. *Whether the petition is bad for non-joinder and mis-joinder of necessary parties? OPR-1&2.*

5. *Whether the deceased was travelling in the offending vehicle as gratuitous passenger as alleged? If so its effect? OPR-3.*

6. *Whether the respondent No. 2 was not holding a valid and effective driving licence on the day of accident as alleged? OPR-3.*

7. *Whether the offending vehicle was being plied by respondent No. 1 in violation of the terms and conditions of insurance policy, as alleged? If so its effect? OPR-3.*

8. *Relief.*

5. Claimants examined five witnesses and claimant No. 1 Smt. Vikky Devi herself stepped into the witness-box as PW1. Respondents, on the other hand examined three witnesses and respondent No. 2 Manjit Singh Bhatia driver of offending vehicle stepped into the witness-box as RW1.

6. The Tribunal, after scanning the evidence determined issue No. 1 against the claimants and dismissed the claim petition. The Tribunal has held that the final report under Section 173 of the Code of Criminal Procedure, for short "the Code" was filed against Manjit Singh driver in which accused Manjit Singh was acquitted vide judgment Ext. RW1/C and accordingly held that the claimants have failed to prove that the driver has driven the offending vehicle rashly and negligently.

7. In civil cases, the parties have to prove their cases by preponderance of probabilities. In summary cases like granting of compensation, in terms of the mandate of Section 166, Chapter XII of the Motor Vehicles Act, for short "the Act", summary procedure has to be adopted, without succumbing to the niceties and technicalities of procedure. It is beaten law of the land that technicalities or procedural wrangles and tangles have no role to play.

8. My this view is fortified by the judgment delivered by the apex court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another***,reported in ***(2013) 10 Supreme Court Cases 646, N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,*** reported in ***AIR 1980 Supreme Court 1354*** **and** ***Oriental Insurance Co. versus Mst. Zarifa and others,*** reported in ***AIR 1995 Jammu and Kashmir 81.***

9. This Court has also laid down the similar principles of law in *FAO No. 692 of 2008* decided on 4.9.2015 titled *Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others*, *FAO No. 287 of 2014* along with connected matter, decided on 18.9.2015 titled *Tulsi Ram versus Smt. Beena Devi and others*, *FAO No. 72 of 2008* along with connected matter decided on 10.7.2015 titled *Anil Kumar versus Nitim Kumar and others* and *FAO No. 174 of 2013* decided on 5.9.2014 titled *Kusum Kumari versus M.D. U.P Roadways and others.*

10. Having said so, the Tribunal has wrongly returned the findings in para 18 of the impugned award.

11. It is apt to record herein that the learned Trial Court while dismissing the criminal case held that the prosecution has failed to prove the case beyond reasonable doubt, is not a clear-cut acquittal. It is apt to reproduce para 14 of the said judgment herein.

> *"14. In view of the forgoing discussion, the prosecution has not been able to prove beyond reasonable doubt that on the evening of 19.12.2005 around 9 p.m. at Rajpur Tanda, P.S. Palampur accused was driving Tractor No. HP-37-7665 on the public way rashly and negligently which resulted in causing death of Kamaljeet Singh when the aforesaid tractor rolled down into fields and the aforesaid tractor overturned on deceased Kamaljit Singh, rather the case of prosecution is shrouded under the shadow of doubt, the benefit of which deserves to be given to the*

accused. Thus, while giving benefit of doubt to the accused, point No. 1 is decided in negative."

12. I have gone through the record. *Prima facie*, it is established and proved that the driver had driven the offending tractor rashly and negligent and caused the accident, in which deceased lost his life. Accordingly, the claimants have proved issue No.1 and the findings returned by the Tribunal on issue No. 1 are set aside and this issue is decided in favour of the claimants/appellants herein and against the respondents.

13. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 to 7.

Issue No.3.

14. It was for the respondents to prove how the claim petition was not maintainable. Respondents have taken the pleas in the written statement. Parties had knowledge of their respective pleadings, understood their case, joined the trial and contested the case. It was for the insurer to prove that the claim petition was not maintainable or there was collusion, has not led any evidence to that effect. However, I

have gone through the claim petition. The claimants are victims of a vehicular accident and the claim petition was maintainable.

15. In terms of mandate of Section 166 of the Act, an application has to be made by a person who has sustained injuries or by legal representatives where the accident has resulted into death of a person or by owner of property.

16. Section 166 of the Act mandates that the Tribunal has to treat report made by the police agency under Section 158 (6) of the Act as a claim petition. It is apt to reproduce Sections 158 (6) and 166 (4) of the Act herein.

"158 (1 to 5)..... ....."

"(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer.

166 (1) to (3).... ...."

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act."

17. The mandate of the aforesaid provisions of the Act is that a police report can be treated as claim petition.

18. Having said so, the Tribunal has rightly decided issue No. 3. Respondents have not questioned these findings, are accordingly upheld.

Issue No. 4.

19. It was for respondents No. 1 and 2 to show how the claim petition suffers from non-joinder and mis-joinder of necessary parties. Driver, owner and insured have been arrayed as parties. It is not the case of non-joinder and mis-joinder of necessary parties. Thus, the Tribunal has rightly decided this issue. Accordingly, the findings returned on this issue are upheld.

Issue No.5.

20. It was for the insurer to prove that the deceased was a gratuitous passenger and onus was on it, has failed to discharge the same. Even the insurer has not questioned the findings returned by the Tribunal, on this issue in para 19 of the impugned award. The

argument advanced by the learned counsel for the insurer that the deceased was a gratuitous passenger, is not tenable for the reasons that the Trial Court has held that the tractor has rolled down and deceased was crushed. There is not an iota of evidence on the record to show or prove that the deceased was gratuitous passenger. Having said so, findings returned on issue No. 5 are upheld.

Issue No.6.

21. It was for the insurer to prove that the driver was not having a valid and effective driving licence at the time of accident, has not led any evidence. However, I have gone through the driving licence Ext. RW1/A, which is valid and effective. Thus, the findings recorded on this issue merits to be upheld and are accordingly upheld.

Issue No.7.

22. It was for the insurer to plead and prove that the insured has committed willful breach, has not led any evidence. Even the findings recorded on issue No. 7 have not been questioned by the insurer. Accordingly, the same merits to be upheld and are accordingly upheld.

Issue No.2.

23. The Tribunal has not determined issue No. 2. Claimants have pleaded that the deceased was earning Rs.15,000-20,000/- per month, was a green grocer and also selling milk. It can be safely held that the deceased was earning not less than Rs.6000/- per month. In view of the 2nd Schedule attached to the Act, read with ***Sarla Verma and others versus Delhi Transport Corporationand another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***., the multiplier applicable is "15" and is accordingly applied. The claimants are three in numbers and 1/3rd has to be deducted towards personal expenses of the deceased.

24. Thus, the claimants are held entitled to compensation to the tune of Rs.4000x12x15= Rs.7,20,000/- under the head loss of source of dependency.

25. In addition, the claimants are also held entitled to compensation under the following four heads:

(i)	Loss of love and affection:		Rs.10,000/-
(ii)	Loss of estate	:	Rs.10,000/-
(iii)	Funeral expenses	:	Rs.10,000/-
(iv)	Loss of consortium	:	Rs.10,000/-
			Total Rs.40,000/-

26. Accordingly, the claimants are held entitled to compensation to the tune of Rs.7,20,000+ Rs.40,000= Rs.7,60,000/- with interest @7.5% per annum, from the date of claim petition till its realization.

27. The factum of insurance is not in dispute. Thus, the insurer is saddled with the liability and has to satisfy the award.

28. The insurer is directed to deposit the amount alongwith interest @ 7.5% per annum, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

29. Viewed thus, the appeal is allowed and the impugned award is set aside, as indicated hereinabove.

30. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Devi Dass & others .....Appellants/Petitioners.
Versus
Prem Chand & another .....Respondents.

FAO No.283 of 2014.
Reserved on: 23.11.2016.
Decided on : 5th December, 2016.

Employees Compensation Act, 1923- Section 4- Deceased was employed as a driver and died in a motor vehicle accident during the course of his employment – a claim petition was filed which was dismissed by the Commissioner for want of proof that the deceased was discharging his duties at the time of accident – held in appeal that the owner had specifically stated that the deceased was employed by him as a driver - it was also proved that he was discharging his duties at the time of accident -a claim petition was filed before MACT which was dismissed- hence, penalty of Rs.1 lac imposed upon the employer. (Para-5 to 11)

For the Appellants: Ms. Rita Goswami, Advocate.
For Respondent No.1: Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.
For Respondent No.2: Mr. Lalit K. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioners/appellants herein are the dependents and successors-in-interest of one Diwan Chand, who purportedly during the course of performance of his employment as a driver under respondent No.1 in motor vehicle bearing No. HP-07-3474 suffered his end in a motor vehicle accident involving the aforesaid vehicle.

2. The apposite claim petition constituted by the appellants herein before the learned Commissioner under the Employee's Compensation Act suffered dismissal. The learned Commissioner recorded disaffirmative findings on the issue qua the deceased at the relevant time performing employment as a driver under respondent No.1 in the vehicle aforesaid also it recorded disaffirmative findings qua the appellants herein qua his suffering his demise during the course of his performing employment under respondent No.1 in the ill-fated vehicle.

3. The appellants herein standing aggrieved by the rendition of the learned Commissioner hence concert to assail it by preferring an appeal therefrom before this Court.

4. When the appeal came up for admission on 18.11.2014, this Court, admitted the appeal instituted herebefore by the appellant against the order of the learned Commissioner, on the hereinafter extracted substantial questions of law:-

g) Whether the findings of the learned Court below is perverse on the ground that the deceased does not fall within the definition of the workman who despite the admitted fact of respondent No.1 is admittedly recruited as driver in connection with a motor vehicle?

h) Whether the courts below have misconstrued the pleadings as well as the evidences/documents produced by the appellants, in which it was proved that the deceased was died on 10.08.2005 during the course of his employment?

i) Whether the learned Commissioner has acted in violation of the provisions of the law contained under Section 108 of the Indian Evidence Act, 1872?

Substantial questions of law No.1 to 3.

5. The disaffirmative finding recorded by the learned Commissioner on the issue qua the predecessor-in-interest of the appellants herein standing engaged by respondent No.1 as a driver in the relevant vehicle, apparently stands not founded on a wholesome appreciation of the relevant evidence on record, significantly, of the recitals embodied in Ex.RW1/A, comprising an affidavit tendered by the owner of the ill-fated vehicle during the course of his examination-in-chief wherewithin a loud communication stands echoed qua his engaging deceased Diwan Chand as a driver in the ill-fated vehicle. The aforesaid pronouncement occurring in Ex.RW1/A does clinch the factum of deceased Diwan Chand standing engaged by the owner of the ill-fated vehicle as its driver thereon whereupon the relevant issue No.1 warrants its standing answered affirmatively vis-a-vis the appellants. Moreover, with a candid pronouncement occurring in Ex. RW1/A qua also at the relevant time deceased Diwan Chand standing borne on the ill-fated vehicle as its driver does nurse a firm conclusion from this Court qua his demise occurring during the course of his performing employment as a driver under respondent No.1 in the ill-fated vehicle.

6. Be that as it may, the occurrence on record of the the apposite FIR comprised in Ex.PW1/B lodged with the police station concerned besides with the learned counsel appearing for respondent No.2 while holding respondent No.1 to cross-examination purveying suggestions to him qua in FAO's arising herebefore against the apposite renditions recorded by the MACT concerned upon the claim petitions preferred therebefore, stirring a verdict herefrom qua the liability qua compensation amount assessed qua the dependents of the deceased/occupants of the ill-fated vehicle standing fastened upon the owner whereto an affirmative elicitation stood purveyed by RW-1, does constrain a conclusion of the ill-fated vehicle whereon thereat the deceased evidently was performing employment as its driver under respondent No.1 rolling into the gushing waters of river Satluj whereupon the demise of its occupants also of its driver occurred. The erection of the aforesaid inference by this Court does oust the formidability of the findings recorded by the learned Commissioner qua in the absence of production of the death certificate of deceased Diwan Chand by the appellants herein thereupon a conclusion standing warranted qua there being abysmal lack of evidence in portrayal of his suffering his demise in an accident involving the ill-fated vehicle.

7. Be that as it may, the relevant accident occurred in the year 2005, whereas, the apposite petition stood preferred before the learned Commissioner as evident from a disclosure made in the impugned rendition belatedly on 21.01.2012 wherefrom the learned counsel appearing for the respondents contend qua their occurring a manifest inordinate unexplained delay in the institution of the apposite petition before the learned Commissioner. Conspicuously, with the apposite delay occurring beyond the appposite statutorily mandated period of two years, prescribed in Section 10(1) of the Employee's Compensation Act (hereafter referred to as the Act) also with the appellants not within the ambit of the relevant proviso purveying a tenable sound explanation in explication of the apposite delay renders the claim petition to suffer the illfate of its standing dismissed given its standing filed beyond the period of limitation. However, the submission addressed herebefore by the learned counsel for the respondents holds no tenacity as they proceed to make the aforesaid submission qua the facet aforesaid only on anvil of a reflection occurring in the impugned award qua the apposite petition standing instituted therebefore by the appellants herein on 21.01.2012, whereas, a perusal of the original claim petition preferred by the appellants before the learned Commissioner unravels qua its presentation occurring only within 50 days elapsing from the date of accident, whereupon its standing preferred therebefore within the statutorily mandated period of two years, rendered it to stand preferred thereat within limitation.

8. Be that as it may, before proceeding to adjudicate qua the appellants a just and fair compensation amount, it is imperative to determine from the relevant record qua the claimants not simultaneously along with the apposite petition laid hereat instituting before the MACT concerned a petition claiming compensation arising out of the demise of their predecessor-

in-interest Diwan Chand in a motor vehicle accident involving the ill-fated vehicle whereon he stood engaged as a driver under respondent No.1, especially when the appellants herein enjoy the statutory leverage to claim compensation either under the Employee's Compensation Act or under the provisions of the Motor Vehicles Act, obviously not under both.

9. The relevant evidence for resting the aforesaid factum stand embodied in the testification occurring in the cross-examination of Devi Dass, the father of deceased Diwan Chand, wherein, he acquiesces to a suggestion put to him by the learned counsel appearing for the respondents while holding him to cross-examination qua his preferring a claim petition before the MACT concerned along with the co-appellants on occurrence of demise of their predecessor-in-interest Diwan Chand in the ill-fated accident involving the relevant vehicle, petition whereof he echoes therein to suffer the ill-fate of its dismissal. The aforesaid proclamation occurring in the cross-examination of co-appellant No.1 does beget an inference of his simultaneously alongwith the preferment of the apposite petition laid hereat, filing a petition under the Motor Vehicles Act before the MACT concerned wherefrom with his simultaneously prosecuting remedies under two compatible statutes whereas he stood enjoined to either avail his remedy under the Employee's Compensation Act or under the Motor Vehicles Act, renders the claim petition laid hereat to warrant it standing dismissed. Also it appears qua despite theirs preferring a claim petition before the MACT concerned in sequel to occurrence of demise of their predecessor-in-interest Diwan Chand theirs yet proceeding to canvass a relief similar to the one which stood canvassed in the aforesaid claim petition thereupon their extant endeavour warrants its standing negated conspicuously to obviate any belittling of conclusivity acquired by the previous rendition pronounced upon their apposite petition laid before the MACT concerned for a purpose akin to the one which stands embodied in the apposite petition laid hereat. Reiteratedly, for blunting the aforesaid eventuality also when the instant claim petition attracts the principle of res judicata besides with the operation of a statutory bar against conjoint relief under compatible statutes being unavailable, conspicuously, when an earlier pronouncement upon the apposite claim petition of the appellants herein has acquired conclusivity also when it was inter se akin litigants thereat vis-a-vis the litigants hereat, verdict pronounced thereon obviously holds an aura of reverence, whereupon, other Courts stand barred to adjudicate any compensation qua the appellants arising out of the demise of their predecessor-in-interest in the ill-fated accident.

10. The effect of the aforesaid diktat formed by this Court for declining vis-a-vis the appellants herein quantification of compensation under the Act would not oust the operation of the statutory mandatory provisions of Section 4A(3) of the Employee's Workman Compensation Act, which stand extracted hereinafter:-

> **"4A. Compensation to be paid when due and penalty for default**:-
>
> (1). Compensation under Section 4 shall be paid as soon as it falls due.
>
> (2). In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the employee, as the case may be without prejudice to the right of the employee to make any further claim.
>
> (3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall-
>
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
>
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per recent of such amount by way of penalty;

The imminent reason for this Court erecting the aforesaid inference is dehors the factum of conclusivity acquired by the rendition recorded by the MACT concerned upon the claim petition preferred therebefore by the co-appellants also dehors qua thereupon the instant petition while obviously attracting the principle of res judicata it forestalling the appellants herein to canvass herebefore the relief which stood previously unsuccessfully canvassed by them. Nonetheless, with none of the statutory provisions engrafted in the Motor Vehicles Act holding any postulation therein akin to the one postulated in Section 10(a) of the Act, renders the relevant statutory expostulation embodied in Section 4A(3)(b) of the Act to warrant deference standing meted thereon, visibly, with this Court recording affirmative findings vis-a-vis the appellants herein on the relevant issues Nos.1 and 2 also visibly with respondent No.1 not revering the statutory mandate of sub Section (1) of Section 4 thereupon this Court is enjoined to impose upon the employer of deceased Diwan Chand statutory penalty quantified in a sum of Rs.1,00,000/- (Rs. One lac only) arising from of his demise occurring during the course of his performing employment under him in the relevant vehicle, dehors no compensation amount being assessable qua the appellants herein especially when the rigor of the relevant mandate occurring therein is inflexible besides when the instant petition has suffered dismissal merely on the ground of estoppel besides on anvil of res judicata whereupon this Court does not deem it unbefitting to compute in the aforesaid amount penalty payable vis-a-vis the appellants herein besides deems it also just to fasten the liability qua its defrayment to the appellants herein upon the employer, who merely on the principle of res judicata has escaped his relevant liability qua defrayment of compensation amount vis-a-vis the appellants herein.

11. For the reasons recorded hereinabove, the instant appeal is partly allowed. In sequel, the award rendered by the learned Commissioner is modified to the extent that the owner of the vehicle, respondent No.1 is held liable to pay penalty of Rs.1,00,000/- (Rs. One lac only), to the appellants herein. All pending applications also stand disposed of. No order as to costs.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Girdhari Lal son of Shri Sher Singh ....Petitioner

Versus

Shashi Kumari wife of Shri Girdhari Lal ....Non-petitioner

Cr.MMO No. 255 of 2014
Order Reserved on 18th November 2016
Date of Order 5th December 2016

Code of Criminal Procedure, 1973- Section 127- S was married to G – G started maltreating S and ousted her from her matrimonial home – she filed a petition for maintenance and maintenance of Rs.500/- per month was granted to him on 19.6.2207- S filed a petition for enhancement of maintenance from Rs.500/- to Rs.5,000/-- Session Judge, Mandi enhanced the maintenance allowance toRs.2,000/- per month from the date of the order- held, that keeping in view the price index and the fact that one daughter is residing with S, it is not expedient to interfere with the order of Sessions Judge, Mandi – the husband is duty bound to maintain his wife – rise in prices is a changed circumstance and the petition for enhancement can be filed on this ground – petition dismissed. (Para- 8 to 12)

Cases referred:

Dwarika Prasad Satpathy vs. Bidyut Prava Dixit and another, AIR 1999 SC 3348
Dhan Raj vs. Kishni and another, 1998 Cr.L.J. 1312

For Petitioner: Mr. H.S. Chandel, Advocate.
For Non-petitioner: Ms. Leena Advocate

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. against order dated 2.6.2014 passed by learned Sessions Judge Mandi District Mandi H.P. whereby learned Sessions Judge Mandi accepted revision petition filed under Section 397 of Code of Criminal Procedure 1973 by Smt. Shashi Kumari and enhanced maintenance allowance to the tune of Rs.2000/-(Rupees two thousand) per month from the date of order.

Brief facts of the case

2. Smt. Shashi Kumari filed petition under Section 127 of Code of Criminal Procedure 1973 for enhancement of maintenance allowance. It is pleaded that Smt. Shashi Kumari is legally wedded wife of Girdhari Lal and their marriage was solemnised about 22 years ago according to Hindu rites and customs. It is pleaded that after solemnisation of marriage Girdhari Lal maltreated Smt. Shashi Kumari and also ousted Smt. Shashi Kumar from her matrimonial house. It is pleaded that maintenance allowance to the tune of Rs.500/- (Rupees five hundred) was granted to Smt. Shashi Kumari on dated 19.6.2007. It is pleaded that Girdhari Lal has constructed six shops and is earning Rs.10000/- (Rupees ten thousand) as rent from shops. It is pleaded that respondent is also employed in HPSEB and is earning Rs.5000/- (Rupees five thousand) per month. It is pleaded that total income of Girdhari Lal is Rs.32000/- (Rupees thirty two thousand) per month from all sources. It is pleaded that due to increase in price index it is not possible to Smt. Shashi Kumari to maintain herself. It is pleaded that daughter of Smt. Shashi Kumari is college going student. It is also pleaded that Smt. Shashi Kumari is at the verge of starvation. It is pleaded that Smt. Shashi Kumari is serving as Angan Wari worker and is earning Rs.1800/- (Rupees one thousand eight hundred) per month. Prayer for enhancement of maintenance allowance from Rs.500/- (Rupees five hundred) to Rs.5000/- (Rupees five thousand) per month sought.

3. Per contra response filed on behalf of Girdhari Lal pleaded therein that Girdhari Lal is daily waged employee and is earning Rs.110/- (Rupees one hundred ten) per day. It is pleaded that Smt. Shashi Kumari is working as Angan Wari worker and is earning Rs.3000/- (Rupees three thousand) per month. Prayer for dismissal of petition sought.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner and also perused the entire record carefully.

5. Following points arises for determination in this petition:-

1. Whether petition filed under Section 482 Cr.P.C. is liable to be accepted as per grounds mentioned in petition?
2. Final Order.

Findings upon Point No.1 with reasons

6. PW1 Smt. Shashi Kumari has stated that Girdhari Lal is her husband. She has stated that her husband had beaten her. She has stated that her husband has turned her out from her matrimonial house. She has stated that she is residing in rented house and is paying Rs.1500/-(Rupees one thousand five hundred) per month as rent. She has stated that her husband is employed in Electricity board and further stated that her husband owned six shops at Bassi and is earning Rs.10000/- (Rupees ten thousand) per month as rent. She has stated that Girdhari Lal has also rented rooms and further stated that income of her husband is Rs.35000/- (Rupees thirty five thousand) per month from all sources. She has stated that Girdhari is also owner of five bighas of agricutural land. She has also stated that Girdhari also used to sell cow milk. She has stated that her daughter is residing with her. She has stated that Rs.500/- (Rupees five hundred) was granted to her as maintenance allowance on 9.6.2007. She has stated that due to increase in price index of necessary commodities she could not maintain herself. She has stated that she is employed as Angan Wari worker and is earning Rs.1500/- (Rupees one

thousand five hundred) per month. She has admitted that her son Pankaj is residing with Girdhari Lal. She has stated that Pankaj is student of B.Tech. She has denied suggestion that Girdhari Lal is drawing Rs.3500/- (Rupees three thousand five hundred only) per month as salary. She has denied suggestion that she has filed present petition just to harass her husband.

7. RW1 Girdhari Lal has stated that Smt. Shashi Kumari is his wife. He has stated that he is regularly paying the maintenance allowance granted to his wife. He has stated that he is employed in Electricity board on daily wages and is earning Rs.3600/- (Rupees thirty three hundred) per month. He has stated that his wife is employed in Angan Wari and is earning Rs.3300/- (Rupees thirty three hundred) per month. He has stated that his son is student of engineering and his expediture is Rs.48000/- (Rupees forty eight thousand) per semester. He has stated that he has no other source of income. He has admitted that his daughter is residing with his wife. He has denied suggestion that his income is Rs.36000/- (Rupees thirty six thousand) per month.

8. Submission of learned Advocate appearing on behalf of petitioner that as per Annexure P-3 placed on record Smt. Shashi Kumari is posted as Angan Wari worker and is drawing honorarium to the tune of Rs.3513/- (Rupees three thousand five hundred thirteen) per month as Angan Wari worker and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that in view of price index as of today and in view of the fact that one daughter is residing with Smt. Shashi Kumari it is not expedient in the ends of justice to interfere in order of learned Sessions Judge Mandi.

9. Submission of learned Advocate appearing on behalf of petitioner that age of mother of Girdhari Lal is about 81 years and she is suffering from various ailments and requires continuous medical treatment and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that Smt. Shashi Kumari is legally wedded wife of Girdhari Lal and Girdhari Lal is under legal obligation to provide reasonable maintenance allowance to her legally wedded wife. It is well settled law that wife has legal right to live in society with honour and dignity.

10. Submission of learned Advocate appearing on behalf of petitioner that petitioner is posted as helper in HPSEB and his salary is Rs.10707/- (Rupees ten thousand seven hundred seven) per month and petitioner has also domestic and social obligations and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner has himself admitted his income to the tune of Rs.10707/- (Rupees ten thousand seven hundred seven) per month in Cr.MMO No. 255 of 2014 in para 7 (c) of petition. It is well settled law that facts admitted need not be proved as per Section 58 of Indian Evidence Act 1872. It is well settled law that wife is entitled for reasonable maintenance allowance to the extent of 1/3rd income of husband. Hence it is held that order of learned Sessions Judge is not illegal and it is held that no interference is warranted.

11. It is well settled law that maintenance allowance can be enhanced under Section 127 Cr.P.C. as per changed circumstances. It is well settled law that rise in prices is changed circumstance as defined under Section 127 Cr.P.C. It is well settled law that object to grant maintenance allowance to married woman is to prevent vagrancy and destitution. ***See AIR 1999 SC 3348 Dwarika Prasad Satpathy vs. Bidyut Prava Dixit and another.*** It is well settled law that Court can take judicial notice of inflation and rising cost of commodities for enhancing maintenance allowance. ***See 1998 Cr.L.J. 1312 Dhan Raj vs. Kishni and another.*** In view of admission of petitioner in petition that monthly income of petitioner is Rs.10707/- (Rupees ten thousand seven hundred seven) per month it is held that maintenance allowance granted to Smt. Shashi Kumari is not excessive in nature. It is held that maintenance allowance granted by learned Sessions Judge Mandi to Smt. Shashi Kumari is reasonable maintenance allowance. It is held that order of learned Sesisons Judge Mandi H.P. is in accordance with law and based upon positive, cogent reasons. In view of above stated facts and case law cited supra point No. 1 is answered in negative.

Point No. 2 (Final Order)

12. In view of findings upon point No. 1 above petition is dismissed. File of learned Sessions Judge Mandi and file of learned Judicial Magistrate Joginder Nagar District Mandi H.P. along with certify copy of order be sent back forthwith. Cr.MMO No. 255 of 2014 is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Himachal Pradesh State Electricity Board, through its Secretary, Vidyut Bhawan, Shimla, H.P. ....Petitioner.

Versus

M/s Virendra Hotels and Allied Hotels Pvt. Ltd. & anr. ....Respondents.

CWP No.1672 of 2010.
Reserved on : 21.11.2016.
Date of Judgment: 05.12.2016.

Constitution of India, 1950- Article 226- Tampering was noticed by Flying Squad of H.P.S.E.B. – criminal proceedings were initiated and electricity connection was disconnected - ombudsman decided the dispute – aggrieved from the order, present writ petition has been filed – held, that ombudsman had decided the dispute only on the basis of acquittal recorded by Criminal Court, which is not correct- no other reason was given by the ombudsman – writ petition allowed and the case remanded to ombudsman for a fresh decision. (Para-9 and 10)

For the petitioner : Mr. Satyen Vaidya, Sr. Advocate with Ms. Priyanka Khenal, Advocate.
For the respondents : Mr. K.D. Sood, Sr. Advocate with Mr. Ankit Aggarwal, Advocate, for respondent No.1.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner against the respondents praying therein for the following substantive reliefs :

> "a) That writ of certiorari may kindly be issued and the impugned order dated 15.3.2010 (Annexure P-4) may kindly be quashed and set aside.
>
> b) That the respondent may kindly be restrained from releasing the amount which is lying in deposit with the present petitioner."

2. As per the petitioner, respondent No.1-company has electric commercial connections bearing Account No.CGC-43-C and CGC-36-C having connected load of 16.4 KW and 58.24 KW. It is averred in the petition that on 4.2.1998, Flying Squid of HPSEB, headed by Assistant Executive Engineer (E), Sub Division, Idgah, Shimla and Executive Engineer, Flying Squid, inspected the premises of respondent No.1, allegedly found the tempering with the electric meter aforementioned. The Flying Squid found that the electricity was used directly from mains by bye passing the recording of consumption meters installed there. Thereafter, the Flying Squid started the proceedings against respondent No.1 for theft of energy and immediately disconnected the electricity of both the meters aforementioned. As per instruction No.206 of H.P Sales Manual Provisional assessment was made on 4.2.1998. Thereafter, the Flying Squid also registered the criminal case against respondent No.1 in Police Station, Shimla, after investigation filed a challan, under Section 39 of the Electricity Act, 1910 against respondent No.1. The final assessment was made on 24.2.1998 and after calculating the same a demand for a sum of Rs.

9,91,776.75 was raised from respondent No.1, for the alleged theft of energy. Respondent No.1 filed a Civil Suit before the learned Court below and later on before learned District & Sessions Judge, Shimla, to restore the electricity connection. The learned District & Sessions Judge, Shimla, vide its order dated 8.5.1998, directed the petitioner to restore the electricity connection of respondent No.1 after taking 50% of the assessed demand amount. Respondent No.1 deposited the half of the assessed amount with the petitioner on 8.5.1998. The electricity meters of respondent No.1 remained disconnected w.e.f. 4.2.1998 to 8.5.1998. Thereafter, respondent No.1 approached before this Court against the disconnection of the electrical meter bearing No.CGC-43-C and CGC-36-C, vide which the HPSEB will not disconnect the electric connection and respondent No.1 was ordered to deposit the remaining amount in four equal installments of rupees one lac. Respondent No.1 deposited the entire amount i.e. Rs. 9,99,775.76. Thereafter, criminal case was filed before Addl. Chief Judicial Magistrate, Court No.1, Shimla, under Section 39 of the Electricity Act, 1910 against respondent No.1, the same was decided on 1.7.2002 and respondent No.1 was acquitted from the charges of theft after giving him benefit of doubt. Respondent No.1 filed an appeal before the Zonal Level Disputes Settlement Committee, Shimla. The Committee after taking into consideration all the facts and circumstances of the case decided the same on 4.1.2003 in favour of the petitioner and appeal of respondent No.1 was dismissed. Thereafter, respondent No.1 again approached this Court regarding his grievances, but in the meantime, the Government have created one Institution, namely, Himachal Pradesh Electricity Ombudsman (hereinafter referred to as 'Ombudsman'), to settle the electricity disputes. Respondent No.2 was directed to decide the dispute within a stipulated period and the parties were also directed to approach respondent No.2 within a time bound manner. Respondent No.2 after hearing both the parties, decided the case, vide order dated 15.3.2010, in which the appeal of respondent No.1 was allowed. Respondent No.1 involved in the theft of electricity from the aforementioned electric meters w.e.f. 6/1996 to 1/1998 and during this period even in few months his consumption of unit was Nil. This fact has not been taken into consideration by respondent No.2 while passing the impugned order dated 15.3.2010.

3. In reply to the petition, respondent No.1 has taken preliminary objections that the present petition is neither competent nor maintainable on account of the act and conduct of the petitioner. The order passed by the learned Ombudsman, suffers from no illegality and irregularity. On merits, it is submitted that the Executive Engineer, City Electrical Division, Shimla, is neither competent nor authorized to file the present writ petition. It has been further submitted that the commercial electricity meter bearing Account Nos. CGC-43-C and CGC-36-C, having connected load of 16.4 KW and 58.2 KW, HPSEB was billing respondent No.1 on the basis of actual consumption/minimum monthly charges whichever was higher. The actual consumption was less with the minimum monthly charges so invariably respondent No.1 was billed on minimum monthly charges. After September 2001, have done away with monthly minimum charges and started billing on the actual consumption basis. Respondent No.1 has further submitted that bill raised for an amount of Rs. 9,99,775.76, is without any basis and illegal. It is further submitted that the challan regarding the theft was put before the learned Addl. Chief Judicial Magistrate, Court No.1, Shimla, under Section 39 of the Electricity Act, vide which respondent No.1 was acquitted of the charges of theft, vide judgment dated 1.7.2002.

4. Heard.

5. Mr. Satyen Vaidya, learned Senior Counsel appearing on behalf of the petitioner has argued that the impugned order dated 15.3.2010 passed by the learned Ombudsman, is without any reason and is based upon the judgment of learned Court below. He has further argued that the judgment is not binding upon the proceedings before the learned Ombudsman and the standard of proof in both is different. He has further argued that the order passed by the learned Ombudsman, is without any basis and unreasoned and so, the writ petition may be allowed and the case may be remanded back after taking afresh decision.

6. On the other hand, Mr. K.D. Sood, learned Senior Counsel appearing on behalf of respondent No.1 has argued that no appeal was filed by the petitioner against the order of

acquittal of respondent No.1 in the alleged electricity theft case and that order has attained finality. The order of learned Ombudsman, also suffers from no illegality and infirmity, as the same was passed after taking into consideration all the facts, which have come on record, to its true perspective. He has further argued that the writ petition may be dismissed.

7. In rebuttal, Mr. Satyen Vaidya, learned Senior Counsel appearing on behalf of the petitioner has argued that consumption of the Hotel of respondent No.1, is much lesser than the bills, which were being paid by respondent No.1 on the basis of minimum charges. He has further argued that hotel was vacant during those days and due to the mischief of the neighbourers, false case has been made out against respondent No.1, when he was out of station because of winter season and hotel was totally unoccupied.

8. To appreciate the arguments of learned Senior Counsel appearing on behalf of the parties, I have gone through the record in detail.

9. As far as the case, under Section 39 of the Indian Electricity Act is concerned, there is no dispute that Satish Chand Sood/respondent No.1 has been acquitted by the learned Addl. Chief Judicial Magistrate, Court No.1, Shimla, on 1.7.2002 and the judgment has attained finality. However, the Zonal Level Dispute Settlement Committee, has held respondent No.1 defaulter and raised demand of Rs. 9,91,776.75 paise against Account No.CGC-43-C and CGC-36-C. Thereafter, in appeal learned Ombudsman/respondent No.2, will gave its findings and has held as under :

> "As per record of the licensee, the petitioner has paid all the bills for supply of power to the licensee (including for the period when the meter in dispute remained disconnected from 4.2.1998 to 8.5.1998) and this amount of Rs. 9,91,776/- as raised by the licensee is a penal amount on account of theft as worked out on the basis of Instruction No.203 to 206 of the Sales Manual. As per demand notice dated 4.2.1998 & 24.2.1998, this amount has been raised by the licensee as additional penal amount on account of alleged theft which has not been proved as per decision of the Hon'ble Addl. Chief Judicial Magistrate, Court No.1, Shimla, as referred above.
>
> Order of the Ombudsman :
>
> Keeping in view the foregoing deliberations, the amount of Rs. 9,91,776/- raised by the respondent Board through demand notice dated 4.2.1998/24.2.1998 is set aside and quashed and HPSEB is directed to refund this amount to the petitioner alongwith annual interest @ 9% as per orders of the Hon'ble High Court immediately but not later than one month from the date of this order. The compliance of the order may be reported to this office by both the parties i.e. petitioner and respondent Board after one month of the issuance of this order."

10. From the above, it is clear that the learned Ombudsman/respondent No.2 has decided the case against the petitioner simply on the ground that the learned Addl. Chief Judicial Magistrate, Court No.1, Shimla, has held that the petitioner has failed to prove the theft, hence the demand notice, raised by the petitioner was set aside and petitioner was directed to refund the amount. This Court finds that the learned Ombudsman/respondent No.2 has erred taking the findings of acquittal in favour of respondent No.1, a sole ground to set aside the demand notice, as respondent No.2 has not given his reasoning for setting aside the demand notice. So, the findings of the learned Ombudsman/respondent No.2, vide its impugned order dated 15.3.2010, is quashed and set aside and respondent No.2 is directed to decide ***Case No.3 of 2009***, afresh, within a period of two months from the date of first hearing. Parties are directed to appear before the Ombudsman/respondent No. 2 on ***22nd December, 2016***. Needless to say that the party against whom learned Ombudsman/respondent No.2 gives the findings shall be at liberty to approach the competent Court, as per law.

11. The writ petition is disposed of accordingly alongwith all pending application (s), if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Oriental Insurance Company .. Appellant.
Versus
Kushla Devi & ors. .. Respondents.

FAO No. 118 of 2008.
Decided on: 5.12.2016.

Employees Compensation Act, 1923- Section 4- Deceased was employed as a driver in a tractor – he died in an accident involving tractor – a claim petition was filed – Commissioner awarded compensation of Rs.2,03,850/- with interest @ 12% per annum- held in appeal that tractor falls within the definition of light motor vehicle (LMV) –however, it will become commercial vehicle when trolley is attached to it and goods are being carried in the same – the tractor was carrying sand and grit and was being used as a transport vehicle – the accident occurred on 2.6.2000- the licence was valid till 23.10.1997 and no application for renewal was received – there was no valid licence with the driver – the insurer was wrongly saddled with liability – appeal allowed and liability fastened upon the insurer.(Para-7 to 12)

Case referred:
M/S United India Insurance Co. Ltd. Chandigrh vs. Sh. Pritpal Singh, (1996-2) 113 P.L.R. 49

For the appellant: Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1 to 4.
Mr. Adarsh K. Vashisht, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J (Oral).

Respondent No. 2, Oriental Insurance Company before learned Commissioner below, being aggrieved by the award dated 20.3.2006, passed in case No. 5/2000, is in appeal before this Court. The perusal of the impugned award reveals that the learned Commissioner below while holding that Sh. Bikram Chand, the predecessor-in-interest of respondents No. 1 to 4 (hereinafter referred to as the claimants) was a workman and taking his monthly salary as Rs. 2500/- per month as well as applying 203.85 as relevant factor keeping in view the age of the deceased as 32 years, has awarded a sum of Rs. 2,03,850/- as compensation whereas Rs. 1,40,249/- towards pendente lite interest @ 12% as on 24.4.2006.

2. The deceased Bikram Chand, was admittedly deployed by respondent No. 5 (hereinafter referred to as the insured) as driver with ill fated tractor bearing registration No. HP-53-0905. Although the petitioners have claimed his monthly salary at Rs. 3,000/- per month, yet as per the admission made by the insured respondent No. 5, he was paying Rs. 2,500/- as wages per month to the deceased. The tractor met with an accident on 2.6.2000 due to sagging of danga. The deceased received multiple injuries on his person and later on succumbed to the injuries so received by him on his person.

3. The claimants, being his widow, minor children and widowed mother, hence dependent upon him had preferred the application under Section 22 of the Workmens' Compensation Act and claimed compensation to the tune of Rs. 5,00,000/- on account of loss they suffered in this accident.

4. The insured-respondent No. 1 before learned Commissioner below by way of preliminary objection has raised the objection qua maintainability of the petition, locus standi of the claimants to file the same as well as for non-joinder of necessary parties. On merits, he, however, has admitted that deceased Bikram Chand was driver of his tractor bearing registration No. HP-53-0905. When he was employed as driver, the deceased had valid driving licence and it is on the basis thereof, he was employed as driver. The accident, however, did not occur due to rash and negligent driving on his part and rather due to sagging of kutcha danga (retaining wall). The monthly wages of the deceased according to the insured was Rs. 2500/- per month.

5. The insurer-respondent No. 1, in addition to the preliminary objections raised by the insured, has also claimed in preliminary that the deceased driver was not holding valid and effective driving licence at the time of accident. Rejoinder was also filed. On the pleadings of the parties, the following issues were framed:

> "1. Whether the deceased Bikram Chand was a workman as defined in the Workmen's Compensation Act, 1923? OPP.
>
> 2. Whether the deceased died during course of his employment with respondent No. 1?OPP.
>
> 3. Whether the deceased was earning wages @ Rs. 3000/- per month? OPP.
>
> 4. Whether the applicants are entitled for compensation under the Workmen's Compensation Act, 1923? OPP.
>
> 5. Whether the application is not maintainable in the present form? OPR.
>
> 6. Whether the deceased was not holding a valid and effective driving licence in the time of accident? OPR.
>
> 7. Relief."

6. Learned Commissioner below, while answering issues No. 1 to 3 has concluded that the deceased was working as driver with ill fated tractor and that his wages were Rs. 2500/- per month. He died during the course of his employment. Being so, while answering issue No. 4, the claimants were held entitled to the award of just and reasonable compensation. The question of maintainability of the petition as raised was rejected while answering issue No. 5 against the appellant. On issue No. 6, though it has been held that the driving licence was not renewed beyond 23.10.1997, however, interpreting Section 15(4) of the M.V. Act, 1988, which provides for renewal of a driving licence up to a period of 5 years, it was held that the same has not become ineffective during the period i.e. 23.10.1997 when its validity had expired till the accident of the tractor i.e. 2.6.2000. The insured-respondent No. 1 has not assailed the impugned award. The same, however, has been assailed on behalf of insurer-respondent No. 1 on several grounds, however, mainly that since deceased was not holding a valid and effective driving licence at the time of accident of the tractor, therefore, the liability, if any, to pay the compensation is that of the insured who allowed the ill fated tractor to be driven by an unauthorised person.

7. The appeal, though has been admitted, however, not on any substantial question of law. Anyhow, as per the settled legal proposition, substantial question of law can be framed at any stage, including at the time of final hearing. Otherwise also, the substantial questions of law arises according to the appellant-insurer for determination are at page 4 of the memorandum of appeal. Anyhow, it is only the substantial question of law at Sr. No. 3 which arises for determination in this appeal, which reads as follows:

> "3. Whether, the Ld. Commissioner below is justified to pass the amount of compensation along with interest against the appellant who has proved on the record that the insured has committed the material breach of Insurance Policy w.r.t. driving clause as well as the use of tractor for non-agriculture purpose although the tractor was insured under Kisan Package Policy and no passenger could be carried on the tractor?

8. In order to decide the legal question as has arisen for determination in this appeal, it is desirable to take note of as to what constitutes a legal and valid driving licence in legal parlance. Reference can be made in this behalf to Section 3(1) of the M.V. Act, which reads as follows:

> "3. Necessity for driving licence.—
>
> (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than 1[a motor cab or motor cycle] hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.—(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than 1[a motor cab or motor cycle] hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do."

9. It is thus safe to hold that no person can drive a vehicle in any public place unless he holds an effective driving licence issued by the competent authority. Similarly, no person can drive a transport vehicle unless and until the driving licence he holds entitles him to do so. Be it stated that here the vehicle is tractor. When it is a tractor alone, it can reasonably be believed that the same falls in the category of light motor vehicle (LMV). Reference in this behalf can be made to Section 2(21) of the Act. However, when trolley is attached and goods carried therein, the same becomes a transport vehicle and in that event only a person whose driving licence authorizes him to drive the same can do so. In this regard, support can be drawn from the judgment of Punjab and Haryana High Court in ***M/S United India Insurance Co. Ltd. Chandigrh vs. Sh. Pritpal Singh, (1996-2) 113 P.L.R. 49.*** The relevant text of the judgment reads as follows:

> "6. Definition of "Motor Vehicle" or "vehicle" is comprehensive so as to include any mechanically propelled vehicle adapted for use upon roads irrespective of the source of power and includes a trailer. "Trailer" has been defined separately but is also included in the definition of the "Motor Vehicle"/"Vehicle". Therefore, even though a trailer may be drawn by a motor vehicle, it by itself is a motor vehicle and both the tractor and the trailer taken together would constitute a transport vehicle. If the trailer/trolley is not driven by a tractor, it does not become a vehicle and does not have any independent identity. The very fact that the trailer has been included within the definition of "motor vehicle" clearly shows that the legislature did not intend to exclude a tractor together with a trailer/trolley from the definition of the "motor vehicle" and in our opinion, the findings recorded by the Tribunal about the liability of the appellant do not suffer from any illegality."

10. Although the insured respondent No. 1 has not said anything about the use of the tractor at the relevant time yet the suggestion given to PW-2 Kushla Devi on behalf of insurer-respondent No. 2 that at the time of accident, sand and grit was being carried in the trolley of the tractor, has been admitted by the said witness, therefore, it can reasonably be believed that the tractor was being used as a transport vehicle at the relevant time. Admittedly, the validity of the driving licence which was issued by Licensing Authority, Mandi was between 24.10.1994 to 23.10.1997. The accident has occurred on 2.6.2000. As per the testimony of DW-3 Anuj Kumar, no application for renewal of the driving licence was received after 23.10.1997, meaning thereby that at the time of accident, the deceased driver was not holding a valid and effective driving licence. Learned Commissioner below has erroneously pressed into service the provision contained under Section 15(4) of the Act because the driving licence which ceases to be effective, no doubt, can be renewed, however, only subject to undergoing and passing out the test of competence to drive in terms of Section 9 of the M.V. Act, i.e. like at initial stage when an

application for issuance of driving licence is made and the driving licence issued subject to qualifying the test of competence. In the case in hand, deceased driver has never approached the Licensing Authority for renewal of the driving licence till his death.

11. The licence could have been renewed within 30 days as provided under Section 15(3) of the M.V.Act. No application, however, was made by the deceased driver within the prescribed period for renewal of the licence in question. Otherwise also, the licence admittedly issued for driving light motor vehicle, the deceased driver could not have driven the tractor loaded with sand and grit in its trolley. Therefore, there being breach of the contract of insurance, no liability could have been fastened upon the insurer-respondent No. 2. Since it is the insured who has allowed the tractor along with its trolley loaded with grit and sand to be driven by an unauthorized person, being responsible for breach of the contract of insurance, is liable to indemnify the claimants in the matter of payment of the compensation as awarded. The substantial question of law is answered accordingly.

12. Being so, the present appeal is allowed and the impugned award is though upheld, however, modified to the extent that the liability to pay the amount of compensation together with interest shall be that of the insured and not the insurer-appellant. The appeal is accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Shri Pawan Kumar Sharma ....Petitioner/JD.

Versus

Sarla Sood and others ....Respondents/DH.

C.R. No. 184 of 2011.
Reserved on:24.11.2016.
Decided on: 5th December, 2016.

Code of Civil Procedure, 1908- Section 47- Rent Controller ordered the eviction of the tenant on the ground of arrears of rent - the order was put to execution – objections were filed, which were dismissed – held, that an application for extension of time was filed, which was dismissed, this shows the liability to pay the amount – however, the general power of attorney admitted in subsequent rent petition that the tenant had paid the rent – the objections were wrongly dismissed by the Executing Court- revision allowed – order of the Rent Controller set aside.

(Para-2 to 4)

For the Petitioner: Mr. Deepak Bhasin, Advocate.
For Respondents: Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Judgment debtor/petitioner herein, tenant in the demised premises stands aggrieved by the pronouncement made by the learned Executing Court upon his objections constituted therebefore vis-a-vis the execution petition constituted thereat by the Decree holder/landlord, wherewithin the apposite unfoldments qua his resistance to the execution of the decree stood discountenanced by the learned Executing Court.

2. The learned counsel appearing for the judgment debtor/petitioner herein submits qua the impugned pronouncement made by the learned Executing Court upon the apposite objections preferred therebefore by the JD/tenant manifesting therein qua the decree put to execution therebefore not warranting recording of affirmative orders thereon, its standing fully satisfied, standing stained with a vice arising from the factum of its palpably slighting the factum

of unfoldments occurring in the relevant record existing therebefore comprised in the testification recorded on 29.10.2004 in Rent Petition No. 10/2 of 2003 by the General Power of Attorney of the landlord wherein he made articulations qua all the outstanding arrears of rent qua the demised premises standing liquidated by the judgment debtor excepting conspicuously the one's pertaining to the period commencing from 1.9.2000 uptill 31.03.2003 whereupon he hence canvassed qua the executable pronouncement recorded in rent petition No. 1-2 of 1996 put to execution before the learned Executing Court embodying therein qua the Judgment debtor, falling into arrears of rent commencing from 1.9.1995 upto the date of payment standing fully satisfied, satisfaction whereof emanating from the factum of liability of rent fastened upon the tenant in a verdict recorded in Rent Petition No. 1-2 of 1996, standing acquiesced to stand liquidated more so when the aforesaid verdict stood put to execution. However, the learned counsel appearing for the tenant/JD/petitioner herein cannot derive the fullest succour from the aforesaid acquiescence occurring in the testification of the GPA of the decree holder/landlord, given its sinew suffering partial dissipation from an imminent display occurring in the impugned pronouncement hereat wherewithin unravelments are held qua the rendition recorded by the learned Rent Controller in Rent Petition No.1-2/1996 standing assailed before the learned Appellate Authority by the tenant/JD by the latter preferring an appeal therebefore whereat he under an application constituted under Section 5 of the Limitation Act sought extension of time for depositing his statutory liability qua the arrears of rent determined by the learned Rent Controller in a pronouncement made by the latter on 6.11.1999, wherefrom an inference spurs of the JD acquiescing qua his not making the relevant deposit qua his liability towards arrears of rent within the statutorily prescribed period, application whereof suffered the ill fate of its dismissal by the learned Appellate Authority under the latter's order recorded on 16.12.2000. Of course, the inevitable ensuing sequel therefrom is qua the tenant/JD acquiescing to the factum of his not depositing the relevant computations of arrears of rent made by the learned Rent Controller concerned in Rent Petition No.1-2 of 1996 within the statutorily prescribed period for its deposit therebefore whereupon the apposite decree for his suffering eviction from the demised premises on account of his falling into arrears of rent became executable qua him, whereupon, he stands estopped besides forestalled to derive the fullest strength from any acquiescence made by the GPA of the decree holder/landlords, rather stands entailed with the misfortune of the learned Executing Court ensuring his eviction from the demised premises by ordering for issuance of warrants of possession qua him.

3. Even though, this Court has partially blunted the effect of the aforesaid communication occurring in the testification of the GPA of the decree holder qua the tenant/JD not holding any liability qua the landlord vis-a-vis liquidation qua him of rent for the period commencing from 1.9.1995 upto the date of payment, whereupon, this Court concludes qua its entailing the effect of the Executing Court ordering for issuance of warrants of possession upon the judgment debtor yet before ordering, the learned Executing Court to make the aforesaid pronouncement, this Court is enjoined to also not remain oblivious to the factum of the executable decree standing rendered in the year 1999 by the learned Rent Controller concerned in Rent Petition No. 1-2 of 1996, also this Court stands enjoined to not remain unmindful to the factum of the landlord subsequent to his obtaining a verdict in Rent Petition No. 1-2 of 1996 his also qua the demised premises instituting Rent Petition No.10/2 of 2003 before the learned Rent Controller concerned, during proceedings whereof the GPA of the landlord made a communication displaying his acquiescence qua the tenant liquidating his liability of rent qua the demised premises in sequel to the pronouncement made in Rent Petition No. 1-2 of 1996. Though, the acquiescence of the GPA of the landlord would not erode the play of the dicktat of the relevant statutory mandatory provisions enjoining the tenant to within the time prescribed therewithin deposit his apposite judicially determined liability of arrears of rent before the Court concerned, whereas, evidently with the tenant not liquidating his apposite liability within the statutorily ordained period for its liquidation whereupon the statutory consequence qua the Executing Court ordering for issuance of warrants of possession qua him is an inevitable ensuing sequel therefrom. However, the acquiescence qua the relevant facet made by the GPA of the landlord in rent petition No.10/2 of 2003 which stood instituted subsequent to the pronouncement made in

rent petition No.1-2 of 1996 holding bespeakings therein of the tenant making the relevant liquidation holds the sequel of the landlord accepting the attornment of rent to him by the tenant/JD other than the statutory mode for its deposit. The effect of the landlord personally/directly accepting attorning of rent qua the demised premises from the tenant in detraction of the statutory mode does hold the consequence of the landlord waiving his rights to seek eviction of the tenant, right whereof stood bestowed upon him under an executable decree pronounced in Rent Petition No.1-2 of 1996, inference whereof when stands construed in coagulation with the landlord subsequent to the pronouncement recorded by the Rent Controller in Rent Petition No. 1-2 of 1996, his in the year 2003 instituting another petition seeking eviction of the JD from the demised premises, ultimately also when both the factum aforesaid stand construed in entwinement with the apposite execution petition constituted before the learned Executing Court by the landlord whereupon he sought execution of the executable decree rendered in Rent Petition No.1-2 of 1996 standing constituted therebefore belatedly on 30.08.2010 does foster an inference of with the landlord receiving rent directly from the tenant, he is to stand construed to not only create a fresh tenancy qua the demised premises upon the tenant besides is to stand construed to concomitantly hence, waive his rights to seek eviction of the JD under an executable decree recorded in Rent Petition No.1-2 of 1996. Contrarily, it has to be concluded of the landlord by procrastinating the execution of the executable decree rendered on 6.11.1999 in Rent Petition No. 1-2 of 1996 upto 29.09.2005 whereat a pronouncement in rent petition No. 10/2 of 2003 also occurred his also thereupon renewing the tenancy qua the relevant premises vis-a-vis the JD.

4. The summom bonum of the aforesaid discussion is that all the aforesaid material which existed before the learned Executing Court standing slighted besides their impact standing untenably undermined by him whereupon the ensuing sequel therefrom is of the learned Executing Court while pronouncing its impugned rendition overlooking the relevant and germane evidence besides its not appreciating its worth. Consequently, the order impugned suffers from a gross absurdity and perversity of mis-appreciation of material on record. Accordingly, the instant petition is allowed and the order impugned is quashed and set aside. In sequel, the apposite execution petition seeking execution of the verdict pronounced in Rent Petition No.1-2 of 1996 is dismissed, whereas, the objections instituted thereat by the JD/petitioner herein/tenant are allowed. All the pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rattan Chand Sharma ...Appellant.

Versus

State of Himachal Pradesh through Collector, Kangra at Dharamshala, H.P ...Respondent.

RSA No.393 of 2006.
Reserved on : 16.11.2016.
Decided on : 05.12.2016.

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration that shamlat land was allotted to him – the allotment was cancelled but the order of cancellation was set aside in the civil suit- an appeal was filed, which was dismissed-representation was made subsequently by the residents of the area on which the allotment was cancelled – the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that cancellation was set aside in the previous suit on the ground that Sub Divisional Magistrate had no jurisdiction to cancel the allotment and only Commissioner was empowered to do so – subsequent cancellation was made by the Commissioner – the land was never possessed by the plaintiff and the allotment was rightly set aside- appeal dismissed.(Para-10 and 11)

For the appellant Mr. N.K. Sood, Sr. Advocate with Mr. Aman Sood, Advocate.
For the respondent : Mr. Virender Kumar Verma, Addl. AG with Mr. Pushpinder Jaswal, Dy. AG.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal under Section 100 of the Code of Civil Procedure is maintained by the appellant against the judgment and decree dated 1.6.2006, passed by the learned District Judge, Kangra at Dharamshala, in Civil Appeal No.144-P/XIII-2005, whereby the learned lower Appellate Court has affirmed the judgment and decree passed by learned Civil Judge (Junior Division), Court No.2, Palampur, District Kangra, H.P, in Civil Suit No.103 of 2000, dated 17.8.2005, with the prayer to set aside the same and decree the suit of the plaintiff.

2. Briefly stating facts giving rise to the present appeal are that appellant/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for declaration and possession of the suit land against the respondent/defendant (hereinafter referred to as 'the defendant') alleging that he was allotted 'Shamlat land' in the year 1976-77, comprised in Khata No.70 min. Khatauni No.241 & 245 Khasra No.218, 670 & 671/1 measuring 0-30-47 hectares, situated in Mohal Nawalkar, Mauza Naura, Tehsil Palampur, District Kangra, H.P. The allotment was cancelled by the SDO (C), Palampur, vide order dated 25.7.1981, without any rhyme or reason, the order was challenged in the Civil Court and the order of S.D.O (C) was quashed by the Civil Court while decreeing the suit of the plaintiff. Thereafter, the State of Himachal Pradesh, maintained an appeal before the learned District Judge, Dharamshala, the same was also dismissed and the judgment and decree passed by the learned Court below was affirmed. On 18.9.1996, Addl. District Magistrate, Kangra, entertained an application of some of the residents of Village Naura, Tehsil Palampur, for cancellation of the allotment cancelled the allotment made in favour of the plaintiff. The said order of Addl. District Magistrate, who was earlier impleaded as defendant No.2 (and whose name was deleted) is in clear disobedience of the decree of Civil Court and without jurisdiction. An application under Order 21 Rule 32 CPC, was also filed against the Addl. District Magistrate, but it was dismissed by the Civil Court.

3. The suit was resisted and contested by the defendant by raising preliminary objections that the Civil Court has no jurisdiction to try and decide the case, suit is not maintainable, plaintiff has no locus standi and cause of action to file the suit and the suit is bad for want of notice under Section 80 CPC. On merits, it has been contended that the suit land was allotted to the plaintiff during the year 1976-77, but its possession was not delivered to him. Thereafter, the said allotment was cancelled by Addl. District Magistrate, exercising the powers of Commissioner, as there was representation of Gram Panchayat, Naura, with a prayer for the cancellation of allotment. There was no bar for the competent Revenue Officer, for cancellation of the suit land. Moreover, the plaintiff was an employee at the time of allotment of land and no possession was ever delivered to him.

4. The learned trial Court framed following issues on 4.1.2003 :

"1. Whether the order dated 28.4.1997 passed by Addl. Dy. Commissioner, Kangra at Dharamshala, is wrong and without jurisdiction, as alleged ? OPP.

15. Whether the plaintiff is entitled to the relief of possession, as alleged ? OPP.

16. Whether this Court has no jurisdiction ? OPD.

17. Whether suit is not maintainable ? OPD.

18. Whether plaintiff has no locus standi ? OPD.

19. Whether plaintiff has no cause of action ? OPD.

20. Whether no notice under Section 80 CPC has been served on the State of H.P ? OPD.

21. Whether plaintiff has no cause of action ? OPD.

22. Relief."

5. The learned trial Court after deciding Issue Nos.1 and 2 against the plaintiff, Issue No.3 against the defendant, Issue No.4 in favour of the defendant, Issue Nos.5 to 8 against the defendant and dismissed the suit of the plaintiff. Thereafter, the appeal was maintained by the plaintiff before learned District Judge, Kangra at Dharamshala and the same was dismissed. Hence, the present regular second appeal, which was admitted on the following substantial question of law:

> "Whether in the face of the decree passed in the earlier suit declaring the appellant-plaintiff as owner in possession of the suit land and restraining the respondent-defendant from causing any interference in possession of the appellant-plaintiff, could the Additional Deputy Commissioner have passed an order for the cancellation of allotment of the suit land in favour of the appellant-plaintiff, under the scheme formulated in accordance with the provisions of H.P. Village Common Lands (Vesting and Utilization) Act ?"

6. Learned Senior Counsel appearing on behalf of the plaintiff has argued that the learned Courts below has not taken into consideration the fact that the judgment and decree passed in favour of the plaintiff in earlier suit has attained finality with respect to the same land and the Additional District Magistrate, was having no power to cancel the allotment after the decree has attained finality.

7. On the other hand, learned Additional Advocate General appearing on behalf of the respondent has argued that the decree in the earlier suit was only to the extent that the Sub Divisional Magistrate, was having no jurisdiction to pass the cancellation order cancelling the Nautor land, but thereafter the order of cancellation was passed by the competent authority, as per law. There is no ground to interfere with the well reasoned judgment passed by the learned Courts below. He has argued that the appeal deserves dismissal.

8. In rebuttal, learned Senior Counsel appearing on behalf of the plaintiff has argued that the land is still lying vacant, as the plaintiff was entitled for Nautor land, he should be given Nautor land, as per Rules by the defendant and so the appeal may be allowed.

9. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

10. At the very outset, it is pertinent to discuss the evidence, which has been led by the plaintiff. The plaintiff Rattan Chand, appeared as PW-1, has stated that the suit land is about 8 ½ Kanals, which was allotted to him by way of 'Patta' in the year 1978, against payment of Rs. 184/- and thereafter Sub Divisional Magistrate, cancelled the same. The plaintiff has challenged the said order before learned Court below and the suit was decreed in his favour. The appeal was preferred by the defendant before the learned lower Appellate Court, Dharamshala, and the same was also decided in favour of the plaintiff. He has further deposed that the Panchayat people approached the Addl. District Magistrate and decided the matter against the plaintiff without any jurisdiction. In his cross-examination, he has stated that the suit land was allotted to him, being a land less person and that he joined services in the year 1990, on daily wages. He has denied that he was in service during the year 1976-77. He has denied that at the time of allotment, his annual income was Rs. 3000/- or that possession was not delivered to him by the Revenue Department stated that the possession was delivered and then Revenue Department again took possession of the suit land. He has denied that all the villagers use the suit land and the land is lying vacant and is possessed by the Government. He has admitted that after the allotment of suit land, the villagers complained against the witness and the allotment

was cancelled. He has admitted that on the complaint of Panchayat before the Addl. District Magistrate, the allotment was cancelled, even after the decision of Civil Court. He has admitted that sufficient opportunity was given to the witness and Panchayat during the proceedings before Addl. District Magistrate. He has also admitted that decisions made by learned Court below and learned District Judge, pertained to the order of Sub Divisional Magistrate. He has also unaware if Addl. District Magistrate (Commissioner) was competent to cancel the 'Pata'. No appeal was preferred by the plaintiff against the order of cancellation of allotment made by the Addl. District Magistrate. He has also stated that Revenue Department had not handed over the possession to him. DW-1 Ranu Ram, Patwari Halqua Naura, has stated that the suit land belongs to the State Government and is in possession of Forest Department through 'Tabe'-Bartandaran'. The said land was allotted to the plaintiff in the year 1976-77, but the possession was not handed over to the plaintiff, because it was in possession of Forest Department through 'Bartandarans'. There is one water pond in the suit land, the water of which is used for irrigation by the 'Bartandarans'. In his cross-examination, he has denied that change in entry of the suit land was made in the year 2000 and such change was effected in the year 1995-96. DW-2 Baldev Singh, Clerk, has produced copy of the order dated 28th April, 1997, Ex.P-7, whereby the allotment of the suit land was cancelled on an application moved by the Gram Panchayat, Naura. He has also proved on record that the plaintiff was working as Mate in the Irrigation and Public Health Department. DW-3 Kashmir Singh, Pradhan, Gram Panchayat, Naura, has stated that the suit land is owned by State of Himachal Pradesh and is possessed by Forest Department through 'Bartandarans'. The suit land falls in village Naura and there is a water pond, the water is being used by the Villagers, that is, the 'Bartandarans'. He has also stated that earlier the suit land had been allotted to the plaintiff, but on the objections and keeping in view the utility of the 'Bartandarans', such allotment was cancelled, on the application of Gram Panchayat, Naura, moved before Deputy Commissioner and the same was duly signed by the Villagers. The plaintiff has no concern with the suit land nor there is any entry in favour of the plaintiff in Revenue record. In his cross-examination, he has admitted that suit land was allotted to the plaintiff in the year 1977, but he does not know, if earlier Sub Divisional Magistrate, had cancelled the same or that such order was challenged by the plaintiff and civil suit was decided in favour of the plaintiff. DW-4 Smt. Kanta Mehta, has deposed that the earlier to the allotment of suit land is being used by the 'Bartandarans', as there is also one water tank, which is hundred years old. The plaintiff has no concern whatsoever with the suit land. In her cross-examination, she has denied that the plaintiff has got the suit land by the order of the Court. She has denied that after decision of the Court, they have built a water tank on the suit land. She has also denied that being Pradhan, she connived with Villagers and got quashed the court orders from the Addl. District Magistrate. She has denied that Addl. District Magistrate, had no powers to quash such order. She has denied that plaintiff is owner-in-possession of the suit land.

11. From the perusal of record, it is revealed that the judgment as passed by the Civil Courts in the earlier litigation shows that the Civil Courts judgment and decree, which has attained finality has specifically held that Sub Divisional Magistrate, was having no jurisdiction to cancel the allotment made in favour of the plaintiff. It was held that in cases under the H.P. Village Common (Vesting and Utilization) Scheme, 1975 only the "Commissioner" is empowered to cancel the allotment made in favour of a particular person. Vide notification No.2-A (4)-3/78, dated January 6, 1979, issued by the State Government, all the Deputy Commissioners in the State of Himachal Pradesh, have been vested with the powers of the "Commissioner" within the meaning of clause 13 (4) of the Scheme of 1975 and vide subsequent notification No.2-A (3)-11/77 dated March 26, 1983, in addition to the Deputy Commissioners, Addl. District Magistrates of Kangra and Mandi, have also been vested with the powers of the "Commissioner" within the meaning of clause 13 (4) of the Scheme of 1975. So, the order of cancellation made by the Sub Divisional Magistrate, Palampur, against the plaintiff was quashed. It was the sole ground on which the cancellation order was set aside by the Civil Courts. However, the Addl. District Magistrate, Kangra, thereafter exercising the powers of "Commissioner" has cancelled the allotment of the suit land in favour of the plaintiff, vide order Ex.D-7, its copy Ex.P-3, also on record. It is specifically admitted by the plaintiff in his cross-examination that he was given full

opportunity to contest the cancellation case by the Addl. District Magistrate. It is also admitted by the plaintiff that the land is in the nature of water body and is still lying vacant. However, the defendant's case is that the land is being used by 'Bartandarans', is in occupation of the Forest Department, which also shows that the land being vacant throughout and it was never possessed by the plaintiff. So, substantial question of law is decided accordingly holding that the judgment and decree passed by the learned Courts below is not in derogation to the decree for Permanent Prohibitory Injunction in respect of the suit land. The learned Courts below has not misconstrued and misinterpreted the provisions of H.P. Village Common Land (Vesting and Utilization) Act, 1974. The order of competent authority is just, reasoned and properly appreciated by the learned Courts below.

12. From the above, it is clear that the findings arrived at by the learned Courts below are just, reasoned and after appreciating the evidence, which has come on record to its true perspective. Hence, needs no interference.

13. With these observations, the appeal of the appellant/plaintiff being without any merit deserves dismissal, hence the same is dismissed. Needless to say that if the plaintiff has a right in view of the order passed by the Additional District Magistrate, Kangra at Dharamshala, H.P, Ex.P-3 dated 28.4.1997, he shall be at liberty to approach the authorities, as per law. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Balvinder Kumar .....Respondent.

Cr. Appeal No. 286 of 2008
Decided on: 05/12/2016.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a van in a rash and negligent manner- Van hit the informant and caused him injuries – the accused was tried and acquitted by the Trial Court- held in appeal that the informant had suddenly appeared before the vehicle - the contents of the FIR were not readover and explained to the informant – one prosecution witness had not supported the prosecution version- the accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Digvijay Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 2.1.2008 by the learned Judicial Magistrate 1st Class, Court No.4, Mandi, Himachal Pradesh, in Police Challan No.255/I/04/255/II/04, whereby she acquitted the respondent (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 21.3.2004 at about 9.00 a.m. at Nerchowk accused Balvinder Kumar was driving a Maruti van bearing No.HP-02-6573 in a rash and negligent manner and at the same time complainant Parma Ram, alongwith Chavi Ram, was walking by the side of the road with his bullocks and the accused while driving the car rashly and negligently hit the complainant causing injuries to him. The injured/complainant was taken to

hospital for medical treatment. A case was got registered against the accused, police visited the spot, prepared the site plan and took into possession the Maruti van bearing No. HP-02-6573 for its mechanical examination. After recording the statements of the witnesses and completion of the investigation, the accused was challaned under Sections 279, 337 and 338 of the Indian Penal Code. After completing all codal formalities and on conclusion of the investigations into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the Indian Penal Code to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. However, he did not choose to lead any evidence in defence.

8. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the learned trial Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. Victim complainant PW-3 lodged F.I.R. qua the relevant occurrence which stands borne on Ext.PW-3/A. PW-6 in his testification while proving the apposite MLC prepared qua the victim embedded in Ext.PW-6/A has made an emphatic pronouncement therein qua the occurrence of injuries on the person of the victim being sequelable in a road side accident. The learned trial Court had pronounced a verdict of acquittal qua the accused respondent who stands alleged to commit the relevant charged offence comprised in his while negligently driving his vehicle his striking it with PW-3 who at the relevant time was occupying the road along with his bullocks whom he was thereat tending to. In sequel thereto the accused respondent carried the victim to hospital whereat he received treatment for the injuries suffered by him in a collision which occurred inter se the vehicle driven by him with PW-3. The ascription of penally inculpable negligence by the prosecution qua the accused respondent stands canvassed by the learned Deputy Advocate General to stand emphatically proven by the consistent testimonies of PW-1, PW-2 and PW-3. He canvasses qua the veracity of the testimonies of PW-1, PW-2 and PW-3 not warranting theirs standing concluded as inaptly done by the learned trial Court to stand countervailed by the deposition of PW-4 also an eye witness to the occurrence merely for PW-4 omitting to lend support to the prosecution version comprised in his reneging from his previous statement recorded in writing. The espousal made herebefore by the learned Deputy Advocate General for seeking reversal of the verdict pronounced upon the accused/respondent enjoins this Court to incisively peruse the defence projected by the accused before the learned trial Court embedded in the factum of PW-3 occupying the road at the relevant time, road whereof also thereat evidently held a heavy congestion of vehicles besides thereat PW-3 was tending to his bullocks whereupon the defence has put apposite suggestions to the prosecution witnesses qua the bullocks on hearing the blaring sounds of sirens emanating from the vehicle occupying the road at the relevant time, theirs moving astray from their maneuvered direction by PW-3

whereupon they struck PW-3 whereafter on the latter abruptly appearing before the vehicle driven by the accused/respondent he suffered a collision with it, besides obviously on anvil thereof the defence espoused qua the striking of PW-3 by the vehicle driven by the accused respondent not being a sequel to any penally negligent act on the part of the accused respondent rather the collision which occurred inter se the vehicle driven by the accused respondent with PW-3 arising from PW-3 standing abruptly struck by the bullocks which he was tending to at the relevant time, who had for reasons afore-stated moved astray from their negotiated direction whereafter the abrupt appearance of PW-3 before the relevant vehicle not begetting the sequel of the vehicle driven by him directly striking PW-3 rather the reason for the relevant collision occurring with PW-3 being ascribable to after PW-3 suffering a jolt from the bullocks to whom he was tending to at the relevant time his thereafter begetting an abrupt collision with the vehicle driven by the accused. Consequently, the defence espouses qua theirs evidently not in the aforestated factual scenario surfacing any proven element of the accused respondent intentionally deviating from the standards of due care and caution nor any penal liability being fastenable upon him for the injuries suffered by PW-3.

10. Be that as it may, PW-1 and PW-2 who are the eye witnesses to the occurrence did lend corroborative succor to the testifications of PW-3 the victim/complainant. The vigour of the prosecution case qua PW-3 sustaining injuries in the manner manifested in F.I.R. embodied in Ext.PW-8/A primarily warranted emanation of taint free evidence of PW-3 qua the recitals borne thereon being free from any stain of compulsion or duress besides the contents embedded in Ext.PW-3/A arising from their volition making by PW-3 whereupon alone the genesis of the prosecution case embedded in Ext.PW-3/A would acquire probative sinew also thereupon the testifications of PW-1 and PW-2 in purported corroboration qua the testification of PW-3 would hold a concomitant vigour of tenacity. Contrarily if the testification of PW-3 holds therewithin the aforestated taints it besides evidence in purported corroboration thereto would fall apart rather reiteratedly the testifications of PW-1 and PW-2 in purported corroboration to the taint ridden testification of PW-3 would be construable to stagger besides the testifications of PW-1 and PW-2 would be construable to be a sequel of the Investigating Officer for meteing corroboration to Ext.PW-3/A his concerting to engineer the statements of PW-1 and PW-3. A close scrutiny of the deposition of PW-3 embodied in his cross-examination unveils qua the Investigating Officer *suo motu* recording the contents of Ext.PW-3/A also therein he communicates qua the contents of Ext.PW-3/A neither standing readover to him nor his reading its contents whereupon it is to be concluded qua without his dictating the recitals of Ext.PW-3/A to the Investigating Officer nor thereafter his comprehending its contents, his proceeding to append his signatures thereon whereupon it is to be concluded qua the recitals embedded in Ext.PW-3/A being not a voluntary making of PW-3 rather the recitals embedded therein standing engineered by the Investigating Officer. In aftermath, the genesis of the prosecution case which stands testified in purported corroboration thereto by PW-3 in his examination in chief stands eroded of its truth. The apt sequel thereof is qua the purported corroboration lent thereto by PW-1 and PW-2 standing obviously concluded to be a sequel to the Investigating Officer tutoring besides inventing their previous statement recorded in writing whereupon their testifications in corroboration thereto do not acquire any tenacity or vigour. Corollary of the aforesaid discussion is qua the genesis of the prosecution case embodied in Ext.PW-3/A standing benumbed.

11. Be that as it may hereat with PW-4 supporting the propagation of the defence, though he obviously reneged from his previous statement recorded in writing rather contrarily being construable for imputation of reliance thereon besides credence being placed thereupon significantly when on his reneging from his previous statement recorded in writing the learned APP on obtaining an affirmative permission of the learned trial Court to hold him to cross-examination though in course whereof he made a concerted bid therein to rip the tenacity of the disclosures made by him in his examination in chief yet the aforestated concert of the APP to rip the tenacity of his deposition embodied in his examination in chief wherein he had lent succor to the propagation of the defence did not yield any fruitful outcome to the prosecution. Consequently, even though PW-4 reneged from his previous statement in writing yet when he

stood subjected thereafter to a rigorous examination by the learned APP whereat his testimony comprised in his examination in chief remained unscuttled constrains this Court to conclude qua thereupon his testimony in support of the defence acquiring credit besides tenacity being imputable thereupon. Even the testifications occurring in the examinations-in-chief of prosecution witnesses who therein renege from their previous statements recorded in writing are not *per se* thereupon rendered unreadable vis-à-vis the propagations articulated therein holding leanings qua the defence especially when the relevant echoings supportive of the defence occurring in the relevant examination-in-chief acquire succor from the factum of the testification of the victim besides of purported eye witnesses to the relevant occurrence standing ingrained with a taint besides blemish also when the testification of a hostile prosecution witnesses despite withstanding the rigors of an exacting cross-examination whereupon his espousal in his examination-in-chief supportive of the defence hence remain unshattered, contrarily thereupon his untaint ridden relevant testification warranting imputation of credence thereto.

12. The *summum bonum* of the above discussion is qua the depositions of PW-3 besides PW-1 and PW-2 in purported corroboration thereto not being amenable to imputation of reliance thereupon contrarily the deposition of PW-4 being amenable to imputation of credence besides reliance thereupon whereupon this Court concludes qua the defence succeeding in proving qua the injuries begotten on the person of PW-3 being a sequel to the latter while standing struck by the bullocks occupying the road at the relevant time his thereafter *suo motu* abruptly striking the vehicle driven by the accused respondent, in sequel whereof no penally inculpable negligence is ascribable to the accused/respondent. Also with the conduct of the accused respondent comprised in his carrying the victim to hospital when is conduct magnificatory of his innocence, hence it negates the charge.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ...Appellant.
Versus
Nanha ...Respondent.

Criminal Appeal No.478 of 2008
Date of Decision : 05.12.2016

Indian Penal Code, 1860- Section 376- Accused had subjected the prosecutrix to sexual assault – the accused was tried and acquitted by the Trial Court- held in appeal that testimony of the prosecutrix if found credible does not require any corroboration - the Court may look for corroboration in case of child witness to satisfy its conscience – Court should have no hesitation in accepting the testimony of the prosecutrix – minor discrepancy or variation in the statement of witness will not be fatal, whereas, contradiction will be – the prosecutrix was minor on the date of incident- the accused was on visiting terms with the family of the prosecutrix and is a close relative – the father of the prosecutrix was not at home and the accused had visited the house of the prosecutrix to spend the night – the prosecutrix supported the prosecution version – her credit was not impeached in cross-examination- absence of blood, rashes, sperms or bruises on

the vital part of the prosecutrix is not sufficient to disbelieve her testimony – her version was corroborated by her mother – the matter was reported to police immediately- the prosecution version was proved beyond reasonable doubt and the Trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offence punishable under Section 376 of I.P.C. (Para-7 to 40)

Cases referred:

State of Rajasthan versus Om Prakash, (2002) 5 SCC 745
State of Maharashtra versus Chandraprakash Kewalchand Jain, (1990) 1 SCC 550
Golla Yelugu Govindu vs. State of AndhraPradesh (2008) 16 SCC 769
Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)
State of Himachal Pradesh vs. Suresh Kumar (2009)16 SCC 697
Gentela Vijayavardhan Rao v.State of A. P. [(1996) 6 SCC 241]
Rattan Singh v. State of H. P., (1997) 4 SCC 161
Rameshwar v. The State of Rajasthan, AIR 1952 SC 54
State of Punjab versus Gurmit Singh and others, (1996) 2 SCC 384
State of H.P. versus Lekh Raj and another (2000) 1 SCC 247
State of Punjab versus Jagir Singh (1974) 3 SCC 277
State of Rajasthan versus N. K. THE ACCUSED (2000) 5 SCC 30
State of M.P. v. Dharkole alias Govind Singh and others, (2004) 13 SCC 308

For the Appellant : M/s M.A. Khan and Varun Chandel, Additional Advocate Generals.
For the Respondent : Mr. N.S. Chandel with Mr.Dinesh Thakur, Advocate.
Accused in the custody of HHC Sant Ram No.1106 and HHC Ghanshyam No. 891, Police Line, Kaithu, Shimla.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 26.4.2008, passed by learned Sessions Judge, Hamirpur, Himachal Pradesh, in Sessions Trial No.16 of 2007, titled as *State v. Nanha,* challenging the acquittal of respondent Nanha (hereinafter referred to as the accused), who stands charged for having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code.

2. It is the case of prosecution that on 8.6.2007, Patto Devi (PW.2) lodged a complaint to the effect that accused Nanha had subjected her daughter, i.e. the prosecutrix (PW.3) to sexual assault. In relation to the said crime, on 8.6.2007 at 2.30 AM, FIR No. 238/2007 (Ex.PW.2/A) under the provision of Section 376 of IPC came to be registered at Police Station, Hamirpur. The alleged incident took place at about 1.30 AM, in the night intervening 7th& 8th June, 2007. Inspector Anjni Jaswal (PW.12), SHO of the concerned Police Station, who conducted the investigation, got the prosecutrix medically examined from Dr. Rajneesh Thakur (PW.1), who issued MLC (Ex.PW.1/B). Accused was also got medically examined from Dr. Rajesh Sharma (PW.4), who issued MLC (Ex.PW.4/B). For corroboration, certain incriminating articles so recovered, were sent for chemical analysis and report of the Chemical Analyst (Ex.PX) taken on record. Police also took on record proof with regard to age of the prosecutrix (Certificates Ex.PW.8/B and PW.9/B).

3. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

4. Accused was charged for having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code to which he did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 12 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took up the following defence:

> "I am innocent. A false case has been foisted against me at the instance of the prosecutrix and her mother. On the day of occurrence, Pato Devi had invited me to her residence in the absence of her husband. I treat Nitu as my cousin."

6. Trial Court has acquitted the accused on the following grounds: (a) testimony of the prosecutrix was highly improbable; (b) element of her tutoring was not ruled out; and (c) possibility of the accused having been falsely implicated on account of his having illicit relationship with the mother of the prosecutrix could not be ruled out.

7. Having heard learned counsel for the parties as also perused the record, we are of the considered view that the trial Court has seriously erred in coming to such conclusions and returning findings of acquittal of the accused. Reasoning adopted is bordering perversity, for it is not based on correct and complete appreciation of testimony of the prosecutrix as also other relevant/material witnesses. In fact, we are of the considered view that the trial Court adopted an extremely insensitive approach, in presupposing certain facts, while arriving at its conclusion. It presupposed that the prosecutrix had caught her mother and the accused in a compromising position, which resulted into concoction of false story and implication.

8. At this juncture, one may only observe the suggestion put by the accused, of his having alleged illicit relationship with the mother of the prosecutrix at least 3-4 years prior to the incident. It is not that the accused and the mother of the prosecutrix had allegedly developed physical intimacy/relationship on the night of the incident itself and as such, out of fear, or alleged threats, mother used her daughter to save herself.

9. It is a settled principle of law that if testimony of the prosecutrix itself is found to be inspiring in confidence, one need not look for corroborative evidence, medical or otherwise. However, it is also a settled principle of law, that in a case of child witness, only as a matter of abundant caution, Court may look for evidence, corroborative in nature and that too, only to satisfy its conscience and lend assurance to the otherwise inspiring version of the prosecutrix.

10. The law on this point is now well settled.

11. In *State of Rajasthan versus Om Prakash*, (2002) 5 SCC 745, the Apex Court has held that:-

> "Cases involving sexual molestation and assault require a different approach – a sensitive approach and not an approach which a court may adopt in dealing with a normal offence under penal laws."
>
> "Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. It is a crime against humanity. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility calls for such protection. Children are the natural resource of our country. They are the country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted. It is necessary for the courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in the Constitution of India in Article 39."

12. Prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. If for some reason Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. If the totality of the circumstances appearing on the record of the case disclose that prosecutrix does not have a strong motive to falsely involve the person charged, Court should ordinarily have no hesitation in accepting her evidence. [*State of Maharashtra versus Chandraprakash Kewalchand Jain,* (1990) 1 SCC 550].

13. In *Golla Yelugu Govindu* vs. *State of AndhraPradesh* (2008) 16 SCC 769, the Apex Court has reiterated its earlier view and has held as under:-

> "11. 6.Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, diseasewhether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in Wheeler v. United States (159 U.S. 523). The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Surya Narayana v. State of Karnataka (2001 (1) Supreme 1).

14. In *Dattu Ramrao Sakhare v. State of Maharashtra* (1997 (5) SCC 341) it was held as follows:

> '5. .....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored'. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

15. In *State of Himachal Pradesh vs. Suresh Kumar* (2009)16 SCC 697, the Apex Court was dealing with a case where the prosecutrix was ravished by the accused on 15.3.2000 which incident was narrated by the prosecutrix to her sister later during the day. She also

narrated the incident to her parents the following day and to the Doctors after the incident. Court accepted the statement of the sister, the parents and the doctors while holding the accused guilty. Importantly, the Apex Court reversed the finding recorded by the High Court wherein it was held that the statement of the prosecutrix being minor was not worthy of credence.

16. Sarkar on Evidence (Fifteenth Edition) summarises the law relating to applicability of Section 6 of the Evidence Act thus :

> "1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.
>
> 2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.
>
> 3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and by-standers. In conspiracy, riot &c. the declarations of all concerned in the common object are admissible.
>
> 4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."

17. This Court in *Gentela Vijayavardhan Rao v.State of A. P.* [(1996) 6 SCC 241] considering the law embodied in Section 6 of the Evidence Act held thus:

(SCC pp.246-47, para 15)

> "15.The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, in exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae."

18. In another judgment in *Rattan Singh v. State of H. P.,* (1997) 4 SCC 161 this Court examined the applicability of Section 6 of the Evidence Act to the statement of the deceased and held thus (SCC p.167, para 16)

> ".....The aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration 'A' to Section 6 makes it clear. It reads thus:
>
> '(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so *shortly before* or after it as to form part of the transaction, is a relevant fact.'(Emphasis supplied)
>
> Here the act of the assailant intruding into the courtyard during dead of the night, victim's identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act."

19. In *Rameshwar v. The State of Rajasthan,* AIR 1952 SC 54, the Supreme Court has held that the previous statement of the raped girl to her mother, immediately after the occurrence, is not only admissible and relevant as to her conduct, but also constitutes corroboration of her statement under the provisions of section 157 of the Evidence Act. In order to come to the aforesaid conclusions, illustration (j) to section 8 of the Evidence Act was relied upon. In that case, the victim, named Purni, was 7/8 years old. She was not administered oath, but was held to be competent witness and, therefore, duly examined and believed.

20. The Apex Court in *State of Punjab versus Gurmit Singh and others,* (1996) 2 SCC 384 has held that:-

> "... ...The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion ?
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> "21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case." ... ...
>
> (Emphasis supplied)

21. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. In order to ascertain as to whether discrepancy pointed out is minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness is making the statement.[*State of H.P. versus Lekh Raj and another* (2000) 1 SCC 247].

22. In the aforesaid decision itself the Court reiterated its earlier view taken in *State of Punjab versus Jagir Singh* (1974) 3 SCC 277 wherein it was held that:-

> "A criminal trial is not like a fairy tale wherein one is free to give fight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."
>
> (Emphasis supplied)

23. The Apex Court in *State of Rajasthan versus N. K.* THE ACCUSED (2000) 5 SCC 30 has held that:-

> "... ...It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal Courts which gives rise to the demand for death sentence to the rapists. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women."
>
> (Emphasis supplied)

24. In *State of M.P. v. Dharkole alias Govind Singh and others,* (2004) 13 SCC 308 the Apex Court has held that:-

> "9. ... Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> "10. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case?
>
> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to

occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

"11. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case." [Emphasis supplied]

25. We shall now discuss the evidence in view of the aforesaid settled proposition of law.

26. Certain facts are not in dispute:

(a) That on 07.06.2007, the date of alleged incident, prosecutrix was minor. She was born on 03.01.1998, which fact, in any event, stands established through the testimony of PW.8 and PW.9, who have proved on record birth certificate (Ex.PW.9/B);

(b) Accused was not only known to, but was on visiting terms with the family of the prosecutrix. In fact, he is a close relative which fact also stands established through the unrebutted testimonies of PW.2, PW.3 and PW.6. He is the cousin of the prosecutrix.

(c) On the fateful day, father (PW.6) of the prosecutrix was not at home, for he had gone for some work to a nearby place.

(d) Same day, accused had come to spend the night in the house of the prosecutrix. Her younger brother and mother were also at home.

(e) After having meals at night, prosecutrix, her brother and mother slept on the cot and in the same room, accused also slept on the floor.

27. With these admitted and undisputed facts, we now proceed to examine the testimony of the prosecution witnesses.

28. Prosecutrix who was competent to understand the sanctity of oath, in Court, has deposed that on 07.06.2007, after having meals, she alongwith her brother and mother went off to sleep on the double bed (cot) whereas accused slept on the ground. Her brother was sleeping towards the side of the wall and she was sleeping towards the side of the accused, and in between was her mother. Sometime in the middle of night, when all were asleep, accused who afterapplying saliva on his fingers, inserted them in her private parts. This was so done twice. Also accused inserted his private part on her private parts, as a result of which she felt pain and cried. Hearing the same, her mother got up and switched on the lights. When enquired, accused ran away, stating that nothing had happened. Soon her mother went to the house of neighbour Manoj Gupta and telephonically informed her father. Thereafter, prosecutrix was taken to the Police Station, where the matter came to be reported.

29. From the cross-examination part of her testimony, we do not find credit of this witness to have been impeached in any manner. We also do not find her to have been tutored in making such a statement in Court. In fact, she has bravely withstood the test of cross-

examination, which by all standards is extremely bold, if not shocking. She is categorical that her father was away for work and the accused, of his own came to their residence. After consuming meals he slept with them. Her mother had asked the accused to leave but he stayed over. When questioned, on her knowledge of the accused having applied saliva, she explained it to be on the basis of her observation, finding the body part to have salivary sensation. She is categorical that it was only on the second occasion that she woke up her mother. On first brush there appears to be little contradiction, but then, on a careful reading of testimony of both the witnesses, it is evidently clear that mother got up only when the child cried, which was at the time of the second attempt by the accused. She is also clear that prior to her mother having switched on the lights, accused had tried to insert his male organ into her vagina. Categorically she has denied, having noticed her mother and accused to be in a compromising position, on the fateful night. We do find that in cross-examination, she does state that "accused was trying to insert his male organ meant for urinating" but then in the examination in chief, she is categorical that accused had started "inserting" the same. Hence in our considered view offence under the provisions of Section 376 of IPC is clearly made out. It is not a case of attempt, but an act of rape. It is a case where the male organ came in contact with the vagina. On this count, our attention is invited to the medical record (Ex.PW.1/B). The version, so narrated by the prosecutrix stands recorded therein. No doubt, doctor did not find any injury on the vaginal part of the prosecutrix, but then he is categorical that there is no evidence to suggest that "rape has not been committed" and that "I finally opined that sexual intercourse has not taken place, but rape cannot be ruled out".

30. Absence of blood, rashes, sperms or bruises on the vital part of the prosecutrix, in itself, cannot be a ground for disbelieving her. We also find that the investigating agencies had been extremely cautious in coming to the conclusion, of involvement of the accused in the crime. They took opinion of the doctor thrice. On the last occasion, the doctor opined (Ex.DA) that even mere penetration itself would amount to sexual assault. Significantly, the doctor has not ruled its possibility.

31. We further find version of the prosecutrix to have been absolutely corroborated by her mother Patto Devi (PW.2). Even she is categorical that at about 1.30 AM, after hearing cries of her daughter, she got up and switched on the lights. The accused ran away from the spot and on her asking, the entire incident came to be narrated by the prosecutrix to her. Pants of the accused were down and the underwear of the prosecutrix was lying on the floor. Even she has withstood the test of cross-examination and we also do not find her to have either deposed falsely or falsely implicated the accused in the alleged crime.

32. It is not that the accused was not known to the family. He was cousin of the prosecutrix. Hence his presence in the house is totally explainable. It has also come on record, as also stands established through the testimony of Dr. Rajesh Sharma (PW.4) who has proved MLC (Ex.PW.4/B), that the accused was under the influence of alcohol.

33. It is contended that the story propounded by the prosecutrix "sounds to be unreasonable and improbable". Such contention only merits rejection. We find the room, where the parties were sleeping to be big enough. Even the cot was big enough to accommodate two adults and two children. Assuming hypothetically that the mother was caught in a compromising position by the child, even then, we see no reason for the mother to have falsely involved her children and that too her daughter, in the alleged crime, for it only tarnishes her image and mars her future prospects. One cannot isolate the socio-economic status of the parties.

34. The defence of the accused of false implication also stands falsified from the fact that the incident came to be reported to the police immediately after the occurrence of crime.

35. To impeach the credit of the prosecution witnesses, more particularly that of the prosecutrix and her mother, our attention is invited to medical record in MLC (Ex.PW-1/B). No doubt, it records that prosecutrix was got medically examined on 8.6.2007 at 11.45 a.m., however the fact of the matter, as is evident from the testimony of the prosecutrix as also police officials, is that prosecutrix was taken to the hospital immediately after lodging of the report. In fact, we also

find the accused to have been arrested and medically examined, same day and that too in the morning hours. Hence, possibility of error in recording the exact timing in the MLC cannot be ruled out, attention of which, in any event, was never brought to the notice of the doctor.

36. Court below, seriously erred in correctly and completely appreciating the testimonies of the prosecution witnesses as also the law as aforesaid.

37. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

38. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable.

39. Thus, in our considered view, findings returned by the trial Court cannot be said to be based on correct and complete appreciation of material on record, which are reversed. The appeal is allowed and we hold the accused guilty of having committed offence, punishable under the provisions of Section 376 of the Indian Penal Code, for having committed rape on prosecutrix.

40. For the purpose of hearing the accused-convict on the quantum of sentence, the appeal be listed on 06.12.2015, as jointly prayed for. He be produced in the Court on the said date. Copy of the judgment be supplied to the accused, free of cost.

41. No other point urged.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Suresh Kumar & others. ....Petitioners.

Versus

M/s Sunnox International & anr. ...Respondents.

CMPMO No.247 of 2015.
Reserved on : 21.11.2016.
Decided on : 05.12.2016.

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed, which was allowed by the trial Court- held, that the interest of the applicant is involved in the present suit and applicant is a necessary party – therefore, the application was rightly allowed by the Trial Court – revision dismissed.(Para-8 to 11)

For the petitioners Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

For the respondents Mr. Dushyant Dadwal, Advocate, for respondent No.1.
Mr. Satyen Vaidya, Sr. Advocate with Ms. Priyanka Khenal, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner under Article 227 of the Constitution of India, for quashing and setting the impugned order dated 30.5.2015, passed by

learned Civil Judge (Junior Division) Court No.II, Nalagarh, District Solan, H.P, in CMA No.6 of 2015 (Civil Suit No.195 of 2012).

2. Brief facts giving rise to the present petition are that the petitioners/plaintiffs (hereinafter referred to as the 'plaintiffs') filed a suit for Permanent Prohibitory Injunction against the respondents/defendants (hereinafter referred to as the 'defendants') alleging that the plaintiffs are co-owners in joint possession of the suit land measuring 24 bighas, 1 biswa, Khasra No.71 (11-01) and 72 (13-00) comprised in Khata/Khatauni No.8/22, situated in village Ambwala, HB No.63, Pargana Plassi, Tehsil Nalagarh, District Solan, H.P (hereinafter refereed to as the 'suit land'). The defendants are stranger to the suit land having no right, title or interest in the suit land. The defendants are threatening to install electricity tower and to lay down/stretch overhead electrical wires in, over and through the suit land forcibly and illegally without any right, title or interest. It is averred that during the pendency of present suit, defendant No.1 filed application under Order 1 Rule 10 of the Code of Civil Procedure, for impleading them as defendant No.2. The application was contested by the plaintiffs on the ground that the application is not maintainable. Subsequently, the learned Civil Judge (Junior Division) Court No.II, Nalagarh, District Solan, vide impugned order dated 30.5.2015, has allowed the application of defendant No.1 and impleaded him as defendant No.2 in the suit. Hence, the present petition.

3. Heard.

4. Learned Senior Counsel appearing on behalf of the plaintiffs has argued that the impugned order passed by the learned Court below is without appreciating the fact, which has come on record, as it is for the plaintiff to choose against whom he wants to maintain his suit.

5. Learned counsel appearing on behalf of respondent No.1-defendant company has argued that the stay order was operating against newly added defendant, now defendant No.1 and so, the interest of defendant No.1 was involved, as he was rightly impleaded as a party.

6. Learned Senior counsel appearing on behalf of defendant No.2-HPSEB has argued that the impugned order passed by the learned Court below is just, reasoned and as per law.

7. In rebuttal, learned Senior counsel appearing on behalf of plaintiffs has argued that the newly added defendant has neither agent nor attorney of HPSEB and so, not required to be impleaded as defendant.

8. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

9. The suit was filed by the plaintiffs for Permanent Prohibitory Injunction. The Government of Himachal Pradesh has sanctioned the transmission of electricity transmission line of 66 KV from Sub-Station Nangal Upperala (Nalagarh) to Panjehra, the premises of M/s Sunnox International Limited, defendant No.1, vide its notification No.MPP-A (3)-3/2003-1, dated 18.9.2008, the said transmission line is being installed under the supervision of HPSEB Limited and its officials/Engineers under the provisions of The Electricity (Supply) Act, 2003. Defendant No.2-HPSEB under the aforesaid notification of the Government of Himachal Pradesh have almost completed the work of electricity transmission line of 66 KV from Nangal Upperla Sub-Station to Panjehra barring two small spans including one in the present suit. Defendant No.1-company and Defendant No.2/HPSEB have strictly carried out the work under the provisions of Electricity Act, 2003, as HPSEB being licensee has been conferred the powers of Telegraph notification under Section 164 of the Government has given vast powers to officials of HPSEB for laying of cables and plants for electrical transmission as per the Indian Telegraph Act, 1885. There is no mention of present notification. The mere fact that notification was published, keeping in mind the interest of the public and not as a prerequisite of laying the cables. The supply of power on 66 KV voltage level from 220/66 KV Sub-Station Uperla Nangal (Nalagarh) to premises of defendant No.1-company at village Panjehra, transmission line was to be set up by erecting the towers. Transmission line is to be set up on self execution basis under the supervision of

defendant No.2/HPSEB. Defendant No.1-company with the help and supervision of defendant No.2/HPSEB has to set up the transmission line. Defendant No.1-company has invested huge amount in the project and due to the present suit, defendant No.1/company is not able to complete the project in the scheduled time resulting in huge financial losses to it. The disturbance at this site, if being created by persons with vested interest who are trying to exploit and arm-twist the company to extract money by creating obstacles in smooth laying of cables. There is no dwelling unit of any farmer/individual or anyone else is being transgressed or damaged in the process. Defendant No.1/company and defendant No.2/HPSEB has already compensated the villagers at rates much higher than those as per the norms of the revenue department whose lands are taken for laying the transmission line and defendant No.1-company even ready to compensate the villagers for the damage, if any, caused during the laying of transmission line.

10. The interest of defendant No.1-company is involved in the present suit and in these circumstances, defendant No.1 was impleaded as necessary party. So, this court finds that there is no illegality and infirmity with the impugned order dated 30.5.2015 passed by the learned Court below.

11. Accordingly, the petition is devoid of any merit and deserves dismissal, hence the same is dismissed. Parties are directed to appear before the learned Court below on ***22nd December, 2016.*** However, the parties are left to bear their own costs. Pending applications, if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Ajay Kumar Sud and others .....Petitioners.

Versus

St. Bede's College and others .....Respondents.

CWP No.1803 of 2014.
Judgment reserved on: 18.11.2016.
Date of decision: 6th December, 2016.

Constitution of India, 1950- Article 226- Petitioners are employees of respondent No.1- petitioners claimed that EPF contribution is payable to them in accordance with H.P. University Act, 1970, various statutes, ordinances and regulations as the college is affiliated to H.P. University – held, that as per the ordinance, every college or institute seeking affiliation with the University is required to satisfy the condition laid down in the statute – respondents No.1 and 2 had restricted the contribution to the one prescribed under EPF and MP, 1952, which is not permissible as ordinance has a force of law- no college can take a decision contrary to the provisions of H.P. University Act and Ordinances, Regulations and Statutes – the scheme framed by the Central Government does not prohibit the applicability of any other regulation or the scheme – petition allowed and respondents No.1 and 2 directed to contribute the provident fund in accordance with the Non-Government Affiliated College Teachers Contributory Provident Fund Rules.(Para-14 to 35)

Cases referred:

Marathwada Gramin Bank Karamchari Sanghatana and another versus Management of Marathwada Gramin Bank and others (2011) 9 SCC 620

State of Maharashtra versus Shashikant S.Pujari and others (2006) 13 SCC 175

Prabhakar Ramkrishna Jodh versus A.L. Pande and another 1965 (2) SCR 713

For the Petitioners Mr.Dilip Sharma, Senior Advocate with Mr.Manish Sharma, Advocate.

For the Respondents Mr.K.D.Sood, Senior Advocate with Ms.Ranjana Chauhan, Advocate, for respondents No.1 and 2.
Mr.J.L.Bhardwaj, Advocate, for respondent No.3.
Mr.Prince Chauhan, Advocate vice Mr.Rahul Mahajan, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

The excellence of the education provided by an institution would depend directly on the excellence of the teaching staff and in turn that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualifications of teachers, salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to the teachers will consequently enable them to render better services to the institution and the pupils.

2. The St. Bede's College is one of the oldest and elite colleges of India having been established initially as an orphanage for the children of the British soldiers in 1864, however, thereafter in 1904 it started teachers training college. Though, till 1947 the College was meant primarily for Christian girls, however, thereafter its doors were open to students of all the faiths.

3. The St. Bede's College was affiliated to the H.P. University (respondent No.3) on 22.07.1970, whereas, respondent No.2 St. Bede's Educational Society is a society registered under the Societies Registration Act, 1860, which is administering respondent No.1-College.

4. The petitioners are the employees of respondent No.1-College. The moot question in this petition concerns the EPF contribution which according to the petitioners is payable to them in accordance with the H.P. University Act, 1970 and the various statutes, ordinances and regulations made under the said Act on account of respondent No.1 being affiliated with respondent No.3.

5. Respondents No.1 and 2 have opposed the claim raised by the petitioners on the ground that they cannot be compelled to contribute in excess of the statutory limit as contemplated and provided for in the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short 'Act').

6. It is not in dispute that respondent No.1 is affiliated to the H.P. University and as a consequence thereof has necessarily to abide by the provisions of the H.P. University Act, 1970 and all the statutes, ordinances and regulations made under the said Act.

7. It is also not in dispute that as per the Non-Government Affiliated College Teachers' Contributory Provision Fund Rules, the contribution of the respondent-College as per rules 60 was initially 10% and thereafter 12% and the matching contribution was being paid by the Management.

8. However, it appears that respondents No.1 and 2 lateron took a decision whereby they decided to contribute only that amount towards its share as was prescribed under the EPF & MP Act.

9. This action of the respondents constrained the petitioners to approach this Court by filing CWP No. No.7655/2012 titled 'Mr.Ajay Kumar Sud and another versus Regional Provident Fund Commissioner and others' which was disposed of by this Court on 22.11.2012 by directing the parties to present themselves before the Regional Provident Fund Commissioner (respondent No.4), who after placing reliance upon the judgment of the Hon'ble Supreme Court in ***Marathwada Gramin Bank Karamchari Sanghatana and another*** *versus* ***Management of Marathwada Gramin Bank and others*** (***2011) 9 SCC 620***held that the Employer could not be

compelled for contributing in excess of the statutory limit and accordingly dismissed the claim of the petitioners.

10. Aggrieved by the decision taken by respondents No.1 and 2 and thereafter aggrieved by the order passed by respondent No.4, the petitioners have filed the instant petition claiming therein the following reliefs:-

> *"(i) That the impugned action of respondents No.1 and 2 whereby contribution to Provident Fund of the petitioners has been reduced to 12% of the pay of petitioners by taking their salary @ Rs.6500/- per month from June, 2012 may be declared to be illegal and ultra-vires the provisions of HP University Act, 1970, Statues and Ordinances of the HP University and the provisions of EPF&MP, 1952;*
>
> *(ii) That rejection of the claim of petitioners by respondent No.4 vide order dated 23.5.2013, Annexure P-9 may also be quashed and set aside;*
>
> *(iii) That the respondent No.3 may be directed to seek compliance of provisions of Non-Government Affiliated College Teachers' Contributory Provident Fund Rules from respondents No.1 and 2;*
>
> *(iv) That the respondents No.1 and 2 may be directed to contribute to the Provident Fund of petitioners @12% of their salary with effect from June, 2012, in accordance with the provisions of Non-Government Affiliated College Teachers' Contributory Provident Fund Rules, in the same manner in which it was being done prior to June, 2012, with all consequential benefits;*
>
> *(v) That respondents No.1 and 2 may be directed to deposit with respondent No.4 interest and also discharge other statutory liabilities which would arise on account of difference in payment of Provident Fund as a result of restoration of the same since June, 2012 as per the provisions of the Non-Government Affiliated College Teachers' Contributory Provident Fund Rules."*

11. Respondents No.1 and 2 have filed their common reply wherein it is averred that they had rightly taken the decision for being governed under the EPF and MP Scheme and their action is perfectly in tune with the judgment rendered by the Hon'ble Supreme Court in ***Marathwada Gramin Bank Karamchari Sanghatana and another*** *versus* ***Management of Marathwada Gramin Bank and others*** (***2011) 9 SCC 620***. On merits, the same plea has been reiterated while fling parawise reply to the petition.

12. The Himachal Pradesh University (respondent No.3) has in its reply clearly stated that the affiliated colleges are required to work in accordance with the Act, Statutes, Ordinances, Rules and Regulations of the H.P. University, though it can manage its college in a manner it so chooses without impinging upon the Rules etc.

13. The Regional Provident Fund Commissioner (respondent No.4) has filed its reply wherein it has obviously supported the order passed by it.

I have heard the learned counsel for the parties and gone through the records of the case.

14. Chapter 38 of the First Ordinance deals with the affiliation and recognition of the Colleges and Institutions and as per Ordinance 38.5, every College and Institution seeking affiliation with the University is required to satisfy the conditions laid down in Statute 16 of the University alongwith conditions contained in Ordinance 38.5, relevant portion where of reads thus:-

> *"38.5. In addition to the conditions laid down in Statute 16 of the First Statues of the University, every college or institution for which affiliation is sought, shall also satisfy the following conditions:-*
>
> *B. In the case of a non-Government college or institution:*

(b) that there shall be an endowment fund in cash, so long as the college or institution exists:

(iv) The endowment fund shall remain intact and shall not be used by the Management for current expenses or as a security for obtaining a loan or for any other purpose. A declaration to this effect by the President/Secretary of the Management shall accompany the endowment fund fixed deposit receipts or Government securities.

(d) that the Principal/teachers of the college or institution shall be appointed in the manner and on the terms and conditions of service as laid down in the rules in Appendix A to this Chapter."

15. Appendix-A appended with paragraph 38.5. B (b) (iv) (d) (supra) deals with the Provident Fund Rules which has been nomenclatured as "The Non-Government Affiliated College Teachers' Contributory Provident Fund Rules" (for short Provident Fund Rules) and is applicable to all teachers holding non-pensionable posts in Non-Government Affiliated College. The conditions of rates of subscriptions are contained in Rule 58(iii)(b) which reads thus:-

"58. *(iii) The amount of subscription shall be fixed by the subscriber himself subject to the following conditions:-*

(b) It may be any sum so expressed, not less than 10% of his pay and not more than his pay."

The contribution by the Management has been provided for in Rule 60, the relevant part thereof reads thus:-

"60. Contribution by Management:- The Management shall make contribution every month to the account of each subscriber of an amount equal to 10% of his pay expressed in whole rupees;"

16. It is not in dispute that respondent No.1 is a Non-Government Affiliated College receiving 95% grant-in-aid from the Government.

17. It is further not in dispute that in the year 1990 the contributions standing to the credit of the petitioners and other employees alongwith shares of the management/employer were transferred to the respective accounts in the Employees Provident Fund Organization. However, thereafter, the respondent-College took a decision to contribute only that amount towards their shares that was contemplated in the EPF & MP Act whereby the contribution of the petitioners to the Provident Fund has been reduced to 12% of the pay of the petitioners by taking their salary at the rate of Rs. 6500/- per month from June, 2012.

18. In light of the what has been set out hereinabove, the seminal question that arises for consideration is whether respondents No.1 and 2 of their own and that too without the consent and concurrence of its affiliating authority (respondent No.3) could have taken the impugned decision to grant their contributions only to the extent of statutory limit as provided for under the EPF & MP Act and in addition thereto whether the order passed by respondent No.4 on 23.05.2013 upholding the action of respondents No.1 and 2 is legal in the eyes of law.

19. Adverting to the first question, the parties are ad idem with respect to the respondent No.1 being affiliated with respondent No.3-University and, therefore, there is no gainsaying that once it is so, then it is bound by the regulations framed by the University as the same have force of law.

20. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***State of Maharashtra*** *versus* ***Shashikant S.Pujari and others (2006) 13 SCC 175*** wherein the Hon'ble Supreme Court observed as under:-

"26. The colleges affiliated to the University are bound by the Regulations. The Regulations have force of law. Terms and conditions of services of a university

employee as also the employees of colleges affiliated to it are governed by statutory regulations....."

21. It has to be borne in mind that the Act, Regulations, Ordinances and Statutes control and regulate the service conditions of the teachers of the affiliated colleges independently of any terms that may have been agreed to between the teachers and the Management of an affiliated college.

22. In ***Prabhakar Ramkrishna Jodh*** *versus* ***A.L. Pande and another 1965 (2) SCR 713***, the Hon'ble Supreme Court held that such provisions are made by the University in exercise of its powers of affiliation granted by law and to protect the teachers of the affiliated college against any arbitrariness of the Management in terms of the efficiency in the field of education. When a college is admitted to the privilege of affiliation or association with the University, its Management is bound by the conditions of affiliation imposed by the University under the Act incorporating such University.

23. Therefore, the affiliating college cannot of its own take a decision which would be contrary to any provisions of the H.P. University Act and Ordinances, Regulations and Statutes framed thereunder and any such course adopted by the affiliated college would be fraught with danger of the affiliation itself being lost.

24. Therefore, this Court has no hesitation to conclude that unilateral decision taken by respondents No.1 and 2 without seeking approval and concurrence of the H.P. University to reduce its contribution to the provident fund cannot withstand judicial scrutiny and is consequently struck down and set aside.

25. Now, adverting to the order passed by the respondent-College, it would be noticed that the same is based upon the judgment rendered by the Hon'ble Supreme Court in ***Marathwada's case*** (supra), however, the moot question is whether the ratio laid down therein is applicable to the fact situation obtaining in the present case.

26. It is not in dispute that it was in the year 1990 that the provisions of EPF & MP Act were extended to the employees of respondent-College. By virtue of Section 15 of the Act, all the conditions standing to the credit of petitioners alongwith the share of the Management stood transferred to the respective accounts in the Employees Provident fund Organization.

27. It is also not in dispute that in exercise of powers conferred by Section 5 of the Act, 1952, the Central Government framed Employees' Provident Fund Scheme, 1952. It is only paragraphs 26 and 29 that are relevant for the purpose of adjudication of this case and are reproduced hereinbelow:-

"[***26. Classes of employees entitled and required to join the fund.***- *(1)(a) Every employee employed in or in connection with the work of a factory or other establishment to which this scheme applies, other than an excluded employee, shall be entitled and required to become a member of the fund from the day this paragraph comes into force in such factory or other establishment.*

(b) Every employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies, other than an excluded employee, shall also be entitled and required to become a member of the fund from the day this paragraph comes into force in such factory or other establishment if on the date of such coming into force, such employee is a subscriber to a provident fund maintained in respect of the factory or other establishment or in respect of any other factory or establishment (to which the Act applies) under the same employer:

Provided that where the Scheme applies to a factory or other establishment on the expiry or cancellation of an order of exemption under section 17 of the Act, every employee who but for the exemption would have become and continued as a member of the fund, shall become a member of the fund forthwith.

(2) After this paragraph comes into force in a factory or other establishment, every employee employed in or in connection with the work of that factory or establishment, other than an excluded employee, who has not become a member already shall also be entitled and required to become a member of the fund from the date of joining the factory or establishment.

(3) An excluded employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies shall, on ceasing to be such an employee, be entitled and required to become a member of the fund from the date he ceased to be such employee.

(4) On re-election of an employee or a class of employees exempted under paragraph 27 or paragraph 27-A to join the fund or on the expiry or cancellation of an order under that paragraph, every employee shall forthwith become a member thereof.

(5) Every employee who is a member of a private provident fund maintained in respect of an exempted factory or other establishment and who but for exemption would have become and continued as a member of the fund shall, on joining a factory or other establishment to which this Scheme applies, become a member of the fund forthwith.

(6) Notwithstanding anything contained in this paragraph, an officer not below the rank of an Assistant Provident Fund Commissioner may, on the joint request in writing, of any employee of a factory or other establishment to which this Scheme applies and his employer, enroll such employee as a member or allow him to contribute more than [six thousand five hundred rupees] of his pay per month if he is already a member of the fund and thereupon such employee shall be entitled to the benefits and shall be subject to the conditions of the fund, provided that the employer gives an undertaking in writing that he shall pay the administrative charges payable and shall comply with all statutory provisions in respect of such employee.]

***[29. Contributions.** (1) The contributions payable by the employer under the Scheme shall be at the rate of [ten per cent] of the [basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)] payable to each employee to whom the Scheme applies:*

[Provided that the above rate of contribution shall be [twelve per cent] in respect of any establishment or class of establishments which the Central Government may specify in the Official Gazette from time to time under the first proviso to sub-section (1) of section 6 of the Act.]

(2) The contribution payable by the employee under the Scheme, shall be equal to the contribution payable by the employer in respect of such employee:

[Provided that in respect of any employee to whom the Scheme applies, the contribution payable by him may, if he so desires, be an amount exceeding [ten per cent] or [twelve per cent], as the case may be, of his basic wages, dearness allowance and retaining allowance (if any) subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act.]

(3) The contributions shall be calculated on the basis of [basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)] actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis.]

(4) Each contribution shall be calculated to [the nearest rupee, 50 paise or more to be counted as the next higher rupee and fraction of a rupee less than 50 paise to be ignored].]"

28. Paragraph 26(6) starts with a non-obstante clause and states that an Officer not below a rank of Assistant Provident Fund Commissioner may on the joint request in writing of any employee of a factory or other establishment to which scheme applies and his Employer, enroll such employee as a member and allow him to contribute more than Rs. 6500/- of his pay per month.

29. Adverting to paragraph 29, it would be noticed that proviso to sub-para 2 of this paragraph clearly provides that the Employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act.

30. However, the said provisions in my humble opinion are not at all applicable to the case of the petitioners as the provident fund being paid to them is under the "Non-Government Affiliated College Teachers Contribution Provident Fund Rules and not strictly under the Employees Provident Fund Rules or Regulations.

31. Moreover, there is nothing in the EPF & MP Act or the Rules or even the Scheme framed thereunder to even remotely indicate that irrespective of there being any other beneficial scheme framed by the State Government, scheme framed under the Act shall have an over-riding effect. That apart, once respondents No.1 and 2 have themselves implemented the scheme, they cannot now turn around and question the scheme or deny the benefits available thereunder to the petitioners.

32. Even otherwise, the reliance being placed by the respondents on the Central Scheme is totally misplaced as the compulsion envisaged therein and thereunder upon the Employer is to pay atleast minimum wages fixed statutorily which is absolute and no Employer can say that he will not pay such minimum wages and if he does so, then he is liable to be prosecuted as in that event he would be committing an offence. As observed earlier, the scheme nowhere bars or prohibits the applicability of any other scheme which obliges the Employer to contribute a larger amount than the one envisaged and prescribed under the Act, Rules and Scheme framed under the Central Act.

33. Apart from the above, the Act itself provides for exemption from the operation of provisions of the Scheme to an establishment as a whole or its class of employees where the employee is in enjoyment of Provident Fund and the benefits of which are more favourable than the one available under the statutory scheme. The intention of the Legislature was not to reduce those benefits and bring them at par with the Central Legislature. On the contrary, the intention of the Act is, where better benefits are available they should be maintained and continued to be made available to the employees. The grant of exemption under the scheme is only a technical measure but the voluntarily scheme has got to be enforced under the control of the respective Provident Fund Commissioners. Not only the accounts must be maintained, but contributions must be according to credit under the appropriate account. Therefore, in the given facts and circumstances of the case, the ratio as laid down by the Hon'ble Supreme Court in ***Marathwada's case*** (supra) is clearly not applicable to the facts of the instant case.

34. Lastly, it is settled that the scheme of contributory provident fund is a beneficial piece of legislation and confers retiral benefit and is in the nature of a substitute for old age pension for the employees because it was felt that in the prevailing conditions in India, the institution of a pension scheme could not be visualized in the near future and thus the same has to be interpreted in a manner so as to confer maximum advantage on the employees.

35. As a sequel to the aforesaid discussion, there is merit in this petition and the same is accordingly allowed and order passed by respondent No.4 on 23.05.2013 is quashed and set aside. The impugned action of respondents No.1 and 2 whereby the contribution to provident fund of the petitioners has been reduced to 12% of the pay of the petitioners by taking their salary @ Rs. 6500/- per month from June, 2012 is declared illegal and ultra vires to the provisions of the H.P. University Act, 1970, Statutes, Ordinances and Regulations etc. framed thereunder. Respondents No. 1 and 2 are directed to contribute the provident fund of the petitioners @ 12% of the salary with effect from June, 2012 in accordance with the provisions of

the Non-Government Affiliated College Teachers' Contributory Provident Fund Rules in the same manner as it was being done prior to June, 2012 with all consequential benefits. The needful be done within three months from today, failing which respondents No.1 and 2 shall be liable to pay interest @ 9% on such amount from the time it fell due i.e. June, 2012 till the date of its actual payment.

36. The petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Amar Nath and another ...Appellants.

Versus

State of H.P. and others ...Respondents.

LPA No. 162 of 2015
Reserved on: 22.11.2016
Decided on: 06.12.2016

Constitution of India, 1950- Article 226- Writ petitioner No.2 was appointed as anganwari worker – respondent No.5 questioned her appointment and sought cancellation of income certificate – it was found on inquiry that the income shown in the certificate was incorrect and the income certificate was cancelled – appeal was filed, which was dismissed- a writ petition was filed, which was also dismissed- held in appeal that the question of facts determined by the authority cannot be questioned in the writ petition unless it is shown that the findings recorded are perverse or are based on no evidence or inadmissible evidence – the authorities had thrashed all the facts – the orders are well reasoned and legal, which cannot be said to be erroneous, perverse or suffering from non-application of mind – writ petition was rightly dismissed- appeal dismissed.(Para-9 to 15)

Cases referred:

Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd., 2014 AIR SCW 3157

Iswarlal Mohanlal Thakkar vs Paschim Gujarat Vij Company Ltd. & Anr., 2014 AIR SCW 3298

For the appellants: Ms. Tim Saran, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 4.
Mr. Rajiv Jiwan, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this appeal is to judgment and order, dated 4th September, 2015, made by the learned Single Judge/Writ Court in CWP No. 5535 of 2012, titled as Amar Nath and another versus State of Himachal Pradesh & others, whereby the writ petition filed by the appellants-writ petitioners, i.e. Amar Nath, father-in-law of Susheela Devi, and Susheela Devi, came to be dismissed (for short "the impugned judgment").

2. In order to determine this appeal, it is necessary to give brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. Susheela Devi, i.e. appellant-writ petitioner No. 2, daughter-in-law of appellant-writ petitioner No. 1, came to be appointed as Anganwari Worker in Ward No. 2, Kharotta, P.O. Berthin, Tehsil Jhandutta, District Bilaspur in the year 2008. Respondent No. 5-Maya Devi questioned the appointment of appellant-writ petitioner No. 2 and also sought cancellation of the income certificate in terms of which the family income of appellant-writ petitioner No. 2 was stated to be ₹ 10,000/-.

4. The Additional District Magistrate, Bilaspur, directed for conducting the inquiry relating to the income certificate issued in favour of appellant-writ petitioner No. 1, i.e. Amar Nath, which was made basis for appointment of appellant-writ petitioner No. 2 as Anganwari Worker. The inquiry was conducted by the Naib Tehsildar, Jhandutta, (Annexure P-2 to the writ petition) who after examining the witnesses and the report submitted by the Patwari Halqa concerned, made the assessment and held that the income of appellant-writ petitioner No. 1 was ₹ 14,000/- per annum and the income recorded in the income certificate issued on 13th June, 2007, was factually incorrect. Further held that the income certificate was to be cancelled, which, resultantly came to be cancelled in terms of order made by the Executive Magistrate, Jhandutta (Annexure P-4 to the writ petition), constraining the appellants-writ petitioners to file appeal before the appellate authority, i.e. Sub Divisional Magistrate, Ghumarwin, District Bilaspur.

5. The appellate authority framed three points for consideration and while holding that the inquiry was rightly conducted in terms of the mandate of H.P. Land Record Manual, upheld the order made by the Executive Magistrate, thereby cancelling the income certificate issued in favour of appellant-writ petitioner No. 1 and dismissed the appeal vide order, dated 2nd July, 2012 (Annexure P-6 to the writ petition).

6. Being dissatisfied, the appellants-writ petitioners invoked the jurisdiction of the Writ Court by the medium of writ petition seeking quashment of the inquiry report (Annexure P-2 to the writ petition), order made by the Executive Magistrate, Jhandutta (Annexure P-4 to the writ petition) and order, dated 2nd July, 2012, made by the appellate authority (Annexure P-6 to the writ petition) with a further prayer that the income certificate issued in favour of the appellant-writ petitioner No. 1 on 13th June, 2007, be declared as legal and valid, on the grounds taken in the memo of the writ petition.

7. The Writ Court, after examining the pleadings and the law applicable, dismissed the writ petition vide impugned judgment. Hence, the appeal.

8. The moot question is – whether the Writ Court can examine and determine the question of facts? The answer is in the negative for the following reasons:

9. The question of facts determined by the authorities cannot be questioned by the medium of writ petitions unless it is shown that the findings recorded are perverse or are based on no evidence or on the evidence, which is inadmissible. The Writ Court can interfere only where it is shown that the authorities have wrongly appreciated the facts and the evidence and the findings are illegal.

10. While going through the orders made by the authorities, it appears that the authorities have thrashed out all the facts, the orders are well reasoned and legal one, cannot be said to be erroneous, perverse or suffering from non-application of mind, in any way.

11. The Apex Court in the case titled as **Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** has held that question of fact cannot be interfered with by the Writ Court unless the findings are perverse, erroneous and without application of mind. However, such findings can be questioned if it is shown that the Tribunal/Court has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence which has influenced the impugned findings. It is apt to reproduce paras 16, 17 and 18 of the judgment herein:

"16. ..... The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.....

17. The judgments mentioned above can be read with the judgment of this court in Harjinder Singh's case (AIR 2010 SC 1116) (supra), the relevant paragraph of which reads as under:

> *"21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty-bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:*
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> > *"10. ... The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State."(State of Mysore v. Workers of Gold Mines, AIR 1958 SC 923 p.928, para 10.)*

18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant." [Emphasis added]

12. Our this view is also fortified by the judgment rendered by the Apex Court in **Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr.,** reported in **2014 AIR SCW 3298.** It is apt to reproduce para 9 of the judgment herein:

"9. We find the judgment and award of the labour court well-reasoned and based on facts and evidence on record. The High Court has erred in its exercise of power under Article 227 of the Constitution of India to annul the findings of the labour court in its Award as it is well settled law that the High Court cannot exercise its power under Article 227 of the Constitution as an appellate court or re-appreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court. The Labour Court in the present case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the appellant. The High Court had no reason to interfere with the same as the Award of the labour court was based on sound and cogent reasoning, which has served the ends of justice.

It is relevant to mention that in the case of Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil, (2010) 8 SCC 329, with regard to the limitations of the High Court to exercise its jurisdiction under Article 227, it was held in para 49 that-

> *"The power of interference under Art.227 is to be kept to a minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court."*

It was also held that-

> *"High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Art. 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it."*

Thus it is clear, that the High Court has to exercise its power under Article 227 of the Constitution judiciously and to further the ends of justice.

In the case of Harjinder Singh v. Punjab StateWarehousing Corporation, (2010) 3 SCC 192, this Court held that,

> *"20. ..... In view of the above discussion, we hold that the learned Single Judge of the High Court committed serious jurisdictional error and unjustifiably interfered with the award of reinstatement passed by the Labour Court with compensation of Rs.87,582 by entertaining a wholly unfounded plea that the appellant was appointed in violation of Articles 14 and 16 of the Constitution and the Regulation."*

13. The same principle has been laid down by this Court in a series of cases.

14. We have gone through the record and are of the view that the appellants-writ petitioners have not been able to made out a case that the findings recorded by the authorities are perverse or based on no evidence or on inadmissible evidence or suffers from non-application of mind or the authority, which had conducted the inquiry, was not competent to do so.

15. Having said so, the Writ Court has rightly held that the findings of fact recorded by the authorities cannot be interfered by the Writ Court.

16. Viewed thus, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Bhawan Avam Sannirman Kamgar Sangh (Regd.) .....Petitioner

Versus

State of HP and others .....Respondents.

CWP No. 1962 of 2015.
Reserved on 22nd November, 2016.
Date of decision: 6th December, 2016.

Constitution of India, 1950- Article 226- Respondent No. 3 permitted to hire accommodation for hostel purposes instead of creating own permanent built up structure – Chief Secretary directed to file a consolidated status report and to take appropriate action from time to time. (Para-6 & 7)

For the petitioner: Mr. K.B. Khajuria, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with M/s Anup Rattan and Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, and Kush Sharma, Deputy Advocate Generals for respondents No. 1,2,4 and 6 to 18.

Mr. Shrawan Dogra, Sr. Advocate with Ms. Shreya Chauhan, Advocate, for respondent No.3-Board.

Mr. Ashok Sharma, Assistant Solicitor General of India with Ms. Sukarma, Advocate for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this writ petition, the petitioner mainly has sought the following reliefs, on the grounds taken therein.

"A. That the records of the case may kindly be called for the kind perusal of this Hon'ble Court.

B. That the respondent Board may kindly be directed to place on record the decision dated 4.6.2014 with regard to the registration of the Building and other Constructions workers and the same may kindly be ordered to be quashed and set aside being in contravention of law.

C. That the respondent No.4 may kindly be directed to register the Building and other Constructions workers as beneficiary from the date of the submission of the application with all benefits.

D. That the impugned orders dated 31.1.2015 and 16.7.2014, may kindly be quashed and set aside."

2. Directions came to be passed by this Court from time to time and in compliance to the said directions, respondents have filed the status reports.

3. Respondent No.10- Chief Secretary to the Government of Himachal Pradesh has filed the status report on 21st November, 2016, which does disclose that what steps the respondents have taken and what follow-up action they have to draw, in order to comply with the Court directions, passed from time to time.

4. In para 17 of the said status report, it is prayed that the order dated 15.5.2015, may be modified and respondent No. 3 be permitted to hire the accommodation for hostel purpose instead of creating own permanent built up structures, for the reasons given in the said report.

5. We have heard the learned counsel for the parties and have examined the entire record.

6. Respondent No.3- Board is at liberty to hire accommodation for hostel purpose, as prayed in paragraph 17 of the status report and accordingly, the order dated 15.5.2015, passed by this Court is modified.

7. Chief Secretary to the Government of Himachal Pradesh is directed to file a consolidated status report in compliance to the directions passed by this Court from time to time and follow up action drawn in terms of the status report filed on 21st November, 2016, **quarterly** before the Registrar (Judicial).

8. The writ petition is accordingly disposed of alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

R.S.A. No. 7 of 2016 a/w RSA No. 8 of 2016.
Judgment reserved on : 30.11.2016
Date of decision: 06.12. 2016.

1. RSA No. 7 of 2016
   Chander Lekha ...Appellant
   Versus
   Purshotam Dutt and others ...Respondents
2. RSA No. 8 of 2016
   Rajesh Kumar ...Appellant
   Versus
   Purshotam Dutt and others ...Respondents

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking the specific performance of the agreement to sell the suit land – the defendant denied the claim of the plaintiff- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that plaintiff has to prove his continuous readiness and willingness to perform the contract from the date of agreement till hearing – plaintiff had pleaded that he was ready and willing to perform his part of the contract, to pay remaining consideration and to bear the expenditure of execution and registration of the sale deed, which is not in accordance with Form 47 and Order 6 Rule 3 of C.P.C – plaintiff had only paid Rs.50,000/- out of Rs.4 lacs agreed to be paid – it was not proved that plaintiff was possessed of balance consideration and was ready to pay the same to the defendant- it was mentioned in the agreement that entire consideration was paid, which is not correct - plaintiff cannot be faulted for not executing the sale deed, in these circumstances – appeal allowed and the suit dismissed with the cost of Rs.20,000/- each.

(Para-10 to 26)

Cases referred:
Jugraj Singh and another vs. Labh Singh and others AIR 1995 SC 945
N.P. Thirugnanam (D) by L.Rs vs. Dr. R. Jagan Mohan Rao and others AIR 1996, SC 116

For the Appellant(s):	Mr. G.R. Palsra, Advocate.
For the respondents:	Mr. Dilip Sharma, Senior Advocate, with Mr. Umesh Kanwar, Advocate, for respondent No.1, in both the appeals. Mr. G.D.Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, for respondent No.2, in both the appeals. Ms. Leena Guleria, Advocate, for respondent No.3, in both the appeals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common question of law and fact arise in both these appeals, therefore, they were taken up together for consideration and are being disposed of by a common judgment.

2. Both these regular second appeals have been filed against the judgment and decree dated 01.10.2015 passed by learned Additional District Judge (I), Mandi in Civil Appeal No. 73 of 2015 and Civil Appeal No. 75 of 2015, whereby he affirmed the judgment and decree passed by learned trial Court on 16.6.2015 in Civil Suit Nos. 78 of 2008 and 79 of 2008 thereby decreed the suit of the plaintiff/respondent No.1 herein in both the appeals.

3. Briefly stated, the facts are that the plaintiff/respondent No.1 (hereinafter referred to as the 'plaintiff'), filed a suit for specific performance of the contract with the allegation that defendant No.1/respondent No.2 herein, was owner in possession of the land comprised in Khewat No. 51 min, Khatauni No. 116, Khasra No. 3467/1, measuring 517 sq.mtrs. situated in Muhal Sundernagar/26/8, Tehsil Sundernagar, District Mandi, H.P. He entered into an agreement of sale with the plaintiff on 15.12.2007 for sale of 244 sq.mtrs. of land out of Khasra No. 3467/1 for consideration of Rs. 3,00,000/- and had received Rs. 50,000/- as earnest money. It was averred that subsequently respondent No.2 again demanded more money and sale consideration was raised to Rs. 4,00,000/-, it was in pursuance to the agreement that sale deed was prepared on 7.1.2008 and was duly attested by the witnesses. However, before the same could be registered, respondent No.2 slipped from the office of Sub Registrar and resultantly the sale deed could not be registered. It was also averred that respondent No.2 out of evil intention thereafter executed a sale deed of entire khasra No. 3467/1 in favour of appellant and proforma respondent No.3 on 1.2.2008 out of Khasra No. 3467/1, 273/517 shares measuring 273 sq.mtrs in favour of proforma respondent No.3 (appellant in RSA No. 8 of 2016) and 2444/517 shares measuring 244 sq. mtrs in favour of appellant (proforma respondent No.3 in RSA No. 8 of 2016) for a total consideration of Rs. 9,38,000/- and in this way the agreement to sell was frustrated. It was averred that the plaintiff was always ready and willing to perform his part of contract and still ready and willing and therefore, the suit be decreed.

4. The appellant filed written statement denying the allegations in the plaint and it was maintained that the appellant was bonafide purchaser for consideration of the suit land under the law. Similar contention was raised by proforma respondent No.3.

5. The learned trial Court on 14.5.2012 framed the following issues:

1. Whether the plaintiff and defendant No.1 entered into an agreement for sale of the suit land on 15.12.2007, as alleged? OPP
2. Whether the sale deed dated 7.1.2008 was executed by the defendant No.1 in favour of plaintiff regarding the suit land, as claimed? OPP

3. Whether the plaintiff is entitled to the relief of the defendant No.1 being directed to register the sale deed regarding the suit land in favour of the plaintiff, as claimed? OPP

4. Whether alternatively, the plaintiff is entitled to recovery of Rs.4,00,000/- alongwith costs and interest against defendant No.1, as claimed? OPP

5. Whether the suit is not maintainable? OPD

6. Whether the plaintiff has no cause of action and locus-standi? OPD

7. Whether the plaintiff is guilty of suppression of material fact? If so, its effect? OPD

8. Whether the defendant No.2 is a bonafide purchaser of part of the suit land? OPD2.

9. Whether the defendant No.3 is bonafide purchaser of part of the suit land? OPD3.

10. Relief.

6. After recording the evidence and evaluating the same, the learned trial Court vide its judgment and decree dated 16.6.2015 decreed both the aforesaid suits and the defendant No.1/respondent No.2 was directed to execute the sale deed in favour of respondent No.1/plaintiff, who in turn was directed to pay the balance sale consideration of Rs. 3,45,000/- within a period of 30 days in each of the cases.

7. Aggrieved by the judgment and decree passed by the learned trial Court, the appellant filed first appeal in the Court of learned District Judge, Mandi, which ultimately came to be tried by learned Additional District Judge (I), Mandi and was dismissed vide judgment and decree dated 1.10.2015.

8. Aggrieved by the judgment and decree passed by learned Courts below, the appellant filed the instant second appeal before this Court which was admitted on 10.8.2016 on the following substantial question of law:

> *"Whether the appellant is a bonafide purchaser for consideration without any notice and finding to issue No.9 is totally wrong?"*

9. During the course of hearing, the record revealed that though the plaintiff/respondent No.1 had pleaded that he was ready and willing to perform his part of the contract, however, the evidence in this regard appeared to be deficient and accordingly with the consent of the parties, the following additional substantial question of law was framed:

> *"Whether the plaintiff/respondent No.1 has proved his continuous readiness and willingness to perform his part of the contact at all stages i.e. from the date of agreement till the date of hearing of the suit?"*

I have heard learned counsel for the parties and also gone through the records of the case carefully.

10. At the outset, it may be observed that it is more than settled that the plaintiff has to prove his continuous readiness and willingness to perform his contract at all stages i.e. from the date of the agreement till the date of the hearing of the suit.

11. In ***Jugraj Singh and another vs. Labh Singh and others AIR 1995 SC 945*** the Hon'ble Supreme Court in para 3 held that in a suit for specific performance of the contract, the plaintiff must prove continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit. It is apt to reproduce para 3 of the judgment as under:

> *"3. Section 16(c) of the Specific Relief Act, 1963 provides that the plaintiff must plead and prove that he has always been ready and willing to perform his part of the essential terms of the contract. The continuous readiness and willingness at all*

stages from the date of the agreement till the date of the hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract."

12. In ***N.P. Thirugnanam (D) by L.Rs vs. Dr. R. Jagan Mohan Rao and others AIR 1996, SC 116***, the Hon'ble Supreme court in para 5 of the judgment observed that the plaintiff must from the date of the execution till date of decree prove that he is ready and has always been willing to perform his part of the contract. It is apt to reproduce para-5 of the judgment as under:

"*It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under s.20 of the Specific Relief Act 1963 (for short, 'the Act'). Under s.20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract."*

13. Now, adverting to the pleadings with regard to the specific performance, there can be no denial that these have to be in conformity with the form as prescribed by Order 6 Rule 3 CPC in this regard i.e. as given in Clause 3 of Form 47 contained in Appendix 'A'.

14. A careful reading of para 10 of the plaint makes it clear that the averments as contained under Clause 3 is not in *stricto sensu* complied with by the plaintiff. The same is evident from the averments made in para 10 of the plaint, which reads "*that the plaintiff is ready and willing to perform his part of the contract and to pay remaining consideration and to borne the expenditure of execution and registration of the sale deed."*

15. The Form No. 47 of Appendix 'A' reads thus:

"No. 47

SPECIFIC PERFORMANCE (No.1)

(Title)

A.B., the above-named plaintiff, states as follows:-

1. By an agreement dated the ….day of…..and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to, for the sum of…..rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras 4 and 5 of Form No.1.]

6. The plaintiff claims that the court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit."

16. Upon a careful reading of para-10 of the plaint, I have no hesitation to hold that the plaintiff/respondent No.1 have not complied with the legal requirement which is mandatory as provided under Order 6 Rule 3 CPC of the Specific Relief Act.

17. Adverting to the oral evidence led by the plaintiff, while appearing as PW-1 the plaintiff has not even cared to make a whisper regarding his being still ready and willing to perform his part of the contract and it is really not understood as to on what basis have the learned courts below decreed the suit of the plaintiff without the mandatory requirement of law having been proved.

18. Apart from the above, is it really so simple for the plaintiff to allege that defendant No.1/respondent No.2 had fled from the spot in order to avoid performance of his part of contract?

19. Having gone through the records of the case, more particularly pleadings and oral evidence, I entertain no doubt in my mind that both the learned Courts below have failed to appreciate the real controversy in issue. The plaintiff while appearing as PW-1 has categorically admitted as against the sale consideration of Rs. 4,00,000/-, he had paid only a sum of Rs. 50,000/- each in both the cases.

20. There is no evidence led by the plaintiff, rather there is no whisper made by him while appearing as PW-1 that he on the date of registration of the sale deed was possessed of the balance sale consideration of Rs. 3,45,000/- and Rs. 3,45,000/- in each case total Rs. 6,90,000/- and was ready to pay this amount to defendant No.1/respondent No.2. Yet, when he got drafted the sale deed, he incorporated therein a clause to the effect that he i.e. respondent No.1/plaintiff had paid the entire sale consideration to defendant No.1/respondent No.2 and he in lieu of his having received the entire sale consideration had delivered the possession to the plaintiff. Obviously in such circumstances, the defendant No.1/ respondent No.2 had no option but to flee from the office of Sub Registrar or else executed the sale deed which itself was based on the fraud committed by respondent No.1/plaintiff.

21. At this stage, it would necessary to refer to the judgments rendered by both the learned Courts below whereby they came to the conclusion that the plaintiff was ready and willing to perform his part of the contract and the relevant portion of the judgment of the learned trial Court reads thus:

"24. The counsel for the defendants avers that the plea of specific performance is a discretionary relief. The counsel avers that the plea of readiness and willingness is not established by the plaintiff. The counsel further avers that without the plea of readiness and willingness as provided under Section 16 (C) of the Specific Relief Act, 1963 no relief of specific performance can be granted in favour of the plaintiff. This plea set up by the counsel for the defendant is without merits. In para No.10 of the plaint, the plaintiff has clearly stated that he is ready and willing to perform his part of the contract. Further, the readiness and willingness is more than established when the plaintiff executed the sale deed with defendant No.1, which is Ext.PW-1/B. The agreement to sell Ext.PW-1/A provided for sale consideration of Rs.3,00,000/-, whereas the plaintiff agreed to purchase the suit land for a consideration of Rs.4,00,000/- as per Ext.PW-1/B. Thus, the readiness and willingness of the plaintiff cannot be doubted in the present case. Rather, the

plaintiff is more than willing to purchase the suit land as he agreed to higher price as compared to agreement to sell, which is evident from the sale deed Ext.PW-1/B."

Whereas, the relevant portion of the judgment of the learned first Appellate Court reads thus:

"18.....The plaintiff has stated that he is ready to perform his part of contract and he is ready to pay the amount of Rs. 3,50,000/- to the defendant No.1. The sale deed Ext.PW-1/B also shows that the land was sold for Rs. 4,00,000/-. There are signature of Shashi Kumar on sale deed Ext.PW-1/B and agreement Ext.PW-1/A. This Ext.PW-1/A shows that amount of Rs. 50,000/- was paid to the defendant No.1 by plaintiff as PW-1 has stated that he has paid Rs. 5,000/- (Five Thousand) on 1st day of the sale deed. He has also admitted that remaining amount of Rs. 3,50,000/- was to be paid to defendant No.1. The plaintiff is ready to pay the remaining amount to the defendant No.1. The plaintiff is ready to perform his part of the contract and defendant No.1 has not come in the witness box to rebut the evidence of the plaintiff. The plaintiff, therefore, has proved this fact that the defendant had executed the agreement to sell Ext.PW-1/A and sale deed Ext.PW-1/B in favour of the plaintiff. Though in Ext.PW-1/B it has been mentioned that whole amount has been received by the defendant No.1, but it is sincere admission of the plaintiff while coming in witness box and he is ready to pay remaining amount to the defendant No.1. Plaintiff is therefore entitled to the relief of Specific Performance of Contract and Ld. Lower Court has rightly held him entitled for this decree. The Ld. Lower Court has therefore rightly decreed the suit of the plaintiff. Therefore, I do not find any reason to interfere with the judgment passed by the Ld. Lower Court. Hence, this point is decided in affirmative."

22. I am really surprised how the learned Courts below extended time for the payment towards the balance sale consideration when it was not even proved on record that he had been ready and willing and was still ready and willing to perform his part of the contract. The learned Courts below appear to have been unnecessarily influenced and prejudiced because the defendant No.1/respondent No.2 had fled away from the office of the Sub Registrar, little realizing his compulsion and complications that would arisen in case he would have executed the sale deed without receiving the balance sale consideration.

23. Conversely, it was incumbent upon the plaintiff to have led sufficient evidence to indicate that on the day when the sale deed was to be registered and the defendant No.1/respondent No.2 had fled from the office of Sub Registrar, he was possessed of the balance sale consideration or that he had actually handed over the balance sale consideration and it was after receipt thereof that defendant No.1/ respondent No.2 had fled from the office of the Sub Registrar. Rather, it is admitted by the plaintiff that he had not paid the balance sale consideration of Rs. 3,45,000/- in each of the cases i.e. total Rs. 6,90,000/- to the defendant No.1/respondent No.2.

24. On the basis of the aforesaid discussion, it can conveniently be held that there was no subsisting contract between the plaintiff and defendant No.1/respondent No.2 which could be enforced in a court of law and obviously therefore, the appellants in both the cases are purchasers for valid consideration and question of their being bonafide in fact does not arise as there is neither any subsisting agreement or contract between the plaintiff and defendant No.1/respondent No.2, rather, it was the plaintiff/respondent No.1, who by dubious means wanted to get the sale deed executed, that too, without paying a single paisa of balance sale consideration of Rs. 3,45,000/- in each case i.e. total Rs. 6,90,000/-.

25. As a sequel to my aforesaid discussion, I have no hesitation to hold that the suits filed by the plaintiff were nothing but an abuse of the process of law and unfortunately both the learned Courts below did not apply their judicial mind to the real issue in controversy and decreed the suit and even the appeal filed against the same was ordered to be decreed. Even the

bare provisions of the Specific Relief Act and the essential pre-requisites as are required to be proved in a case of specific performance of contract, were conveniently ignored. Even otherwise, the plaintiff has not approached the Court with clean hands which is pre-requisite for maintaining a suit for specific relief of agreement to sell.

26. Having said so, I find merit in both the appeals and the same are allowed with special costs quantified at Rs. 20,000/- each in each case to be paid by the plaintiff/respondent No.1 to the appellant(s).

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Hemant Kumar .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

Cr. Revision No. 219 of 2011
Decided on : December 6, 2016

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving the bus in a rash and negligent manner- bus rolled down in a gorge and the passengers sustained injuries – accused was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held in revision that accident was not disputed – it was also not disputed that the accused was driving the bus – only one witness had supported the prosecution version – he admitted in cross-examination that it took about 50-55 minutes for the bus to cover the distance of 12 kilometers, which shows that bus was being driven in a normal speed- rash and negligence driving was not proved, in these circumstances- the accused was wrongly convicted by the Courts- appeal allowed- judgments of the trial Court and Appellate Court set aside and accused acquitted.

(Para-6 to 22)

Cases referred:

State of Kerala vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Akshay Kumar v. State of HP, Latest HP LJ 2009 HP 72
Gurcharan Singh versus State of Himachal Pradesh 1990 (2) ACJ 598

For the petitioner : Mr. Rohit Chauhan, Advocate.
For the respondent : Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Present criminal revision petition filed under Sections 397 CrPC is directed against judgment dated 30.8.2011 rendered by the learned Additional Sessions Judge, Mandi, HP in Criminal Appeal No. 45 of 2010, upholding the judgment of conviction recorded by the learned Judicial Magistrate 1st Class, Court No.2, Mandi, HP in Police Challan No. 190-I/2003, 119-II/2003, holding petitioner-accused (herein after, 'accused') guilty of having committed offence under Sections 279, 337 and 338 IPC and convicting and sentencing the accused as per the description given herein below:

"1. To undergo simple imprisonment for six months and to pay a fine of Rs.500/- (five hundred only) and in case of non payment of fine to undergo simple imprisonment for one month for commission of offence under Section 279 of Indian Penal Code.

2. To undergo simple imprisonment for six months and to pay a fine of Rs.500/- (five hundred only) and in case of non-payment of fine to undergo simple imprisonment for one month for commission of offence under Section 337 of Indian Penal Code.

3. To undergo rigorous imprisonment for nine months and to pay a fine of Rs.1,000/-(one thousand only) and in case of non payment of fine to undergo simple imprisonment for two month for commission of offence under section 338 of Indian Penal Code.

4. It is however ordered and directed that sentences of substantive imprisonment shall run concurrently. The sentence in case of non payment of fine shall run independently."

2. Briefly stated the facts as emerge from the record are that the complainant namely Netar Singh made a statement that on 25.3.2003 at 5.45 pm, he boarded a private bus (Bharat Service) bearing No. HP-32-4140 in order to go to his house. There were 25-30 passengers. When at around 6.15, the bus reached near Bajeer Bain, it rolled down in a gorge, as a result of which, he as well as other passengers suffered injuries. Complainant, further complained that at the relevant time, vehicle in question was being driven by the accused in rash and negligent manner and in high speed. On the basis of aforesaid statement, police sent a *Rukka*, on the basis of which, FIR No. 96/2003 dated 25.3.2003 came to be registered at Police Station Balh, District Mandi. Police after completion of codal formalities, submitted challan in the Court against the accused under Sections 279, 337 and 338 IPC. Learned trial Court, on being satisfied that prima facie case exists against the accused, put notice of accusation to him, to which he pleaded no guilty and claimed trial. Subsequently, learned trial Court, on the basis of material adduced by the prosecution, convicted and sentenced the accused under sections 279, 337 and 338 IPC, as per description given above. Being aggrieved by the aforesaid judgment of learned trial Court, accused filed an appeal before the Additional Sessions Judge, Mandi, under Section 374 CrPC, which was also dismissed. In the aforesaid background, accused has approached this Court by way of instant petition, praying therein for acquittal after setting aside the judgments of the Courts below.

3. Mr. Rohit Chauhan, Advocate, vehemently argued that the judgments passed by the Courts below are not sustainable as the same are not based on correct appreciation of evidence adduced on record and as such same deserve to be set aside. Mr. Chauhan, while referring to the judgments passed by the Courts below, strenuously argued that the Courts below have not appreciated the evidence in its right perspective, rather judgments are based on conjectures and surmises and as such same can not be allowed to sustain. Mr. Chauhan, during arguments having been made by him, made this Court to travel through the depositions have been made by the prosecution witnesses, to demonstrate that no conviction could be imposed by the Court below on the set of evidence having been adduced by the prosecution, because there were material contradictions and majority of prosecution witnesses had turned hostile. While referring to the statement of PW-1, Netar Singh, Mr. Chauhan, stated that even the complainant, nowhere stated with regard to specific speed of the vehicle at the relevant time, as such, Courts below erred in concluding that at the relevant time, vehicle in question was being driven in rash and negligent manner by the accused, that too at a high speed. While concluding his arguments, Mr. Chauhan, forcefully contended that the learned Courts below miserably failed to take note of the fact that at the relevant time, one cow had come before the bus, as a result of which, accused had to take sudden turn. In the aforesaid background, Mr. Chauhan prayed that accused may be acquitted of the charges framed against him by setting aside the judgments of the Courts below.

4. Mr. Ramesh Thakur, learned Deputy Advocate General, supported the judgments passed by the learned Courts below. Mr. Thakur, while referring to the judgments passed by the Courts below, vehemently argued that there is no scope of interference, whatsoever by this Court, especially in view of the concurrent findings of facts and law recorded by both the learned Courts below. Mr. Thakur, while inviting attention of the Court to the judgments forcefully argued that

each and every aspect of the matter has been dealt with meticulously by the Courts below while recording conviction of accused and as such there is no merit in the present petition and the same deserves to be dismissed. With a view to refute the contentions having been put forth on behalf of the petitioner, Mr. Thakur, stated that bare perusal of statement of PW-1 Netar Singh (Complainant) suggests that at the relevant time, vehicle in question was being driven rashly and negligently at a high speed by the accused, as such, there is no illegality or infirmity in the judgments passed by the Courts below, and as such, same deserve to be upheld. Mr. Thakur, while concluding his arguments reminded this Court of its limited jurisdiction under Section 397 as far as re-appreciation of evidence is concerned. Learned Additional Advocate General, has placed reliance upon the judgment passed by Hon'ble Apex Court in case **State of Kerala versus Puttumana Illath Jathavedan Namboodiri** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> " In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

5. I have heard learned counsel representing the parties and have carefully gone through the record made available.

6. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been convicted and sentenced under Sections 279, 337,338 of the Indian Penal Code, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and the same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

7. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another Versus Krishnaveni and another*, (1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality or sentence or order. The relevant para of the judgment is reproduced as under:-

> "8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct

irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

8. During the proceedings of this case, this court had an occasion to peruse the entire evidence on record, perusal whereof suggests that the Courts below have erred in recording conviction against the accused that too on the basis of contradictory and inconsistent pleas having been taken by the prosecution witnesses. However, this court solely with a view to ascertain the genuineness and correctness of the submission having been made by the learned counsel for the respective parties, undertook an exercise to critically examine the evidence available on record to ensure that the judgments passed by the learned Courts below are not perverse and same are based on correct appreciation of the evidence available on record.

9. It is undisputed that on 25.3.2003, vehicle bearing registration No. HP-32-4140, in which 25-30 passengers were traveling, met with an accident, as a result of which, PW-1 Netar Singh (Complainant) and other persons suffered injuries. It is also undisputed that the vehicle at that time was being driven by the accused, who, while recording his statement under Section 313 CrPC, claimed himself to be innocent, though he did not lead any evidence in his defence. But careful perusal of the evidence available on record suggests that during the proceedings of the case, defence of the accused was that since one cow had suddenly emerged before the bus, he had to take a right turn, as a result of which, bus fell in a gorge. In the present case, prosecution has examined as many as 12 witnesses to prove its case. But careful perusal of judgments passed by learned Courts below as well as evidence available on record clearly suggests that except for PW-1 Netar Singh (complainant), none of the material prosecution witnesses supported the prosecution case. Apart from PW-1, Netar Singh, there are two material witnesses i.e. PW-2 Dhaneshwari Devi and PW-3 Durga Dass, who at the relevant time, were also traveling in the same bus alongwith complainant, Netar Singh, whereas PW-5 Pawan Kumar is a witness of recovery, PW-6 is Parvati, PW-7 Om Parkash has prepared challan, and PW-8 Dr. P.K. Soni, has examined the injured and rendered his opinion in the shape of MLC (Ext. PB). PW-9 Deepak Kumar is also a witness of recovery and PW-10 Dina Nath has conducted investigation. PW-12 Breastu Ram has conducted mechanical examination of the vehicle in question.

10. Close scrutiny of the judgments passed by learned Courts below suggests that the Courts below, while recording conviction against accused have placed heavy reliance on the statement of PW-1 Netar Singh as well as documentary evidence available in the shape of photographs and spot map adduced on record by the prosecution. PW-1 Netar Singh in his deposition before the Court stated that he was traveling in the bus. When it came near Bajir Bain, it fell down. It is stated that at the relevant time, accused was driving the vehicle at a high speed, which caused the accident. In his cross-examination, he stated that the bus started from Ner Chowk at 5 pm. He also stated that it took about 4-5 minutes to board the passengers. He also stated that the vehicle stopped for 3-4 minutes near Galma Pull, Kotlu and Lakhwan. It has come in his statement that the distance between Ner Chowk and Bajeer Bowri was about 12 Kms and bus took about 50-55 minutes to cover the distance. PW-1 Netar Singh has admitted in his cross-examination that it took about 50-55 minutes for the bus to cover a distance of 12 kms, meaning thereby that by no stretch of imagination, it can be concluded that at the relevant time, bus was being driven in a rash and negligent manner and at a high speed, rather this Court, after carefully examining the aforesaid aspect of distance as well as speed, as projected by PW-1 Netar Singh, in his statement, is of the view that vehicle in question was being driven at a normal speed at the relevant time. Similarly, PW-6 Parvati Devi, in her statement, stated that on hearing noise, she reached the spot. In her cross-examination, she denied the suggestion put to her that accused was driving vehicle at a high speed and vehicle fell down due to rash and negligent driving of accused. She, in her cross-examination, further stated that there is a *Bowri* near the place of accident, which certainly does not prove the case of the prosecution.

11. PW-2 Dhaneshwari Devi, has also not supported the case of the prosecution. She was declared hostile. In her cross-examination by the learned APP, she categorically denied that at the relevant time, accused was driving the vehicle at higher speed and vehicle fell down due to

negligence of the accused. She stated that the vehicle had fallen towards its side. She also admitted that the accident had occurred due to colpase of *Danga*.

12. PW-3 Durga Dass has also not supported the case of the prosecution. Accordingly, he was declared hostile. In his cross-examination, he denied that accused was driving vehicle in rash and negligent manner and he was unable to control the vehicle due to high speed. He further stated in his cross-examination, that accident had taken place while saving some stray animal, which had come on road. As per record available, aforesaid prosecution witnesses were the only eye-witnesses, who witnessed the accident but interestingly, except PW-1 Netar Singh, none of the prosecution witnesses has stated that accident occurred due to rash and negligent driving of accused.

13. Similarly, none of the aforesaid prosecution witnesses has stated that at the relevant time, they saw accused driving bus at a high speed, rather, their cross-examination, if read in its entirety, suggests that vehicle was being driven at a normal speed.

14. PW-1 Netar Singh, complainant, on whose statement, Courts below have placed strong reliance, has also not supported the prosecution case because, in his own statement, as discussed above, he has categorically stated that the bus took almost 50-55 minutes to cover distance of 12 kms. If, for the sake of arguments, it is presumed that during these 50-55 minutes, bus had deboarded passengers at the stations as narrated by PW-1, at Galma Pull, Kotlu and Lakhwan, 10 minutes can be deducted from 55 minutes, meaning thereby that bus took 45 minutes to cover distance of 12 kms, which can be easily covered in 45 minutes. If bus took 45 minutes to cover distance of 12 kms, no man of ordinary prudence can say that vehicle was being driven in a rash and negligent manner.

15. Moreover, there is another aspect of the matter, which suggests that there was no specific evidence led on record by the prosecution suggestive of the fact that vehicle in question was being driven in a rash and negligent manner at a high speed. None of the prosecution witnesses has stated anything specifically with regard to the speed of the vehicle at the relevant time, which is essential for determining rashness and negligence on the part of accused. Though, PW-1 Netar Singh, who only supported the case of the prosecution, in his statement, stated that the vehicle was being driven rashly and negligently at a high speed but he himself stated/admitted that it took 50-55 minutes for the bus to cover a distance of 12 kms, which falsifies the stand of the prosecution that bus was being driven in a rash and negligent manner at that time.

16. True it is that the prosecution by way of leading convincing evidence on record was able to prove the injuries suffered by PW-1 Netar Singh as well as other passengers, who were traveling in the bus at that time, but same may not be sufficient to record conviction against accused, who at the relevant time was driving bus in question.

17. Since the prosecution has miserably failed to prove that the bus in question was being driven rashly and negligently and at high speed, this Court is unable to accept the findings of the learned Courts below, which are totally based upon the statement of PW-1 Netar Singh as well as documents i.e. photographs and spot map because once rashness and negligence on the part of accused has not been duly proved, no conviction could be recorded on the basis of material available on record.

18. Apart from above, none of the prosecution witnesses has specifically stated with regard to speed of the vehicle and as such, no finding could be returned by the court below on mere statement of complainant that at that relevant time vehicle was being driven rashly and negligently. Had any prosecution witness stated something with regard to specific speed, it could be the best piece of evidence for the Court to ascertain the genuineness and correctness of the claim of the complainant with regard to rash and negligent driving of the petitioner-accused.

19. At this stage, reliance is placed on judgment rendered our own High Court in case titled **Akshay Kumar v. State of HP**, Latest HP LJ 2009 HP 72, relevant para of which reads as under:-

> "8. In fact, an injury shall be deemed to be negligently caused whomsoever it is willfully caused, but results from want of reasonable caution, in the undertaking and doing of any act either without such skill, knowledge or ability as is suitable to consequences of such act, or when it results from the not exercising reasonable manner of using them or from the doing of any act without using reasonable caution for the prevention of mischief, of from the omitting to do any act which is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without an intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Rash and negligent act may be described as criminal rashness negligence. It must be more than mere carelessness or error of judgment."
>
> The courts below did not appreciate the above facts that there was debris on the side of the road on the curve due to the slip, while negotiating the curve, as stated above, some witnesses have admitted that the danga gave way to the bus which caused the accident and the rash and negligent driving by the petitioner is also denied, therefore, it find that the findings of quilt arrived at against the petitioner by both the courts below were not based upon legal and proper appreciation of evidence. In the circumstances aforesaid, the petitioner cannot be said to have criminal rashness or negligence, thus he is entitled for the benefit of doubt as two views were deducible from the evidence on record."

20. Reliance is placed upon judgment of this Court reported in **Gurcharan Singh versus State of Himachal Pradesh** 1990 (2) ACJ 598, the relevant paragraphs of which are reproduced here-in-below:-

> "14. Adverting to the facts of this case, it is in evidence that the truck in question was loaded with fertilizer weighing 90 quintals. Obviously, it cannot be said that the speed of the vehicle was very fast. Secondly, it is a State Highway and not a National Highway. Therefore, the speed on this account as well cannot be considered to be high.
>
> "15. Coming to the statements of witnesses on this aspect, it has been stated that the truck was moving in high speed but it has not been said as to what that speed actually was. To say that a vehicle was moving in a high speed is neither a proper and legal evidence on high speed nor in any way indicates thereby the rashness on the part of the driver. The prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved in a case under Section 304-A of the Indian Penal Code. Further, there are no skid marks which eliminate the evidence of high speed of the vehicle. In addition to this, it has been stated by the witnesses that the vehicle stopped at a distance of 50 feet from the place of accident. This appears to be exaggerated. However, it is not a long distance looking to the two points; viz, the first impact of the accident and the last tyres of the vehicle and the total length of the body of the truck in question. If seen from these angles, the distance stated by the witnesses cannot be considered to be very long and thus an indication of high speed. The version of the petitioner that he blew the horn near about the place of curve which frightened the child, cannot be considered to be without substance. This can otherwise be reasonably inferred that the petitioner would have blown the horn on seeing the child on the road as it is in evidence that the child had come on the pucca portion of the road while there is no evidence as to whether the witnesses, more particularly, Ghanshyam, PW7, Chander Kanta, PW8, mother, and a few other witnesses were there at that particular time. Rather the depositions of

these witnesses indicate that they were coming from some village lane which was joining the main road in question. Children of this age, usually crafty by temperament, move faster than the parents and are in advance of them while walking. This appears to have happened in the present case. Minute examination of the circumstances of this case and the evidence brought on the record, discloses that the deceased had reached the pucca portion of the road much before the arrival of his parents and the witnesses. That is why in their deposition they have said that the child had been run over by the truck. On the other hand, the petitioner has stated that horn by him and started crossing the road which could not be seen by him and the result was the accident and the death of the child. In case some pedestrians suddenly cross a road, the driver of the vehicle cannot save the pedestrian, however slow he may be driving the vehicle. In such a situation he cannot be held negligent; rather it appears that the parents of the child were negligent in not taking proper care of the child and allowed him to come alone to the road while they were somewhere behind and they could have rushed to pull back the child before the approaching vehicle came in contact with him as it is in their depositions that the truck driver was at a distance coming at a high speed and in case the child wanted to cross the road, it could do so within the time it reached at the place of the accident. How the accident has actually taken place, has not been clearly and comprehensively stated by any of the witnesses. They appear to have been prejudiced by the act of the driver. Their versions are, therefore, coloured by the ultimate act of the petitioner and the fact that the child had been finished."

21. In the aforesaid case, Hon'ble Court while passing aforesaid judgment has observed that "prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved under Section 304-A of the Indian Penal Code". Definitely, there cannot be any quarrel with regard to the aforesaid observations made by the Court. But now question arises as to what can be the method/mode for measuring the exact speed of the offending vehicle at the time of accident, undisputedly, in the present case, engine of offending vehicle after falling in gorge must have stopped, no help at all could be taken from speedometer to ascertain the exact speed of the vehicle at the relevant time. To my mind, in the aforesaid situation, the eye witnesses of the accident could be the best persons to depose whether offending vehicle was in high speed or not. Apart from above, aspect of high speed can be gauged from the side/direction of the offending vehicle and certainly an inference of its being driven rashly and negligently on high speed can be drawn by perusing spot map, photographs and mechanical reports, which may point towards the force/impact, as supporting evidence. But obviously, in the absence of some specific mode to gauge the speed, only eye witnesses to the accident can be the best persons to depose the high speed/actual speed of the vehicle. In the instant case, as has been discussed in detail, none of the prosecution witness has stated anything with regard to specific speed of the offending vehicle, rather all the prosecution witnesses in one way or the other, have admitted that vehicle in question was being driven in normal speed by the petitioner accused and as such, no finding could be returned by the court below that vehicle in question was being driven at high speed by the petitioner accused at that relevant time.

22. Consequently in view of the detailed discussion as well as law referred to herein above, this Court sees substantial force in the contentions put forth on behalf of the petitioner and as such, present petition is allowed. Accordingly, judgments passed by the Courts below are set-aside. Accused is acquitted of the charges so framed against him. Bail bonds of the accused are discharged. Interim orders, if any, are vacated. All applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Khuri .....Petitioner
Versus
State of Himachal Pradesh and another .....Respondents

CWP No. 4742 of 2011
Decided on : December 6, 2016

Constitution of India, 1950- Article 226- Land of the petitioner was used for the construction of the road without acquisition - assurance was made to acquire the land but no steps were taken for acquisition – the respondent stated that the road was constructed on the persistent demand of the Villagers- it was denied that any objection was raised by the petitioner – held, that the road was constructed in the year 1991 - no document was placed on record to show that the land was donated by the petitioner or that there was implied consent of the petitioner – the petition allowed – respondent directed to pay admissible compensation to the petitioner. (Para-8 to 13)

Case referred:
State of Maharastra Vs Digamber (AIR 1995) SC 1991 and 1995 4 SCC 683
K.B. Ramachandra Raje v. State of Karnataka, (2016) 3 SCC 422

For the petitioner : Mr. B.S. Chauhan, Senior Advocate with Mr. Rakesh Thakur, Advocate.
For the respondents : Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

By way of instant writ petition under Article 226 of the Constitution of India, the petitioner has prayed for following main relief(s):

> "It is therefore prayed that the writ petition may kindly be allowed and appropriate writ, order or direction be issued to the respondents for initiating acquisition proceedings in respect to land measuring about 3 bighas used for the construction of road bearing Kh no 411 and 413 kita 2, measuring 00-13-61 hecters, situated at Mohal / Mauza Madhole , Tehsil Jubbal, Distt. Shimla, H.P. used in the year 1995 and made functional in 2007 in the interest of justice and fair play."

2. Briefly stated the facts as emerge from record are that land belonging to the petitioner, description whereof is available in para-4 of the petition, has been used by the respondents for the construction of road namely Mandhol-Khara Pathar-Patsai road in the year 1993 and it was completed in 2007. Petitioner has specifically averred in the petition that for the construction of aforesaid road, land of the petitioner has been used by the respondents without there being any acquisition of land. Pleadings further suggest that the petitioner, at the time of construction of road, raised objection and prayed that before starting construction of road, steps may be initiated for acquiring the land in accordance with Land Acquisition Act (in short, 'Act'). It also emerges from the record that on the assurance having been given by the respondent Department, petitioner allowed department concerned to construct the road through the land without there being acquisition of the land in terms of the Act. Pleadings further suggest that petitioner was assured by the representatives of the Department that acquisition proceedings would be started and amount of compensation would be paid in accordance with law. In the aforesaid background, petitioner allowed road to be constructed through the land as described in the petition but after the construction of the road, where now vehicles ply, no steps, whatsoever,

were taken by the respondents for acquiring the land, admittedly, having been used by them for the construction of aforesaid road. It also emerges from the record that the petitioner made several requests to the authorities for initiating process for acquisition of land and payment of compensation thereafter, but despite that, no action was taken and as such petitioner was compelled to file present petition, for the redressal of her grievances praying therein for reliefs as reproduced herein above.

3. Respondents, pursuant to issuance of notice by this Court, filed a detailed reply refuting therein the claim of petitioner. Respondents, in their reply, submitted that the rural link road namely Mandhol-Khara Pathar-Patsai from KM 0/0 to 10/0 was proposed to be constructed under State Head during 1985 to facilitate the public of the area upon their popular demand to take their horticulture produce to the market by providing road connectivity. Work of the construction of road was started in 1985 from Magawta side and completed upto KM 4/810 upto village Madot in the year 1990-91. Land of the petitioner falls between RD 4/500 to 4/810 and cutting work through this portion of land as per MB (Measurement Book) entries (JD No. 1318 Page 4 to 7) has been completed during 1990-91. Respondents also placed on record copies of MB's suggestive of the fact that land in question was actually used by the respondent Department for the construction of road. It also emerges from annexure R-1 that at the relevant time, entries were made by the concerned officer in the MB. However, respondents categorically denied the contentions having been put forth on behalf of the petitioner that he had objected to the construction of road through his land, rather, respondents have stated that the road in question was constructed on the 'persistent demand' of people of area. It would be apt to reproduced herein following para of the reply filed by the respondents:

> "2. That in this behalf it is respectfully submitted that rural link road namely Mandhol-Khara Pathar-Patsai road from km 0/0 to 10/0 was proposed to be constructed under state head during the year 1985 to facilitate the public of the area upon their popular demand to take their Horticultural produce to the market by providing road connectively. The work of construction of road was started in the year 1985 from Magawta side and completed up to K.M. 4/810 up to village Madot in the year 1990-91. The suit land of petitioner falls between RD 4/500 to 4/810 km and cutting work through this portion of suit land of petitioner as per MB entries (No. JD-1318 page 4 to 7) has been completed during 1990-91. The copy of MB entries is annexed as **Annexure R-1**. Needless to point out that none of the land owners including petitioner ever objected at the time of construction of road by the contractor through suit land. Thereafter, upon the persistent demand of the people of area, the remaining road i.e. from km 4/810 to 10/0 was started in the year 2002 and completed in the year, 2007. However, the work of construction of this road upto km 4/810 was completed during the year, 1990-91 and since then the villagers including petitioner has been utilizing the "usufruct" of this connectively upto 4/810 km by plying their vehicles. In fact, to provide connectivity to rural areas, the govt. of HP had formed a policy vide which land is to be donated by the land owners free of cost. Therefore, now the petitioner has raised dispute after an inordinate delay of about 30 years from the date of construction of road through her suit land i.e. in the year, 1990-91 when cutting work was done. Hence, the present writ petition is not maintainable as the petitioner has raised this highly disputed question of law and facts with respect to the land compensation on account of the use of suit land which otherwise cannot be adjudicated in a Civil Writ Petition having lost his remedy of filing a civil suit on the ground of limitation. As such at this belated stage the same being barred on the ground delay and latches as per the law laid down by the Apex Court in the case State of Maharastra Vs Digamber (AIR 1995) SC 1991 and 1995 4 SCC 683 and recently followed up by the majority verdict of full bench of our Hon'ble High court on 2.3.2013 in CWP No.

1966/2010 titled as Shankar Dass vs State of HP & ors connected matters. Hence, the present petition deserves its dismissal on this ground alone."

4. Perusal of aforesaid para of reply clearly suggests that the land of the petitioner was used for construction of road and entries were recorded in the MB. Aforesaid averments contained in the reply support the contention put forth on behalf of the petitioner that at the time of construction of road, concerned officer while recording measurements in MB, repeatedly assured the petitioner that the land in question would be acquired in accordance with law and she would be paid compensation in terms of measurement recorded in the MB. While praying for rejection of the claim of the petitioner, respondents in their reply have categorically stated that the claim at such a belated stage can not be accepted and as such present petition may be dismissed on the grounds of delay and laches.

5. Mr. B.S. Chauhan, learned Senior Advocate duly assisted by Mr. Rakesh Thakur, Advocate, vehemently argued that perusal of reply of the respondents, clearly suggests that land of the petitioner was used by the respondents for the construction of the road in question that too without there being any payment of compensation. He, while placing reliance on annexure R-1, placed on record by the respondents, strenuously argued that it clearly suggests that at the time of construction of road, measurements were recorded in the MB and repeated assurances were given to the petitioner that let the road be completed and then steps would be taken for acquisition of land and due and admissible compensation would be paid. While refuting the contentions raised by the respondents, with regard to delay in filing the petition, Mr. Chauhan, placed reliance upon judgment passed by the Apex Court in **Raj Kumar vs. State of H.P. and ors** in SLP(C) No. 2373 of 2014 decided on 29.10.2015, wherein Hon'ble Apex Court has held that once user of land owned by the petitioner is not denied by the State in the counter affidavit filed before the High Court, plea of delay, may not be available to the respondents simply for denying legitimate claim of the person, who gave his land for the construction of road. Mr. Chauhan, further placed reliance on the judgment passed by this Court in a bunch of cases i.e. CWP No. 2067 of 2008 **Birbal versus State of H.P. and others** and connected matters, wherein, in the similar facts and circumstances, this Court directed the respondents to complete the proceedings under Land Acquisition Act for acquisition of the land of the petitioner, therein, within six months from the date of passing of the judgment and thereafter to pay due and admissible compensation.

6. Mr. Ramesh Thakur, learned Deputy Advocate General, vehemently opposed aforesaid prayer having been made on behalf of the petitioner. Mr. Thakur strenuously argued that that no compensation as claimed in the present petition can be awarded to the petitioner at this belated stage because there is no document suggestive of the fact that after the construction of road, petitioner, at any point of time, made request to the authorities for the acquisition of land and payment of compensation. Mr. Thakur, while admitting that road in question was constructed through the land of the petitioner, stated that same was constructed on the popular demand of the people of area, who repeatedly requested the Government to construct road for their convenience and they themselves offered their land for the construction of road and as such, at this belated stage, petitioner can not be allowed to claim compensation qua same land. Mr. Thakur also placed reliance upon judgment passed by the Hon'ble Apex Court in case State of Maharastra Vs Digamber (AIR 1995) SC 1991 and 1995 4 SCC 683, which was followed by a Full Bench of this Court on 2.3.2013 in CWP No. 1966 of 2010 **Shankar Dass versus State of H.P. and another.** In the aforesaid background, Mr. Thakur, prayed that the instant petition deserves to be dismissed on the ground of delay and laches.

7. I have heard learned counsel representing the parties and have carefully gone through the record made available.

8. True, it is that in the judgment passed by the Full Bench of this Court in Shankar Dass versus State of H.P. and others, it was held that in cases where State has not taken steps under Land Acquisition Act for the purpose of construction of road on the ground that required land had been willingly surrendered, either orally or otherwise or with the implied

or express consent of the owners at the relevant time, they can invoke jurisdiction refuting such express or implied consent or the stand of the State on voluntary surrender, only within the time within which such a relief can be claimed in a Civil Suit. Once such a question is thus raised in a Writ Petition, the same can be considered in the Writ Petition itself.

9. Careful perusal of pleadings as well as documents clearly suggests that land of the petitioner was used by the respondents for the construction of road in question in the year 1991 and it is also not disputed that no steps were taken by the respondents for the acquisition of land and thereafter for paying compensation in lieu of the land used by them for the construction of road. Interestingly, respondents in the present case neither in their reply nor in the oral submissions having been made at the time of hearing, disputed that the land of the petitioner was not used for the construction of road, rather, respondents took a very strange plea that since no objections were raised by the petitioner during construction of road, she can not be allowed to put forth claim for payment of compensation at this belated stage. Respondents, though have taken plea of delay and laches but no document worth the name has been placed on record to refute plea of petitioner that she had been repeatedly requesting the respondents to acquire land in question in accordance with law. As per the own case of the respondents, work of construction of road was started in 1985 from Magawta and completed upto KM 4/810 upto village Madot in the year 1990-91. Though respondents, in their reply, have taken stand that road in question was constructed upon the persistent demand of people of the area, but there is no document available on record suggestive of the fact that prayer for construction of road was ever made by the petitioner as well as other villagers, as is claimed by the respondents in their reply. Further, perusal of reply suggests that the construction of road in question though was started in the year 1985 but same was completed in 2007. Respondents have categorically stated in their reply that the work of construction of road upto KM 4/810 was completed in 1990-91 but since villagers including petitioner, had been utilizing 'usufruct' of the connectivity upto 4/810 by plying their vehicles, which was completed in the year 2007. Reply also suggests that there is a policy of the Government to construct road on land which may be donated by the owners. But it may be again stated that neither there is any pleading nor document available on record suggestive of the fact that land in question was donated by the petitioner for the purpose of construction of road. Averments contained in the writ petition suggest that the land of the petitioner as well as co-owners was used for the construction of road, which was completed in 2007. There is no rebuttal to aforesaid assertion having been made by the petitioner in the writ petition.

10. In the instant case, this Court, after carefully perusing the reply having been filed by the respondents, is of the view that respondents have not been able to make out a case that petitioner willingly surrendered her land either orally or otherwise, with implied or express consent, at the time of construction of road, as such with due respect, this Court is of the view that the judgments passed by the Full Bench of this Court in the case of **Shankar Dass** (Supra), may not be applicable in the present case. In the present case, respondents have not stated anything in their reply, from where it can be inferred that land in question was either donated by the petitioner for the construction of the road or there was any kind of implied consent on her part for using her land for the construction of road in question. The Hon'ble Coordinate Bench of this Court while dealing with the similar issue in CWP No. 128 of 2003 decided on 25.7.2007, titled "Mathu Ram v. State of HP and Ors.", wherein land was used for construction of road and compensation was paid to the similar situate persons, directed the respondents to initiate acquisition proceedings for acquisition of land of the persons and to pay compensation in accordance with law. As far as contention put forth by the respondents with regard to the inordinate delay in maintaining the petition as well as compensation is concerned, the Hon'ble Apex Court in case title Raj Kumar v. State of HP and Ors. in SLP(C) No 2373 of 2014 decided on 29.10.2015, held as under:-

> "There is in our opinion considerable merit in the submission made by Mr. Nag. It is true that the appellant had approached the High Court rather belatedly inasmuch the land had been utilized sometime in the year

1985-86 while the writ petition was filed by the appellant in the year 2009. At the same time it is clear from the pleadings in the case at hand that the user of the land owned by the appellant is not denied by the State in the counter affidavit filed before the High Court of that filed before us. It is also evident from the averments made in the counter affidavit that the state has not sought any donation in its favour either by the appellant or his predecessor in interest during whose life time the road in question was constructed. All that is stated in the counter affidavit is that the erstwhile owner of the land "might have donated" the land to the State Government. In the absence of any specific assertion regarding any such donation or documentary evidence to support the same, we are not inclined to accept the ipsit dixit suggesting any such donation. If that be so as it indeed it, we fail to appreciate why the State should have given up the land acquisition proceedings initiated by it in relation to the land of the appellant herein. The fact that the State Government had initiated such proceedings is not in dispute nor is it disputed that the same were allowed to lapse just because the road had in the meantime been taken under the Pradhan Mantri Gram Sadak Yojna. It is also not in dispute that for the very same road the land owned by Kanwar Singh another owner had not only been notified for acquisition but duly paid for in terms of Award No. 10 of 2008. In the totality of the above circumstances, the offer made by Mr. Nag to the effect that the appellant would be satisfied if he is paid compensation at the rate determined and paid to Kanwar Singh under Award No. 10 of 2008 appears to be reasonable. That is so especially when the compensation in terms of Award No. 10 of 2008 was determined by reference to a Notification issued nearly 10 years ago The fact that the appellant is giving up his claim for any compensation for wrongful utilization of land and to the payment of interest which is otherwise statutorily prescribed makes the offer still more attractive for the State."

11. Further, Mr. Chauhan, has relied upon judgment rendered by Apex Court in **K.B. Ramachandra Raje v. State of Karnataka** reported in (2016) 3 SCC 422, wherein it has been held as under:

"15. According to the learned counsels for the respondents the writ petition is inordinately delayed. The writ petition has been filed in the year 1994 though the acquisition of land was finalized in the year 1988 and, in fact, the possession of the land to the respondent No.28-Society was handed over as far back as on 26th September, 1988. It is further pointed out that the fact that the acquisition was being made, in part, for the respondent No.28-Society is amply clear from the recitals contained in the order dated 31st July, 1987, by which the objections of the appellant under Section 16(2) was rejected. In this regard, it is also pointed out that in the course of the objection hearing the appellant was represented by his counsel. It is therefore contended that the statement made by the writ petitioner – appellant that he came to know about the allotment of the land for the respondent No.28-Society when the said Society had made attempts to construct a wall on the land in the year 1994 is wholly incorrect and the entire premise on the basis of which the writ petition has been filed is false. Therefore, on the aforesaid twin grounds of delay and lack of bona fides of the writ petitioner, the present appeals are liable to be dismissed.

28. It has been vehemently argued on behalf of the respondents that the writ petition ought not to have been entertained and any order thereon could not have been passed as it is inordinately delayed and the appellant has made certain false statements in the pleadings before the High Court details of which have been mentioned hereinabove. This issue need not detain the Court. Time and

again it has been said that while exercising the jurisdiction under Article 226 of the Constitution of India the High Court is not bound by any strict rule of limitation. If substantial issues of public importance touching upon the fairness of governmental action do arise the delayed approach to reach the Court will not stand in the way of the exercise of jurisdiction by the Court. Insofar as the knowledge of the appellant – writ petitioner with regard to the allotment of the land to the respondent No.28-Society is concerned, what was claimed in the writ petition is that it is only in the year 1994 when the respondent No.28- Society had attempted to raise construction on the land that the fact of allotment of such land came to be known to the writ petitioner – appellant.

29. A mere recital of the fact that a part of the land proposed for acquisition is contemplated to be allotted to the Respondent No. 28 in the order dated 31st July, 1987 rejecting the objections filed by the writ petitioner – appellant in response to the notice issued under Section 16(2) of the 1903 Act, in our considered view, cannot conclusively prove that what was asserted in the writ petition has to be necessarily understood to be false and incorrect. At the highest, the fact claimed by the respondents that the appellant had previous knowledge may be a probable fact. The converse is also equally probable. Taking into account the above position and the contentious issues raised and the conduct of the State Authorities and the MUDA, we are of the view that the said fact by itself i.e. delay should not come in the way of an adjudication of the writ petition on merits. We, therefore, hold that the impugned acquisition by MUDA under the provisions of the 1903 Act is invalid in law and has to be so adjudged."

12. Accordingly, in view of the aforesaid observations/findings of the Hon'ble Apex Court, the plea of inordinate delay having been raised by the respondents deserves to be rejected outrightly. In the aforesaid judgment, Hon'ble Apex Court has observed that time and again it has been said that while exercising jurisdiction under Article 226 of the Constitution of India, the High Courts are not bound by strict rule of limitation. In the instant case, this Court would be failing in discharging its duties, in case appropriate directions are not issued to the respondents to pay due and admissible compensation to the petitioner, whose land has been used by the State for the construction of the road in question.

13. Consequently, in view of detailed discussion as well as law referred to herein above, this petition is allowed. Respondents are directed to pay due and admissible compensation to the petitioner in lieu of land admittedly used by them for the construction of road in question by resorting to the procedure as is envisaged in Land Acquisition Act. Since considerable delay has already occurred in initiation of proceedings under Land Acquisition Act, respondents are directed to complete the acquisition proceedings under Land Acquisition Act for the acquisition of land within six months from today and pay the compensation to the petitioner thereafter.

14. Pending applications, if any, are disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Mohan Singh ....Appellant-Plaintiff

Versus

Inder Singh & Others ....Respondents-Defendants

Regular Second Appeal No.41 of 2006
Date of decision: 06.12.2016

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that D was the owner of the suit land-suit land was acquired by the plaintiff and the proforma defendants by way of gift- it was given to

R for the purpose of living on Dharmarth – defendant No.1 and 2 got a Will executed by R – R had no right in the suit land – the defendants pleaded that D had executed a gift in favour of RS, who was tenant of D – his widow R remained in possession of the property as owner- she executed a Will in favour of the defendants No.1 and 2- they filed a counter claim seeking declaration – suit was dismissed by the Trial Court and counter claim was decreed- an appeal was filed, which was dismissed- held in second appeal that Trial Court had dismissed the suit and had decreed the counter-claim – one appeal was filed for setting aside the decree passed in the civil suit- no prayer was made for setting aside the decree in the counter-claim- counter-claim is a suit for all intents and purposes – separate appeals were required to be filed against the dismissal of the suit and decree of the counter-claim – once the defendants have been declared to be the owners while decreeing their counter-claim, relief could not have been granted to the plaintiff without setting aside the decree in the counter-claim- composite appeal was not maintainable- appeal dismissed.(Para-23 to 44)

Cases referred:

Rajni Rani and versus Khairati Lal and Others, (2015)2 SCC 682

Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11

Narhari and others vs. Shanker and others, AIR 1953 S.C.419

Gangadhar and another vs. Shri Raj Kumar, AIR(1983) Supreme Court 1202

Tamilnad Mercantile Bank Shareholders welfare Association(2) versus S.C.Sekar and others (2009)2 Supreme Court Cases 784

B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 SCC 123

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant: Mr.N.K. Sood, Senior Advocate with Mr.Aman Sood, Advocate.

For Respondents No.1 and 2(a): Mr.N.K. Thakur, Senior Advocate with Ms.Jamuna, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellant-plaintiff against the judgment and decree dated 27.12.2005, passed by the learned District Judge, Chamba, District Chamba, H.P., affirming the judgment and decree dated 30.11.2004, passed by the learned Civil Judge(Junior Division), Chamba, whereby the suit filed by the appellant-plaintiff has been dismissed.

2. The brief facts of the case are that the appellant-plaintiff *(herein after referred to as the 'plaintiff'),* filed a suit for declaration to the effect that the plaintiff alongwith proforma defendants are owners of the land comprised in Khasra No.263, situated in village Tissa Kaswati *(hereinafter referred to as the `suit land')* and the entry in the revenue record in favour of the defendants qua the suit land are wrong and illegal. Plaintiff further prayed that the defendants be restrained permanently from raising any construction over the suit land and in the alternative for possession of the suit land.

3. It is averred by the plaintiff that he is recorded owner in possession of the land comprised in Khasra Nos.264, 265 and 267, measuring 205 square yards and one square feet, which is adjoining to the suit land, which was recorded in the ownership of the plaintiff and proforma defendants, but in possession of defendants Nos.1 and 2 without any status. It is further averred that at one point of time, the suit land was owned by one Sh.Dass son of Sh.Harkha and the same was acquired by the plaintiff and proforma defendants by way of gift vide mutation No.38. It is alleged by the plaintiff that the suit land was given to one Smt.Rukmani widow of Sh.Ram Singh for the purpose of living on 'Dharmarth', but defendants Nos.1 and 2, in connivance with the revenue agency on the basis of some forged Will allegedly executed by

Smt.Rukmani, got themselves recorded in possession of the same, which entry is wrong, illegal and not binding upon the plaintiff and proforma defendants. It is averred by the plaintiff that Smt.Rukmani was not having any right, title or interest in the suit land, except that she was in permissive possession of the same and, as such, the defendants could not have inherited the suit land on the basis of Will. It is further averred by the plaintiff that the defendants, taking advantage of the wrong entry in connivance with the revenue staff, got attested mutation No.64 on 30.1.1976, according to which proprietary rights were conferred upon them qua the suit land without any lawful authority as the suit land, which is comprising of a house, could not have been the subject of acquisition of proprietary rights under tenancy or any other law. It is further averred by the plaintiff that the defendants were recorded in possession of the suit land, not as a tenant, but without any status. Thereafter, defendant No.1 on 27.1.1995 has dismantled the building situated over the suit land with a view to raise fresh construction to which he has no right, title or interest. In the aforesaid background the plaintiff filed a civil suit.

4. Defendants, by way of filing written statement, refuted the claim of the plaintiff on the ground of maintainability, estoppel, limitation and *locus standi*. They also filed counter claim against the plaintiff. On merits, the defendants have denied the claim of the plaintiff that he is recorded as owner in possession of the land comprised in Khasra Nos.264, 265 and 267. The possession of defendant No.1 on the suit land has been admitted, whereas it is denied that that the plaintiff and proforma defendants are either owners or in possession of the suit land. It is also denied that Sh.Dass executed a gift deed qua the suit land in favour of the plaintiff, but stated that one Sh.Ram Singh was a tenant of Dass, as he used to cultivate the land comprised in Khasra Nos.267 and 268 as a tenant and a house comprised in Khasra No.263 was gifted to Sh.Ram Singh by Sh.Dass and after the death of Shri Ram Singh, his widow Smt.Rukmani remained in possession of the suit land as owner. Smt.Rukmani, therefore, executed a Will in favour of defendant No.1. It is averred that Smt.Kunanu was not competent to dispose of the house situated over the suit land in favour of the plaintiff and proforma defendants as she was not in possession of the suit property. The possession of the suit property was never delivered to the plaintiff and, as such, revenue entry qua the suit land in favour of the plaintiff and proforma defendants are wrong and the same is not binding upon the defendants. It is further averred by the defendants that they have repaired the house in dispute and have also made improvement therein. It is further averred by the defendants that since Smt.Rukmani got the disputed house from her husband late Shri Ram Singh, she was competent to dispose of the same. It is denied that the Will executed by Smt.Rukmani is forged document. It is averred by the defendants that for the last more than 38 years Sh.Ram Singh, Smt.Rukmani and thereafter defendants No.1 and 2 are in possession of the disputed house to the knowledge of the plaintiff and profroma defendants and, as such, the defendants have acquired ownership rights over the disputed house by way of adverse possession as the defendants are in physical possession of the disputed house for the last more than 12 years. It is further averred by the defendants that they have also set up a counter claim seeking declaration that the suit property is in their possession as owners and entry in the revenue record qua the suit property in favour of the plaintiff and proforma defendants is null and void and not binding upon the rights of the defendants. In the aforesaid background the defendants prayed for dismissal of the suit.

5. On the pleadings of the parties, the learned trial Court framed the following issues:-

"1. Whether the plaintiff and the proforma defendants are owners of the property comprised in Khasra No.263 as alleged? OPP.

2. Whether the suit property was given to Smt.Rukmani for residence purpose as 'Dharmarth' as alleged. If so, its effect? OPP.

3. Whether the revenue entries existing in favour of the defendants Nos.1 and 2 are wrong and illegal as alleged? OPP.

4. Whether the plaintiff and the proforma defendants are entitled to decree for possession of the disputed property as claimed? OPP.

5. Whether the suit is not maintainable in the present form? OPD.

6. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD.

7. Whether the suit is time barred? OPD.

8. Whether the plaintiff has no locus standi to sue? OPD.

9. Whether Smt.Rukmani was competent and validly willed away the suit property in favour of the defendants as alleged? OPD.

10. Whether the disputed property was gifted to Sh.Ram Singh as alleged. If so, its effect? OPD.

11. Whether mutation No.64 has been wrongly and illegally attested in favour of the defendants as alleged? OPP.

12. Whether the suit has been properly valued for the purpose of court fee and jurisdiction? OPP.

13. Whether the defendants have become the owners of the suit property by way of adverse possession? OPD.

14. Whether the defendants are owners in possession of the suit property as alleged? OPD.

15. Relief."

6. Learned trial Court vide common judgment and decree dated 30.11.2004 dismissed the suit of the plaintiff and decreed the counter claim filed by the defendants.

7. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiff was dismissed and counter claim by the defendants-respondents were decreed, appellant-plaintiff filed an appeal under Section 96 of the Code of Civil Procedure *(for short 'CPC')* read with Section 21 of the H.P. Courts Act assailing therein judgment and decree dated 30.11.2004 passed by learned Civil Judge(Junior Division) in the Court of learned District Judge, Chamba.

8. Learned District Judge, Chamba vide judgment and decree dated 27.12.2005 dismissed the appeal preferred by the plaintiff by affirming the judgment and decree passed by the learned trial Court. Learned first appellate Court also affirmed the decreed passed by the learned trial Court in the counter claim.

9. In the aforesaid background, the present appellant-plaintiff filed this Regular Second Appeal before this Court, details whereof have already been given above.

10. This second appeal was admitted on the following substantial question of law:

"(1) Whether the respondents/defendants No.1 and 2 could not have claimed title to the suit property both on the basis of the will from Rukmani, in whose favour a gift had allegedly been made by the original owner Dass, and also on the basis of plea of adverse possession at the same time?

2. Whether the finding that the respondents/defendants No.1 and 2 have acquired title by prescription, could not have been returned when it was also found that possession of Rukmani and prior to her that of Ram Singh, her husband, was permissive?"

11. At this stage, it may be noticed that on 15th November, 2016, the matter was listed before this Court, and attention of Mr. N.K. Sood, Senior Advocate, representing the appellant-plaintiff was invited towards the judgment passed by Hon'ble Apex Court in ***Rajni Rani and versus Khairati Lal and Others, (2015)2 SCC 682*** and ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11***, which was further followed by this Court while dismissing ***RSA No.293 of 2006***, *titled as* ***Piar Chand & Others versus***

Ranjeet Singh & Others, wherein Hon'ble Apex Court has held that while dismissing the counter claim, Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree and same needs to be laid challenge, if any, by way of filing separate appeal affixing required court fee.

12. In view of aforesaid law having been brought to the notice of Mr.N.K. Sood, learned Senior Advocate, representing the appellant-plaintiff, he sought time to go through the same. Thereafter, today i.e. on 6.12.2016, when the matter was listed before this Court, this Court in view of aforesaid law having been laid down by the Hon'ble Apex Court deemed it fit to frame additional substantial question of law for proper adjudication of the case at hand. The additional substantial question of law is as under:-

1. "Whether the learned First Appellate Court has erred in entertaining the composite appeal having been preferred by the appellant-plaintiff against the judgment and decree passed by learned trial Court dismissing the suit of the plaintiff and decreeing the counter claim preferred by the defendants-respondents that too without affixing separate/ requisite court fee as far as counter claim is concerned.

13. Mr.Sood, learned Senior Advocate, vehemently argued that the judgments passed by both the Courts below are not sustainable as the same are not based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, same deserves to be quashed and set-aside. Mr. Sood, further contended that bare perusal of the of the judgments passed by both the Courts below suggests that evidence led on record by the appellant-plaintiff has not been read in its right perspective and as such, great prejudice has been caused to the appellant-plaintiff against whom decree for possession has been passed.

14. Mr.Sood, while making his submission qua the additional issue having been framed by this Court, contended that genuine and legitimate claim of the appellant-plaintiff cannot be allowed to be defeated on mere technicalities and this Court has wide power to ignore such technicalities and can proceed ahead to decide the matter on the basis of the evidence adduced on record by the respective parties to do substantive justice in the matter. Mr.Sood, further claimed that the learned trial Court decreed the counter claim of the defendants-respondents and appellant-plaintiff rightly preferred composite appeal against the same before the learned District Judge laying challenge therein to the composite decree passed in the suit as well as in the counter claim in favour of the defendants. He further contended that no appeal, if any, could be filed without there being any decree and as such, appellant-plaintiff had no option but to file composite appeal, whereby suit of the plaintiff was dismissed and counter claim of the defendants-respondents was decreed.

15. In the aforesaid background, Mr. Sood, strenuously argued that the counter claim filed by the defendants-respondents deserve to be dismissed after setting aside the judgment and decree passed by the Courts below. In support of his contention Mr. Sood, also placed reliance on the judgments of Hon'ble Apex Court in ***Narhari and others vs. Shanker and others, AIR 1953 S.C.419, Gangadhar and another vs. Shri Raj Kumar, AIR(1983) Supreme Court 1202, Tamilnad Mercantile Bank Shareholders welfare Association(2) versus S.C.Sekar and others (2009)2 Supreme Court Cases 784 and B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 Supreme Court Cases 123.***

16. Mr.N.K. Sood, Learned Senior Counsel appearing for the appellant-plaintiff, vehemently argued that the impugned judgment and decree passed by learned first appellate is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence as well as law on point. Mr.Sood contended that bare perusal of impugned judgment passed by learned first appellate Court suggests that the same is based on conjectures and surmises and learned first appellate Court has fallen in grave error while affirming the judgment and decree passed by the learned trial Court that too on the very flimsy grounds.

17. Mr.N.K. Sood,Learned Senior Counsel appearing for the appellant-plaintiff, vehemently argued that the learned court below has fallen in error of law as also on facts while holding that the defendants have perfected their title by adverse possession. He further contended that pleadings qua plea of adverse possession were not sufficient and adequate as required in law. It ought to have been specifically pleaded and proved how and at what time the hostile title started and began to be prescribed or on what date the defendants came into possession or that possession was open, peaceful and continuous. Mr.Sood forcefully contended that adverse possession does not begin to operate unless the plea of title is renounced and disclaimed and without renouncing and disclaiming the plea of acquisition of title on the basis of Will, the defendants could not have raised the plea of adverse possession. Mr.Sood further contended that the averment made by the defendants that the plaintiff and proforma defendants were not the owners of the suit property and that the title vested in Ram Singh and then Rukmani itself demolishes their case of adverse possession. Mr.Sood vehemently argued that once the courts below have conclusively held that the gift dated 1.12.1969 (Ex.D-1) in favour of plaintiff and proforma defendants of the suit property from Kunanoo widow of Sh.Dass was proper and legal, in that event, the very basic, essential and classic requirement of setting up hostile title against the true owner and further animus to hold suit property in denial to the title of the plaintiff and proforma defendants is missing.

18. Mr.Sood, forcefully contended that the courts below have wrongly and illegally held that the hostile possession of the defendants started from the year 1971. In the absence of such specific pleadings, the starting point could not have been presumed and thus the courts below have made out a case for the defendants on its own presumptions, assumptions, conjectures and surmises. Mr.Sood vehemently contended that even the oral evidence of the defendants was not sufficient to sustain and establish the plea of adverse possession. Statements of defendants as well as their witnesses have been misread and misconstrued which are contrary to the pleadings of adverse possession and the same not sufficient to constitute a lawful proof of adverse possession and the entire approach of the courts below on the question of adverse possession is illegal, unsustainable and has vitiated the findings.

19. Mr.N.K. Thakur, learned Senior counsel appearing for the respondents-defendants, supported the judgment passed by the learned first appellate Court. Mr. Thakur, vehemently argued that bare perusal of the judgment passed by the learned first appellate Court suggests that the same is based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, there is no scope of interference, whatsoever, by this Court especially in view of the concurrentfindings of fact recorded by the Court below. He further contended that the present appeal is not maintainable in view of the law laid down by the Hon'ble Apex Court in ***Rajni Rani and another vs. Khairati Lal and Others, (2015) 2 SCC 682*****,** which was further followed by this Court while passing ***judgment dated 16.9.2016 in RSA No.293 of 2006.***Mr. Thakur also placed reliance on the judgment of Hon'ble Apex Court in ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilala Kabrawala and others, AIR 1964 SC 11.***

20. Mr. Thakur, while concluding his arguments, further contended that apart from above, this Court has very limited power while exercising power under Section 100 CPC to re-appreciate the evidence and as such, he placed reliance on the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**, herein below:-

> "16. Based on oral and documentary evidence, both the Courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100

> C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the Courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."

21. I have heard learned counsel for the parties and have gone through the record of the case.

22. Keeping in view the specific objection with regard to maintainability having been raised by the appellant-plaintiff in the light of the judgment passed by the Hon'ble Apex Court, this Court deems it fit to take additional substantial question of law framed by this Court at first instance for adjudication.

23. Perusal of the counter claim filed on behalf of the defendants-respondents suggests that while filing written statement they asserted counter claim but fact remains that no requisite fee was paid on the aforesaid counter claim. The appellant-plaintiff denied the aforesaid counter claim of the respondents-defendants terming the same to be false and claimed that there was no negligence on the part of the appellant-plaintiff as claimed in the counter claim.

24. Careful perusal of the trial court record further suggests that appellant-plaintiff refuted the aforesaid counter claim of the respondents-defendants by way of replication as well as by filing separate written statement. However, the fact remains that learned trial Court after framing issues, as have been reproduced above, dismissed the suit of the plaintiff and decreed the cross-objection having been filed by the respondents-defendants. Operative part of the judgment and decree passed by the learned trial Court clearly suggests that the learned trial Court dismissed the suit of the appellant-plaintiff for possession, whereas decreed the counter claim of ownership and possession preferred on behalf of the respondents-defendants. Careful perusal of the decree sheet available on record suggests that decree for possession was passed in favour of the respondents-defendants and against the appellant-plaintiff.

25. Careful perusal of the decree, as referred, hereinabove, suggests that it also stands mentioned, ***"in view of my findings on the aforesaid issues, the suit of the plaintiff fails and the same is, accordingly, dismissed, whereas, the counter claim of the defendants is decreed and the defendants are declared to be the owners in possession of the suit property."*** Perusal of aforesaid decree prepared by the learned trial Court while dismissing the suit and accepting the counter claim of the defendants, clearly suggests that proper decree was drawn as far as acceptance of the counter claim filed by the defendants is concerned.

26. Appellant-plaintiff, being aggrieved with the aforesaid judgment and decree, approached the learned District Judge by way of an appeal under Section 96 CPC laying therein challenge to aforesaid judgment and decree passed by the learned trial Court. At this stage, it would be appropriate to reproduce cause title/ head note of appeal preferred by the appellant-plaintiff before the learned District Judge, which reads thus:-

> "Civil appeal under section 96 CPC read with section 21 of the H.P. Courts Act against the judgment and decree dated 30.11.2004 passed by the learned Civil Judge (Jr.Division), Chamba in Civil Suit no.2 of 1995, titled as Mohan Singh-Versus-Inder Singh and others, with a prayer to set-aside the same."

27. Careful perusal of aforesaid cause title as well as relief claimed in the appeal clearly suggests that appellant-plaintiff before the learned first appellate Court prayed that the appeal filed by him be accepted with costs and the judgment and decree dated 30.11.20-4 passed by learned trial Court be set aside, but there is no prayer, if any, for setting aside the judgment and decree passed by the learned trial Court, whereby counter claim filed by the defendants-respondents have been decreed and they were declared owners in possession of the suit property.

28. Before adverting to the submissions having been made on behalf of the learned counsel representing both the parties, it would be appropriate to refer to relevant provisions of law applicable in the present case i.e. Order 8 Rule 6A:

> "6A. Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:
>
> Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.
>
> (2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.
>
> (3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.
>
> (4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

29. Aforesaid provisions of law entitles defendant in a suit to set up counter claim against the claim of the plaintiff in respect of cause of action accruing to him against the plaintiff either before or after filing the suit, butdefinitely before defendant files his defence or before the time stipulated for delivering the defence is expired. Needless to say that aforesaid right of filing counter claim is in addition to his right of pleading as set up in Rule 6. Further perusal of aforesaid provisions of law suggests that counter claim, if any, filed on behalf of the defendant would be treated as a plaint and same would be governed by Rules applicable to the plaint. Similarly, counter claims filed on behalf of the defendant would have same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and the counter claim.

30. Similarly, Rule 6A(3) enables the plaintiff to file a written statement, if any, to the counter claim filed by the defendant. Rule 6D specifically provides that in case suit of the plaintiff is stayed, discontinued or dismissed, the counter claim filed on behalf of the defendant would nevertheless be proceeded with.

31. Similarly, Rule 6E provides that if plaintiff fails to file reply to the counter claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him/her, or make such order in relation to the counter-claim as it deems fit. It would be relevant here to refer to Order VIII Rule 6F:

> "6F. Relief to defendant where counter-claim succeeds.- Where in any suit a set-off or counter-claim is established as a defence against the plaintiffs claim and any balance is found due to the plaintiff or the defendant, as the case may be , the Court may give judgment to the party entitled to such balance."

32. Perusal of aforesaid Order VIII Rule 6F clearly suggests that where in any suit a set-off or counter claim is established as a defence against the plaintiffs' claim and any balance is found due to the plaintiff or the defendant, Court may give judgment to the party entitled to such balance. Further perusal of Order VIII Rule 6G suggests that no pleadings, if any, subsequent to the written statement filed by a defendant other than by way of defence to set up a claim can be presented except with the leave of Court.

33. Under Order VIII Rule 10 when any party fails to file written statement as required under rule 1 or rule 9 within the stipulated time, the Court shall pronounce judgment

against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

34. Careful perusal of aforesaid provisions of law clearly suggests that counter claim, if any, preferred by the defendant in the suit is in nature of cross suit and even if suit is dismissed counter claim would remain alive for adjudication. Since counter claim is in nature of cross suit, defendant is required to pay the requisite court fee on the valuation of counter claim. It has been specifically provided in the aforesaid provisions that the plaintiff is obliged to file a written statement qua counter claim and in case of default court can pronounce the judgment against the plaintiff in relation to the counter claim put forth by the defendant as it has an independent status. As per Rule 6A(2), the Court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim.

35. In the present case, as clearly emerged from the judgment passed by the learned trial Court, learned trial Court effectively determined the rights of the parties on the basis of counter claim as well as written statement thereto filed by the respective parties and as such it attained the status of decree. It would be profitable here to reproduce definition of the term *'decree'* as contained in Section 2(2) of CPC:-

> "2.(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [1][* * *] Section 144, but shall not include –
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default.
>
> Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

36. Close scrutiny of aforesaid definition of "decree" clearly suggests that there should be formal expression of adjudication by the Court while determining the rights of the parties with regard to controversy in the suit, which would also include the rejection of plaint. Similarly, determination should be conclusive determination resulting in a formal expression of the adjudication. It is settled principle that once the matter in controversy has received judicial determination, the suit results in a decree, either in favour of the plaintiff or in favour of the defendant.

37. In this regard, it would be appropriate to place reliance on the judgment of the Hon'ble Apex Court in ***Rajni Rani and Another vs. Khairati Lal and Others,*** **(2015)2 SCC 682**, wherein the Court has held as under:-

> "16. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible."

38. After perusing aforesaid judgment passed by Hon'ble Apex Court, this Court need not to elaborate further on the issue at hand because Hon'ble Apex Court has categorically held that if by virtue of order of the Court rights have finally been adjudicated, it would assume the status of decree. Hon'ble Apex Court has also stated that Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree. Learned Apex Court has further held that in such like situation order passed by trial Judge has the status of decree and challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee.

39. Apart from above, this Court viewed this matter from another angle also. Admittedly, appellant-plaintiff claiming himself to be the owner of the suit land, as recorded in Jamabandi for the year 1970-71, filed a suit for declaration and permanent prohibitory injunction restraining defendants No.1 and 2 from changing the nature of the suit land. The aforesaid claim having been set up by the plaintiff in the instant Civil Suit was dismissed; meaning thereby that he was not declared as owner of the suit land entitling him to seek possession of the same. Whereas, in the aforesaid suit having been filed by the plaintiff, defendants filed written statement-cum-counter claim seeking declaration to the effect that they may be declared owners in possession of the suit property, which relief was extended by the trial Court by decreeing the counter claim of the defendants declaring them to be the owners in possession of the suit property.

40. Since, as has been observed above, no challenge has been laid to the judgment and decree passed by the trial Court decreeing the counter claim of the defendants, whereby they have been declared to be owners in possession of the suit property, composite appeal laying therein challenge to the judgment and decree passed by learned Civil Judge in Civil Suit No.2 of 1995 was not maintainable. Moreover, relief as claimed in the appeal having been filed by the appellant-plaintiff could not be extended to him without setting aside the judgment and decree passed in the counter claim in favour of the defendants. Once defendants have been declared to be owners in possession of the suit property by the trial Court while decreeing their counter claim, it is not understood how relief as prayed for in Civil suit having been filed by the plaintiff can be extended without setting aside the judgment and decree passed in the counter claim.

41. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court, this Court sees no force in the contention put forth on behalf of the counsel representing the appellant-plaintiff that in the absence of specific decree drawn by learned trial Court at the time of decreeing the counter claim filed by the defendants, plaintiff could not file separate appeal. Substantial question is answered accordingly.

42. Consequently, in view of the detailed discussion made hereinabove, this Court is of the view that learned first appellate Court erred in entertaining the composite appeal having been preferred on behalf of the appellant-plaintiff laying challenge therein to the judgment passed by the learned trial Court dismissing the suit of the appellant-plaintiff as well as decreeing the counter claim preferred on behalf of the defendants-respondents. In view of the latest law laid down by the Hon'ble Apex Court as well as provisions contained in the law as discussed above, appellant-plaintiff being aggrieved with the dismissal of the suit and decreeing the counter claim ought to have filed separate appeals by affixing separate court fee and composite appeal, as has been preferred in the present case, was not maintainable. In view of the aforesaid findings having been returned by this Court on the additional substantial question of law, other substantial questions of law have become redundant and as such, are not required to be answered at this stage.

43. As far as judgments relied upon by the learned counsel appearing for the appellant-plaintiff are concerned, this Court is of the view that the same are not applicable in the present facts and circumstances of the case, especially in view of the law laid down by the Hon'ble Apex Court *(supra).*

44. In view of the detailed discussion made hereinabove, as well as latest law laid down by the Hon'ble Apex Court in ***Rajni Rani's*** case *(supra)***,** the present appeal is not maintainable and the same is accordingly dismissed. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s Italian-Thai Development Public Company Ltd. …Petitioner

Vs.

State of HP & Others …Respondents.

CWP No. 9552 of 2013
Judgment reserved on: 22.11.2016
Date of decision: December 06, 2016

H.P. Motor Vehicles Taxation Act, 1972- Section 3- Petitioner had purchased different construction equipment vehicles- respondents have imposed tax on them – the petitioner filed a writ petition pleading that construction equipment vehicles do not fall within the definition of motor vehicle- held, that machinery like excavator, loader, dumpers have been included as construction equipment vehicle and have been termed as non-transport vehicle- therefore, there cannot be any exemption regarding the imposition of tax – petition dismissed. (Para-5 to 25)

Cases referred:

M/s Kshardas & Co. vs. State of Maharashtra 1986 AIR (Bom) 348
Poomani vs. Tuticorin Thermal Power Project, 1990 AIR (Mad), 372
M/s Chakkiat Agencies Pvt. Ltd. vs. State of Kerala, 2001 AIR (Ker), 363
M/s Birla Cement Works vs. State of Rajasthan, 2003 AIR (Raj) 25,
Dinesh Mehta vs. Kaushikbhai K. Patel and others, C.W.P. No. 5373 of 2015, decided on 15.12.2015
Bolani Ores Ltd. vs. State of Orissa, 1975 AIR SC, 17
Travancore Tea Co. Ltd. vs. State of Kerala, 1980 (3) SCC 619
Union of India vs. Cowgule and Co. Pvt. Ltd. 1992 Supp 3 SCC 141
Chief General Manager, Jagannath Area vs. State of Orissa (1996) 10 SCC 676
Bose Abraham vs. State of Kerala and another (2001) 3 SCC 157,
M/s Natwar Parikh and Co. Ltd. vs. State of Karnataka, 2005 AIR (SC) 3428
National Insurance Company Ltd. vs. Sharda Devi and others (2016) 3 ACC, 627 (HP)

For the Petitioner : Mr. C. N. Singh, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This writ petition involves the seminal question as to whether the construction equipment vehicles, more particularly, water tankers, heavy hyvas, farm tractors, transit mixtures and other heavy machines do not fall within the scope and purview of the definition of 'Motor Vehicles' and thus are exempted from tax?

2. The petitioner is executing the construction of Kol Dam Hydro Electric Power Project, main civil works Package 1 and has purchased different construction equipment vehicles. Being aggrieved by the imposition of tax on these vehicles, has filed the instant petition for the following substantive reliefs:

> *(i) Issue a writ in the nature of certiorari, mandamus or other appropriate writ or directions quashing the notification dated 31.12.2003 being ultra vires (Annexure P-6) for all intents and purposes.*
>
> *(ii) Consequentially issue a writ in the nature of certiorari, mandamus or other appropriate writ or directions quashing impugned orders dated 20.4.2012 (Annexure P-4).*
>
> *(iii) Issue a writ in the nature of mandamus or other appropriate writ or directions to the respondents to refund the tax collected by the respondent authority under the aforementioned notification /order dated 20.4.2012 with 12% interest per annum.*

3. It is averred that no tax is leviable on construction equipment vehicles as these do not fall within the definition of 'Motor Vehicles' in terms of Motor Vehicle Taxation Act, 1972 (for short 'Act of 1972').

4. The respondents filed the reply wherein it is averred that the tax levied on the vehicles in question is as per the provisions of Section 3 of the Himachal Pradesh Motor Vehicles Taxation Act, 1972 (for short Act of 1972) and the notifications dated 24.12.2003 and 31.12.2003 issued under the Act of 1972. It is averred that the vehicles in question have in fact been registered as per the Motor Vehicles Act (for short 'M.V.Act') and, therefore, the petitioner is liable to pay tax on the same.

We have heard the learned counsel for the parties and have gone through the records of the case.

5. The term "Motor Vehicle" has been defined in Section 2 (28) of the Motor Vehicles Act, 1988 which reads thus:

> *"(28) "Motor Vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimeters."*

6. The term "Construction Equipment Vehicle" has been defined under Rule 2 (ca) of the Central Motor Vehicles Rules, 1989, which reads as under:

> *"(ca) 'construction equipment vehicle' means rubber-tyred (including pneumatic tyred), rubber-padded or steel drum wheel mounted, self-propelled, excavator, loader, backhoe, compactor roller, dumper, motor grader, mobile crane, dozer, fork-lift truck, self-loading concrete mixer or any other construction equipment vehicle or combination thereof designed for off-highway operations in mining, industrial undertaking, irrigation and general construction but modified and manufactured with 'on or off or' on and off highway capabilities.*
>
> ***Explanation**.- A construction equipment vehicle shall, be a non-transport vehicle the driving on the road of which is incidental to the main off-highway function and for a short duration at a speed not exceeding 50 KMs per hour, but such vehicle does not include other purely off-highway construction equipment vehicle designed and adopted for use in any enclosed premises, factory or mine other than road network, not equipped to travel on public roads on their own power."*

7. It is clear from the aforesaid clause that the machineries like excavator, loader, dumpers have been included as 'construction equipment vehicle' and have been termed 'non-transport vehicle' under the explanation given to this clause.

8. Likewise, a 'non-transport vehicle' has been defined under sub rule (h) of Rule 2 as under:

> *"2 (h): 'Non-transport vehicle' means a motor vehicle which is not a transport vehicle."*

9. It is evident from the perusal of the above definition that the vehicles of special nature like dumpers, tippers and excavators are non-transport vehicles but nonetheless they are motor vehicles within the definition of Section 2 (28) of the Act. Even if the driving of the same on the road is incidental and for a short duration and its speed is 50 Kms per hour, even then, what has been excluded or not included in the definition is the equipments which are purely off-highway construction equipment designed and adopted for use in any enclosed premises, factory or mines, other than road work, not equipped to travel on public roads on their own power.

10. At this stage, we may refer to some of the opinions rendered by the various Hon'ble High Courts on the issue.

11. In ***M/s Kshardas & Co. vs. State of Maharashtra 1986 AIR (Bom) 348,*** a Division Bench of the Bombay High Court held that motor crane has mobility and is also suitable for use on a public road so far as its movement is concerned and mere fact that it had been used in the closed premises, cannot be said that it is not a motor vehicle as defined in Section 2 (28) of the Act.

12. In ***Poomani vs. Tuticorin Thermal Power Project, 1990 AIR (Mad), 372***, the learned Single Judge of the Madras High Court held that crane driven on public road is a motor vehicle, though this was a case arising out of motor accident compensation claim.

13. Likewise, in ***M/s Chakkiat Agencies Pvt. Ltd. vs. State of Kerala, 2001 AIR (Ker), 363*** a Division Bench of the Kerala High Court held that trailers kept in the area of the Port Trust and which are used for transport inside the Port area can still be said to be motor vehicles kept for use in the State would nonetheless the motor vehicle as defined under the Act.

14. In ***M/s Birla Cement Works vs. State of Rajasthan, 2003 AIR (Raj) 25***, a Division Bench of the Rajasthan High Court while going into the question whether dumpers would be amenable to tax since the same were being used in the factory premises came to hold that simply because it is the special type of vehicle that are being used in the factory premises will not bring dumpers within the exemption provided under Section 2 (28) as it is the user of the vehicle which determines its adaptability.

15. Similar issue came up before the Rajasthan High Court in ***Dinesh Mehta vs. Kaushikbhai K. Patel and others, C.W.P. No. 5373 of 2015, decided on 15.12.2015***, wherein it was held as under:

> *"6. The question posed before this Court is whether the Notification dated 1.1.2015 is beyond the competence of the State Legislature in so far as the State is only competent to levy tax as per Entry No. 57 of List II of Schedule 7 of the Constitution of India on such vehicles as are suitable for use on roads and whether NORMET MULTIMEC 6600 S.No. GB 821 equipment is to be treated as a construction equipment or whether it is to be treated as off-roading vehicle, as described under Section 2(p) of the Rajasthan Motor Vehicles Taxation Act, 1951.*
>
> *7. The term "Motor Vehicle" has been defined in Section 2 (28) of the Motor Vehicle Act, 1988, which reads as under:-*
>
> > *" "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a*

chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty five cubic centimetres."

8. The term "construction equipment vehicle" has been defined in Rule 2(ca) of the Central Motor Vehicles Rules, 1989, which reads as under:-

"2 (ca) "construction equipment vehicle" means rubber tyred (including pneumatic tyred), rubber padded or steel drum wheel mounted, self-propelled, excavator, loader, backhoe, compactor roller, dumper, motor grader, mobile crane, dozer, fork lift truck, self-loading concrete mixer or any other construction equipment vehicle or combination thereof designed for off highway operations in mining, industrial undertaking, irrigation and general construction but modified and manufactured with "on or off" or "on and off" highway capabilities.

Explanation.--A construction equipment vehicle shall be a non-transport vehicle the driving on the road of which is incidental to the main off-highway function and for a short duration at a speed not exceeding 50 kms per hour, but such vehicle does not include other purely off-highway construction equipment vehicle designed and adopted for use in any enclosed premises, factory or mine other than road network, not equipped to travel on public roads on their own power."

9. The contention raised by the counsel appearing on behalf of the petitioner that the Notification dated 1.1.2015 issued by the State Government including the term of purely Off-road vehicle is beyond the scope and ambit of the power conferred upon the State vide Entry No. 57 of List II of Schedule 7 of the Constitution of India since the State has been conferred power to impose tax only on such vehicles as are suitable for use on roads (emphasis supplied) and furthermore section 2(28) of the Motor Vehicle Act 1988 specifies that a vehicle of a special type adapted for use only in a factory or in any other enclosed premises will not be included in the definition of a vehicle. This argument is without merit. A Division bench of this court in Birla Cement Works and Anr. Vs. State Of Rajasthan And Ors. AIR 2003 Raj 251 while going into the question whether dumpers would be amenable to tax since the same were being used in factory premises , came to hold that simply because it is the special type of vehicle and that they have been used in the factory premises will not bring dumpers within the exemption provided under Section 2(28). It is the user of the vehicle who determines its adaptability.

38. Thus, we are of the view that the definition of the Motor Vehicles Act under Section 2(28) is quite comprehensive. The exemption incorporated therein relating to the vehicle "all special type adopted or used only in a factory or any other enclosed premises significantly has used word 'adapted' and another word 'only'. The expression "adapted" for use on roads means that the vehicle should be fit and apt to use on roads. It does not mean "actually used on roads". By the use of rubber tyres it is evident that they have been adapted for use on roads, which means that they are suitable for being used on public roads. The dumpers can certainly be used for carrying loads even outside the factory premises. The dumpers are suitable for use on public or private roads. Simply because it is the special type of vehicle and that they have been used in the factory premises will not bring within the exemption provided under Section 2(28). It is the user of the vehicle who determines its adaptability. The test is if the vehicle is reasonably suitable for being used along with the public roads the mere fact that the manufacturer have made or intended a

particular vehicle for one purpose or the other or the dealers have sold it for a particular purpose or that a particular vehicle is described by a particular name or description is no criteria to decide whether the vehicle is adapted for use upon the roads within the meaning of definition of Motor Vehicles Act under Section 2(28) of the M.V. Act. 1998.

Another word 'only' is also of a great significance. It clearly shows that the exemption is confined to only those kinds of vehicles which are exclusively designed for use in a factory or any enclosed premises, the actual use for particular purpose is no criteria to decide whether the vehicle is a motor vehicle. Thus, if the dumpers are suitable for use on public roads, it is a motor vehicle despite the fact they may have been used only in factory premises. Thus, we hold that the dumpers owned by the appellants/petitioners are motor vehicles within the meaning of Section 2(28) of the Motor Vehicles Act, 1988 as it does not fall in the exempted category in spite of being a special type of vehicle, being adaptable or suitable for being used on roads (by the use of rubber tyres) even though actually used only within the enclosed premises of the appellants/petitioners' factory. Hence they are liable to be taxed."

10. Similarly in the present case, the equipment imported by the petitioner is suitable for being used on public roads and the petitioner has not been able to demonstrate otherwise. The equipment in question, though used and adapted for mining purposes, is mounted on four rubber wheels .The description in the invoice itself describes it as a utility vehicle and as per the technical details of the equipment, it is shown as an underground carrier having its use for logistics underground mines for scissor lift, personnel carrier with a diesel tank. Furthermore, it is a three gear vehicle with a reverse gear and is a four wheel drive. There is nothing available on record which would indicate that the said vehicle cannot be used on roads ,is not capable of being propelled mechanically, neither is it a vehicle running on fixed trails . Once it is a vehicle which is capable of being on the road , the State Government is competent to legislate and the notification dated 1.1.2015 is held to be valid."

16. Having considered the view taken by the various Hon'ble High Courts, we would now proceed to consider the judgments rendered by the Hon'ble Supreme Court on the subject.

17. One of the first judgment which otherwise has heavily relied upon by learned counsel for the petitioner has been rendered in ***Bolani Ores Ltd. vs. State of Orissa, 1975 AIR SC, 17,*** wherein it was held that the water tankers, heavy hyvas, farm tractors, transit mixtures and other heavy machines do not fall within the scope and purview of the definition of 'Motor Vehicle' and it is apt to reproduce the relevant observations which reads thus:

"23. The meaning of the word "adapted" in s. 2(18) of the Act is itself indicated in entry 57 of List II of the Seventh Schedule to the Constitution, which confers a power on the State to tax vehicles whether propelled mechanically or not and uses the word "suitable" in relation to its use on the roads. The words "adapted for use" must therefore be construed as "suitable for use". At any rate, words "adapted for use" cannot be larger in their import by including vehicles 'Which are not " suitable for use' on roads. In this sense, the words "is adapted" for use have the same connotation as "is suitable" or" is fit" for use on the roads."

18. However, we find that not only has the Motor Vehicle Act undergone a sea change, but even the judgment rendered by the Hon'ble Supreme Court in ***Bolani's*** case has been subsequently distinguished in number of cases and reference in this regard can conveniently be made to the decision in the case of ***Travancore Tea Co. Ltd. vs. State of Kerala, 1980 (3) SCC 619*** wherein it was ruled that dumpers, rockers with rubber tyres,

though used for transporting goods within the enclosed factory premises were nevertheless adaptable and suitable for use on public roads and were thus motor vehicles.

19. Likewise, in ***Union of India vs. Cowgule and Co. Pvt. Ltd. 1992 Supp 3 SCC 141*** while distinguishing the decision in ***Bolani's*** case, it was held that dumpers and shovels used in mining activities were motor vehicles.

20. In ***Chief General Manager, Jagannath Area vs. State of Orissa (1996) 10 SCC 676,*** the Hon'ble Supreme Court held that dumpers running on tyres and used within mining areas were motor vehicle within the meaning of Section 2 (28) of the Act even though it was contended that such vehicles exceeded the permissible restrictions laid down in Rules 92 and 93 of the Central Motor Vehicles Rules, the Hon'ble Supreme Court opined that once the vehicles which otherwise fall within the definition of Motor Vehicles, would not go out of definition the moment it exceeds the limit as provided in Rules 92 and 93 of the Rules and it was held as under:

> "7. *The various restrictions contained in Rules 92 and 93 referred to by Mr. Shanti Bhushan, learned senior counsel are intended to lay down the outer limits for the vehicles to be plied or, the public road. But that does not mean that the vehicles which are otherwise motor vehicles within the definition clause go out of the definition the moment they exceed the limit as provided in Rules 92 or 93 of the Rules. the taxability of dumpers again came up before this Court in the case of Union of India & Ors. vs. Chowgule & Co. Pvt. Ltd. & Ors.- 1992 Sup. (3) Supreme Court Cases 141. In this case an argument had been advanced that the dumpers are used only in mining operation within the mining area and are not actually used on roads nor are suitable for use on roads and, therefore, are not taxable. The Judicial Commissioner of Goa, Daman and Diu accepted the contention and allowed the appeal. Union of India had come up in appeal to this Court. This Court reversed the decision of the Judicial Commissioner of Goa, Daman and Diu and relying upon the earlier decision of this Court in Central Coal Fields Ltd. vs. State of Orissa - 1992 Suppl. (3) SCC 133 held the mere fact that dumpers were used solely on the premises of the owner or that they were in closed premises or permission of the authorities was needed to move them from one place to another or that they are not intended to be used or are incapable of being used for general purposes or that they have an unladen and laden capacity depending on their weight and size is of no consequence for dumpers are vehicles used for transport of goods and thus liable to pay a compensatory tax for the availability of roads for them to run upon commission."*

21. In ***Bose Abraham vs. State of Kerala and another (2001) 3 SCC 157,*** the Hon'ble Supreme Court categorically held that once the equipments like excavators and roadrollers are motor vehicles under the M.V. Act and further held that merely because a motor vehicle is put to a specific use such as being confined to enclosed premises, will not render the same to be a different kind of vehicle. It is apt to reproduce the following observations:

> "6. Section 2 (j) *of the Act defines motor vehicle to mean a motor vehicle as defined in Section 2(28) of the Motor Vehicles Act, 1988 [Central Act 59 of 1988]. Subject to the provisions of the Act, Section 3 of the Act enables the levy and collection of tax on the entry of any motor vehicle into local area for use or sale therein which is liable for registration in the State under the Motor Vehicles Act at such rate as may be fixed by the Government. Therefore, in order to attract tax under the provision of Section 3 of the Act, a motor vehicle must have entered into a local area for use or sale therein and secondly which is liable for registration under the Motor Vehicles Act.*
>
> *7. We hold that the excavators and road rollers are motor vehicles for the purpose of the Motor Vehicles Act and they are registered under that Act. The High Court has noticed the admission of the appellants that the excavators and road*

rollers are suitable for use on roads. However, the contention put forth now is that they are intended for use in the enclosed premises. Merely because a motor vehicle is put to a specific use such as being confined to an enclosed premises, will not render the same to be a different kind of vehicle. Hence, in our view, the High Court has correctly decided the matter and the impugned order does not call for any interference by us. However, the question whether any motor vehicle has entered into a local area to attract tax under the Entry Tax Act or any concession given under the local Sales Tax Act will have to be dealt with in the course of assessment arising under the Entry Tax Act."

22. In ***M/s Natwar Parikh and Co. Ltd. vs. State of Karnataka, 2005 AIR (SC) 3428,*** the Hon'ble Supreme Court interpreted the term 'motor vehicle' in the broadest possible sense keeping in mind that the Act had been enacted in order to keep control over vehicles.

23. As a matter of fact, similar issue has been considered in detail by one of us (Justice Mansoor Ahmad Mir, C.J.) in ***National Insurance Company Ltd. vs. Sharda Devi and others (2016) 3 ACC, 627*** (***HP)*** wherein the question posed before this Court was as to whether the JCB machine (excavator) is a motor vehicle and it was held as under:

"15. Section 2 (28) of the Act defines definition of a motor vehicle and while going through the said definition, it appears that JCB machine is a motor vehicle. It is apt to reproduce Section 2 (28) of the Act herein.

"2 (28) "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding 4 [twenty-five cubic centimetres];"

16. It is also profitable to reproduce the definition of JCB given in Oxford dictionary at page 695.

"A powerful motor vehicle with a long arm for digging and moving earth."

17. The above quoted definition does disclose that the JCB is a powerful motor vehicle with a long arm for digging earth. In terms of the said definition, the JCB is a motor vehicle.

18. The same question arose before the Madhya Pradesh High Court in case titled ***New India Assurance Co. Ltd. Indore versus Balu Banjara and others*** *reported in* ***2008 (2) MPHT 252****. It is apt to reproduce relevant portion of para 8 of the said judgment herein.*

"8. …… ……In the present case the JCB machine is running on the roads and is being used for construction of the roads. Only because it is not being registered by the Regional Transport Authority as motor vehicle and no registration number is being given, it cannot be said that the JCB was not a motor under the provisions of the Motor Vehicles Act. In the facts and circumstances of the case, this Court is of the view that the learned Tribunal has rightly held that the JCB machine is motor for the purpose of Motor Vehicles Act."

19. The apex Court in ***Bose Abraham*** *versus* ***State of Kerala and another*** *reported in* ***AIR 2001 SC 835*** *has discussed Section 2 (28) of the Act and held that the excavators and road rollers are motor vehicles. It is apt to reproduce para 7 of the said judgment herein.*

> *"7. We hold that the excavators and road rollers are motor vehicles for the purpose of the Motor Vehicles Act and they are registered under that Act. The High Court has noticed the admission of the appellants that the excavators and road rollers are suitable for use on roads. However, the contention put forth now is that they are intended for use in the enclosed premises. Merely because a motor vehicle is put to a specific use such as being confined to an enclosed premises, will not render the same to be a different kind of vehicle. Hence, in our view, the High Court has correctly decided the matter and the impugned order does not call for any interference by us. However, the question whether any motor vehicle has entered into a local area to attract tax under the Entry Tax Act or any concession given under the local Sales Tax Act will have to be dealt with in the course of assessment arising under the Entry Tax Act".*

20. The apex Court in another judgment rendered in case titled ***Nagashetty versus United India Insurance Co. Ltd and others,*** *reported in* ***AIR 2001 SC 3356,*** *held that the trailer attached with the tractor is a motor vehicle.*

21. The apex Court in another judgment in case ***M/s Natwar Parikh and Co. Ltd. versus State of Karnataka and others*** *reported in* ***AIR 2005 SC 3428*** *discussed Sections 2 (28), 2 (14) and 2 (47) of the Act and held that tractor-trailer is a transport vehicle under Section 2 (47) of the Act. It is apposite to reproduce para 24 of the said judgment herein.*

> *"24. Section 2(28) is a comprehensive definition of the words "motor vehicle". Although, a "trailer" is separately defined under Sec. 2(46) to mean any vehicle drawn or intended to be drawn by a motor vehicle, it is still included into the definition of the words "motor vehicle" under Sec. 2(28). Similarly, the word "tractor" is defined in Sec. 2(44) to mean a motor vehicle which is not itself constructed to carry any load. Therefore, the words "motor vehicle" have been defined in the comprehensive sense by the legislature. Therefore, we have to read the words "motor vehicle" in the broadest possible sense keeping in mind that the Act has been enacted in order to keep control over motor vehicles, transport vehicles, etc. A combined reading of the aforestated definitions under Sec. 2, reproduced hereinabove, shows that the definition of "motor vehicle" includes any mechanically propelled vehicle apt for use upon roads irrespective of the source of power and it includes a trailer. Therefore, even though a trailer is drawn by a motor vehicle, it by itself being a motor vehicle, the tractor-trailer would constitute a "goods carriage" under Sec. 2(14), and consequently, a "transport vehicle" under Sec. 2(47). The test to be applied in such a case is whether the vehicle is proposed to be used for transporting goods from one place to another. When a vehicle is so altered or prepared that it becomes apt for use for transporting goods, it can be stated that it is adapted for the carriage of goods. Applying the above test, we are of the view that the tractor-trailer in the present case falls under Sec. 2(14) as a "goods carriage" and consequently, it falls under the definition of "transport vehicle" under Sec. 2(47) of the M.V. Act, 1988."*

22. The Gujarat High Court in case ***National Insurance Co. Ltd. v. Baby Anjali & Ors****., reported in* ***AIR 2008 Gujarat 12,*** *has discussed the*

definition in terms of Sections 2 (18) and 2 (19) of the Act and held that the trailer attached to the tractor falls within the definition of motor Vehicle.

23. The question arose before the Gujarat High Court in case titled ***State of Gujarat versus Danabhai Bhulabhai and Ors.,*** *reported in* ***1991 (2) G.L.H. 404****, whether the bulldozer is a motor vehicle and it was held that the same is a motor vehicle. It is appropriate to reproduce relevant portion of para 11 of the said judgment herein.*

> *"11. .....Therefore, going by the definition of the expression 'Motor Vehicle' and keeping in mind the evidence on record, the submission that bulldozer cannot be said to be a motor vehicle must be said to have been rightly rejected by the Tribunal."*

24. In case ***Kusum and others versus Kamal Kumar Soni and another*** *reported in* ***2009 ACJ 1613,*** *the Madhya Pradesh High Court held that the power-tiller is a motor vehicle.*

25. The apex Court in a latest judgment in case titled Chairman, ***Rajasthan State Road Transport Corporation & Ors versus Smt. Santosh & Ors.*** *reported in* ***2013 AIR SCW 2791*** *has discussed the object of the Motor Vehicles Act and also Sections 2 (28) and 2(44). It is apt to reproduce relevant portion of para 22 of the said judgment herein.*

> *"22. The Tractor is a machine run by diesel or petrol. It is a self-propelled vehicle for hauling other vehicles. It is used for different purposes. It is also used for agricultural purposes, along with other implements; such as harrows, ploughs, tillers, blade-terracers, seed- drills etc. It is a self-propelled vehicle capable of pulling alone as defined under the definition of Motor Vehicles. It does not fall within any of the exclusions as defined under the Act. Thus, it is a Motor Vehicle in terms of the definition under Section 2(28) of the Act, which definition has been adopted by the Act. So, even without referring to the definition of the Tractor, if the definition of the Motor Vehicle as given under the Act is strictly construed, even then the Tractor is a Motor Vehicle as defined under the Act. The Tractor is not only used for agricultural purposes but is also used for other purposes as stated above. Therefore, it cannot be said that the Tractor in its popular meaning is only used for agricultural purposes and, thus, is not a Motor Vehicle as defined under the Act. The Tractor is a Motor Vehicle is also proved by this definition under Section 2(44) of the Act. Different types of Motor Vehicles have been defined under the provisions of the Act, and the Tractor is one of them. Thus, considering the question from any angle, the Tractor is a Motor Vehicle as defined under the Act."*

26. Viewed thus, it is held that the JCB is a motor vehicle."

24. In view of the aforesaid discussion, the question posed in this writ petition is answered by holding that the construction equipment vehicles, more particularly, water tankers, heavy hyvas, farm tractors, transit mixtures and other heavy machines definitely fall within the definition of 'Motor Vehicles' and thus cannot claim any exemption against the imposition of tax. Even otherwise, once these vehicles have been duly registered as Motor Vehicles under the Act, the petitioner can have no legitimate grievance for claiming that these vehicles do not fall within the definition of 'Motor Vehicles', that too, only on the ground that these machines are designed and adopted for use in an enclosed premises.

25. Having said so, we find no merit in this petition and the same is accordingly dismissed alongwith pending application(s), leaving the parties to bear their costs.

****

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Rameshwar Dass (Deceased) through LR Bhushan Lal .....Appellant
Versus
State of Himachal Pradesh and others .....Respondents

RSA No. 319 of 2006
Decided on: December 6, 2016

Specific Relief Act, 1963- Section 5- Plaintiff pleaded that he is owner of the suit land- water pipe lines were laid through his land despite his objection – Officers of the State assured to acquire the land and to give employment to the son of the plaintiff - these promises were not fulfilled and the plaintiff instituted a suit for mandatory injunction- the job was provided to the son of the plaintiff and plaintiff got the suit dismissed in default- however, son of the plaintiff was removed from service- hence, the suit was filed for seeking possession- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held, that earlier suit was dismissed in default for non-appearance – plaintiff failed to prove that assurances were made to him at the time of laying pipe lines – circumstances show that pipe line was laid with the consent of the plaintiff- the suit was rightly dismissed by the Court- appeal dismissed.(Para-14 to 19)

Cases referred:
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the appellant Ms. Ruma Kaushik, Advocate.
For the respondents: Mr. P.M. Negi, Deputy Advocate General,

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant regular second appeal filed under Section 100 CPC is directed against judgment and decree dated 27.4.2006 passed by learned District Judge, Sirmaur at Nahan in Civil Appeal No. 66-CA/13 of 2005 affirming judgment and decree dated 12.8.2005 passed by the learned Civil Judge (Senior Division) Sirmaur District at Nahan, HP in Civil Suit No. 75/1 of 2003 whereby suit for possession having been filed by the present appellant-plaintiff (in short, 'plaintiff') was dismissed.

2. Briefly stated the facts as emerge from the record are that the plaintiff filed a suit for possession claiming therein that he is owner-in-possession of the land comprised in Khewat Khatauni No. 10 min/ 24 min, Khasra Nos. 439 and 453 measuring 356-47 hectares situated at village and Mauza Nauni of Nahan town, District Sirmaur, Himachal Pradesh as per Jamabandi for the year 1995-96 (hereinafter, 'suit land'). Plaintiff further claimed that in the year 1995, at the instance of officials of defendant No.2, the Irrigation and Public Health Department installed water pipe line under Nahan-Khairi pipe line scheme through the land of the plaintiff. Plaintiff claimed that aforesaid line was laid down by the authorities despite the resistance on the part of the plaintiff and the officials of the I&PH Nahan had assured him that land over which pipe line has been laid down, would be acquired by the State Government in accordance with law and he would be given reasonable compensation. Plaintiff further stated that he was induced by the then

officers of the defendants that permanent job would be provided to his son. Since the defendants failed to fulfill aforesaid commitment having been made at the time of laying down pipe line through the land of the plaintiff, he was compelled to file suit bearing No. 42/1 of 97 titled as Rameshwar Dass versus State of Himachal Pradesh and others in the Court of learned Sub Judge, 1st Class, Nahan, for mandatory injunction for removal of aforesaid water pipe line from the suit land. Plaintiff further averred in the plaint that during the pendency of the suit, defendants provided job to his son therefore, plaintiff got the suit dismissed in default. Defendants after dismissal of the suit removed the son of the plaintiff from the job illegally and also backed out from their commitment. Plaintiff further claimed that he requested the defendants several times after aforesaid event to acquire the land and to pay compensation but no action was taken by them and as such he was compelled to file instant suit for possession.

3. Defendants by way of written statement, refuted the claim put forth on behalf of the plaintiff by stating that suit is not maintainable since plaintiff had earlier filed Civil Suit on same and similar cause of action, which was dismissed in default and suit is also not properly valued for the purpose of court fee and jurisdiction. On merits, defendants claimed that the pipe line in question was laid down in the year 1995 with the consent of the plaintiff and at no point of time, during laying of pipe line, objection was raised by him. Defendants further denied that the plaintiff at any point of time was given assurance by the officials of the respondent-Department that his son would be given permanent job and compensation would be paid after acquiring the suit land. Defendants further claimed in the written statement that there is no vegetation on the suit land and they have constructed one pillar of size 1.25x 1.25 metres and a pipe of 300 MM dia rests on this pillar and 4.20 RMT of pipe line falls in Khasra No. 453 and 17 RMT pipe line falls in Khasra Nno. 439, which is above the ground level. Defendants specifically pleaded in the written statement that civil suit No. 42/1 of 97 having been filed by the plaintiff was dismissed in default for non-appearance of the plaintiff, vide order dated 6.7.1998, passed by Sub Judge, First Class, Nahan. Defendants further averred that the son of the plaintiff was given appointment on daily wages but he himself abandoned the job voluntarily and thereafter, plaintiff approached the defendant for payment of compensation or removal of the water pipe line from suit land, because he had voluntarily given suit land for laying pipe line.

4. On the basis of the pleadings of the parties, learned trial Court settled following issues on 24.6.2004

> "1) Whether plaintiff is entitled for the relief of mandatory injunction/possession directing the defendants to remove the water pipe line illegally laid by the defendants on the suit land? ...OPP
>
> 2) Whether the suit is not maintainable in the present form? ... OPD
>
> 3) Whether the suit is not properly valued for the purpose of court fee and jurisdiction ..... OPD
>
> 4) Whether no cause of action has accrued to the plaintiff to file the present suit against the defendants? . OPD
>
> 5) Relief:"

5. Subsequently, vide judgment and decree dated 12.8.2005, learned trial Court dismissed the suit of the plaintiff. Being aggrieved and dissatisfied with the dismissal of the suit by the learned trial Court, plaintiff preferred an appeal before the learned District Judge, which was also dismissed vide judgment and decree dated 27.4.2006, hence, this Regular Second Appeal.

6. Present regular second appeal was admitted on 27.5.2005, on the following substantial questions of law:

> "1. Whether non-consideration of oral as well as documentary evidence, which goes to the root of the matter has vitiated the findings of the ld. Court below?
>
> 2. Whether the suit of the plaintiff was barred under the law and as such was not maintainable?"

7. Ms. Ruma Kaushik, Advocate on behalf of appellant vehemently argued that the judgments and decrees passed by the learned Courts below are not sustainable as the same are not based on correct appreciation of evidence adduced on record by the respective parties, as such same are liable to be set aside. Ms. Kaushik, while referring to the judgments of the courts below, contended that bare perusal of same suggests that the evidence led on record by the plaintiff has not been read in its right perspective, as a result of which great prejudice has been caused to the plaintiff, whose land has been admittedly used by the defendants while laying water pipe lines. Ms. Kaushik further contended that both the learned Courts below miserably failed to appreciate that considerable portion of land has been used by the defendants for laying water pipe lines that too without there being any acquisition in accordance with law. She further contended that for the last 25 years, defendants have been using this land without awarding any compensation to the plaintiff and as such judgments passed by both the Courts deserve to be set aside. While concluding her arguments, Ms. Kaushik further contended that it is ample clear from the record that in lieu of land having been used by the defendants, son of plaintiff was offered appointment but subsequently, after dismissal of the suit having been filed by the plaintiff, he was illegally removed from service and as such impugned judgments and decrees passed by the Courts below deserve to be set aside. In the aforesaid background, Ms. Kaushik forcefully contended that the present appeal deserves to be allowed, after setting aside the judgments and decrees passed by the Courts below.

8. Mr. P.M. Negi, Deputy Advocate General duly assisted by Mr. Ramesh Thakur, Deputy Advocate General, supported the judgments and decrees passed by the Courts below. Mr. Negi, while referring to the judgments passed by Courts below, strenuously argued that same nowhere suggest that the evidence led on record by the respective parties has not been dealt with in its right perspective rather as per perusal of judgments, it is revealed that each and every aspect of the matter has been dealt with meticulously by the Courts below and there is no scope of interference, whatsoever by this Court, especially in view of the concurrent findings of fact and law recorded by the Courts below. While referring to the statements having been made by the plaintiff himself, as PW-1, Mr. Negi strenuously argued that the plaintiff was unable to prove on record that at the time of laying of pipes over his land, any assurance was given to him that land would be acquired and he would be paid compensation. Similarly, he further argued that there is no evidence, be it ocular or documentary, adduced on record by the plaintiff suggestive of the fact that any assurance was given to the plaintiff for offering appointment to the son of the plaintiff, as such there is no illegality or infirmity in the judgments and decrees passed by the learned Courts below and same deserve to be upheld. While concluding his arguments, Mr. Negi contended that this Court has limited jurisdiction to re-appreciate evidence while exercising powers under Section 100 CPC, especially when both the Courts below have returned concurrent findings of facts and law.

9. Before adverting to the merits of the case, it would be appropriate to deal with the specific objection raised by the learned counsel representing the defendants with regard to maintainability and jurisdiction of this Court, while examining the concurrent findings returned by both the Courts below, learned counsel for the defendants had invited the attention of this Court to the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** wherein the Hon'ble Supreme Court has held:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High

Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***(p.269)***

10. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record, but as emerges from the case referred above, there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appears to be perverse.

11. In this regard reliance is placed upon judgment passed by Hon'ble Apex Court in **Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others,** (2013)15 SCC 161 wherein the Court held:

"35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)

"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same." ***(pp.174-175)***

12. I have heard the learned counsel for the parties and gone through the record carefully.

13. Since both the substantial questions of law are interconnected as such are being taken up together to avoid repetition of discussion of evidence.

14. With a view to explore answer to aforesaid substantial questions of law, this Court carefully analyzed evidence adduced on record by the respective parties, perusal whereof nowhere suggests that there is non-consideration of oral as well as documentary evidence by the Courts below while dismissing the suit of the plaintiff. Similarly, this Court, after carefully examining the judgments passed by the learned Courts below, finds no illegality or infirmity in the findings returned by the learned Courts below that the suit of the plaintiff is barred in law in view of dismissal of earlier suit filed by the plaintiff on same and similar cause of action.

15. Perusal of pleadings available on record suggests that there is no dispute that in the year 1995, Irrigation and Public Health Department Nahan installed water pipe lines under Nahan-Khairi Scheme through the land of the plaintiff. It also emerges from the pleadings that apart from the land of the plaintiff, Department also used land of certain other persons. It is also not in dispute that no compensation was paid to the plaintiff at the time of laying of aforesaid water pipe lines through his land. Since land was never acquired in terms of the Land Acquisition Act, there was no occasion for the defendants to pay compensation to the plaintiff. Though the plaintiff in his pleadings claimed that at the time of laying of pipes, he resisted but later on, on the assurance of officials of the I&PH Department, he allowed to lay pipes through his land. Plaintiff has further claimed that he was assured by the officials of the Department that once work of laying water pipe lines is over, land would be acquired and he would be paid compensation and his son would be offered appointment in the Department.

16. Defendants by way of written statement has specifically denied the aforesaid claim of the plaintiff. It also emerges from the record that in the year 1997, plaintiff had filed Civil Suit on same and similar grounds, which was dismissed in default for non-appearance of the plaintiff vide order dated 6.7.1998, perusal whereof suggests that earlier suit filed by the plaintiff was dismissed in default for non-appearance of the plaintiff as such there is no force in the contention of the plaintiff that he had got his suit dismissed in default because his son was given appointment on daily wages by the Department. With a view to substantiate his case, plaintiff examined himself as PW-1 and also tendered in evidence copies of Jamabandi for the year 1995-96 (Ext. P1), copy of Aks Shajra (Ext. P2), copy of order dated 6.7.1998 (Ext. P3) and notice (Ext. P4). Perusal of Exts. P-1 and P-2 clearly suggests that the suit land is owned and possessed by the plaintiff and there is no dispute qua the same. It also appears from the pleadings that some portion of land has been used by the defendants for laying pipes rather, defendants have only constructed pillars of dimensions of 1.25 x 1.25 and a pipe of 300 mm dia has been rested on the raised pillar in Khasra No. 453 of suit land and a pipe of17 m in Khasra No. 439 of suit land. Remaining portion of suit land is in possession of the plaintiff.

17. This Court while sifting evidence, be it ocular or documentary, adduced on record by the plaintiff was unable to lay its hand on any document, suggestive of the fact that at the time of laying pipelines, assurance was given by the defendants that land would be acquired and plaintiff would be paid compensation. Similarly, there is no evidence suggestive of the fact that defendants at the time of laying pipes had assured to offer appointment to the son of the plaintiff. Though, it emerges from the record that son of the plaintiff was working on daily wages in the Department but admittedly no evidence has been led on record by the plaintiff that his son got appointment in lieu of land offered by him for laying pipe line. Though, there is no dispute regarding laying of pipeline over the suit land, which definitely belongs to the plaintiff but work of laying pipeline was started and completed in 1995 whereas, plaintiff at first instance filed Civil Suit bearing No. 42/1 of 1997 in the year 1997 i.e. after two years, seeking relief of mandatory injunction but admittedly, same was dismissed in default. At the cost of repetition, it may be stated that though the plaintiff claimed that he got suit dismissed in default since his son was provided employment on daily wages by the defendants but aforesaid version of the plaintiff was

not rightly accepted by the Courts below in the absence of cogent and convincing evidence adduced on record by the plaintiff, whereas as has been noticed above, perusal of Ext. P3 i.e. order dated 6.7.1998, clearly suggests that earlier suit filed by the plaintiff was dismissed in default for non-appearance of the plaintiff. In the written statement, defendant have admitted that the son of plaintiff was offered appointment in the Department but they stated that son, who was working in their Department, himself abandoned the job. Similarly, this Court finds no evidence in support of the claim of the plaintiff that at the relevant time, when pipe line was being laid by the defendants, he was assured by the officials of the Department that he would be paid adequate compensation after acquisition of land rather, this Court, after noticing that earlier suit was filed in the year 1997, is convinced and satisfied that water pipe line was laid through the land of plaintiff with the consent of the plaintiff. Had the plaintiff not consented for laying pipe through his land, he would have raised dispute immediately but in the present case, as has clearly emerged, dispute for the first time was raised after two years in 1997.

18. Interestingly, in the present case, earlier suit filed by plaintiff was dismissed on 6.7.1998. and thereafter no effort was made by the plaintiff to get that suit restored by moving application in accordance with law rather the plaintiff chose to wait for another five years to file another Civil Suit being Civil Suit No. 75/1 of 2003, which itself suggests that the plaintiff had no cause of action rather instant suit has been filed solely with a view to pressurize the defendants to either pay compensation in lieu of land or to offer employment to his son, who admittedly abandoned the job.

19. This Court, after carefully examining the entire evidence led on record by respective parties, sees no illegality or infirmity in the judgments passed by the Courts below and as such there is no force in the contentions raised by the plaintiff that there has been non-consideration of oral as well as documentary evidence, which goes to the root of the matter. This Court, with a view to answer aforesaid substantial question of law, minutely examined entire evidence led on record and found no reason to differ with the findings returned by the learned Courts below, which otherwise appear to be based on correct appreciation of evidence adduced on record. Similarly, this Court, after perusing Ext. P3 sees no illegality in the findings returned by the Courts below that instant suit filed by the plaintiff is barred in law.

20. Substantial questions of law are answered accordingly.

21. Consequently, in view of aforesaid discussion above, there is no merit in the present appeal and the same is dismissed.

22. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

23. This Court, after noticing the fact that the land of the plaintiff has been used by the defendants, that too without paying any compensation to the plaintiff, deems it fit to direct the defendants to consider the request, if any, made by the plaintiff for offering job to his son, who was working with the defendants as daily wager.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sreshta Devi. ...Petitioner.

Versus

State of Himachal Pradesh and others. ...Respondents.

CWP No. 294/2016
Reserved on 17.11.2016
Decided on: 6.12. 2016

Constitution of India, 1950- Article 226- Petitioner is the sole surviving daughter of late J, who belonged to ST category – the petitioner performed marriage with the non-tribal – the application

for grant of tribal certificate was rejected – aggrieved from the rejection, present writ petition has been filed – held, that in case of inter caste marriage or marriage between a tribal and non-tribal person, the status of children is a question of fact – there can be a presumption that children have the status of the father but the presumption is rebuttable – the children had received middle and higher education at Chamba – they had not suffered the disabilities suffered by other members of the scheduled tribe- the application was rightly rejected- appeal dismissed.

(Para-6 to 17)

Case referred:

Rameshbhai Dabhai Naika vs. State of Gujarat and others, (2012) 3 SCC 400

For the Petitioner: Mr. S.R. Chauhan, Advocate.

For the Respondents: Ms. Meenakshi Sharma and RupinderSingh, Addl. A.Gs with Mr. J.S. Guliera, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

The seminal issue which arises for consideration in this writ petition is: as to whether the children of a tribal woman, who admittedly is married to non-tribal, can claim the status of Scheduled Tribe solely on the basis of their having resided for sometime with the mother (petitioner) in the tribal area, that too, not on account of compulsion, but on account of the petitioner being posted there while working as a Teacher in the Education Department.

2. The bare minimal facts, as are necessary for deciding the controversy in issue, are that the petitioner is alleged to be the only surviving daughter of late Sh. Jodh Singh, who belonged to the Scheduled Tribe category. The petitioner performed marriage with Madan Kumar, who admittedly, was non-tribal. The petitioner is admittedly working in the Education Department and chose to stay back at her native place while being posted there, when her husband was employed and posted elsewhere in SSB.

3. The petitioner has assailed the decision passed by the Sub Divisional Magistrate, Bharmour rejecting the application for the grant of tribal certificate to her children on the ground that he has not at all taken into consideration that not only did the children of the petitioner reside with her at her house at Ullansa, but even the Gadi community there had accepted these offspring in their folds and had unanimously passed a resolution in favour of the claim being raised by the petitioner.

4. The respondents have filed reply wherein it has been stated that the inquiry into the status of the community of the petitioner was got conducted through Tehsildar, Chamba, who found that in the year 1985, the petitioner had solemnized inter-caste marriage with Madan Kumar son of Prem Lal, resident of village and Post Office Mohal Mangla, Tehsil and District Chamba. He also found that Madan belonged to Rajput/Kashav caste, whereas the petitioner belonged to Scheduled Tribe caste (Gaddi Hali). Madan Kumar was living at Mohalla Obri, Sultanpur, Chamba on the property, which had been purchased by him, whereas the petitioner was reported to be a Government servant and was working as a Teacher in Government Primary School, Udaipur and presently residing at Mohalla Obri, Tehsil and District Chamba with her husband. It was also found that the children of the petitioner had not suffered any disabilities socially, economically and educationally either individually or cumulatively as the children remained with their mother in the tribal area only till their primary education and subsequently all these children got middle and higher education in non-tribal area while residing with their parents in Mohalla Obri, Chamba Town and were, therefore, not entitled to claim the status of Scheduled Tribe.

5. I have heard the learned counsel for the parties and have perused the material placed on record.

6. At the outset, it may be observed that the petitioner has referred to various texts and judgments in support of the claim that her children are entitled to be considered as Scheduled Tribe.

7. However, I do not feel the necessity to go into the text and the judgments so relied upon, as the question posed in this petitioner has been elaborately and lucidly dealt with by the Hon'ble Supreme Court in ***Rameshbhai Dabhai Naika*** vs. ***State of Gujarat and others***, (2012) 3 SCC 400, wherein it was observed as under:

> "[54] In view of the analysis of the earlier decisions and the discussion made above, the legal position that seems to emerge is that in an inter-caste marriage or a marriage between a tribal and a non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case.
>
> [55]. In an inter caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the scheduled caste/scheduled tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which his/her mother belonged. Additionally, that he was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well."

8. The Hon'ble Supreme Court made a incisive study of the entire case law on the subject and it was thereafter held that any inter-caste marriage or a marriage between a tribal and a non- tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case. In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non tribal the husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the Scheduled Caste/Scheduled Tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which his/her mother belonged. Additionally, that he was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well.

9. As already observed earlier, it was on account of petitioner being an employee in the Education Department and having been posted in Government Primary School, Udaipur that she of her own volition and free will chose to remain in the tribal area in the house of her parents' and further it was only on this account that the children of the petitioner got the primary education in Government Primary School, Ullansa. There was no compulsion or even a pressing need for the petitioner to reside in her residential house and this choice was obviously based upon the convenience of the petitioner.

10. It would be noticed that on the transfer of the petitioner to Government Primary School, Gajnui, Kiani and Mehla Block-I/II, all her children came and resided with their parents in the property purchased by them in the Chamba town itself. It is thereafter at Chamba that the

children then received their middle and higher education. Therefore, in such circumstances, the certificates produced by the petitioner in support of the claim that her children are recognized as members of the tribal community are of no avail.

11. Learned counsel for the petitioner would then heavily rely upon the revenue record to claim that the children of the petitioner having been born and brought up and accepted by the tribal Gadi community at Ullansa Panchayat have to be recognized as Schedule Tribe.

12. It has to be borne in mind that it is on account of extreme socially and economic backwardness arising out of traditional practices of untouchability that is normally considered as a criteria for including a community in the list of Scheduled Caste and Scheduled Tribe. However, it does not mean that where a woman belongs to Schedule Tribe and decides to reside for sometime in tribal area with her parents more out of convenience than out of necessity or compulsion, she cannot be heard to claim that her children have been made to face disadvantages as once faced by her after birth.

13. Even otherwise, it has come on record that as per the local custom of the tribal area only the male members of the family has right to inherit the property. Female members of the family can acquire the right to inherit the property on the basis of Will and gift deed. Mere fact that the petitioner possessed a separate ration card would not support the claim of the petitioner as I find that most of the documents placed on record have been created with the sole aim of getting conferred the status of Scheduled Tribe conferred upon the children of the petitioner.

14. In the instant case, it has come on record that the petitioner has purchased the land from her father and thereafter became the owner thereof. Thus, the property has not been acquired by way of inheritance.

15. Before parting, it would be once again necessary to avert to the decision of the Hon'ble Supreme Court in ***Rameshbhai Dabhai Naika's*** case (supra), wherein the Hon'ble Supreme Court did not accept the guiding principle that no person, who was not a Scheduled Caste or Scheduled Tribe by birth would be deemed to be a member of the Scheduled Caste or Schedule Tribe merely because he or she had married a person belonging to Scheduled Caste or Scheduled Tribe and further did not readily accept the presumption that the child has the caste of the father.

16. However, these findings were rendered in the peculiar facts and circumstances of that case where the High Court had not at all adverted to the fact that the mother of the appellant on the question of his upbringing as a member of the Nayak community and his acceptance in the community. It was in these circumstances that the Hon'ble Supreme Court held the presumption of caste to be rebuttable one.

17. However, this is not the fact situation obtaining in the instant case. Rather, it is a clear case where the petitioner has tried to get a Schedule Tribe certificate in favour of her children despite being disentitle to the same.

18. Having said so, there is no merit in the petition and the same is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh & another. .....Petitioners.

Versus

Shri Ashok Kumar. .....Respondent.

CWP No. 3399 of 2014
Reserved on: 15.11.2016
Decided on: 06.12.2016

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-9 to 11)

Case referred:
Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301

For the petitioners: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.
For the respondent: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being aggrieved by the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., passed in Reference No. 367 of 2009, decided on 14.05.2013, maintained this writ petition to set aside and quash the same.

2. Brief facts of the case are that respondent Ashok Kumar had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie from 1995 to October, 2000 and he has worked for 64 days in 1995, 193 days in 1996, 276 days in 1997, 272 days in 1998, 316 days in 1999 and 261 days in 2000 (up to 13.11.2000). It is pleaded in the petition that all surplus workers were disengaged after complying with the provisions of Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and after following the principle of *"Last Come First Go"*. The respondent has challenged the retrenchment before the learned Labour Court by way of filing claim petition and the learned Labour Court set aside the retrenchment order of the respondent-workman and directed that respondent be re-engaged forthwith granting respondent continuity and seniority in service w.e.f. 13.11.2000, except back wages and further directed that case of the respondent would be considered for regularization from the date/month of the regularization of the services of the juniors.

3. The petitioners have prayed for the dismissal of the claim petition and averred that the order has been passed by the Tribunal below without appreciating the facts and law to its true perspective. It is averred that petitioner has complied with the provisions of Section 25(F), (G) & (H) of the Act and the award passed by the Court below is contrary to the law and the same be set-aside.

4. It is averred that respondent/workman had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. October, 1995 to 13.11.2000 and he has worked for 64 days in 1995, 193 days in 1996, 276 days in 1997, 272 days in 1998, 316 days in 1999 and 261 days in 2000 (up to 13.11.2000). It is further averred that due to shortage of funds and work in the Division, the petitioner was facing huge financial constraints and there being a large number of daily waged workers engaged in the Division, it had become impossible to adjust all the workers. It is further averred that due to less budget provision, the availability of work has decreased such as the service of the respondent, alongwith 363 number of workers were retrenched after complying with the provision of Section 25-F of the Act and by adhering to the principle of *"Last Come First Go"*. It is further averred that the petitioner has duly issued a notice under Section 25-F of the Act to the respondent and similarly situated workmen and had paid the due compensation, preceding retrenchment. It is further averred while disengaging the respondent, the seniority of the Division has been taken into consideration. The seniority is maintainable at Divisional level and the principle of *"Last Come First Go"* has been strictly followed.

5. In reply, filed by the respondent, it is averred that the petitioners (employer) have challenged the award dated 14.05.2013 rendered by the learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, in Reference Petition No. 367 of 2009, which has attained finality after one month on 14.06.2013. It is further averred that the civil writ petition filed by the petitioner is not maintainable, without explaining the delay in filing of the civil writ petition. The petitioners have chosen to harass the respondent/claimant so that he may not perform his duties and earn his livelihood/remuneration, which action is in violation of various provisions of the Act.

6. It is further averred that the respondent-workman was working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie, from 1995 to 13.11.2000 and he has worked for 64 days in 1995, 193 days in 1996, 276 days in 1997, 272 days in 1998, 316 days in 1999 and 261 days in 2000 (up to 13.11.2000). It is further averred that he has clearly mentioned in his claim petition, rejoinder with affidavit and also in examination-in-chief, that his juniors were engaged by the petitioners after the retrenchment of the respondent.

7. Learned Additional Advocate General has argued that the award of the learned Labour court is without appreciating the facts, which has come on record and is liable to be set-aside. On the other hand, the learned counsel appearing for the respondent has argued that the award passed by the Labour Court, Dharamshala is as per law and no interference is required and the jurisdiction of this Court is wrongly invoked and writ petition deserves dismissal. To appreciate the arguments, this Court has gone through the record of the case carefully and the law as settled by this Hon'ble Court. Admitted fact is that the respondent was engaged by the petitioners and he has worked with them from 1995 to 13.11.2000 and he has worked for 64 days in 1995, 193 days in 1996, 276 days in 1997, 272 days in 1998, 316 days in 1999 and 261 days in 2000 (up to 13.11.2000).

8. It is further case of the respondent that the petitioners have not re-engaged the respondent till date neither he was given opportunity for re-employment whereas his juniors were engaged. However, the petitioners have denied that any junior was engaged.

9. Seniority list relating to Shri Angrej Singh and others reveals that Smt. Sodha Devi was appointed by the State in the year 1999, whereas the services of Smt. Lata Devi engaged in the year 2000. However, a note has been given that both these ladies were appointed on compassionate grounds. The date of death of their husbands, namely, S/Sh. Ashok Kumar and Tarbeej Singh have not come on the file. The Court below has rightly held that the respondent (petitioners herein) has not complied with the provisions of Section 25(H) of the Act. Shri L.S. Thakur (RW-1) in cross-examination has admitted that Smt. Biasa Devi and Shri Hem Raj have been re-engaged. The names of these two workmen figure at serial No. 414 and 435 of the seniority list. Shri Hem Raj and Smt. Biasa Devi were juniors to the respondent. There is nothing on record that before engaging the freshers, opportunity of re-employment was afforded to the respondent.

10. As discussed above, the impugned award does not suffer from any perversity. The learned Additional Advocate General for the petitioners has canvassed before this Court with vigour that the reference is stale. However, the said submission is unacceptable given the fact that the said fact was not agitated by the employer/petitioner before the appropriate Government at the time Government proceeded to make a reference of the dispute to the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. It has been held in ***Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301*** that there is no limitation for reference to Labour Court under Section 10 of the Act. It was held that words *"At any time"* mentioned in Section 10 of the Act clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of the Act. Operative part of Section 10 of the Act is quoted in *extenso*:

> "**Section 10 of Industrial Disputes Act, 1947:-** Reference of dispute to Boards, Courts or Tribunals-(1) where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, (a) Refer the dispute to a Board for promoting a settlement thereof, (b)

Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry."

11. In view of the above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 367 of 2009, decided on 14.05.2013, is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal, Dharamshala. Therefore, the writ petition is without any basis, requires dismissal and is accordingly dismissed. No order as to costs. All pending application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh & another .....Petitioners.

Versus

Shri Bhuri Singh. .....Respondent.

CWP No. 4592 of 2014
Reserved on: 15.11.2016
Decided on: 06.12.2016

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-9 to 11)

Case referred:
Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301

For the petitioners: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.
For the respondent: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being aggrieved by the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., passed in Reference No. 336 of 2009, decided on 12.08.2013, maintained this writ petition to set aside and quash the same.

2. Brief facts of the case are that respondent Ashok Kumar had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. July, 1994 to 16.11.2000, and he has worked for 147 days in 1994, 138 days in 1995, 267 days in 1996, 344 days in 1997, 342 days in 1998, 247 days in 1999 and 309 days in 2000 (up to 16.11.2000). It is pleaded in the petition that all surplus workers were disengaged after complying with the provisions of Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and after following the principle of *"Last Come First Go"*. The respondent has challenged the retrenchment before the learned Labour Court by way of filing claim petition and the learned Labour Court set aside the retrenchment order of the respondent-workman and directed that respondent be re-engaged forthwith granting respondent continuity and seniority in service w.e.f. 16.11.2000, except back wages and further directed that case of the respondent would be

considered for regularization from the date/month of the regularization of the services of the juniors.

3. The petitioners have prayed for the dismissal of the claim petition and averred that the order has been passed by the Tribunal below without appreciating the facts and law to its true perspective. It is averred that petitioner has complied with the provisions of Section 25(F), (G) & (H) of the Act and the award passed by the Court below is contrary to the law and the same be set-aside.

4. It is averred that respondent/workman had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. July, 1994 to 16.11.2000, and he has worked for 147 days in 1994, 138 days in 1995, 267 days in 1996, 344 days in 1997, 342 days in 1998, 247 days in 1999 and 309 days in 2000 (up to 16.11.2000). It is further averred that due to shortage of funds and work in the Division, the petitioners were facing huge financial constraints and there being a large number of daily waged workers engaged in the Division, it had become impossible to adjust all the workers. It is further averred that due to less budget provision, the availability of work has decreased such as the service of the respondent, alongwith 363 number of workers were retrenched after complying with the provision of Section 25-F of the Act and by adhering to the principle of *"Last Come First Go"*. It is further averred that the petitioner has duly issued a notice under Section 25-F of the Act to the respondent and similarly situated workmen and had paid the due compensation, preceding retrenchment. It is further averred that while disengaging the respondent, the seniority of the Division has been taken into consideration. The seniority is maintainable at Divisional level and the principle of *"Last Come First Go"* has been strictly followed.

5. In reply, filed by the respondent, it is averred that the petitioners (employer) have challenged the award dated 12.08.2013 rendered by the learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, in Reference Petition No. 336 of 2009, which has attained finality after one month on 12.09.2013. It is further averred that the civil writ petition filed by the petitioners is not maintainable, without explaining the delay in filing of the civil writ petition. The petitioners have chosen to harass the respondent/claimant so that he may not perform his duties and earn his livelihood/remuneration, which action is in violation of various provisions of the Act.

6. It is further averred that the respondent-workman was working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie, w.e.f. July, 1994 to 16.11.2000, and he has worked for 147 days in 1994, 138 days in 1995, 267 days in 1996, 344 days in 1997, 342 days in 1998, 247 days in 1999 and 309 days in 2000 (up to 16.11.2000). It is further averred that he has clearly mentioned in his claim petition, rejoinder with affidavit and also in examination-in-chief, that his juniors were engaged by the petitioners after the retrenchment of the respondent.

7. Learned Additional Advocate General has argued that the award of the learned Labour court is without appreciating the facts, which has come on record and is liable to be set-aside. On the other hand, the learned counsel appearing for the respondent has argued that the award passed by the Labour Court, Dharamshala is as per law and no interference is required and the jurisdiction of this Court is wrongly invoked and writ petition deserves dismissal. To appreciate the arguments, this Court has gone through the record of the case carefully and the law as settled by this Hon'ble Court. Admitted fact is that the respondent was engaged by the petitioners and he has worked with them w.e.f. July, 1994 to 16.11.2000, and he has worked for 147 days in 1994, 138 days in 1995, 267 days in 1996, 344 days in 1997, 342 days in 1998, 247 days in 1999 and 309 days in 2000 (up to 16.11.2000).

8. It is further case of the respondent that the petitioners have not re-engaged the respondent till date neither he was given opportunity for re-employment whereas his juniors were engaged. However, the petitioners have denied that any junior was engaged.

9. Seniority list relating to Shri Angrej Singh and others reveals that Smt. Sodha Devi was appointed by the State in the year 1999, whereas the services of Smt. Lata Devi engaged

in the year 2000. However, a note has been given that both these ladies were appointed on compassionate grounds. The date of death of their husbands, namely, S/Sh. Ashok Kumar and Tarbeej Singh have not come on the file. The Court below has rightly held that the respondent (petitioners herein) has not complied with the provisions of Section 25(H) of the Act. Shri L.S. Thakur (RW-1) in cross-examination has admitted that Smt. Biasa Devi and Shri Hem Raj have been re-engaged. The names of these two workmen figure at serial No. 414 and 435 of the seniority list. Shri Hem Raj and Smt. Biasa Devi were juniors to the respondent. There is nothing on record that before engaging the freshers, opportunity of re-employment was afforded to the respondent.

10. As discussed above, the impugned award does not suffer from any perversity. The learned Additional Advocate General for the petitioners has canvassed before this Court with vigour that the reference is stale. However, the said submission is unacceptable given the fact that the said fact was not agitated by the employer/petitioner before the appropriate Government at the time Government proceeded to make a reference of the dispute to the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. It has been held in ***Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301*** that there is no limitation for reference to Labour Court under Section 10 of the Act. It was held that words *"At any time"* mentioned in Section 10 of the Act clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of the Act. Operative part of Section 10 of the Act is quoted in *extenso*:

> "**Section 10 of Industrial Disputes Act, 1947:-** Reference of dispute to Boards, Courts or Tribunals-(1) where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, (a) Refer the dispute to a Board for promoting a settlement thereof, (b) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry."

11. In view of the above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 367 of 2009, decided on 14.05.2013, is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal, Dharamshala. Therefore, the writ petition is without any basis, requires dismissal and is accordingly dismissed. No order as to costs. All pending application(s), if any, also stand(s) disposed of.

****

BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh & another. ....Petitioners.

Versus

Shri Inder Singh. ....Respondent.

CWP No. 4591 of 2014
Reserved on: 15.11.2016
Decided on: 06.12.2016

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-9 to 11)

Case referred:

Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301

For the petitioners: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.
For the respondent: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being aggrieved by the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., passed in Reference No. 5 of 2010, decided on 03.07.2013, maintained this writ petition to set aside and quash the same.

2. Brief facts of the case are that respondent Ashok Kumar had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. November, 1995 to 01.09.2000, and he has worked for 44 days in 1995, 163 days in 1996, 218 days in 1997, 238 days in 1998, 132 days in 1999 and 146 days in 2000 (up to 01.09.2000). It is pleaded in the petition that all surplus workers were disengaged after complying with the provisions of Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and after following the principle of *"Last Come First Go"*. The respondent has challenged the retrenchment before the learned Labour Court by way of filing claim petition and the learned Labour Court set aside the retrenchment order of the respondent-workman and directed that respondent be re-engaged forthwith granting respondent continuity and seniority in service w.e.f. 01.09.2000, except back wages and further directed that case of the respondent would be considered for regularization from the date/month of the regularization of the services of the juniors.

3. The petitioners have prayed for the dismissal of the claim petition and averred that the order has been passed by the Tribunal below without appreciating the facts and law to its true perspective. It is averred that petitioner has complied with the provisions of Section 25(F), (G) & (H) of the Act and the award passed by the Court below is contrary to the law and the same be set-aside.

4. It is averred that respondent/workman had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. November, 1995 to 01.09.2000, and he has worked for 44 days in 1995, 163 days in 1996, 218 days in 1997, 238 days in 1998, 132 days in 1999 and 146 days in 2000 (up to 01.09.2000). It is further averred that due to shortage of funds and work in the Division, the petitioners were facing huge financial constraints and there being a large number of daily waged workers engaged in the Division, it had become impossible to adjust all the workers. It is further averred that due to less budget provision, the availability of work has decreased such as the service of the respondent, alongwith 363 number of workers were retrenched after complying with the provision of Section 25-F of the Act and by adhering to the principle of *"Last Come First Go"*. It is further averred that the petitioners have duly issued a notice under Section 25-F of the Act to the respondent and similarly situated workmen and had paid the due compensation, preceding retrenchment. It is further averred that while disengaging the respondent, the seniority of the Division has been taken into consideration. The seniority is maintainable at Divisional level and the principle of *"Last Come First Go"* has been strictly followed.

5. In reply, filed by the respondent, it is averred that the petitioners (employer) have challenged the award dated 03.07.2013 rendered by the learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, in Reference Petition No. 5 of 2010, which has attained finality after one month on 03.08.2013. It is further averred that the civil writ petition filed by the petitioners is not maintainable, without explaining the delay in filing of the civil writ petition. The petitioners have chosen to harass the respondent/claimant so that he may not perform his duties and earn his livelihood/remuneration, which action is in violation of various provisions of the Act.

6. It is further averred that the respondent-workman was working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie, w.e.f. November, 1995 to 01.09.2000, and he has worked for 44 days in 1995, 163 days in 1996, 218 days in 1997, 238

days in 1998, 132 days in 1999 and 146 days in 2000 (up to 01.09.2000). It is further averred that he has clearly mentioned in his claim petition, rejoinder with affidavit and also in examination-in-chief, that his juniors were engaged by the petitioners after the retrenchment of the respondent.

7. Learned Additional Advocate General has argued that the award of the learned Labour Court is without appreciating the facts, which have come on record and is liable to be set-aside. On the other hand, the learned counsel appearing for the respondent has argued that the award passed by the Labour Court, Dharamshala is as per law and no interference is required and the jurisdiction of this Court is wrongly invoked and writ petition deserves dismissal. To appreciate the arguments, this Court has gone through the record of the case carefully and the law as settled by this Hon'ble Court. Admitted fact is that the respondent was engaged by the petitioners and he has worked with them w.e.f. November, 1995 to 01.09.2000, and he has worked for 44 days in 1995, 163 days in 1996, 218 days in 1997, 238 days in 1998, 132 days in 1999 and 146 days in 2000 (up to 01.09.2000).

8. It is further case of the respondent that the petitioners have not re-engaged the respondent till date neither he was given opportunity for re-employment whereas his juniors were engaged. However, the petitioners have denied that any junior was engaged.

9. Seniority list relating to Shri Angrej Singh and others reveals that Smt. Sodha Devi was appointed by the State in the year 1999, whereas the services of Smt. Lata Devi engaged in the year 2000. However, a note has been given that both these ladies were appointed on compassionate grounds. The date of death of their husbands, namely, S/Sh. Ashok Kumar and Tarbeej Singh have not come on the file. The Court below has rightly held that the respondent (petitioners herein) has not complied with the provisions of Section 25(H) of the Act. Shri L.S. Thakur (RW-1) in cross-examination has admitted that Smt. Biasa Devi and Shri Hem Raj have been re-engaged. The names of these two workmen figure at serial No. 414 and 435 of the seniority list. Shri Hem Raj and Smt. Biasa Devi were juniors to the respondent. There is nothing on record that before engaging the freshers, opportunity of re-employment was afforded to the respondent.

10. As discussed above, the impugned award does not suffer from any perversity. The learned Additional Advocate General for the petitioners has canvassed before this Court with vigour that the reference is stale. However, the said submission is unacceptable given the fact that the said fact was not agitated by the employer/petitioner before the appropriate Government at the time Government proceeded to make a reference of the dispute to the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. It has been held in ***Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301*** that there is no limitation for reference to Labour Court under Section 10 of the Act. It was held that words *"At any time"* mentioned in Section 10 of the Act clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of the Act. Operative part of Section 10 of the Act is quoted in *extenso*:

> "**Section 10 of Industrial Disputes Act, 1947:-** Reference of dispute to Boards, Courts or Tribunals-(1) where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, (a) Refer the dispute to a Board for promoting a settlement thereof, (b) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry."

11. In view of the above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 5 of 2010, decided on 03.07.2013, is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal, Dharamshala. Therefore, the writ petition is without any basis, requires dismissal and is accordingly dismissed. No order as to costs. All pending application(s), if any, also stand(s) disposed of.

****

BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh & another. .....Petitioners.
Versus
Shri Partap Singh. .....Respondent.

CWP No. 4481 of 2013
Reserved on: 15.11.2016
Decided on: 06.12.2016

Industrial Disputes Act, 1947- Section 25-F- P was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that plea of the employer that P had abandoned the service has not been established- merely because a workman had not reported for duty cannot lead to an inference of abandonment- a disciplinary inquiry should have been initiated against the workman for abandoning the service, which was not done- fresh hands were engaged and employer had not complied with the provision of Section 25-H –there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-10 to 13)

Case referred:
Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301

For the petitioners: Mr. Virender K. Verma, Addl. AG, with Mr. Rajat Chauhan, Law Officer.
For the respondent: Mr. Vinod Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being aggrieved by the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., passed in Reference No. 15 of 2010, decided on 13.09.2013, maintained this writ petition to set aside and quash the same.

2. Succinctly the key facts necessary for adjudication of the present petition are that the State Government referred the following reference to the learned Labour Court-cum-Industrial Tribunal, Dharamshala, H.P.:

> *"Whether termination of services of Shri Partap Singh s/o Shri Lajju Ram, by The Executive Engineer, IPH division Padhar, Distt. Mandi, H.P. w.e.f. 12.12.2000, without complying the provisions of the Industrial Disputes Act, 1947 whereas junior to him are retained by the employer, is legal and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"*

3. As per the petitioners, respondent Partap Singh (workman) had been working on daily wage basis with the Executive Engineer, I&PH Division, Padhar w.e.f. 21.06.1987 to 11.12.2000, and he did not complete 240 days in the years 1989 to 1992 and 1997. The workman also did not complete 240 days in the calendar year preceding twelve calendar months of his retrenchment. It is pleaded that after 11.12.2000, the workman himself abandoned the work. As the workman, did not complete 240 days during the calendar year preceding his retrenchment, there is break in service disentitling him the protection under Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). As per the petitioners, the workman remained dormant for nine years and ultimately maintained the reference petition, which was hit by delay and laches, but the fact qua delay and laches was overlooked by the

learned Tribunal below. The workman abandoned the job himself, thus he has no right to take benefit of the fact that his juniors have been retained. The workman has challenged the retrenchment before the learned Labour Court by way of filing the claim petition and the learned Labour Court set aside the retrenchment order of the respondent-workman and directed that he be re-engaged forthwith granting continuity and seniority in service w.e.f. 12.12.2000, except back wages and the order is thus against law and required to be set-aside.

4. As per the petitioners, the reference petition was hit by delay and laches, but the said fact was ignored by the learned Tribunal below. The petitioners have prayed for quashing and setting aside the impugned award and averred that the award has been passed by the learned Tribunal below without appreciating the facts and law to their true perspective. It is averred that award of the learned Tribunal below holding that the petitioners have not complied with the provisions of Section 25(G) and 25(H) of the Act is contrary to the evidence and the same also being contrary to law may be set-aside.

5. The workman did not file any reply to the petition. However, the stand of workman, as taken in the reference petition, was that he was engaged as daily waged *beldar* by the petitioners on muster roll basis w.e.f. 21.06.1987. On 12.12.2000 his services were illegally terminated without adhering to the mandatory provisions of the Act. As per the workman, he was given artificial breaks during employment and the same is required to be counted towards his continuous service. His services were terminated verbally and the persons junior to him were retained. Thus, the petitioners did not adhere to the principle of *'last come first go'.* The action of the petitioners was highly illegal and unjustified, thus violative of Sections 25-F, 25-G and 25-H of the Act.

6. Learned Additional Advocate General has argued that the award of the learned Tribunal below is without appreciating the facts, which have come on record and is liable to be set-aside. On the other hand, the learned counsel appearing for the respondent has argued that the award passed by the Labour Court, Dharamshala, is as per law and no interference is required and the jurisdiction of this Court is wrongly invoked and writ petition deserves dismissal.

7. In order to appreciate the arguments, this Court has gone through the record of the case carefully.

8. The workman, who tendered his affidavit, Ex. PW-1/A, has submitted that he joined the service in the year 1987 and was removed in the month of November, 2000. He has admitted that he raised the industrial dispute in the year 2010 and prior to that he had approached the H.P. State Administrative Tribunal. The workman has denied that he left the job on his own.

9. RW-1, Shri Arun Sharma, Executive Engineer, I&PH Division, Padhar, in his cross-examination has admitted that after the disengagement of the services of the petitioner, new labour has been employed and the workman was not afforded any opportunity of re-employment. The workman was not served with any notice to resume his duties.

10. Indisputably, the workman was engaged as a daily waged *beldar* on 21.06.1987 and he, with frictional breaks, worked upto 11.12.2000. As per the petitioners, the workman himself abandoned the job. It is settled that abandonment is not to be lightly presumed, but it has to be unequivocally proved by the employer. The workman did fails to report for duty does not in any way raise a presumption that the workman himself left the job. Admittedly, while analyzing the statement of RW-1, it is manifest that no notice was served upon the petitioner asking him to resume duties. Even if, it is presumed that the workman had abandoned the job himself and the same is a gross misconduct, in that case some disciplinary inquiry should have been initiated against the workman, but there is no evidence which reveals that the employer ever conducted any disciplinary inquiry. Therefore, the plea of willful absence, unestablished.

11. It has also come on record that fresh hands were engaged by the employer without affording opportunity to the workman. The seniority list, Ex. RW-1/B, if read in conjunction with statement of RW-1, clearly demonstrates that persons junior to the workman are serving with the petitioners, which is in defiance to the principle of *'last go first come'*. Therefore, provisions of Sections 25-G and 25-H of the Act have been contravened and it is not obligatory for the workman to have completed 240 days in a block of 12 calendar months preceding termination to derive the benefit under these sections of the Act. As per the petitioners, Section 25-F of the Act, is not applicable as the workman did not complete 240 days in cumulative period of 12 calendar months preceding his termination.

12. The learned Additional Advocate General for the petitioners has canvassed before this Court with vigour that the reference is stale. However, the said submission is unacceptable given the fact that the said fact was not agitated by the employer/petitioner before the appropriate Government at the time Government proceeded to make a reference of the dispute to the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. It has been held in ***Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301*** that there is no limitation for reference to Labour Court under Section 10 of the Act. It was held that words *"At any time"* mentioned in Section 10 of the Act clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of the Act. Operative part of Section 10 of the Act is quoted in *extenso*:

> "**Section 10 of Industrial Disputes Act, 1947:-** Reference of dispute to Boards, Courts or Tribunals-(1) where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, (a) Refer the dispute to a Board for promoting a settlement thereof, (b) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry."

Further it has come on record that the workman, in the meantime, had also approached the H.P. State Administrative Tribunal, thus, it cannot be said the workman has delayed the proceedings.

13. In view of the above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 15 of 2010, decided on 13.09.2012, is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal, Dharamshala. Therefore, the writ petition is without any basis, requires dismissal and is accordingly dismissed. No order as to costs. All pending application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J.

Sh. Sunil Kumar s/o Sh. Sanjay Kumar and others ....Revisionists.

Versus

Ms. Sudesh Kumari w/o Sh. Satish Kumar and others ....Non-revisionists

Civil Revision Petition No.110/2016
Order Reserved on 25.11.2016
Date of order: 6.12.2016

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that applicant is co-owner of the suit land and is not in a position to alienate her share in view of the injunction granted by the Court- the application was allowed by the Trial Court- held in revision that applicant is recorded to be the co-owner of the property – suit has been filed for declaration – all the co-owners are necessary parties in a suit for declaration- her interest

would be directly affected by the declaration- the Court had rightly allowed the application- revision dismissed.(Para-10 to 12)

Cases referred:
Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram and others, AIR 1961 Punjab 528
Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay, (1992) 2 SCC 524
New Redbank Tea Co.Pvt Ltd. Vs. Kumkum Mittal and others, (1994)1 SCC 402

For revisionists : Mr. R. K. Gautam, Sr. Advocate with Ms. Megha Kapoor Gautam, Advocate
For non-revisionists : Mr. Bhupinder Gupta, Sr.Advocate with Mr. Janesh Gupta, Advocate

The following order of the Court was delivered:

P. S. Rana, J.

Present civil revision petition is filed under section 115 Code of Civil Procedure 1908 against order dated 02.07.2016 passed by learned Civil Judge (Sr. Division) Dehra Distt. Kangra (H.P.) whereby learned Civil Judge (Sr. Division) allowed the application filed under order I Rule 10 read with section 151 CPC by Ms. Sudesh Kumari.

Brief facts of the case:

2. Sh. Sunil Kumar and others filed civil suit for declaration to the effect that plaintiffs are owners in possession of suit land. It is pleaded that suit land is ancestral coparcenery property. It is further pleaded that co-defendant No.1 got no right for alienation creating any charge or mortgaging or disposing of the suit property. It is further pleaded that mortgage deed dated 12.03.2014 executed by co-defendant No.1 in favour of co-defendant No.2 is without consideration, collusive and has been fraudulently got executed to defeat the legal rights of plaintiffs. It is further pleaded that same be declared as null and void.It is further pleaded that mutation No.235 dated 10.06.2014 be also declared as illegal. Additional relief of perpetual and prohibitory injunction also sought restraining defendants from dispossessing plaintiffs or raising any construction or alienating suit land or creating any charge, mortgage or cutting or removing trees. Additional relief of mandatory injunction also sought directing defendants to restore the land to its original position. In alternative relief of possession of suit land also sought.

3. Per contra written statement filed on behalf of co-defendant No.1 pleaded therein that suit is not maintainable and plaintiffs are estopped by their act conduct and acquiescence to file present suit. It is pleaded that plaintiffs have no cause of action to file suit. It is further pleaded that plaintiffs have no locus standi to file present suit. It is further pleaded that suit is not properly valued for purposes of Court fee and jurisdiction and suit is bad for non-joinder of necessary parties i.e. Sonu Sharma and Sudesh. It is further pleaded that suit land is not ancestral joint Hindu coparcenery property. It is further pleaded that plaintiffs have no cause of action to file present suit and prayer for dismissal of suit sought.

4. Per contra separate written statement filed on behalf of co-defendant No.2 pleaded therein that suit is not maintainable and plaintiffs have no cause of action to file suit and plaintiffs have no locus standi to file present suit and suit is not properly valued. It is further pleaded that plaintiffs are estopped by their act conduct and acquiescence from filing present suit. It is further pleaded that entry of mortgage in favour of co-defendant No.2 relating to suit land is in consonance with law. It is further pleaded that co-defendant No.1 took loan from co-defendant No.2 to the tune of Rs.12 lacs for education of his children and for repair of his shop. It is further pleaded that plaintiffs are not entitled for any decree as prayed and prayer for dismissal of suit sought.

5. During pendency of suit Ms. Sudesh Kumari filed application under Order I Rule 10 CPC pleaded therein that she is co-owner of suit land and her ownership is recorded in record of rights prepared by revenue officials. It is pleaded that ad-interim injunction has been granted by learned Trial Court and she being co-owner of suit land is not in a position to alienate her own share. It is further pleaded that Ms. Sudesh Kumari is necessary party in civil suit and prayer for acceptance of application filed under Order I Rule 10 CPC sought.

6. Response filed on behalf of plaintiffs to application filed under Order I Rule 10 CPC. Plaintiffs contested the application pleaded therein that application is not maintainable. It is pleaded that Ms. Sudesh Kumari is not necessary party in present civil suit. It is further pleaded that present suit is filed for declaration and mortgage executed by co-defendant No.1 in favour of co-defendant No.2 has been challenged in present civil suit. It is further pleaded that Ms. Sudesh Kumari has no concern with share of co-defendant No.1. It is further pleaded that present application is filed in collusion with other co-defendants and prayer for dismissal of application sought.

7. Learned Trial Court impleaded Ms. Sudesh Kumari as co-defendant No.3 in civil suit under Order I Rule 10 CPC. Feeling aggrieved against order passed by learned Trial Court plaintiffs have filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionists and learned Advocate appearing on behalf of non-revisionists and Court also perused entire record of case carefully.

9. Following points arises for determination:

1) Whether civil revision petition filed by revisionists is liable to be accepted as mentioned in memorandum of grounds of revision petition?

2) Relief.

Findings upon Point No.1 with reasons.

10. Submission of learned Advocate appearing on behalf of revisionists that Ms. Sudesh Kumari is not necessary party in present civil suit and no relief is claimed against her by revisionists in civil suit and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Name of Ms. Sudesh Kumari is recorded as one of co-owners of suit property in jamabandies prepared by revenue officials under H.P. Land Revenue Act 1954. Jamabandies have been prepared by public official in discharge of their official duties and are relevant fact under section 35 of Indian Evidence Act 1872. It is well settled law that in suit for declaration all the co-owners are necessary parties because all the co-owners in joint property have direct interest in suit property till joint land is not partitioned in accordance with law. Following are the rights of co-owners in the suit property: (1) A co-owner has an interest in the whole property and also in every parcel of it. (2) Possession of one co-owner in joint property is possession of all. (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster because possession of one is deemed to be on behalf of all. (4) The above rule admits of one exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all on the ground of ouster the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other. (5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment. (6) Every co-owner has a right to use the joint property in a husband like manner. (See **AIR 1961 Punjab 528 Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram and others.**

11. It is well settled law that Court can direct impleadment of parties at any stage of civil suit under Order I Rule 10(2) Code of Civil Procedure 1908 whose presence before Court is necessary in order to effectively and completely adjudicate and settled all questions involved in suit property and concept of *dominus litis* would not apply upon necessary parties in civil suit. See **(1992) 2 SCC 524Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay.** See **(1994)1 SCC 402 New Redbank Tea Co.Pvt Ltd. Vs. Kumkum Mittal and**

others. It is held that Ms. Sudesh Kumari is necessary party in civil suit because Ms. Sudesh Kumari is one of co-owners of suit land and she has direct interest in the decision of present civil suit of declaration. It is held that interest of Ms. Sudesh Kumari will be adversely effected in a declaratory suit if Ms. Sudesh Kumari is not impleaded as co-defendant in civil suit being co-owner in suit property because plaintiffs have sought relief of declaration to the effect that plaintiffs are owners in possession of suit land with specific shares. In view of above stated facts and case law cited supra it is held that order of learned Trial Court is in consonance with law. It is held that there is no illegality in the order of learned Trial Court. In view of above stated factspoint No.1 is answered in negative.

Point No.2 (Relief).

12. In view of findings upon point No.1 present civil revision petition is dismissed. Parties are left to bear their own costs. Observations will not effect merits of case in any manner and will be strictly confined for disposal of present revision petition. Parties are directed to appear before learned Trial Court on **20.12.2016.** File of learned Trial Court alongwith certified copy of order be sent back forthwith. C.R. No.110/2016 is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

United India Insurance Co. Ltd. .....Appellant.
Versus
Smt. Teji Devi & others ....Respondents.

FAO No. 416 of 2016 along
with Cross Objection No. 122 of 2016.
Decided on : 6th December, 2016.

Employees Compensation Act, 1923- Section 4- Deceased was a conductor in a truck- he died in an accident- compensation of Rs.9,05,520/- was awarded – held in appeal that the monthly wages of the workmen have to be taken as Rs.4,000/- in view of the statutory provisions – the Commissioner had wrongly taken the income as Rs.8,000/- - after deducting 50% amount and taking the factor as 225.22, compensation of Rs.4,50,440/- (2000 x 225.22) awarded- along with interest @ 12% per annum. (Para-5 to 8)

For the Appellant: Mr. Lalit K. Sharma, Advocate.
For respondents No.1 &2: Mr. G.R. Palsra, Advocate.
For Respondents No.3 and 4: Ms. Archana Dutt, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned order rendered on 16.02.2016 in W.C. Petition No.66 of 2011 by the learned Commissioner, Employees Compensation, Civil Judge (Senior Devision) Mandi, District Mandi, H.P., (for short the "Commissioner"), whereby he allowed the petition preferred thereat by the claimants/respondents No.1 & 2 for the grant of compensation under the Workmen (Employee's) Compensation Act (for short the "Act").

2. The predecessor-in-interest of respondents No.1 and 2 herein during the course of his employment as a conductor in truck bearing No. HP-38-F-8529 owned by respondent No.3 herein suffered his end in a motor vehicle accident involving the aforesaid vehicle. Under the impugned award the learned Commissioner assessed compensation in a sum of Rs.9,05,520/-

vis-a-vis the successor-in-interest of deceased Bhimi Singh, liability whereof for its defrayment qua them stood fastened upon the insurer/appellant herein.

3. Uncontrovertedly, in the accident involving truck bearing No. HP-30F-8529 owned by respondent No.4, whereon the deceased stood engaged as a conductor by its owner, the truck aforesaid suffered a mishap on 2.11.2009, in sequel whereof, deceased Bhimi Singh met his end, obviously when thereat he was performing thereon his relevant employment as a conductor under respondent No.3 herein.

4. After hearing the learned counsel appearing for the appellant/insurer also the counsel for the Cross-objector, the instant appeal as also the cross-objections instituted by the Cross-objector stand admitted by this Court on the hereinafter extracted substantial questions of law:-

FAO No. 416 of 2016.

"1. Whether the Commissioner is justified to conclude the salary of the deceased Bhimi Singh for Rs.8000/- per month without there being any evidence and whether the Commissioner is competent to ignore the maximum ceiling of salary of a workman for Rs.4000/0 per month as contemplated in Section 4(a)(a)(b), Explanation II of The Employees Compensation Act, 1923, where the monthly wages of a workman exceeded 4000/- rupees, his monthly wages for the purpose of Clause (a) and (b) shall be deemed to be 4000/- rupees only?

2. Whether the Commissioner below is justified in to apply relevant factor of 226.38 in the instant case especially when the age of deceased was 19 years and as per schedule IV under Section 4 of the Employees Compensation Act, 1923 the relevant factor is 225.22?

Cross Objections No.122 of 2016.

3. Whether the objectors/respondents No.1 and 2 are entitled to interest on the compensation amount awarded @ 12% per annum in terms of Section 4 of the Employees Compensation Act?

Substantial Question of law No.1.

5. Given the uncontroverted factum qua the accident involving the vehicle aforesaid occurring on 2.11.2009 warranted the learned Commissioner to in his proceeding to assess compensation qua the claimants/successors-in-interest of deceased Bhimi Singh to mete deference to the apposite statutory provisions of the Workmen's Compensation Act, apposite provisions whereof stand encapsulated in Explanation-II occurring in Section 4 of The Workmen's Compensation Act, 1923, Explanation-II whereof stood incorporated therein by a legislative Enactment brought into force by the Act of 46 of 2000 besides under the amendment aforesaid carried vis-a-vis Section 4 of the Act whereby Explanation-II stood incorporated therein, the apposite Explanation-II embodied therein acquired force on 8.12.2000. The currency of the aforesaid Explanation-II, added to Section 4 of the Workmen Compensation Act, 1923 by the legislative amendment aforesaid remained in existence upto 17.01.2010 therewithin a mandate stands cast upon the learned Commissioner to in sequel thereof imminently with the accident hereat occurring on 2.11.2009, hence, during the currency of the provisions of Explanation-II added to the statute by way of an amendment effectuated on 8.12.2000, to where evidently the monthly wages of a workman exceed Rs.4000/-, his monthly wages for the purpose of applying thereon the relevant statutory factor standing circumscribed in a sum of Rs.4000/-, hence, mete deference thereto. Contrarily, the learned Commissioner has inaptly drawn a conclusion qua with the evident factum of the deceased drawing from his relevant employment as a conductor under respondent No.3 herein in the ill-fated vehicle herein monthly wages in a sum of Rs.8000/, whereupon he by applying the inapposite statutory provisions circumscribed his wages in a sum of Rs.4000/-, for the relevant computation standing made therefrom, he thereafter made an erroneous computation of compensation amount payable to the claimants. The inherent fallacy ingraining the factum of the learned Commissioner inaptly proceeding to mete deference to the

amended provisions of Section 4 of The Employee's Compensation Act, 1923, whereupon under an apposite legislative amendment brought into force with effect from 18.01.2010, Explanation-II incorporated therein by an amendment which previously occurred in the year 2000 stood omitted, visibly arises from his fallaciously meteing retrospective effect thereto, whereas with the ill-fated accident involving truck bearing No. HP-38-F-8429, whereupon, deceased Bhimi Singh stood employed as a conductor under respondent No.3 herein occurring on 2.11.2009 whereat the provisions of Explanation-II occurring in Section 4 of the Workmen's Compensation Act, 1923 enjoyed force besides sanctity warranted deference standing meted thereto by the learned Commissioner, reiteratedly his conspicuously proceeding to revere or mete deference to the provisions of Section 4 of the Employee's Compensation Act, 1923 whereby in the year 2010, explanation-II which hitherto occurred therewithin stood deleted is grossly unwarranted. Consequently, the learned Commissioner has fallen in gross error while computing the reckonable salary of the deceased at Rs.8000/- per month, whereas, by applying the rigors of the apposite Explanation-II of Section 4 of the Workmen's Compensation Act it is to stand statutorily restricted in a sum of Rs.4000/- per month whereon after meteing thereto the apposite statutory deduction, the apposite factor for computing compensation vis-a-vis the claimants/respondents No.1 and 2 is to be applied. Accordingly, substantial questions of law No.1 is answered in favour of appellant and against the respondents.

Substantial question of law No.2.

6. The learned Commissioner while applying the relevant statutory principle/factor for computing compensation qua the claimants/respondents No.1 and 2 herein has slighted the age of the deceased workman which indisputably at the time of accident was 19 years, whereupon, the relevant factor for application vis-a-vis the compensation amount prescribed in Schedule-II is 225.22, whereas, his applying the inapposite factor of 226.38 has resulted in his computing an unfair or an erroneous compensation amount vis-a-vis the successors-in-interest of the deceased workman. Consequently, for the reasons aforestated, when explanation-II of The Workmen's Compensation Act was applicable at the relevant time of occurrence of the ill-fated mishap, thereupon with this Court concluding qua the deceased workman uncontrovertedly at the relevant time of his employment under his employer earning a salary exceeding Rs.4000/- per month, whereupon with the apt Explanation-II mandating qua his salary standing pegged in a sum of Rs.4000/- per month, whereupon after meteing 50% deduction thereto, the apt reckonable amount per mensem comes to Rs.2000/-, on application thereon of the relevant statutory factor of 225.22, the compensation amount assessable vis-a-vis the claimants/successor-in-interest/respondents No.1 and 2 is computable in a sum of Rs.4,50,440/- (Rs. 2000X225.22). Accordingly, substantial question of law No.2 is answered in favour of the appellant and against the respondents.

Substantial Question of Law No.3.

7. The learned counsel appearing for respondents No.1 and 2/cross-objectors submits that the learned Commissioner erroneously awarded interest @ 6% per annum on the compensation amount. The aforesaid submission warrants it being accepted as the levying of interest by the learned Commissioner on the compensation amount is beyond the statutory prescription held in clause (a), sub-section (3) of Section 4-A of the Workmen's Compensation Act, 1923 wherewithin a mandate is held qua interest @ 12% being leviable since the elapse of one month since the accident. Consequently, the aforesaid compensation amount assessed at Rs. 4,50,440/- qua the claimants/ respondents No.1 and 2 shall carry interest at the rate of 12% per annum from one month elapsing since the date of accident till its realization. Accordingly, substantial question of law No.3 is answered in favour of the cross-objectors/respondents No.1 and 2 and against the appellant. Liability qua the aforesaid compensation amount shall be borne by the insurer.

8. For the reasons recorded hereinabove, the instant appeal as also the cross-objections are both allowed. Consequently, the impugned award is modified in the manner aforestated. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Ganga Ram ....Petitioner/JD.
Versus
Prakash Verma ... Respondent/DH.

Civil Revision No. 158 of 2011.
Reserved on 25.11.2016.
Decided on: 7.12.2016.

Code of Civil Procedure, 1908- Order 21 Rule 32- Civil suit was decreed for specific performance of the agreement – the decree was put to execution – Court ordered the execution of the sale deed and directed the vendee to join J.D. for completing the sale – held, that decree was passed for specific performance of the agreement relating to Khasra No.508 – the Court had directed the execution of the sale deed in respect of Khasra No.508/8- the Executing Court cannot go behind the decree – revision allowed and the Court directed to execute the sale deed in accordance with the decree. (Para- 5 to 9)

For the petitioner. : Mr. G.C. Gupta, Sr. Advocate with Ms. Meera, Advocate.
For respondent. : Mr. H. C. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this revision petition, the petitioner/judgment debtor has challenged the order passed by executing Court i.e. the Court of learned Civil Judge (Sr. Division), Karsog, Distt. Mandi in Execution Petition No. 16-10/2010 dated 6.9.2011, vide which executing Court has directed the petitioner/judgment debtor to execute sale deed in favour of respondent/decree-holder out of the land comprised in khasra No. 508/8 to the extent mentioned in the decree.

2. Brief facts necessary for adjudication of the present case are that in Civil Suit No. 41/2008 filed by the respondent/decree-holder against petitioner/judgment debtor, the following judgment and decree was passed by the Court of learned Civil Judge (Jr. Division), Karsog dated 27.8.2009:

> *"It is ordered that suit filed by the plaintiff is decreed to the effect that plaintiff is entitled to specific performance of agreement dated 15.2.2007 in respect of the land comprised in khata/khatauni No. 486/669 khasra No. 508, measuring 6-16-13 bighas situated at muhal karsog/416, Tehsil Karsog, Distt. Mandi, HP to the extent of 0-1-16 bighas out of the share of defendant total measuring 0-18-15 bighas. The defendants are also directed to execute the sale deed of the suit land measuring of 0-1-16 bighas as per agreement dated 15.2.2007 on payment to him or depositing of remaining sale consideration amount in the Court within three months. Keeping in view the peculiar facts and circumstances of the case, parties are left to bear their own costs."*

3. It is also pertinent to refer to the prayer clause of the plaint, on the basis of which the said judgment and decree was passed by learned trial court which is quoted herein below:-

> *"It is, therefore, prayed that a decree for specific performance of agreement dated 15.2.2007 may kindly be passed in favour of the plaintiff while directing the defendant to execute the Registered sale deed of his share to the extent of 33 x 22 feets i.e. measuring about 0-1-16 bighas in the land comprised in Khata/Khatauni No. 486/669 Khasra No. 508 measuring 6-16-13 bighas situated in muhal*

Karsog/416, Tehsil Karsog, Distt. Mandi H.P. in which the defendant has got 0-18-15 bighas and the plaintiff is ready and willing to perform his part of contract i.e. to pay the balance sale amount of Rs. 25000/- to the defendant and it is the defendant who has failed to perform his part of contract i.e. the defendant has failed to execute the sale deed of the suit land in favour of the plaintiff in stipulated period i.e. upto 15.8.2007 and a decree to this effect may kindly be passed in favour of the plaintiff and against the defendant together with cost of the suit and in spite of it the double amount to the tune of Rs. 1,42,000/- as agreed may also be decreed in favour of the plaintiff and against the defendant and any other relief to which the plaintiff be found entitled to in the circumstances of the case be passed in favour of the plaintiff and against the defendant for which the plaintiff shall ever pray."

4. It is not a disputed fact that the judgment and decree passed by learned trial court has attained finality.

5. In the execution petition filed by respondent/decree-holder for execution of the judgment and decree passed in his favour by learned trial court, executing court passed the following order:-

> "I have heard ld. Counsels for the parties. Ld. Counsel for the D.H. argues that respondent/J.D. has tried to frustrate the decree passed in his favour by selling a portion of land to Bihar Lal which was agreed to be sold to D.H. To the contrary, ld. Counsel for the J.D. argues that J.D. is ready and willing to execute sale deed as per decree but D.H. cannot demand specific property as he had purchased the land from the joint land.
>
> The trial Court has specifically ordered that J.D. shall execute the Sale deed to the extent of 0-1-16 bighas as per agreement dated 15.2.2007. Now this agreement clearly reads that J.D. had agreed to sell 33x22 feet land adjoining to Karsog-Gharatha Road towards upper side for Rs.96,000/-. Now the contents of this agreement do not leave any doubt that D.H. is entitled to get sale deed executed in his favour of the land which is adjoining to Gharatha-Karsog road.
>
> Now it is emerging from the oral as well as written contentions of the parties before the court that J.D. has got only one Khasra number adjoining to the road i.e. 508/8. Now J.D. is duty bound to execute the sale deed in favour of D.H. out of that land and any sale made by him in violation of the directions given in the decree cannot sustain and accordingly vendee shall be bound by the decree in view of Section 52 of T.P. Act. Accordingly, it is direct5ed that J.D. shall execute the sale deed in favour of the D.H. out of the land comprised in Khasra No. 508/8 to the extent of mentioned in the decree. The vendee Bihari Lal shall join the J.D. in completing the sale deed in favour of the D.H. within 45 days.
>
> Let file be fixed for consideration on 21.10.2011."

6. Mr. G.C. Gupta learned Senior Counsel appearing of the petitioner/judgment debtor argued that the impugned order passed by executing Court is not sustainable in the eyes of law as executing Court while passing the order under challenge has failed to follow the well settled principle of law that an executing Court cannot go behind the decree. Mr. Gupta argued that the decree passed by learned trial court entitles plaintiff for specific performance of agreement dated 15.2.2007 in respect of land comprised in khata khatauni No. 486/669 khasra No. 508, measuring 6.6.13 bighas situated at Muhal Carsog/416, Tehsil Karsog, Distt. Mandi to the extent of 0-1-16 bighas out of the share of the defendant/judgment debtor and rather than executing the said decree, executing Court has directed the decree-holder to execute sale deed out of land comprised in khasra No. 508/8 to the extent mentioned in the decree. This direction as per Mr. Gupta passed by executing Court was beyond the decree. According to Mr. Gupta the judgment-debtor was still ready and willing to execute sale deed as per decree but decree-holder

cannot demand specific property as he had purchased land out of the joint holdings. Accordingly, Mr. Gupta has prayed that the impugned order passed by executing Court be set aside.

7. Mr. H.C. Sharma, learned counsel for the respondent argued that there is no infirmity or perversity with the order passed by executing Court because after the passing of the judgment and decree by learned trial court, the judgment debtor in fact had sold portion of suit land in favour of one Bihari Lal, therefore, executing Court had rightly directed the decree holder to execute sale deed out of land comprised in khasra No. 508/8 to the extent mentioned in the decree.

8. I have heard learned counsel for the parties and have also gone through the records of the case as well as plaint, agreement to sell, judgment and decree passed by the learned trial court and the impugned order.

9. In my considered view, there is error and perversity in the order which has been passed by executing Court whereby it has issued directions to the judgment debtor to execute the sale deed in favour of decree holder out of land comprised in khasra No. 508/8 to the extent mentioned in the decree. While passing the said order, executing Court has erred in not appreciating that as executing Court cannot go behind the decree, therefore, it was not having any jurisdiction to direct the judgment debtor to execute a sale deed in favour of decree holder out of land comprised in khasra No. 508/8 as it was not so contemplated either in the agreement to sell or in the plaint or in the judgment and decree passed by the Court of learned Civil Judge (Jr. Division), Karsog dated 27.8.2009. The judgment and decree passed by the Court of learned Civil Judge (Jr. Division), Karsog held plaintiff entitled for specific performance of agreement dated 15.2.2007 in respect of land comprised in khasra No. 508 to the extent of 0-1-16 bighas. There is no decree in favour of decree holder for specific performance of agreement dated 15.2.2007 out of khasra No. 508/8. This very important aspect of the matter has lost sight of the matter by executing court while passing the impugned order.

Therefore, in view of the above discussion this revision petition is allowed and order dated 6.9.2011 passed by executing Court i.e. Court of learned Civil Judge (Sr. Division), Karsog, in case No. 16-10/2010 is set aside and the case is remanded back to the executing Court to pass appropriate order in the execution petition filed by the decree holder strictly taking into consideration the judgment and decree which has been passed in favour of the decree holder. Parties through their learned counsel are directed to put in appearance before executing Court on 26.12.2016. Registry is directed to forthwith send back the records of the case to the executing Court.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Sh. Mahinder Singh .....Petitioner

Versus

Sh.Prabodh Saxena and another .....Respondents.

COPC No. 662/2015.
Reserved on 24th November, 2016
Date of order: 7th December, 2016.

Contempt of Courts Act, 1971- Section 12- It was pleaded that the Court had directed the respondents to consider the case of the petitioner for placement as S.P.- respondents stated that they had adopted sealed cover procedure and had complied with the directions – held, that the respondents were directed to consider the case of the petitioner for placement as S.P. and release

all consequential benefits - the respondents are in breach – they are directed to comply with the directions and report compliance.(Para-5 to 9)

Present: Mr. Onkar Jairath, Advocate, for the petitioner.
Mr. Shrawan Dogra, Advocate General with M/s Anup Rattan, Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for the respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

It is stated at the Bar that Shri P. Mitra, Chief Secretary, to the Government of H.P., has retired and his successor has taken over in his place. We deem it proper to substitute Principal Secretary (Home) to the Government of H.P. and Director General of Police, H.P. as party respondents in this petition in place of Sh. P.Mitra, Chief Secretary to the Government of HP, shall figure as respondents No. 1 and 2 respectively in the petition. Registry to carry out necessary correction in the memo of parties. Petitioner to file fresh memo of parties within one week.

2. Issue notice to the newly substituted respondents. Mr. Anup Rattan, learned Additional Advocate General waives notice on behalf of the said respondents.

3. Petitioner, by the medium of this Contempt Petition, has invoked the jurisdiction of this Court for drawing contempt against the respondents in terms of the provisions contained in the Contempt of Courts Act, 1971, for short "the Act".

4. It is specifically averred in the contempt petition that the respondents have not complied with the directions contained in the Judgment delivered by the learned Single Judge dated 30.4.2015, in CWP No. 9954 of 2011, titled **Mahinder Singh versus State of Himachal Pradesh.**

5. Precisely, the case of the petitioner is that he has earned the judgment dated 30.4.2015 in CWP No. 9954 of 2011 made by the learned Single Judge of this Court, whereby respondents were directed to consider the case of the petitioner for placement as Superintendent of Police. It is apt to reproduce operative portion of the said judgment herein.

> **"**8.In view of the settled position, this Court is left with no option but to allow the petition. Ordered accordingly. The respondent is directed to consider the case of the petitioner for placement as Superintendent of Police within a period of six weeks and in case the petitioner is found entitled for such placement, he shall be released and given all actual consequentialbenefits within another period of eight weeks. The petition is allowed in the aforesaid terms, leaving the parties to bear their **costs."**

6. Respondents have filed the reply and have stated that they have invoked the sealed cover procedure and the directions contained in the aforesaid judgment have been fully complied with, in letter and spirit.

7. Learned counsel for the petitioner argued that it is utter disregard to the Court directions and respondents are in breach. Learned Single Judge has categorically held that the action of respondents was not in accordance with law and directed them to consider the case of the petitioner for placement as Superintendent of Police and release all actual consequential benefits. Thus, it cannot lie in the mouth of respondents at this stage that the enquiry is pending against the petitioner and he is facing trial in FIR No. 13/2009. At the relevant point of time, petitioner had neither been served with the memo of charge in the departmental inquiry nor was charge-sheeted in the criminal case.

8. Having said so, it appears that the respondents are in breach, are directed to appear in person and explain why they be not dealt with in terms of the provisions of the Act.

9. In the meantime, respondents to comply with the Court directions contained in the judgment dated 30.4.2015 in CWP No. 9954 of 2011, and report compliance. List on **5th January, 2017.** Copy dasti.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Mohinder Nath Sofat son of Shri Ram Krishan Sofat ....Petitioner/Accused

Versus

Dr. Rajeev Bindal Ex-Health Minister of H.P. ....Non-petitioner/Complainant

Cr.MMO No. 10 of 2016
Order Reserved on 21st November 2016
Date of Order 07 December 2016

Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offences punishable under Sections 500, 501, 502, 503, 504, 505, 506 read with Section 177, 182 and 186 of I.P.C.- the Magistrate found that a prima facie case was made for the commission of offences punishable under Sections 500, 504 and 506 of I.P.C but no case was made for the commission of other offences- a revision was preferred, which was partly allowed and it was held that prima facie case was made out for the commission of offence punishable under Section 500- held, that the statements and the documents prove that there are sufficient ground to proceed against the accused for the commission of offence punishable under Section 500 of I.P.C – the Court has to prima facie satisfy itself that there are sufficient grounds for proceeding against the accused at the stage of summoning of the accused - mere pendency of the civil suit is not sufficient to dismiss the criminal complaint – petition dismissed. (Para-9 to 17)

Cases referred:

Nagawwa vs. Veeranna Shivalingappa Konjalgi, AIR 1976 SC 1947
Chandra Deo Singh vs. Prokash Chandra Boase, AIR 1963 SC 1430
Madan Razak vs. State of Bihar, AIR 2016 SC (Weekly) 122
Ashok Kumar Sarkar vs. Radha Kanto Pandey and others, AIR 1967 Calcutta (DB) 178
State of Bombay vs. S.L. Apte and another, AIR 1961 SC 578

For Petitioner: Mr. H.S. Rana, Advocate.
For Non-petitioner: Mr. Sudhir Thakur Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Article 227 of Constitution of India read with Section 482 Cr.P.C. against summoning order dated 2.6.2012 passed by learned Chief Judicial Magistrate Solan District Solan H.P. in private complaint No. 49/2 of 2012 registered under Sections 499, 500, 501, 502, 503, 504, 505, 506 read with Section 177, 182 and 186 of Indian Penal Code and against order of learned Additional Sessions Judge-I Solan District Solan passed in revision petition No. 17-S/10 of 2012 vide which learned Additional Sessions Judge partly accepted the revision petition and affirmed summoning order issued against petitioner qua criminal offence punishable under Section 500 IPC only.

Brief facts of the case

2. Dr. Rajiv Bindal Ex-Health minister of H.P. filed private criminal complaint against Shir Mohinder Nath Sofat under Sections 500, 501, 502, 503, 504, 505 and 506 read with Section 177, 182, and 186 of Indian Penal Code alleging that at the time of filing of complaint complainant was Health Minister in Government of H.P. for the last four years and previously he was member of legislative assembly of Himachal Pradesh from Solan constituency (H.P.). It is alleged that complainant namely Dr. Rajiv Bindal enjoys very good reputation. It is further alleged that accused alleged false allegations of corruption against complainant namely Dr. Rajiv Bindal. It is further alleged that accused has alleged by way of publication in news that complainant was owning 300 metres of land only prior to elections and after elections complainant is owner of 160 bighas of land. It is alleged that accused has uttered words that complainant is brand ambassador of corruption. It is alleged that above stated act of accused is highly defamatory and highly derogatory in nature. Prayer for punishment of accused in accordance with law sought.

3. Learned Trial Court examined three witnesses in preliminary evidence namely CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup. Learned Judicial Magistrate held that after perusal of oral statements of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup coupled with documentary evidence Ext.P1 to Ext.P82 prima facie case is made out against accused under Sections 500, 504, 506 IPC. Learned Chief Judicial Magistrate Solan held that no primafacie case against accused is made out qua criminal offence punishable under Sections 501, 502, 503, 505, 177, 182 and 186 IPC.

4. Feeling aggrieved against summoning order of learned Chief Judicial Magistrate accused Mohinder Nath Sofat filed revision petition No. 17-S/10 of 2012 before learned Additional Sesisons Judge-I Solan. On 29.10.2015 learned Additional Sessions Judge-I Solan District Solan H.P. partly allowed the revision petition. Learned Additional Sessions Judge held that no primafacie case under Sections 504 and 506 IPC is made out against accused Mohinder Nath Sofat. However learned Additional Sessions Judge-I Solan District Solan H.P. held that primafacie case under Section 500 IPC is made out against accused.

5. Feeling aggrieved against order of learned Additional Sessions Judge-I Solan District Solan H.P. accused Mohinder Nath Sofat filed present petition under Article 227 of Constitution of India read with Section 482 of Code of Criminal Procedure 1973 before High Court of H.P.

6. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner and also perused the entire record carefully.

7. Following points arises for determination in this petition:-

1. Whether petition filed under Article 227 of Constitution of India read with Section 482 of Code of Criminal Procedure is liable to be accepted as per grounds mentioned in petition?
2. Final Order.

8. Findings upon Point No.1 with reasons

8.1 CW1 Dr. Rajiv Bindal has stated in preliminary evidence that he is doctor by profession and he is private practitioner. He has stated that he is also social worker. He has stated that he was elected as legislature from Solan in the year 2000. He has stated that thereafter he was again elected as legislature in the year 2003. He has stated that thereafter he was again elected as legislature in the year 2007. He has further stated that thereafter he was appointed as Health Minister in H.P. Government w.e.f. 9.1.2008. He has stated that he belongs from reputed family and his father used to pay income tax. He has stated that accused is his political rivalry. He has stated that accused contested the assembly elections against him in the year 2003 but he was defeated. He has stated that accused started giving defamatory statement against him in the media. He has stated that defamatory statement was also published in

newspaper against him. He has stated that accused uttered false defamatory statement against him with intention to defame him in general public. He has further stated that his reputation was effected in general public due to defamatory statement given by accused in press. He has tendered into evidence news items Ext.P1 to Ext.P86 placed on record. He has stated that thereafter he issued notice Ext.PX to accused. He has also stated that postal receipt is Ext.PY and reply of notice is Ext.PZ. He has stated that accused be punished in accordance with law.

8.2 CW2 Lokeshwar has stated in preliminary evidence that complainant Dr.Rajiv Bindal is known to him and accused namely Mohinder Nath Sofat is also known to him. He has stated that doubt has created in his mind about integrity of Dr.Rajiv Bindal after allegations of corruption levelled by accused Mohinder Nath Sofat against Dr.Rajiv Bindal. He has stated that after allegations of corruption he did not generally meet Dr.Rajiv Bindal. He has stated that Dr.Rajiv Bindal was not called in social functions due to allegations of corruption levelled against Dr.Rajiv Bindal in press and media by accused Mohinder Nath Sofat.

8.3 CW3 Kanti Sarup has stated that he remained as Pardhan of Gram Panchayat continously for two times and remained Up-Pardhan of Panchayat for one time. He has stated that complainant Dr.Rajiv Bindal is known to him. He has stated that Dr.Rajiv Bindal complainant is honest person and he has great reputation in society. He has stated that complainant Dr.Rajiv Bindal has won assembly elections due to good reputation. He has stated that accused Mohinder Nath Sofat levelled false allegations against Dr.Rajiv Bindal relating to acquirement of property in illegal manner. He has stated that defamatory statements were published in papers and media. He has further stated that Mohinder Nath Sofat accused visited village to village and spread defamatory statements against Dr.Rajiv Bindal. He has stated that when he read defamatory statement against complainant Dr.Rajiv Bindal in newspaper he stopped meeting with Dr.Rajiv Bindal. He has stated that reputation of Dr.Rajiv Bindal effected due to defamatory statements published in newspaper.

8.4 Complainant also tendered into preliminary evidence news publications Ext.P1 to Ext.P86.

9. Submission of learned Advocate appearing on behalf of petitioner that there is no sufficient ground for summoning the accused under Section 500 IPC in present case is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused testimonies of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup recorded under preliminary evidence and Court has also carefully perused documentaries evidence Ext.P1 to Ext.P86 placed on record. After careful perusal of testimonies of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup in preliminary evidence and after careful persual of documentaries evidence Ext.P1 to Ext.P86 annexed with complaint Court is of the opinion that there are sufficient grounds to proceed against accused under Section 500 IPC.

10. Submission of learned Advocate appearing on behalf of petitioner that accused did not commit any offence punishable under Section 500 IPC and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that judicial findings whether accused committed criminal offence punishable under Section 500 IPC or not cannot be given at this stage of case and judicial findings relating to fact whether accused has committed criminal offence or not will be given by learned Trial Court after giving due opportunities to both parties to lead evidence in support of their case. It is well settled law that at the time of summoning accused learned Trial Court is not under legal obligation to weigh evidence in meticulous consideration. It is held that at the stage of summoning the accused Magistrate is mainly concerned with allegations made in complaint and preliminary oral evidence and documentaries evidence adduced in support of complainant. It is well settled law that Magistrate should not enter into detailed discussion of merits and demerits of case and Magistrate should primafacie satisfy whether there are sufficient grounds for proceeding against accused or not at the summoning stage of case. ***See AIR 1976 SC 1947 Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi. See AIR 1963 SC 1430 Chandra Deo Singh vs. Prokash Chandra Boase. See AIR 2016 SC (Weekly) 122 Madan Razak vs. State of Bihar.***

11. Submission of learned Advocate appearing on behalf of petitioner that complainant did not examine publisher or auditor in preliminary evidence and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that oral testimonies of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup are prima facie sufficient grounds to proceed against accused under Section 500 IPC because CW2 Lokeshwar has specifically stated when he appeared in witness box that after publication of defamatory statement in newspaper reputation of complainant CW1 Dr.Rajiv Bindal lowered down in his eyes and he ceased his links with Dr.Rajiv Bindal. Similarly CW3 Kanti Sarup has also stated that after publication of defamatory statement against complainant Dr.Rajiv Bindal in press reputation of Dr.Rajiv Bindal lowered down in his eyes and he stopped meeting Dr.Rajiv Bindal. It is held that oral testimonies of CW2 Lokeshwar and CW3 Kanti Sarup are sufficient to proceed against accused Mohinder Nath Sofat under Section 500 IPC.

12. Submission of learned Advocate appearing on behalf of petitioner that testimonies of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup are not sufficient to proceed against accused because none of witnesses has stated that they have seen the petitioner issuing statement in press or public and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. CW2 Lokeshwar and CW3 Kanti Sarup have specifically stated in preliminary oral evidence that when they read the news in newspaper that complainant Dr.Rajiv Bindal has acquired illegal property by way of corruption after becoming Health Minister of H.P. Government then reputation of Dr.Rajiv Bindal lowered down in their eyes. There are direct allegations against accused Mohinder Nath Sofat that news were published in newspaper at the instance of accused Mohinder Nath Sofat. It is held that in view of above stated facts primafacie there are sufficient grounds to proceed against accused under Section 500 IPC.

13. Submission of learned Advocate appearing on behalf of petitioner that dcouments were released to media on behalf of H.P. Lokhit Paty a breakaway group of BJP and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Accused Mohinder Nath Sofat at the time of release of news item was member of Lokhit party a breakaway group of BJP and Mohinder Nath Sofat had released the documents to media directly and direct active participation of accused is primafacie proved at this stage of case as per testimonies of CW2 Lokeshwar and CW3 Kanti Sarup and as per documents Ext.P1 to Ext.P86 adduced in preliminary evidence.

14. Submission of learned Advocate appearing on behalf of petitioner that complainant did not implead Lokhit party as co-accused in present case and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. There are direct allegations against accused Mohinder Nath Sofat that accused Mohinder Nath Sofat directly took active part and used defamatory statement against complainant. It is well settled law that learned Trial Court can implead a person as co-accused at any stage of case if learned Trial Court comes to conclusion that other persons have also committed criminal offence.

15. Submission of learned Advocate appearing on behalf of petitioner that complainant Dr.Rajiv Bindal has also filed civil suit for damage to the tune of Rs.fifteen lacs and parallel civil and criminal proceedings relating to similar facts cannot continue is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that suit for damage to the tune of Rs.fifteen lacs and criminal complaint under Section 500 IPC are two distinct civil and criminal offence. It is well settled law that harm to reputation of person defamed is common ground in both civil and criminal proceedings and truth of imputation is defence in both civil and criminal proceedings. It is well settled law that damage is granted in civil defamation proceedings and conviction and sentence of imprisonment are granted in criminal proceedings of defamation. It is well settled law that defamation is of two kinds. (1) Libel (2) Slander. It is well settled law that libel is by way of (1) Writing (2) Printing (3) Picutres (4) Effigies. It is well settled law that slander defamation is always made by spoken words. ***See AIR 1967 Calcutta (DB) 178 Ashok Kumar Sarkar vs. Radha Kanto Pandey and others.*** It is well

settled law that if two remedies are distinct then notwithstanding the fact that allegations of facts into two remedies are substantially similar then two parallel civil and criminal proceedings would be continued. ***See AIR 1961 SC 578 State of Bombay vs. S.L. Apte and another.***

16. Submission of learned Advocate appearing on behalf of petitioner that accused is innocent person and he has been falsely implicated in present case and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Judicial findings whether accused is guilty or not cannot be given at this summoning stage of case. Judicial findings about absence of mensrea or actus reus would be given by learned Trial Court after giving due opportunities to both parties to lead evidence in support of their case. Accused would be at liberty to take all defences available to him as provided in exception first to tenth exception provided under Section 499 of Indian Penal Code during trial of case. It is held that at the stage of summoning the accused the Magistrate has to simply see whether primafacie there are sufficient grounds to proceed against accused or not. It is held that at the stage of summoning the accused Magistrate is not under legal obligation to meticulously discuss merits and demerits of case. In view of above stated facts point No.1 is answered in negative.

Point No. 2 (Final Order)

17. In view of findings upon point No. 1 above petition is dismissed. Parties are directed to appear before learned Trial Court on ***20.12.2016.*** Observations made in this order will not effect merits of case in any manner and will strictly confine for disposal of petition. File of learned Trial Court and learned Additional Sessions Judge-I Solan District Solan H.P. be sent back forthwith along with certify copy of order. Learned Trial Court will dispose of petition expeditiously within three months because private criminal complaint is pending since 2012 and requires expeditious disposal. Cr.MMO No. 10 of 2016 is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

M/s Quality Industries Corporation .....Petitioner

Versus

State of Himachal Pradesh and another .....Respondents

CWP No. 2544 of 2016
Reserved on: November 11, 2016
Decided on: December 7, 2016

Constitution of India, 1950- Article 226- Petitioner participated in tender process for the supply of tools and equipments for vocational laboratories/workshop – petitioner was recommended for grant of contract by Tender Evaluation Committee- however, the tender process was cancelled- respondent pleaded that complaints were received regarding discrepancies in the tendering process- hence, a decision was taken to cancel the whole process- held, that it was not disputed that the petitioner was the lowest tenderer – tender was cancelled on the ground of discrepancies and the shortcomings – all purchases beyondRs.50 lacs were to be carried out by e-tender but in the present case this procedure was not adopted – there was no infirmity in the cancellation of the tender – Court can interfere in the tender or contractual matter only when the process adopted or the decision taken is malafide or intended to favour some persons – no such circumstances were established in the present case- writ petition dismissed.(Para-8 to 30)

For the petitioner : Mr. Rajnish Maniktala, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Varun Chandel, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Instant petition under Article 226 of the Constitution of India has been filed seeking following main reliefs:

"(i) That the orders of cancellation of tenders dated 19.09.2016 (Annexure P-16) issued by respondent No.2 may be quashed and set aside.

(ii) That the respondents may be directed to finalize the present tendering process issued vide tender documents placed on record as Annexure P-13."

2. Briefly stated the facts of the case, as emerge from the record are that petitioner is a proprietor firm having its office at Ambala Cantt. Petitioner participated in tender process for the supply of the tools and equipments for vocational laboratories/ workshops of functional trades in National Skill Qualification Framework (NSQF) which was floated by respondent No.2. Petitioner was found to be lowest bidder and petitioner firm was recommended for grant of contract by the Tender Evaluation Committee. However, on 19.9.2016, tendering process was cancelled.

3. The respondents-State by its reply stated that a tender notice was published in three leading newspapers dated 1.6.2016, for the supply of tools and equipment for establishing vocational laboratories in various Government Senior Secondary Schools on the basis of technical specifications finalized by a Technical Committee constituted for this particular purpose by the Government of HP. 8 Firms participated in the pre-bid meeting, wherein all the points about the technical specifications were addressed. Technical bids were opened on 23.6.2016 by the Technical Evaluation Committee and four participating firms including petitioner were found qualified. Financial bids were opened on 19.7.2016 and rates quoted by the petitioner firm were found to be lowest and same were announced. However, various complaints were received by respondents regarding discrepancies in the tendering process and pointed out shortcomings in the specifications. On the direction of State Government to conduct tendering process as per Rules, respondent No. 2 took decision to cancel the tendering process. It was specifically averred in the reply that the tendering process was cancelled on following shortcomings, i.e. (a) That e-tendering process was not followed as the department did not have e-tendering Platform, and (b) that specifications of some of the items were found lengthy and exaggerated. These errors crept in due to lack of technical know-how of the Committee constituted for the purpose. It was further stated that petitioner was free to compete in e-tendering process as it would be much fair and transparent.

4. During the course of proceedings, petitioner filed an application for placing on record additional documents suggestive of the fact that despite there being aforesaid decision of cancellation on the ground of e-tendering, respondent department is still continuing with the procedure of inviting offline/manual tender. Petitioner also placed on record documents to demonstrate that objections with regard to e-tendering in the instant case were also overruled by the Joint Controller (Finance) and thereafter department proceeded ahead by inviting offline/manual tender, in which petitioner emerged as the lowest bidder.

5. Mr. Rajnish Maniktala, Advocate appearing for the petitioner, vehemently argued that action of the respondents in cancelling the tender for the supply of Tools and Equipments for Vocational Laboratories/Workshops of Vocational Trades/Subjects under National Skill Qualification Framework in 300 Government Senior Secondary Schools of Himachal Pradesh, is illegal and colourable exercise of power, especially in view of the fact that entire process was completed and bids furnished by petitioner were duly accepted by the Technical Committee constituted in this regard by the Department. While referring to the cancellation order, annexure P-16, Mr. Maniktala, strenuously argued that it suffers from legal malafides especially when petitioner had furnished all requirements and after valuation of Technical Committee, he was found to be successful bidder, respondents had no authority to cancel the same that too without

assigning any reason in the cancellation order. He further argued that cancellation of tender dated 19.9.2016, is a non-speaking order because, save and except, "due to administrative reasons", no other plausible reason has been assigned, which itself suggests unreasonableness, arbitrariness of the action taken by the respondents in haste. He further invited attention of the Court to the reply filed by the respondents to demonstrate that the decision to cancel the order has been taken at the behest of those firms, which had participated in the tender process and had failed to procure the tender, since their specifications and rates were not found suitable by the respondent department. While concluding his arguments, Mr. Maniktala forcefully contended that no action could be taken on the complaints having been filed by the other competitors, who had admittedly participated in the tender.

6. Mr. Shrawan Dogra, learned Advocate General, duly assisted by Mr. Anup Rattan, Additional Advocate General, supported the decision of cancellation of tender passed by the authorities and stated that since entire process initiated by the Department for inviting tender in question was in violation of the policy of procurement framed by the Government of Himachal Pradesh, wherein material/ specifications provided in the tender in question could only be procured through e-tender, there is no illegality in the cancellation order passed by the respondents. Mr. Dogra, strenuously argued that before any final decision could be taken in the matter, after valuation of the bid by the Technical Committee, respondent-State received certain complaints with regard to procedure adopted by the department while inviting tender, as a result of which matter traveled upto the Minister in-charge i.e. Hon'ble Chief Minister, who after verifying the records directed the authorities concerned to take decision in accordance with rules. He further invited attention of the Court to clause 15 of the tender document, to suggest that decision with regard to acceptance of tender entirely vested with the State Project Director, Rashtriya Madhyamik Shiksha Abhiyan (RMSA), and he has right to accept or reject the tender without assigning any reason. While concluding his arguments, Mr. Dogra also invited attention of the Court to the procedure of procurement i.e. FM&P manual prepared in accordance with the provisions of GFR-2005 and as per latest CVC guidelines, required to be adopted, especially under RMSA, wherein it has been specifically provided that procurement of all goods, work and consultancy services under RMSA project is required to be carried out in accordance with principles, rules and procedure contained in Chapter 8 i.e. 'procurement under RMSA'. Table 6, Annexure XXV, column No.5 suggests that any procurement above Rs. 50.00 Lakh is required to be done through open tender for civil works, goods and services. Mr. Dogra while referring to the documents having been annexed by the petitioner alongwith petition as well as application for placing on record additional documents, contended that, true it is that petitioner firm was found to be lowest bidder but that can not be the sole ground to award work in its favour, especially in view of non-compliance of procedure as prescribed under the provisions of "FM&P manual). The material advertised in the Notice Inviting Tender could only be procured through e-tendering.

7. We have heard the learned counsel for the parties and also gone through the records.

8. This Court, after perusing documents available on record and after hearing submissions having been advanced by the counsel representing the petitioner, at the stage of issuance of notice, called for the original record of the case from the respondent-State, which was produced and same was perused by this Court at the time of final hearing of the case. After carefully perusing the pleadings as well as documents annexed thereto, it is undisputed that petitioner firm was found to be the lowest bidder and it was recommended for grant of contract by the Tender Evaluation Committee. Aforesaid factum of petitioner firm having been found to be the lowest bidder has also not been disputed by the respondent-State. Vide order dated 19.9.2016, respondent-State took a conscious decision to cancel tender process invoking clause 15 of the tender document, which empowers the State Project Director, RMSA to cancel any tender without assigning any reason.

9. True it is, perusal of annexure P-16 i.e. cancellation order nowhere stipulates specific reasons for cancellation of tender in question. Respondents have simply cancelled the

tender citing administrative reasons, which may not be sufficient to justify cancellation. However, perusal of reply filed by respondents No.1 and 2, which is supported by affidavit of State Project Director, RMSA, suggests that after completion of evaluation by the Technical Evaluation Committee, wherein petitioner alongwith four other participating firms was found to be qualified as per specifications, complaints were received regarding discrepancies in the tendering process and tender document. It would be appropriate to reproduce following portion of the reply filed by respondents No.1 and 2:

> 1. That, the tender was issued for the supply of tools & equipment for establishing vocational laboratories in various Government Senior Secondary Schools on the basis of technical specifications finalized by a technical committee constituted for this particular purpose by the Government of HP through a tender notice published in three leading newspaper on dated 1/6/2016 and 8 firms participated in the pre bid meeting wherein all the points raised by the participating firms about the technical specifications were addressed. Subsequently eight firms submitted their bids.
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> 2. The technical bids were opened on 23/6/2016 by the technical evaluation committee and four participating firms including that of the petitioner were found to be qualified as per the specifications. As a result financial bids were opened on 19/7/2016 and the rates quoted by the petitioner firm were found to be lowest and the same were announced. On finding the rates of the petitioner firm lowest in all the tendered items, various complaints were received in the office of the Respondent No. 2 regarding discrepancies in the tendering process and tender document .
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> 3. That one firm Science and Surgical House averred that there were some faulty specifications which are not common in the market and hence prejudiced. The firm namely Amco Industries and Export Corporation stated that there was fixing with the party and the process was not fair. It further stated that there was big difference in lowest and highest bid and the foul play was apprehended.
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> 4. That the same firm namely Amoco Industries stated that the specifications were manipulated and rigid in nature. On examination of the complaints it was found that the averments made by the complainants were just an after thought and same were designed to somehow
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> stall the process and press for retendering. However, demand for E-Tendering and some infirmities in specification were found to be a fair demand. The demand for e-tendering was examined in lien with the procurement plan as suggested under Rashtriya Madhyam shiksha Abhiyan (RMSA) manual RMSA Manual has prescribed that for procurement over 50 lakh , e-procurement should be followed.
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> 5. That considering the urgency of vocational LABS IN 300 Government senior secondary schools in wchich vocational streams have been started during 2015-16 , the matter was referred to the Government for relaxation of e-tendering process as the incumbent office does not have e-tendering platform as on date and in anticipation of that a fair and transparent tendering process had been adopted for the captioned procurement. The Government however, directed that the entire procurement must be done as per rules.
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> 6. That, the Respondent no. 2 took the decision to cancel the tender on dated 19/09/2016 by invoking clause 15 of the tender document and decided to go for e-tendering as per the RMSA framework.
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> 7. That in addition to E-tendering the decision was also taken in view of the various discrepancies such as item No. 6,9,11,12,13,14,34,38, 40, 41,35,52 in the specification of the 'Telecom Lab', item no. 29,30,63 in 'Agriculture' item no. 15, 21 in 'Retail' and item No. 21,22,23,24,26,42, in the specification of security. These specification were either lengthy or not common in market and are being

amended for E-tendering and the decision to cancel the tender was taken in public interest as there was a point in the complaint of some firms, who approached the Chief Minister/ DGP (Police), HP/Secretary Education, HP Government/ Anti-Corruption Bureau, HP/Finance Secretary, HP Government/ DGP Vigilance regarding infirmities in tendering process. After consulting different agencies it was decided to float the E-tender and rectify the discrepancies in the tendering process.

8. That, the petitioner firm has not been unfairly treated since tender was initially awarded to them and there was no malafied intention on the part of respondents. The reason for cancellation was mainly the discrepancies in tendering process.

9. That, the petition may be dismissed and the department may be allowed to float e-tender in the interest of justice. The respondent has no grudge or bad intention against the petitioner who has still the opportunity to complete in the e-tendering process."

10. Close scrutiny of the aforesaid averments contained in the reply suggests that since there were certain discrepancies in the items/specifications given in the Notice Inviting Tender, participant firms were unable to quote rates and apart from above, a few items /specifications were not common in market. Most importantly, decision to cancel the tender was taken at the level of Hon'ble Chief Minister specifically on the ground that procurement of specifications as quoted in the tender was required to be done through e-tendering. Accordingly, respondent Department after obtaining approval of the Minister in-charge i.e. Hon'ble Chief Minister, decided to adopt e-tendering by canceling the present tender.

11. Perusal of documents placed on record by the petitioner alongwith CMP No. 8780/2016, also suggests that the financial/commercial bids submitted by the petitioner qua all the specifications were found to be lowest. Accordingly, Committee proposed that L-1 (lowest bidder) identified for six vocational labs could be directed to establish sample lab for each sector so that same could be inspected by the Technical/Expert Committee of RMSA. Proceedings of the meeting conducted for opening financial/commercial bids dated 19.7.2016 i.e. annexure C (page 216) also suggests that letter of award/supply order to the lowest bidder could only be issued after inspection and satisfaction of Technical Committee. Similarly, perusal of meeting of Technical Committee suggests that five representations were received from different parties regarding discrepancy in the tender. Out of these five parties, four had participated in the bids. The Committee with a view to meet the objections having been raised by the representationists, gave point-wise reply. It would be apt to reproduce relevant paras of meeting of the Committee:

"Keeping in view the above facts the committee has proposed that the L-1 i.e. lowest bidders identified for 6 Vocational Labs maybe directed to establish sample lab for each sector so that the same could be inspected by the technical/expert committee of RMSA. After the inspection & satisfaction of the technical committee we may issue letter of award/ supply order to the lowest bidder for 6 Vocational Sectors/Labs so that the Lab equipments could be procured by September 2016.

Accordingly the proceeding of the meeting held for opening of financial bids alongwith comparative statements are being placed below approval/signature.

However 5 representations have been received from different parties regarding discrepancy in these tenders. Out of these 5 parties 4 have participated as competitor in the bids. All these firms have raised different issues regarding the tendering process. In this regard it is submitted that the issues raised by the different firms seems to be biased and baseless because there has been complete transparency throughout the tendering process. The pre-bid meting was also conducted before the opening of the technical bids and all the bidders including 4 complainants were present in the pre-bid meeting also. The amendments suggestions given by the bidders regarding technical specifications

during pre-bid meeting were also incorporated and a corrigendum was issued to this effect.

The point wise reply is as under :-

I. Regarding opening of price bid without scrutiny of technical bid: -

There was thorough scrutiny of the documents in technical bid and it took nearly 25 days (23.06.2016 to 18.07.2016) to check the papers submitted in technical bid. There after the price bids were opened in the presence of the tenderers without any objection.

II. Regarding manual tender:-

The SPO Office is not yet on E-Tendering platform. Therefore manual tenders were invited. There was no objection regarding manual tender from any corner during the tendering process at all.

III. Regarding preponement of opening of price bid.

The opening of price bid was preponed to 10 AM on 19.07.2016, as SPD RMSA was to proceed on tour later in the day. All the parties were duly informed about the change of time through e mail as well as telephonically.

IV. Regarding manipulation in specifications/ terms & conditions: -

A pre bid meeting was held on 16.06.2016 to discuss about the specifications/ terms & conditions and a number of firms (7 out of 8) participated in the meting. The suggestions given by the participants were duly incorporated in the tender document by issuing a corrigendum on dated 16.06.2016."

12. Further, perusal of the noting placed on record by the petitioner itself available at page 225 suggests that representations were received by the Department and Secretary concerned approached the Hon'ble Chief Minister and informed him that their office did not have e-tendering platform and as such manual tendering process was followed. But careful perusal of noting given by the Secretary for the consideration of the Hon'ble Chief Minister i.e. Minister In-charge, itself suggests that there was a provision of e-procurement under the RMSA procurement manual for all purchases beyond Rs. 50.00 Lakh. The noting given by the Secretary (Education) is reproduced below:

"Regarding the representations on Tender Process, detailed replies have been made as per N-14 & 15. Also Hon'ble CM has called me in person and I had briefed him that our office does not have e-tendering platform. However, complete tendering process has been followed.

It is further brought in the notice of the Govt. that the proposed vocational labs are to be set up in 300 phase III Schools in which vocational classes have already commenced wef academic session 2015-16. If e-tendering process is to be followed, the same would take long time and result in inordinate delay in setting up vocational labs in The state. However, there is a provision of e-procurement as per RMSA procurement manual (Flag-A) for all purchases beyond 50 lacs. Submitted for further directions and order pl.

Sd/-
29/8

Pr. Sec(E)
For perusal pl.

Sd/-

Hon. C.M.
The … committee made for such purpose may take decision at its own level as per Rules.

Sd/-
Pr. Sec(Edu) SPD"

13. This Court, after carefully examining the aforesaid noting having been given by the Secretary, perused the original record produced by the Department to ascertain the views of the Hon'ble Chief Minister, who, in no uncertain terms, directed the concerned quarters to take decision as per Rules.

14. It is amply clear from the note given above by the Secretary, which was further approved by the Hon'ble Chief Minister that as per RMSA procurement manual, all purchases beyond Rs. 50.00 Lakh, especially under RMSA were to be done through e-procurement but in the instant case, as is evident from the records, procedure of e-procurement was not followed by the authorities while proposing purchase of items/ specifications contained in the tender document, rather same were proposed to be procured through open tender. It also emerges from the record that at the time of initiation of process of issuance of tender, Joint Controller(Finance) had noted in the concerned file that the process of e-tendering may be adopted for award of contract, but his objection was overruled and process for physical tender i.e. paper tender was adopted on the ground that the Department has no platform for e-tendering. However, it clearly emerges from the reply filed by the respondents that now the Department has the platform for e-tendering. Learned Advocate General specifically informed the Court that at present Department is well equipped with e-tendering platform and now procurement in question would be solely made through e-tendering process strictly in terms of procurement plan as suggested in the RMSA Manual.

15. This Court also perused Chapter-8 i.e. procurement under RMSA of FM&P Manual prepared in accordance with GFR-2005 which provides as under:

"CH 8

Procurement

8.1 Procurement in RMSA

8.1.1 The provision of the FM&P manual has been prepared in accordance with the provisions of GFR-2005 and as per latest CVC guidelines. However, in case of further changes in rules & regulations notified from time to time by said bodies, shall prevail and would be incorporated accordingly.

8.1.2. the cardinal principle of any public buying is to provide the Works /Goods/ services of the specified quality, at the most competitive prices, in a fair, just and transparent manner. To achieve this end, it is essential to have a uniform and well documented policy guidelines in RMSA scheme so, that this vital activity is executed in a well coordinated manner with least time and cost overruns.

Procurement of all works, goods and consultancy services under the project would be carried out in accordance with principle, rules and procedures outlined in this chapter. These principles, rules and procedure need to be understood and followed by the central and State Governments so as to enable them to procure 'Works', 'Goods' and 'Consultant Services" under the project. Compliance with these procedures will ultimately result in efficiency, economy, fairness and transparency in procurement.

8.1.3 The implementation of the national programme of Rashtriya Madhyamik Shiksha Abhiyan (RMSA) entails procurement of teaching and learning equipment and materials, furniture, school equipment, materials required for ..

Table 6 Annexure XXV

S.No.	Procurement Type	Financial Limit
1.	No Tender or Direct Purchase (Certificate to be furnished as per rule under 145 of GFR 2005)	Up to Rs.15,000/-

2.	Three member committee (Certificate to be furnished as per rule 146 of GFR 2005)	Above Rs.15,000/- and upto Rs. 1.00 Lakh
3.	Limited Tender	Above Rs. 1 lakh and upto Rs. 10.00 Lakh
4.	Open tender	Above Rs.10.00 Lakh and below Rs.50.00 Lakh
5.	Open tender using e-procurement process for Civil works, goods and services	Rs.50.00 Lakh or above
6.	Service Contracts	
6(a)	Direct Contracting (with three quotations)	Upto Rs.1.00 Lakh
6(b)	Limited tender	Above Rs.1.00 Lakh and upto Rs.10.00 Lakh
6(c)	Open tender	Above 10.00 Lakh

For different methods of procurement, MHRD may change these limits by a separate communication as and when required from time to time."

16. Aforesaid Chapter clearly suggests that any procurement under RMSA scheme for civil works, goods and services can only be by open tender by using e-tendering. It is undisputed that the procurement in the present case is more than Rs. 50.00 Lakh and respondent Department had floated the physical tender, for the supply of Tools and Equipments for Vocational Laboratories/Workshops of Vocational Trades/Subjects under National Skill Qualification Framework, in 300 GSSS in HP under RMSA.

17. Hence, in view of detailed discussion herein above, we see no illegality or infirmity in the decision taken by the respondent department for canceling the tender especially in view of the fact that no final decision, if any, was taken by the competent authority pursuant to recommendation of the Technical Evaluation Committee, which admittedly had found petitioner firm to be the lowest bidder. Since no final decision by the competent authority was taken in favour of the petitioner, no right could be stated to have accrued in its favour entitling it to the award of work. No doubt, there is substantial force in the contentions having been made by Mr. Maniktala that no complaint/representation could be entertained by the Department, made on behalf of those firms, which had participated in the tendering process, because they, after having failed to procure tender, had no right to point out discrepancy, if any, in the tender document. But in the present case, very basis of issuance of Notice Inviting Tender is in violation of procurement policy under RMSA and as such this Court sees no reason to interfere with the decision taken by the competent authority, which is in its wisdom and strictly in accordance with the policy framed by the Ministry of HRD, with regard to procurement, has decided to cancel the tender due to administrative reasons.

18. Further, by no stretch of imagination, court can assume the role of technical expert, who in their wisdom have cancelled the tender on account of technical /administrative reasons. Since respondents have already taken a conscious decision to recall the tender, this Court sees no occasion to grant relief as prayed for in the petition.

19. It is well settled by now that respondents can withdraw /recall tender at any time, if it is convinced that same is not in accordance with the requirements as indicated in Notice Inviting Tender. Though, in the present case, petitioner claimed himself to be lowest bidder on account of his financial bid but there is no document suggestive of the fact that pursuant to opening of his financial bid, he was awarded work, as such no right has accrued in his favour which would have entitled him to claim the relief as prayed for in the petition.

20. The Apex Court in **State of Jharkhand v. M/s. CWE-SOMA Consortium** reported in AIR 2016 SCW 3366, has held that:

> 13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-
>
> > "Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof." Clause 32.1 of SBD: "…the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action." In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.
>
> 14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness.

21. That Apex Court in **Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd.** reported in AIR 2016 SCW 3385, has held that:

> 13. First and foremost, under tender condition 2.5.5, commercial bids have to strictly conform to the format provided in Annexure 2 of the tender document. Annexure 2 which contains the format for the price bid makes it clear that the salary paid to deployed manpower should not be less than the minimum wage. It further goes on to state in paragraph 3 thereof that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected. On this ground alone, Respondent No.1's bid is liable to be rejected inasmuch as, vide its letter dated 3.9.2015, Respondent No.1 stuck to its original figure of Rs.2,77,68,000/- which is way below the minimum wage fixed by the Government. Secondly, Shri Raval is also right in stating that the without prejudice offer of Rs.3,00,92,346/- is an offer which is not fixed, but open ended. This is clear from the fact that it was up to the Government then to pick up either figure by way of acceptance. This is clearly interdicted by clause 2.5.6 of the tender which states that prices quoted by the bidder have to be fixed, and no open ended bid can be entertained, the same being liable to be rejected straightaway. Such condition is obviously an essential condition of the tender which goes to the eligibility of persons who make offers under the tender.
>
> 14. Unfortunately, even though the High Court noticed the open ended nature of Respondent No.1's bid, it went on to add that the offer of Respondent No.1 shall be treated as matching with the revised minimum wage calculation and that it is nowhere envisaged by the tender conditions that rejection of an offer which may have the potential of causing loss to the tenderer is present. It is not for the High Court to revisit a condition contained in Annexure 2 read with 2.5.5 of the tender

in the manner aforesaid. Once the tender condition states that the tender must strictly conform to the format provided in Annexure 2, and Annexure 2 in turn clearly states that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected, and the High Court cannot hold otherwise. The High Court's further finding that Respondent No.1's offer was "clear" is wholly incorrect. It was a without prejudice offer which muddied the waters and rendered the price quoted by the bidder as variable and not fixed.

22. The Apex Court in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)** reported in AIR 2016 SCW 3814, has further held that:

> 44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.
>
> 55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.
>
> 56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."

23. Admittedly, Court can go into the question of mala fides raised by a litigant, but in order to succeed, much more than a mere allegation is required. Bald and unfounded allegations of mala fides are not sustainable and that mala fides must be specifically pleaded and proved and such allegations of mala fides should be made with all sense of responsibility, otherwise, the maker of such allegations should be ready to face consequences.

24. It is equally well settled that the burden of proving mala fides is on the person making the allegations and the burden is 'very heavy." Reliance is placed upon ***E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3***.

25. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fides are often more easily made than proved and proof of high degree is required to prove the same. Reliance is also placed on ***Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800*** wherein it is held, *"It (mala fides) is the last refuge of a losing litigant."*

26. Reliance is also placed on ***Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760***, whereby it is held by the Apex Court that seriousness of allegations of mala fides demands proof of high order of credibility and the Courts should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office having high responsibility. It was held:

> *"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill- will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate*

exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579)."

27. Courts can interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India.

28. Principles of judicial review under Article 226 of the Constitution of India would apply to the exercise of contractual powers by the Government only in case the process adopted or decision making process of the authorities is wrong and illegal and in order to prevent arbitrariness or favoritism.

29. Reliance is further placed on ***Tata Cellular*** versus ***Union of India (1994) 6 SCC 651***, whereby Apex Cout has laid down the limitations in relation to the scope of judicial review of administrative decisions in exercise of powers awarding contracts:(SCC pp 687-88, para 94)

30. In the instant case, the decision regarding cancellation of the tender is a bonafide one and is otherwise in the larger public interest because by not adhering to e-tendering, rules were violated and as such for a fair and transparent tendering, e-tendering is necessary. Further, e-tendering would increase healthy competition amongst the participants, thereby saving the public exchequer. It is not a fit case to exercise powers of judicial review as there is no violation of the provisions of law and further there is no procedural aberration or error in assessment. It is more than settled that power of judicial review will not be permitted to invoke to protect private interest at the cost of public interest and reliance is placed on a judgment delivered by the Apex Court in ***Jagdish Mandal*** *versus* ***State of Orissa and others(2007) 14 SCC 517*** wherein the Hon'ble Supreme Court has held that before interfering in tender or contractual matters in exercise of judicial review, Courts should ascertain whether process adopted or decision made by the authority is mala fide or intended to favour some and whether process adopted or decision made is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached, and also whether public interest is affected.

31. Applying the aforesaid test to the instant case, the writ petition merits to be dismissed and is accordingly dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Shri Neeraj Naiyar and others .....Petitioners.
Versus
State of H.P. and another. .....Respondents.

Cr.MMO No. 163 of 2009 &
Cr.M.P No. 1222 of 2016
Date of decision: 7th December, 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Sections 447 and 506 read with Section 34 of I.P.C – petitioners have sought the quashing of FIR on the ground that the disputed land is located adjacent to the land of the petitioners – the land is in possession of the petitioners – held, that Civil Court had also found the petitioners to be in possession- continuation of criminal proceedings will be abuse of the process of the Court – petition allowed, FIR and consequential proceedings quashed. (Para-4 to 8)

For the petitioners:	Mr. K.D. Sood, Sr. Advocate with Mr. Rajeev Sood, Mr. Sanjeev Sood and Ms. Ranjana Chauhan, Advocates.
For the respondents:	Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs for respondent No. 1. Mr. Vikas Rathore, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)**.**

The petitioners are accused in FIR No. 245/08 registered under Section 447, 506 read with Section 34 of the Indian Penal Code, Police Station, Sadar, Chamba with the allegations that they entered upon the land belonging to Smt. Saristha Devi wife of complainant Madan Singh entered in Khasra No. 9422/9056 and 9422/9054 situated at mauza Chamba town-II, Tehsil and District Chamba, H.P. Not only this, they allegedly started construction of a tin shed thereon unlawfully. The accused-petitioners allegedly encroached upon the suit land to occupy the same by raising construction of tin shed thereon. The complainant and his wife when intervened and asked the accused-petitioners not to raise any construction over the land in question, they threatened them with dire consequences including to do away with their lives.

2. On the basis of the complaint made by Madan Singh aforesaid, FIR came to be registered and the investigation conducted by the police. The police has filed the challan in the Court of learned Chief Judicial Magistrate, Chamba. On perusal of challan and findings sufficient grounds to proceed further against the accused-petitioners, process was issued against them vide order dated 15.05.2009. The notice of accusation has also been put to the accused-petitioners under Section 447, 506 read with Section 34 of the Indian Penal Code. The case presently is at the stage of recording prosecution evidence.

3. The FIR and consequential criminal proceedings have been sought to be quashed on the grounds inter-alia that the land in dispute is adjoining to own land of the accused-petitioners bearing Khasra No. 10359/90/55/7211, Khata Khatauni No. 90/93 measuring 4426.07 square yards situated at Mauza Chamba town-II, Tehsil and District Chamba, H.P. The owner thereof to the extent of half share is Sagar Chand Naiyar, the predecessor-in-interest of the accused-petitioners. He has constructed road in the year 1966 over a portion of the land in dispute. The shed was constructed in the year 1970. No one objected to it. Smt. Sarishtha Devi wife of complainant after registration of sale deed got conducted the demarcation of her land on 04.10.2008. In the report, the revenue authorities have made

mention of existence of metalled road and one iron shed over the land allegedly entered upon by the accused-petitioners. Their predecessor Shri Sagar Chand Naiyar had filed Civil Suit No. 4/2008 along with an application under Order 39 Rule 1 and 2 of the Code of Civil Procedure. In the interim, learned District Judge, Chamba had directed the parties to maintain status quo qua the possession, nature and construction of the land in question till further orders. The interim order was made absolute on 27.11.2009 vide order, Annexure P-8. It has, therefore, been claimed that there is no question of the accused-petitioners having entered upon the land in question. The same rather was in their possession since time immemorial.

4. The civil suit which was instituted by deceased Sagar Chand Naiyar now stands decided vide judgment dated 29.09.2016. The certified copy thereof is annexed to the application, Cr.M.P No. 1222/2016 filed with a prayer to place the same on record. The application is allowed and the judgment is ordered to be taken on record. The perusal of the judgment reveals that learned Civil Judge (Senior Division), Chamba District at Chamba has held the plaintiffs (accused-petitioners herein) in possession of land in question, which is measuring 68.08 square yards. True it is that Smt. Srestha Devi, wife of complainant has been declared to be owner thereof, however, in view of the accused-petitioners are in possession of the land in dispute, she has been restrained from dispossessing them except in due process of law. Said Smt. Srestha Devi, wife of complainant may have preferred an appeal as argued by Mr. Rathore, learned counsel representing her, however, the fact remains that learned Civil Judge (Senior Division) on appreciation of the evidence available on record has arrived at a conclusion that it is the accused petitioners (plaintiffs in the suit) are in possession of the suit land.

5. Now if coming to the essential ingredients required to constitute the commission of an offence punishable under Section 447 of the Indian Penal Code, the provisions contained under Section 441 which defines criminal trespass reveals that in order to infer the commission of such an offence, the accused must have entered upon the property in the possession of another person (complainant) intentionally to commit an offence or to intimidate, insult or annoy such person in possession of the property. True it is that Smt. Srestha Devi has been held owner of the suit land may be on account of she having acquired the same from its previous owner by way of sale. The judgment passed in the civil suit by learned Civil Judge (Senior Division), Chamba, however, reveals that she is out of possession thereof. Learned Civil Jduge in para 20 and also 24 of the judgment has observed that metalled road is in existence over a portion of the land in question since the year 1970 to the notice and knowledge of the then owner of the suit land and retaining wall as well as one shed is already constructed by the plaintiff thereon.

6. Said Smt. Srestha Devi, the defendant in the civil suit may or may not succeed in the appeal, however, keeping in view the dispute civil in nature, allowing the criminal proceedings to go on further against the accused-petitioners would amount to abuse of process of law, when in view of the position discussed hereinabove, ingredients of commission of an offence punishable under Section 447 are not established. This Court has every doubt qua likelihood of the accused-petitioners to be ultimately held guilty for the commission of alleged offence. As a matter of fact, there is no likelihood of their's being convicted or sentenced in view of such material available on record and to the contrary, allowing the criminal proceedings to continue against them would amount to their harassment mentally and also financially. Therefore, there is no question of the accused-petitioners having entered upon the same within the meaning of Section 441 and thereby the commission of an offence punishable under Section 447 of the Indian Penal Code made out against them.

7. Now if coming to the offence the accused-petitioners allegedly committed under Section 506 of the Indian Penal Code, the allegations that the threatening to do away with the lives of complainant and his wife were held out at such a stage when the accused party requested not to raise any construction over the land in dispute also seems to be not genuine for the reason that as per the findings now recorded by the Civil Court on appreciation of the evidence not only the shed but the road was constructed over a portion thereof long back. The wife of complainant has acquired the land in dispute by way of sale on 07.01.2008. The previous owner thereof was

someone else. As per record the road and the shed were constructed by deceased Sagar Chand Naiyar in the year 1966 and 1970 respectively. Therefore, it is difficult to believe that the shed has been constructed recently by the accused-petitioners. Even if the evidence collected by the investigating agency is taken as it is i.e. without cross-examining the complainant and other witnesses, the present is a case where to allow the criminal proceedings to continue would not only amount to abuse of process of the law but also harassment of the accused-petitioners. The petition as such is allowed. Consequently, FIR No. 245/2008 and the consequential proceedings i.e. case No. 207-I/2009 titled State of H.P. versus Neeraj Nayyar and others in the Court of learned Chief Judicial Magistrate, Chamba are quashed and set aside. The record be returned to learned trial Court.

8. The petition is according allowed and stands disposed of. Pending application(s), if any, shall also stand disposed of.

Any observations made hereinabove shall not be construed to be a reflection on the merits of the appeal filed against the judgment and decree passed by learned Civil Judge (Senior Division), Chamba and shall remain confined to the disposal of this petition alone.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Subhash Chand .....Respondent.

Cr. Appeal No. 288 of 2008
Decided on : 7.12.2016

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 5 cartons of Indian made foreign liquor each containing 12 bottles and one carton of country liquor 'Patiala' brand- the accused was tried and acquitted by the Trial Court- held in appeal that independent witnesses were available but were not associated –the link evidence was missing – the case property was not bearing any seal when it was produced before the Court- the view taken by the Trial Court was reasonable- appeal dismissed.(Para-9 to 15)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondent: Mr. N.S Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 15.2.2008 rendered by the learned Judicial Magistrate, 1st Class, Barsar, District Hamirpur, in Excise Case No. 1-III-2007, whereby the learned trial Court acquitted the respondent (for short "accused") for the offences charged.

2. Brief facts of the case are that on 28.2.2006 at about 12.45 a.m. in the night HC Purshotam Dass No. 41 alongwith HHC Ajit Singh No. 149 and HHG Rakesh Kumar No. 10-5/101 was on patrolling duty at place Mehre vide Rapat Ex.PW-4/B. At the relevant time one Maruti car bearing No. HP-23A/2680 came from Dandru side at a high speed which was stopped by the police officials and on the basis of suspicion the aforesaid vehicle was checked. The police official recovered 5 cartons of Indian Made foreign liquor "Bagpiper whisky" each containing 12 bottles and one carton of country liquor "Patiala brand". The police extracted out 2 bottles from two cartons of "Bagpiper whisky" and 1 bottle of country liquor "Patiala brand", separately for sample purpose and thereafter sample bottles and remaining liquor were sealed and were taken

into possession vide recovery memo Ex.PW-1/B. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court qua his committing offence punishable under Section 61(1)(a) of Punjab Excise Act as applicable to the State of H.P, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 4 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and claimed false implication. However, he did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The seizure of liquor borne on the relevant seizure memo embodied in Ex. PW-1/B occurred at a place reflected in the site plan comprised in Ex. PW-3/B. The recovery of illicit liquor stood effectuated from vehicle bearing No.HP23A-2680 which at the relevant time stood driven by the respondent. The prosecution for proving the genesis of the occurrence embodied in the FIR depended upon the testimonies of official witnesses. All the official witnesses in their respective testifications occurring in their respective examinations-in-chief rendered a version qua the prosecution case bereft of any stain of any inter-se contradictions occurring therewithin vis-à-vis their respective communications articulated in their respective cross-examinations. Also their respective testifications are free from any taint of any intra-se contradictions, in sequel thereto their taint free testifications warranted imputation of credence thereto.

10. The learned trial Court had pronounced an order of acquittal upon the respondent merely for non-association by the investigating Officer concerned of independent witnesses who despite evident availability in proximity to the relevant site of occurrence remained omitted to be associated by him in the relevant proceedings. Though formidable evidence does exist on record qua availability of a thickly inhabited colony in close proximity to the site of occurrence yet the factum of a heavily populated colony occurring in close proximity to the relevant site of occurrence would not constrain an inference qua any omission on the part of the investigating Officer concerned to solicit their participation in the proceedings which occurred at the site of occurrence begetting a sequel of his thereupon concerting to smother the truth of the prosecution case or his inventing the effectuation of recovery of illicitly carried liquor bottles in the relevant car which at the relevant time stood driven by the respondent. Conspicuously also the aforesaid inference stands forbidden to be drawn by the evident factum of the relevant occurrence taking place in the morning at about 12.45 a.m. on 28.2.2006 whereat the inhabitants of homesteads occurring in close proximity thereof would not accede to any request of the investigating officer or of any official deputed by the investigating officer for soliciting their participation in the relevant proceedings. In sequel thereof the reason propounded by the learned trial Court qua non-association of independent witnesses in the relevant proceedings by the

Investigating Officer despite their evident availability in close proximity thereof ingraining the prosecution case with a pervasive stain of vitiation cannot warrant it standing accepted by this Court.

11. Even though on an incisive scanning of the evidence adduced by the prosecution, it is evident qua the aforesaid witnesses in their respective testifications voicing a taint free version qua the genesis of the prosecution case yet also when in their respective testifications they bespeak qua at the time contemporaneous to the relevant occurrence vehicles besides the vehicle wherefrom the relevant seizure occurred making their appearance at the relevant site of occurrence, nonetheless the afore-stated bespeakings occurring therewithin also cannot facilitate the defence to make any espousal qua non-association of their occupants by the Investigating Officer as independent witnesses qua the relevant proceedings making pervasive inroads qua the efficacy besides the tenacity of the prosecution case unless compatible suggestions unveiling the factum of the investigating officer in making the aforesaid omission(s) hence concerting to smother the factum of his despite effectuating the relevant recovery from the aforesaid vehicles, his proceeding to introduce the carton of liquor onto the vehicle driven at the relevant time by the accused. In absence of the aforesaid apposite suggestions the mere factum of vehicles arriving at the site of occurrence in contemporarnity to the relevant proceedings occurring thereat would not stain the vigor of the prosecution case.

12. The learned counsel for the accused has contended with force qua the prosecution standing enjoined with a solemn obligation under law to prove its case beyond reasonable doubt. He also submits qua the testifications of the official witnesses not holding any element of creditworthiness. However his submission holds no force as this Court has concluded qua the testimonies of the official witnesses while making echoings therein in proof of the genesis of the prosecution case their relevant articulations qua the relevant factum probandum when free from any taints aforesaid hence enjoining this Court to thereupon proceed to impute credence to their respective testimonies. In face thereof yet with the prosecution thereupon succeeding in proving the genesis of the prosecution case, the defence contrarily was under an obligation to belittle its creditworthiness or also was under an obligation to by putting apposite suggestion to the prosecution witnesses make a concerted attempt in portrayal of the entire genesis of the prosecution case voiced by the prosecution witnesses standing engulfed in a pervasive shroud of doubt whereupon this Court would stand facilitated to conclude of the prosecution failing to prove its case beyond reasonable doubt. However the defence has omitted to make the apposite endeavor. Significantly when the eminent principle of criminal jurisprudence though is held in the canon of the prosecution standing enjoined to prove its case to the hilt nonetheless for eroding the efficacy of propagations made by the PWs they are enjoined to be held to an exacting cross-examination for relevant unearthings therefrom standing elicited qua doubt hence seeping the genesis of the prosecution case whereupon alone on doubt standing reared qua the genesis or efficacy of the prosecution case would the apposite benefit accrue to the defence. Consequently when the aforesaid concerts are wholly amiss hereat nor any doubt qua the aforesaid facet hence is gripping the prosecution case, ensuing sequel wherefrom is qua its benefit being undrawable by the defence.

13. Though the defence had made a feeble attempt to by putting suggestions qua availability of a liquor vend in close proximity to the site of occurrence to unveil vaguely therefrom qua the investigating officer concerned after collecting the liquor therefrom his introducing it onto the vehicle driven at the relevant time by the respondent wherefrom the relevant seizure occurred. However the aforesaid feeble attempt is also bereft of any specificity especially when it does not hold therewithin any suggestion unveiling the aforesaid factum. Also with both PWs 1 and 3 wheretowhom the relevant suggestion stood put by the learned defence counsel while holding them to cross-examination qua the availability of a liquor vend in close proximity to the relevant site of occurrence though while meteing their respective answers thereto they acquiesced qua the relevant factum yet with both the aforesaid prosecution witnesses while meteing answers thereto also conveying qua its closing at 12.30 p.m. whereas the relevant seizure occurring 15 minutes thereafter whereupon the learned defence counsel was under an obligation to also put further

suggestions to them qua at the relevant time whereat the relevant seizure occurred the liquor shop also remaining open thereat yet he omitted to put the aforesaid suggestion to them wherefrom it has to be concluded qua at the relevant time, the liquor shop occurring in close proximity to the site of occurrence not being open thereat. In aftermath it has to be concluded qua the defence even if it has feebly attempted therefrom to convey of the Investigating Officer after making the relevant collection therefrom his introducing the liquor bottles onto the car of the respondent/accused yet its attempt also standing wholly enfeebled, corollary whereof is qua the concert made by the defence to belittle the creditworthiness of the prosecution case propagated through the un-tainted testimonies of the prosecution witnesses also its concert to prove qua a pervasive doubt seeping into the genesis of the prosecution case wherefrom it has concerted herebefore to constrain this Court to make a conclusion qua the prosecution failing to prove its case beyond reasonable doubt apparently has to suffer the ill fate of its suffering outright rejection from this court.

14. Be that as it may the entire vigor of the prosecution case was held in the relevant factum of it succeeding in proving qua the relevant seizure of the liquor bottles, seizure whereof stands embodied in Ex.PW-1/B, on their production before the Court for theirs standing shown to the relevant PWs theirs thereat standing invincibly connected with the seizure of liquor bottles embodied in the apposite recovery memo. Efficacious proof qua connectivity existing qua the seizure of liquor bottles held in the relevant seizure memo vis-à-vis the ones which stood produced in Court stood constituted in the trite factum of liquor bottles on standing produced in Court for theirs standing shown to the relevant PWs theirs standing held in sealed cartons/boxes. However with PW-1 in his cross-examination testifying qua on the case property on standing shown to him in Court it not holding seals thereon, constrains this Court to conclude qua efficacious proof qua existence of an imminent connectivity occurring inter-se the liquor bottles embodied in seizure memo comprised in Ex.PW-1/B vis-à-vis the ones which stood produced in Court standing not unflinchingly proven by the prosecution. In sequel thereof the ensuing deduction therefrom is qua the prosecution not thereby proving the factum of liquor bottles which stood produced in Court standing connected or related qua the bottles borne on Ex.PW-1/B or theirs standing related to the opinion of the FSL concerned. Concomitantly with the aforesaid link qua the relevant trite factum aforesaid standing not effectively proven obviously a doubt seeps qua the vigor of the prosecution case benefit whereof ought to go to the accused.

15. A wholesome analysis of evidence on record portrays that except qua the aforesaid parameters the appreciation of evidence as done by the learned trial Court not suffering from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit any interference.

16. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Records be sent back.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ... Appellant

Versus

Ram Kishan ... Respondent

Cr. Appeal No. 264 of 2012
Reserved on: 22.11.2016
Date of decision: 7.12.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1 kg. 550 grams charas- the accused was tried and acquitted by the Trial Court- held in appeal that the accused was travelling in the bus, however, no independent witness was associated- one police official was not examined – there are material contradictions in the testimonies of police witnesses – the testimonies of the police officials are not cogent or trustworthy and cannot be made basis for convicting the accused- appeal dismissed. (Para-9 to 21)

For the appellant: Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.
For the respondent: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this appeal, State has challenged judgment passed by the Court of learned Presiding Officer, Fast Track Court, Mandi, in Sessions Trial No. 54/2010 dated 29.09.2011, vide which, the accused has been acquitted for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act.

2. The case of the prosecution in brief was that on the intervening night of 26/27th December, 2009, ASI Satish Kumar, Investigating Officer, Police Station Jogindernagar alongwith other police officials had set up a Naka at Cinema Chowk, Jogindernagar. HHG Amar Singh and HHG Kali Dass, were on patrolling duty in beat No. 2. They were also associated in the Naka by the Investigating Officer. At around 12.45 A.M., one HRTC bus of Keylong Depot bearing registration No. HP-66-1307 came from Manali which was on its way to Dharamshala. This bus was stopped for checking. Accused was found sitting on Seat No. 37. As soon as he saw the police party, he got perplexed, as a result of which, the police party became suspicious. During his personal search, he was found to have tied some material with Cello Tapes to both his legs. He was alighted from the bus. The Cello Tapes tied to his legs were removed and some material of black colour in the shape of chapattis and sticks was recovered from the accused, which he had tied to his legs. On smelling, this material was found to be Charas and when weighed it was found weighing 1 kilogram 550 grams. Biri Chand was the driver of the bus and Duni Chand was conductor of the said bus. When asked, conductor Duni Chand disclosed that the accused had boarded the bus from Kullu to Baijnath. The bus ticket of the accused was attested by Duni Chand which was taken into possession by the police. Recovered Charas was packed in a cloth parcel which was sealed with six seals of 'S'. The socks of the accused and Cello Tape used for tying the Charas in legs, were put in another cloth parcel, which was also sealed with seal 'S'. NCB form was filled on the spot. The seal after its use was handed over to Constable Inder Dev. Recovered case property was taken into possession by the police vide seizure memo Ext.PW1/B. Constable Inder Dev and HHG Rvainder Kumar put their signatures on the seizure memo as witnesses and accused also put his signatures on it. Rukka Ext. PW-8/B was scribed and sent to the Police Station through HHG Amar Singh on the basis of which FIR Ext. PW-8/A was registered. Site plan etc. were prepared. Accused was arrested and after completion of formalities, the case property as well as the accused were taken to the Police Station. Case property was produced before the then S.H.O. Police Station Jogindernagar for resealing, which was resealed with three seals of 'N'. Case property was thereafter deposited with MHC Mangat Ram. The same was sent to the laboratory vide R.C. No. 213/09 through Constable Karam Singh. The recovered contraband on chemical examination was found to be Charas as per report of the Expert certificate Ext. PX.

3. After completion of the investigation, challan was filed in the Court and as a prima facie case was found against the accused, he was charged for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act, to which, he pleaded not guilty and claimed trial.

4. On the basis of evidence led both ocular as well as documentary, learned trial Court held that in view of non-association of independent witnesses coupled with the contradictions in the statements of the prosecution witnesses who were police officials, the alleged recovery of Charas from the possession of the accused from his personal search was doubtful. It further held that the evidence adduced by the prosecution could not be said to be sufficient to prove beyond reasonable doubt that 1 kilogram 550 grams Charas was recovered from the exclusive and conscious possession of the accused during his personal search. It was further held by learned trial Court that there was non-compliance of the mandatory provisions of Section 50 of Narcotic Drugs & Psychotropic Substances Act and as such, the prosecution could not be said to have proved the guilt of the accused. On these basis, learned trial Court acquitted the accused.

5. Feeling aggrieved by the said judgment passed by learned trial Court, the State has filed this appeal.

6. Mr. Vikram Thakur, learned Deputy Advocate General, has strenuously argued that the judgment of acquittal returned by learned trial Court is not sustainable in the eyes of law as learned trial Court erred in not appreciating that the prosecution had proved its case against the accused beyond reasonable doubt and learned trial Court had erred in discarding the well reasoned and consistent testimonies of the prosecution witnesses on material points. It was further argued by learned Deputy Advocate General that learned trial Court failed to appreciate and take into consideration the statements of PW-1 HC Inder Dev, PW-6 HHG Amar Singh and PW-10 ASI Satish Kumar in its correct perspective. According to Mr. Thakur, a perusal of the statements of these three witnesses clearly demonstrated that the prosecution had proved its case against the accused beyond reasonable doubt, however, learned trial Court had erred in returning the conclusion to the contrary. It was further argued by Mr. Thakur that learned trial Court had erred in not appreciating the testimony of the Investigating Officer to the effect that the statement of conductor could not be recorded for valid reasons that had been given by him. It was further argued by Mr. Thakur that the conclusion arrived at by learned trial Court that the mandatory provisions of Section 50 of Narcotic Drugs & Psychotropic Substances Act were not complied with was totally a wrong conclusion in the facts and circumstances of the case as it was a 'chance recovery'. On these grounds, it was urged by Mr. Thakur that the judgment of acquittal passed by learned trial Court was perverse and was liable to be set aside and the accused was liable to be convicted for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act.

7. Mr. Ajay Chandel, learned counsel for the respondent, on the other hand, argued that the judgment passed by learned trial Court was neither perverse nor the findings of acquittal returned by learned trial Court were incorrect. Mr. Chandel argued that learned trial Court after taking into consideration the entire evidence placed on record by the prosecution held that the prosecution had failed to prove its case against the accused. Mr. Chandel argued that in fact non-compliance of Section 50 of Narcotic Drugs & Psychotropic Substances Act was done by the prosecution because in fact no contraband was recovered from the accused by the prosecution and the accused had been framed in a false case. He further argued that no cogent explanation was there from the prosecution that as to why independent witnesses were not associated with search and seizure when it was the case of the prosecution that the alleged recovery of the Charas was made from the accused who was travelling in the bus. He further argued that contradictions and inconsistencies in the statements of the official witnesses were not minor but were major contradictions and they created serious doubt over the story of the prosecution and in this background, it could not be said that learned trial Court had erred in acquitting the accused. On these basis, it was argued that the judgment of acquittal returned by learned trial Court do not warrant any interference.

8. We have heard learned counsel for the parties and have also gone through the records of the case as well as judgment passed by learned trial Court.

9. As per the prosecution, the contraband was seized from the person of the accused on the intervening night of 26/27th December, 2009, while he was travelling in a bus which was proceeding from Manali to Dharamshala. The contraband was so seized when the said bus was stopped for checking at Jogindernagar at Cinema Chowk at around 12.45 A.M. Further, as per the prosecution, the accused was found sitting on Seat No. 37 and as he got perplexed when he saw police party. The police party became suspicious and during his search, it was found that he had tied some material with Cello Tapes in both of his legs. Taking the story of the prosecution as it is, we fail to understand as to when the police found that the accused had tied some material with Cello Tapes in both of his legs and he was alighted from the bus why no independent witness was associated with the search and seizure of the contraband. Not only this, admittedly, when the search and seizure was conducted by the prosecution on suspicion being raised by the conduct of the accused, no cogent explanation is there as to why the mandatory provisions of Section 50 of Narcotic Drugs & Psychotropic Substances Act were not complied with. Incidentally, it is not a case where the alleged recovery of the contraband was made by the prosecution from the accused either at an isolated place or secluded place. Though the prosecution has tried to explain non-joining of the independent witnesses and non-recording of the statement of the conductor on the ground that it was a cold night and the passengers were raising hue and cry, but according to us, the explanation which has been so given by the prosecution, does not seem to be creditworthy because it belies prudence that the police party did not record the statement of the conductor or the driver of the bus neither did it associate any independent witness from amongst other passengers present in the bus simply because it was a cold night or the passengers were raising hue and cry. It has come in evidence even otherwise that it is not as if immediately after the accused was nabbed by the police party, the bus was allowed to go. On the contrary, PW-6 has stated that bus remained at the spot during entire proceedings on the date in issue.

10. Besides this, even otherwise, story as has been put forth by the prosecution does not inspire confidence. The testimony of official witnesses is neither cogent or trustworthy nor does the same appear to be believable. The contradictions and inconsistencies in their statements have not been satisfactorily explained by the prosecution.

11. As per the prosecution, the Investigating Officer had associated Constable Inder Dev and HHC Ravinder Kumar as witnesses of search and seizure. HHC Ravinder Kumar was not examined by the prosecution and in fact he was given up by the prosecution on 13.06.2011 as being repetitive.

12. Inder Dev entered the witness box as PW-1 to corroborate the case of the prosecution and he has stated in his cross-examination that when the accused saw them (police party), he got frightened and they (police party) became suspicious that he must be possessing some contraband. He further stated that the search of the accused was carried out inside the bus. He also stated that the police officials did not give their personal search to the accused. He also stated that the Investigating Officer after having become suspicious that the accused was in possession of narcotic substance, did not give any option to the accused to be searched before Magistrate or Gazetted Officer. In our considered view, testimony of this witness creates a serious doubt over the version of the prosecution that it was a case of 'chance recovery'. It has come in his cross-examination that the bus was almost full except 3-4 seats and only three persons out of the police party went inside the bus.

13. HHG Amar Singh, who entered the witness box as PW-6 stated that when the police party entered the bus, accused who was sitting on seat No. 37 got frightened when he saw the police party and ASI Satish Kumar became suspicious. He further deposed that during checking, legs of accused were found to be swellon and when his pent was lifted, it was noticed that under the socks accused had tied something. He further deposed that thereafter the accused was taken out of the bus and on search, the tied material was found to be in shape of sticks and *chappati* of black colour which was *charas*. In his cross-examination, this witness stated that when accused became frightened, the police party became suspicious that he was possessing

some narcotic substance. He also stated that there were 2-3 passengers sitting on the same bench alongwith the accused. He also stated that on suspicion, accused was alighted from the bus by the police and thereafter, his search was taken. He also stated that HHG Ravinder Singh and Constable Inder Dev had brought weight and scale from nearby vegetable shop. He also stated that bus remained at the spot till the completion of entire proceedings and the entire proceedings were completed at about 1:45 a.m. He also stated that none of the passengers were associated as witness at the time of search and thereafter self stated that driver and conductor were associated as witnesses. He also stated that no file was taken by him from Police Station. He also stated that during the course of proceedings, he never visited the Police Station. Incidentally, in his examination-in-chief, PW-6 stated that Investigating Officer gave him ruqua which he gave to MHC and thereafter he handed over case file to Investigating Officer in the Police Station.

14. The Investigating Officer entered the witness box as PW-10. When we peruse the statement of PW-10 ASI Satish Kumar Investigating Officer, there is no mention in his examination-in-chief that while they were checking the bus in question, the accused was sitting on Seat No. 37 got perplexed when he saw the police party or raised a suspicion on account of his conduct. He has deposed in the Court as under:-

> "During the checking of the bus one person was found sitting on seat No. 37. During the checking of that person, it was found that he had tied some material in both his legs below knee. He was taken out of the bus. During the checking, it was found that he had wrapped a tape around his both legs."

15. It has further come in the testimony of PW10 that he brought weights and scale from a vegetable shop of Chota Walla alias Krishan from his servant Kripal Singh. While Kripal Singh has not been examined by the prosecution, the testimony of Investigating Officer that he brought weights and scale from a nearby shop is belied by the statement of PW-6 who has stated that the weights and scale were brought from the nearby shop by Ravinder and Inder Dev.

16. Moreover, while it has come in the cross-examination of PW-10 that the accused was sitting alone on the bench of Seat No. 37, whereas it has come in the statement of PW-6 that 2-3 persons were also sitting on the same bench.

17. Not only this, while as per PW-10 ASI Satish Kumar, there were 15-20 passengers in the bus, however, it has come in the statement of PW-1 that the bus was almost full except 3-4 seats.

18. Further, whereas in his cross-examination PW-10 has stated that the case file was brought from Police Station by HHG Amar Singh and handed over to him at around 03.00 A.M. Amar Singh (PW-6) on the contrary has stated that he did not bring any file from the Police Station to the spot. Not only this, whereas PW-10 has stated that the file was handed over to him at the spot at around 03.00 A.M. PW-6 has deposed that the entire police party had left the spot at around 01.45 A.M.

19. In our considered view, these are major contradictions and inconsistencies in the testimony of main prosecution witnesses on the strength of whose testimonies prosecution wants the conviction of the accused. Statements of these official witnesses are neither cogent nor trustworthy at all and these cannot be made basis for convicting the accused. The contradictions and inconsistencies in their statements cannot be terms as minor but are major and these contradictions create very serious doubt as to whether any contraband was in fact recovered from the accused by the police party on the date, time and place as the prosecution wants this Court to believe.

20. As we have already discussed above, apparently it does not seem to be a case of 'chance recovery' and the prosecution has made it a case of 'chance recovery' just to get out of the rigors of Section 50 of Narcotic Drugs & Psychotropic Substances Act, which are mandatory. Neither the driver of the bus nor the conductor of the bus has been examined by the prosecution

nor other passengers travelling in the bus has been examined by the prosecution to substantiate its case that the contraband was recovered from the accused in the mode and manner in which the prosecution wants this Court to believe. Non-joining of independent witnesses with the search and seizure on the pretext that it was a case of 'chance recovery' also does not seem to be believable. It has clearly come in the deposition of PW-1, PW-6 as well as in cross-examination of PW-10 that before the search of the accused, police party had become suspicious that he was possessing some narcotic substance. Whereas PW-1 has stated that the accused was searched inside the bus, it has come in the statements of PW1 and PW-10 that he was searched after being alighted from the bus.

21. Therefore, in our considered view, it cannot be said that on the basis of evidence both oral as well as documentary prosecution had proved its case against the accused beyond reasonable doubt. A perusal of the judgment passed by learned trial Court also demonstrates that it has exhaustively taken into consideration the entire evidence produced on record by the prosecution and after appreciation of the same has held that the prosecution was not able to prove its case against then accused on the strength of evidence placed on record. We concur with the findings so returned by learned trial Court. The findings so returned by learned trial Court are neither perverse nor it can be said that the same are not borne out from the records of the case.

22. Accordingly, in view of the above discussion, we do not have any reason to interfere with the well reasoned judgment passed by learned trial Court in favour of the accused and while upholding the judgment so passed by learned trial Court, we dismiss the present appeal being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Ms. Anjali Devi. ....Petitioner

Versus

State of H.P. & others. .....Respondents

CWP No. 2497 of 2013
Date of decision: 8.12.2016

Constitution of India, 1950- Article 226- Petitioner applied for the post of Part Time Water Carrier on the ground that her father had donated land for the construction of the school in the year 1964 – respondent No.3 was selected by the Government under Rule 12 of Recruitment Scheme for the appointment of Part Time Water Carriers – held, that Rule 12 empowers the State to make the appointment on compassionate ground without following the selection process amongst widow, women deserted by their husbands, or otherwise destitute, handicapped persons, if such candidate falls below the poverty line - the petitioner had applied for recruitment under this Rule – the Rule was subsequently quashed but the appointment was made prior to the quashing – respondent No.3 falls within the criteria laid down in Rule 12 and her appointment cannot be said to be bad – writ petition dismissed.(Para-7 to 10)

Case referred:
Mangla Devi Vs. State of H.P. and others, Latest HLJ 2015 (HP) 902,

For the Petitioner: Ms.Sheetal Kimta, Advocate.

For the Respondents: Mr.Varun Chandel, Additional Advocate General with Mr.Pankaj Negi, Deputy Advocate General, for respondents No. 1 and 2.
Mr.B.B. Vaid, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Vivek Singh Thakur J. (Oral).

By way of present petition, petitioner has challenged appointment of respondent No. 3 as Part Time Water Carrier (herein after referred to as PTWC) in Government Primary School, Baghthal Madhana, District Sirmour, H.P. on the ground that petitioner is more deserving candidate to be appointed on compassionate ground under Rule 12 of Recruitment Scheme for the appointment of Part Time Water Carriers in Schools of Education Department (herein after referred to as 'Scheme').

2. During course of arguments, learned counsel for respondent No. 3 has adopted reply filed by respondents No. 1 and 2. As per reply of respondents No. 1 and 2, appointment of respondent No. 3 was approved by Government under Rule 12 of the Scheme for the post of Part Time Water Carrier (PTWC) in Government Primary School, Baghthal Madhana and was sent to Deputy Director, Elementary Education, Sirmour on 8.4.2013 for further action and after completing all formalities, President School Management Committee, Government Primary School, Baghthal Madhana was directed to appoint respondent No. 3 on 16.4.2013 as PTWC in the said school and in pursuance to her appointment, she joined her duties on 18.4.2013. It is further stated in reply that approval of petitioner was also received under Rule 12 of the Scheme for the same post in the same school, but said approval was sent to Deputy Director, Elementary Education on 16.4.2013, who had referred back the case of petitioner with remarks that post of Part Time Water Carrier (PTWC) was not vacant in Government Primary School, Baghthal Madhana.

3. I have heard learned counsel for parties and perused the record.

4. Clause/Rule 12 of the Scheme empowers respondent-State to make appointments of PTWC on compassionate grounds without following the selection process amongst widows, women deserted by their husbands or otherwise destitute, handicapped persons if such candidate falls below the poverty line as defined by Rural Development Department from time to time. Copy of Scheme has been placed on record as Annexure P-8.

5. Petitioner claims that she is permanently disabled to the extent of 45%, having academic qualification of +2, belongs to below poverty line family with income of Rs. 6,000/- per annum from all sources and an unemployed person also registered with Employment Exchange. She further claims that she has lost her father and there is none to look after her and because of permanent disability, she is unable to do any kind of manual work. Being an eligible candidate, she had applied to respondent No. 2 for the post of PTWC vide application (Annexure P-6) on the ground that her father had donated land for construction of aforesaid school long back ago, somewhere in the year 1964. She has also placed copy of mutation dated 21.3.1964 on record as Annexure P-7. It is also averred that her village is situated at a shorter distance from the school premises in comparison to respondent No. 3. It is submitted by learned counsel for the petitioner that respondent No. 2 has not adopted procedure for appointment of respondent No. 3 and swayed only by the fact that she is a widow. Competence of respondent No. 2 to appoint any candidate on compassionate ground has also been disputed by stating that respondent No. 3 had been appointed by respondent No. 2 and not by Government, as power to appoint on compassionate ground vested only with the Government.

6. Respondents No. 1 and 2 have clarified in their reply that appointment of respondent No. 3 was approved by the Government and sent to respondent No. 2, who only completed the codal formalities in pursuance to approval of Government.

7. Petitioner has not rebutted averments of reply filed by respondents No. 1 and 2 and no rejoinder has been preferred to be filed. Learned counsel for the petitioner has relied upon judgment of Division Bench of this Court in ***Mangla Devi Vs. State of H.P. and others, Latest HLJ 2015 (HP) 902***, vide which Rule 12 of the Scheme has been quashed and set aside,

being ultra virus and thus she has prayed for quashing and setting aside of the appointment of respondent No. 3 made exercising powers under Clause/Rule 12 of the Scheme.

8. In judgment rendered by Division Bench in *Mangla Devi's* case (supra) Rule 12 of the Scheme has been struck down by declaring the said Rule ultra virus. In present case, petitioner herself is also harping upon Rule 12 of the Scheme and it is not case of the petitioner that appointment of respondent No. 3 made under Rule 12 of the Scheme is bad for unconstitutionality of Rule 12, but on the basis of her family circumstances, petitioner is also claiming appointment on the basis of power of the State under Rule 12 on compassionate ground. It is not case of the petitioner that post in question should have been advertised, rather she herself had applied vide Annexure P-6 for compassionate appointment by the Government. Moreover, Rule 12 of the Scheme was struck down on 15th May, 2015 without any direction with respect to appointment made before striking down of Rule 12 of the Scheme and rightly so, as appointments made prior to 15th May, 2015 under this Rule were neither in question nor the candidates appointed prior to that date were party in that petition. Therefore, candidates appointed under Rule 12 of the Scheme prior to striking down of the said Rule will not be liable to be ousted automatically on the basis of ratio laid down by Division Bench in the aforesaid judgment, unless their appointment is assailed on that ground.

9. In present case, petitioner herself is claiming right under Rule 12 of the Scheme, therefore, striking down of Rule 12 of the Scheme subsequent to the appointment of respondent No. 3 is not having any advantage to petitioner, rather it has adverse effect on her claim, as except claiming her entitlement for appointment under provisions of Rule 12 of the Scheme, there is no other ground for asserting her claim for appointment to the post of PTWC against which respondent No. 3 has been appointed.

10. At the time appointment of respondent No. 3, Rule 12 of the Scheme was in force and she was found within the criteria fixed for appointment under the said Rule and petitioner has not questioned the power of respondent-State to appoint candidate under Rule 12 of the Scheme at relevant point of time, but has claimed her right to be appointed in the same manner in exercise of powers under Rule 12.

11. In view of above discussion, I find no merit in this petition and the same is dismissed accordingly, along with pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Rajesh Jaswal and others .....Appellants

Versus

State of Himachal Pradesh and others .....Respondents

LPA No. 108 of 2010
Reserved on: November 23, 2016
Decided on: December 8, 2016

Constitution of India, 1950- Article 226- Petitioners were appointed as Inspectors Grade-I – a notification was issued on 1.6.1996 merging 147 posts of Inspector Grade-II in the cadre of Inspector Grade-I- the petitioners challenged the tentative seniority list – the writ petition was dismissed on the ground that petitioners were not in service on the date of integration of cadres and had no locus standi to challenge the same- held in appeal that cadres were merged w.e.f. 1.7.1995 but in view of pendency of litigation notification of mergers could be given effect on 9.3.1999 and 17.3.1999 – the date of merger was modified by Administrative Tribunal as 1.8.1995 – a working formula was evolved before the High Court, which was accepted – Rules do not prohibit the merger of the cadres – the petitioner were appointed subsequent to the issuance

of notification – retrospective seniority cannot be given to the employees from the date when they were not borne in the cadre- seniority needs to be counted against promotion/appointment from the date of issuance of order of substantive appointment – mere pendency of litigation will not assist the petitioner- merging of cadres is a matter of policy- writ petition dismissed.

(Para-10 to 28)

Cases referred:

P. Sudhakar Rao & Ors Vs U. Govinda Rao and Ors, (2013) 8 SCC 693

State of Uttaranchal and Another Vs Dinesh Kumar Sharma, (2007) 1 SCC 683

A.P. Manchanda Vs State of Haryana, 1994 Supp (2) SCC 44

State of Bihar Vs Akhouri Sachindra Nath & ors, 1991 Supp (1) SCC 334

National Agricultural Coop. Marketing Federation of India Vs Union of India, (2003) 5 SCC 23

Uttaranchal Forest Rangers' Assn (Direct Recruit) & Ors Vs State of U.P. & Ors, (2006) 10 SCC 346

Chairman, Railway Board Vs C.r. Rangadhamaiah, (1997) 6 SCC 623

S.P. Shivprasad Pipal Vs Union of India & Ors, (1998) 4 SCC 598

For the appellants : Mr. K.D. Shreedhar, Senior Advocate with Mr. Yudhbir Singh, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.

Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel and Mr. Om Pal, Advocate, for respondents No. 11, 55, 69, 111, 115, 116 and 120.

Respondents No. 3 to 10, 12 to 54, 56 to 68, 70 to 110, 112 to 114, 117 to 119 and 121 to 157, ex parte.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Instant Letters Patent Appeal under clause 10 of the Letter Patents of Delhi High Court as applicable to the Himachal Pradesh High Court has been filed against judgment dated 23.6.2010 passed in CWP No. 1861 of 2009 by a learned Single Judge of this Court, with the following main relief:

> "It is, therefore, prayed that this appeal may kindly be accepted and the judgment dated 23.6.2010 passed in CWP No. 1861/2009 (sic 1861/2010) by Hon'ble Single Judge, whereby writ petition filed by the present appellants stand may kindly be set aside in the interest of law and justice."

2. Briefly stated the facts of the case, as emerge from the record are that the petitioners were appointed as Inspectors Grade-I in the year 1998, in accordance with Rules, Annexure P-1 of the writ petition. Mode of recruitment under Rule 10 of the relevant Rules, notified in 1986, is as under:

10% by direct recruitment,

50% by promotion from Sub Inspectors/ Sub Inspectors (Audit),

30% by promotion from amongst Clerks, and,

10% by promotion from amongst Gram Sewaks.

3. On 1.6.1996, a notification (Annexure P-2 of writ petition) was issued, merging 147 posts of Inspectors Grade-II in the Cooperation Department in the cadre of Inspector Grade-I (General and Audit), i.e. the cadre to which the appellants were appointed by direct recruitment in 1998. Consequently, respondents No. 3 to 156, who were working as Inspectors Grade-II, on

the date of issuance of that notification in the Cooperative Department, became Inspectors Grade-I. Aforesaid respondents were initially appointed as Sub Inspectors but later redesignated as Inspectors Grade-II. Annexure P-2 of the writ petition besides merging two cadres also provided for regulating the seniority of the incumbents of the posts of two cadres in the integrated cadre. It was provided that the persons already working as Inspectors Grade-I would rank senior, en bloc, to the persons, who became Inspector Grade-I, by virtue of the order of merger. Appellants, who were appointed in 1998 and 1999 challenged the tentative seniority list of Inspectors Grade-I, (Annexure P-5 of the writ petition), by filing CWP No. 1861 of 2009, seeking following main relief(s):-

> "(b) That the Hon'ble court may kindly be pleased to issue a writ of certiorari or any other appropriate writ, direction or order in favour of the petitioners and against the respondents to the effect that the provisional tentative seniority list, i.e. from Sr. No. 58 to 211, contained in **Annexure P-5**, be quashed and set aside as there is an error apparent on the face of record in drawing up the seniority list.
>
> (c) That the Hon'ble court may be pleased to issue a writ or mandamus or writ in the nature of mandamus to the effect that the respondents may kindly be directed to draw up seniority list as per the Recruitment and Promotion Rules and the Notifications, which have been issued by the respondents from time to time."

4. Respondents No.1 and 2 filed reply to the writ petition, which was also adopted by the private respondents. In the reply, locus standi of the appellants to assail Notification Annexure P-2, which was admittedly issued prior the date of their appointment to the cadre in question was questioned.

5. The writ Court, after hearing the arguments of both the sides, dismissed the petition mainly on the ground that the persons (appellants), who were not even in service on the date of integration of different cadres, can not seek seniority above the persons, who are/were already borne on the integrated cadre and as such they have no locus standi to assail the order of integration.

6. Now, feeling aggrieved by aforesaid judgment rendered by the writ Court, appellants-petitioners have approached this Court, by way of present appeal, seeking reliefs as have been reproduced above.

7. Crux of the arguments having been made by Mr. K.D. Shreedhar, learned Senior Advocate duly assisted by Mr. Yudhbir Singh, Advocate, is that notification, vide which two cadres were ordered to be merged deserves to be quashed and set aside being contrary to the Rules framed by the respondents. As per Mr. Shreedhar, there could not be any merger of cadres merely by issuance of a notification, without there being amendment in the Rules. Apart from above, Mr. Shreedhar also contended that learned Single Judge failed to appreciate that the mergerists could not claim status of promotees and as such in no situation, they could be placed above direct recruits in the seniority list, especially when it stands duly proved on record that the petitioners being direct recruits had joined as Inspector Grade-I in 1998/1999, whereas respondents, though became Inspector Grade-I pursuant to notification issued on 1.6.1996, for all intents and purposes, they assumed charge of the post of Inspector Grade-I in the year 1998/1999 i.e. after the appointment of the petitioners in the cadre of Inspector Grade-I. While inviting attention to the notification of merger issued by the respondents, Mr. Shreedhar further contended that the judgment passed by learned Single Judge is also vitiated because it failed to take note of the stipulation contained in the notification, wherein it was specifically provided that after merger, Inspector Grade-2 shall rank junior to the Inspector Grade-I i.e. General and Audit and after merger, they shall not claim seniority over and above the already appointed Inspectors Grade-I.

8. Mr. Shrawan Dogra, learned Advocate General, duly assisted by Mr. Anup Rattan, Additional Advocate General, supported the judgment passed by the learned Single Judge. As per Mr. Dogra, there is no illegality or infirmity in the judgment passed by the learned Single Judge and the same is based on correct appreciation of Rules as well as notification issued in this regard by the appropriate authority. While refuting arguments having been advanced by Mr. Shreedhar, Mr. Dogra while inviting attention to the Notification of merger issued by the respondents, stated that two cadres of Inspector Grade-I and Inspector Grade-2 were ordered to be merged with effect from 1.7.1995. Mr. Dogra, further contended that the State Government on 1.6.1996 vide notification No. Coop.A(1)-1/95 merged entire cadre of Inspector Grade-2 with existing cadre of Inspector Grade-I with effect from 1.7.1995 and thereby enhanced total sanctioned strength of the cadre of Inspector Grade-I from 388 to 535. Mr. Dogra also invited the attention of this Court to the subsequent orders passed by learned Single Judge in another set of cases i.e. CWP(T) No. 2162/2008, CWP(T) No. 3189/2008 and CWP(T) No. 4244/2008, filed by the Himachal Pradesh Cooperative Department Inspector Grade-2 Union, Roshan Lal and others and Association of Inspector Grade-2, Cooperative Societies, whereby placing reliance upon the supplementary affidavit of the Joint Secretary (Cooperation) dated 7.7.1997, petitions were disposed of on the basis of 'working formula', suggested as per supplementary affidavit. Mr. Dogra, further contended that in terms of aforesaid judgment passed by the learned Single Judge, aforesaid notification of merger dated 1.6.1996, merging Inspector Grade-2 with existing cadre of Inspector Grade-I, was made effective with effect from 1.8.1995 instead of 1.7.1995. While refuting the contentions raised on behalf of the learned counsel for the petitioners that as per Notification of merger dated 1.6.1996, Inspectors Grade-2 were to rank junior to the Inspector Grade-I, General and Audit, after merger, Mr. Dogra, strenuously argued that no benefit can be drawn by the appellants from para (iv) in the aforesaid notification, because same relates to the Inspector Grade-I, who were already working in the Department as such, at the time of issuance of notification i.e. 1.6.1996, appellants who were admittedly appointed as direct recruits in 1998-99 can not claim any benefit on the basis of aforesaid stipulation. While concluding his arguments, Mr. Dogra forcefully contended that after notification of merger, all the consequential benefits of pay scale and arrears of pay were given to both the employees, direct and merged with effect from 1.6.1996, as a result of which promotees and merged inspectors acquired status of Inspector Grade-I from that date and as such there is no illegality in the judgment passed by the learned Single Judge and same deserves to be upheld.

9. We have heard the learned counsel for the parties and also gone through the records.

10. Before proceeding to decide the present appeal, it would be appropriate to refer to order dated 31.8.2010 passed by this Court in the present appeal, which is reproduced below:

> "No notice needs to be issued to private respondents at this stage. There will be direction to second respondent to file an affidavit as to whether any person, who has been promoted to the cadre of Inspector Grade-I after the petitioners joining duty, have been given a place above the petitioners in the seniority list and if so what is the reason thereof. The affidavit, as above, shall be filed by the second respondent within a period of six weeks. There will also be a direction to respondents No.1 and 2 that in case any promotion is made during the pendency of LPA, it shall be made clear in the proceedings that promotion is subject to the outcome of the LPA. Post on 25.10.2010."

11. Pursuant to aforesaid direction issued by this Court, Additional Registrar Cooperative Societies, Himachal Pradesh filed affidavit stating therein as under:

> "2. That in compliance of the directions of the Hon'ble High Court referred in para 1 supra it is submitted that the Department had circulated the final seniority list of Inspector Cooperative Societies on 03-04-1998 showing the seniority position of Inspectors appointed/ promoted prior to 31-12-1995. It is further submitted that after the petitioners joining duty as Inspector Grade-I in

the Department, no seniority list of the cadre of Inspector Grade-I could be finalized till date due to the complications that arose on account of merger of the cadre of Inspector Grade-2 with the cadre of Inspector Grade-I on 01-06-1996 and the promotion orders of Inspector Grade-I issued on same date. The detail submissions with regard to merger and promotion order dated 01-06-1996 have been made in succeeding paras. However, this department has prepared a tentative/provisional seniority list of Inspector Cooperative Societies showing the seniority position as on 31-12-2007 and circulated vide this office letter No. 4-64/2003 Coop.(Estt.) dated 22-2-2008. In this tentative/provisional seniority list, no incumbent who has been promoted to the cadre of Inspector Grade-I after the petitioners joining duty has been given place over and above the petitioners.

3. That it is worth stating here that on 01.06.1996, 38 Inspector Grade-2 and 23 Junior Assistants/Senior Clerks were promoted as Inspector Grade-I vide this office order No. 4-91/87-Coop.(Estt.) dated 01.06.96. The State Government on the same date i.e. 01.06.96 vide Notification No. Coop.A(1)-1/95 dated 01.06.96 merged entire cadre of Inspector Grade-2 with existing cadre of Inspector Grade-I, w.e.f. 01.07.95 and thereby enhanced the total sanctioned posts of Inspectors (General/Audit) from 388 to 535.
4. That due to the retrospective effect of the merger notification dated 01.06.96 some administrative complications arose and O.A. No. 879/96 was filed in the Hon'ble Administrative Tribunal by the promoted Inspectors from amongst the cadre of Clerks against the Notification of merger with effect from 01.07.95. The erstwhile Tribunal clubbed above-mentioned O.A. with O.A. No. 1369/93 and O.A. No. 533/97 which were filed by the Association of the Inspector Grade-II for merger of cadre of Inspector Grade-II with Inspector Grade-I on Punjab pattern. Subsequently, the Government of Himachal Pradesh vide Notification No. Coop.A(1)-1/96 dated 09.03.99 modified the date of merger w.e.f. 01.06.96 instead of 01.07.95 with the condition that this decision as well as inter-se-seniority of all the parties to this dispute shall be subject to the decision in O.As No. 1369/93, 879/96 and 533/97 and promotions orders issued on 01.06.96 were also implemented w.e.f. 01.06.96 vide this office order No. 4-109/92-Coop.(Estt.) dated 17th March, 1999. As such the merger orders as well as the promotion orders issued on 01.06.96 could not be implemented till 9th March, 1999 and 17th March, 1999 respectively.
5. That after the modification of merger date i.e 01-6-1996 instead of 01-07-1995 all the consequential benefits of pay scale of Inspector and arrears of pay were given to both the set of employees i.e. the promoted and merged Inspectors w.e.f. 01-06-1996. Accordingly, the promotees and merged Inspectors have the status of Inspector Grade-I w.e.f. 01-06-1996. Therefore, 23 Clerks promoted on 01.06.96 and 147 Inspector Grade-II merged with the cadre of Inspector Grade-I on 01.06.96 have been placed above the petitioners in the tentative/provisional seniority list circulated on 22-02-2008.
6. That all the O.As No. 1369/93, 879/96 and 533/97 referred above were transferred to the Hon'ble High Court after scrapping of the erstwhile Tribunal and listed before the Hon'ble High Court as CWP(T) No. 2162/08 in O.A. No. 1369/93, CWP(T) No. 4244/2008 in O.A. No. 533/1997 and CWP(T) No. 3189/2008 in O.A. No. 879/96. The above referred CWPs have been disposed off by the Hon'ble High Court on 07.08.2009 by a common judgment. This Hon'ble High court in its judgment dated 07-08-2009 has relied upon the supplementary affidavit of Joint Secretary (Cooperation) to the Government of Himachal Pradesh filed in O.A. No. 879/96 on 07-07-1997. For the sake of brevity, operative portion of the affidavit is reproduced as under: -

"6(i) The Government notification No. Coo.A(1)-1/95, dated 01.06.96 merging the Inspector Grade-II with that of Inspector Grade-I shall be effective w.e.f. 01.08.95 instead of 01.07.95. In this way, the promotion orders issued on 24.07.95 whereby the services of 12 Inspectors were regularized shall remain intact.

(ii) The present applicants in O.A. No. 879/96 as well as other similarly situated persons promoted on 01.06.96 will not reverted and they will be entitled for benefits available under F.R. 22-C while fixing their pay.

(iii) That the inter-se- seniority of the applicants (Clerks) promoted on 01.06.96 and the merged Inspector cadre will be based on the length of service of the concerned Clerks and Inspectors. This will be done in relaxation of the exiting provision of the R&P Rules for the post of Inspector Grade-I.

(iv) That the State Government contemplates framing of new R&P Rules for the category of Inspector Grade-I wherein we are proposing to increase the promotion to a reasonable level of Clerks against 30% quota as available at present."

Consequently, the Hon'ble High Court has directed the respondent State to do the needful as per the supplementary affidavit in O.A. No. 879/1996 converted to CWP(T) 3189/2008. Copy of the judgment passed by the Hon'ble Court on 7.08.2009 is enclosed herewith as Annexure A-I.

7. That Sh. Roshan Lal and others have filed an LPA No. 10/2010 before this Hon'ble Court against the judgement dated 7.08-2009, which is pending adjudication."

12. Perusal of aforesaid affidavit having been filed on behalf of the respondent-State suggests that vide notification dated 1.6.1996, 38 Inspector Grade-II and 23 Junior Clerks/Senior Clerks were promoted as Inspector Grade-I. State Government on the same date merged entire cadre of Inspector Grade-II with that of existing cadre of Inspector Grade-I with effect from 1.7.1995. OA No. 1369/93 and OA No. 533/97 were filed for merger of cadre of Inspector Grade-II with Inspector Grade-I on Punjab Pattern and State Government issued notification merging cadre of Inspector Grade-II with Inspector Grade-I, with effect from 1.8.1995, on 1.6.1996. Another set of employees being aggrieved by issuance of notification dated 1.6.1996, also approached Himachal Pradesh Administrative Tribunal by filing OA No. 879/96. Aforesaid decision of the Government of merging cadre of Inspector Grade-II with Inspector Grade-I in the State of Himachal Pradesh, was stayed by the Himachal Pradesh Administrative Tribunal in OA No. 879/1996 at the stage of admission, as a result of which, merger order as well as promotion order issued on 1.6.1996 could not be implemented till 9.3.1999 and 17.3.1999, respectively. It also emerges from the record that the Himachal Pradesh Administrative Tribunal clubbed aforesaid Original Applications i.e. OA No. 879/1996 and 1369/1993. During the pendency of the aforesaid Original Applications, which later came to be heard by the learned Single Judge of this Court, after abolition of Himachal Pradesh Administrative Tribunal, Government of Himachal Pradesh, vide notification No. Coop.A(1)-1/95 dated 9.3.1999 modified the date of merger from 1.7.1995 to 1.8.1995, subject to the condition that this decision as well as inter-se seniority of all the parties to the petition shall be subject to decision of OA No. 1369/93, OA No. 533/1997 and OA No. 879/1996 and promotion orders issued on 1.6.1996 were also implemented from 1.6.1996 vide office order dated 17.3.1999.

13. At this stage, it may be noticed that later on aforesaid Original Applications (CWP(T)'s) came to be decided by the learned Single Judge of this Court on 7.8.2009, wherein learned Single Judge while placing reliance upon supplementary affidavit of Joint Secretary (Cooperation) filed on 7.7.1997, disposed of the petitions by recording the statement of the counsel for the parties, on the basis of working formula suggested in the supplementary affidavit.

It would be apt to reproduce herein the operative portion of judgment passed by the learned Single Judge:

> "The judgment was reserved by this Court on 10.7.2009. The learned counsel for the parties have failed to point out the supplementary affidavit dated 7.7.1997 in OA No. 879/1996 to the Court. It is in these circumstances the matters have been listed for speaking to the minutes to permit the learned counsel for the parties to assist the Court after the filing of this affidavit. The Court has ascertained from the learned counsel appearing on behalf of the parties whether these petitions can be disposed of on the basis of the working formula suggested as per the supplementary affidavit. The learned counsel appearing on behalf of the parties in all the three petitions have fairly submitted that the formula evolved by Mr. V.C. Katoch by way of his affidavit is acceptable to the parties.
>
> The learned counsel appearing on behalf of the petitioner in CWP (T) 2162/2008 and CWP (T) No. 4244/2008 have submitted that their clients are stagnating on the same post for more than two decades. It is settled law by now that there should be two to three promotional avenues available to every category of employees to remove the stagnation and to improve the efficiency in public service.
>
> Accordingly, the interest of justice will suffice by directing the respondent-State to consider this plea of the petitioners in accordance with law laid down by their Lordships in A. Satyanaryana and others versus S. Purushotham and others, (2008) 5 SCC 416 within a reasonable period.
>
> Consequently, the respondent-State is directed to do the needful as per the supplementary affidavit filed by Mr. V.C. Katoch in O.A. No. 879/1996 converted to CWP (T) No. 3189/2008.
>
> In view of the observations made hereinabove, the petitions are disposed of. No costs."

14. The working formula as mentioned in the aforesaid judgment is as under :

> "6(i) The Government notification No. Coo.A(1)-1/95, dated 01.06.96 merging the Inspector Grade-II with that of Inspector Grade-I shall be effective w.e.f. 01.08.95 instead of 01.07.95. In this way, the promotion orders issued on 24.07.95 whereby services of 12 Inspectors were regularized shall remain intact.
>
> (ii) The present applicants in O.A. No. 879/96 as well as other similarly situated persons promoted on 01.06.96 will not reverted and they will be entitled for benefits available under F.R. 22-C while fixing their pay.
>
> (iii) That the inter-se- seniority of the applicants (Clerks) promoted on 01.06.96 and the merged Inspector cadre will be based on the length of service of the concerned Clerks and Inspectors. This will be done in relaxation of the exiting provision of the R&P Rules for the post of Inspector Grade-I.
>
> (iv) That State Government contemplates framing of new R&P Rules for the category of Inspector Grade-I wherein we are proposing to increase the promotion to a reasonable level of Clerks against 30% quota as available at present."

15. This Court after carefully examining the affidavit filed by the Additional Registrar Cooperative Societies as well as judgment delivered by the learned Single Judge dated 7.8.2009, is of the view that cadre of Inspector Grade-II existing as on 1.6.1996 was actually merged with cadre of Inspector Grade-I with effect from 1.7.1995 but in view of pendency of litigation before the Himachal Pradesh Administrative Tribunal, notification of merger could be given effect on 9.3.1999 and 17.3.1999, respectively.

16. True it is that the learned Himachal Pradesh Administrative Tribunal while taking cognizance of the averments contained in OA No. 789/1996 (CWP(T) No. 3189/2008) filed by a set of employees aggrieved by notification dated 1.6.1996, stayed the operation of notification at the stage of admission but as has been discussed above the Original Application having been preferred by the affected parties including those employees, who were aggrieved by issuance of aforesaid notification, were later on disposed of by the learned Single Judge of this Court on 7.8.2009, on the basis of working formula suggested in the supplementary affidavit of Joint Secretary (Cooperation) on 7.7.1997, reproduced herein above. As per working formula, all the parties including those who were aggrieved by issuance of notification of merger, agreed that notification dated 1.6.1996 merging cadre of Inspector Grade-II with that of Inspector Grade-I shall be effective from 1.8.1995 instead of 1.7.1995, as a result of which, promotion orders dated 1.7.1995, whereby services of 12 Inspectors were regularized, were to remain intact.

17. Crux of the working formula suggests that all the parties, who had filed Original Application before the Court, agreed to abide by notification of merger, merging cadre of Inspector Grade-II with Inspector Grade-I with effect from 1.8.1995. Since, in the final adjudication of the Original Applications, wherein Himachal Pradesh Administrative Tribunal had stayed operation of notification of merger dated 1.6.1996, was upheld with minor modifications of date of application i.e. 1.8.1995 instead of 1.7.1995, it can be safely concluded that respondents, who were Inspector Grade-II had merged with the cadre of Inspector Grade-I with effect from 1.7.1995 in terms of notification of merger for all intents and purposes. Perusal of affidavit having been filed by Additional Registrar Cooperative Societies, clearly suggests that immediately after issuance of notification dated 1.6.1996, entire cadre of Inspector Grade-II had merged with that of existing cadre of Inspector Grade-I with effect from 1.7.1995, which was later on ordered to be modified with effect from 1.8.1995, in terms of judgment dated 7.8.2009 passed by the learned Single Judge in aforesaid Original Applications/CWP(T)'s. It may also be noticed at this stage that judgment dated 7.8.2009 passed by the learned Single Judge in CWP(T)'s No. 2162, 3189 and 4244 of 2008 was further upheld by this Court in LPA No. 10/2010, vide judgment dated 6.9.2016. Further perusal of appointment letters issued to the appellants at the time of their joining as Inspector Grade-I, which were made available to this Court, during the hearing by the learned Advocate General, clearly suggests that their appointment was subject to final decision of OA No. 1369/1993 filed by the State Cooperative Inspectors Grade-II Association. Appointment letter further suggests that in case offer of appointment, wherein aforesaid stipulation with regard to final decision of OA No. 1369/1993 was incorporated, was acceptable to the appointees, they were directed to report for duty to the Assistant Registrar Cooperative Societies Solan, on or before 21.9.1998, meaning thereby that present appellants were fully conscious about the pendency of OA No. 1369/1993, wherein issue of notification of merger was involved. Since appellants were fully aware that in terms of notification of merger dated 1.6.1996, Inspector Grade-II would be merged into cadre of Inspector Grade-I and they would be placed en bloc below Inspector Grade-I already working in the Department, on the basis of notification, in seniority, they can not be allowed to rake up the issue at this belated stage. But despite above, no steps were ever taken by the appellants to lay challenge to the notification of merger and as such there is no force in the contentions put forth by Mr. Shreedhar that respondents who were Inspector Grade-II, could not be placed above the appellant in seniority by virtue of notification of merger.

18. Perusal of writ petition preferred by the appellants nowhere suggests that the appellants laid any challenge to notification of merger which was effective from 1.6.1996 and as such they can not be allowed at this stage to state that respondents could not be placed over them in the seniority on the basis of notification of merger issued in 1996 i.e. prior to their direct recruitment. This Court, after perusing documents available on record has no hesitation to conclude that for all intents and purposes, respondents were merged with the existing cadre of Inspector Grade-I with effect from 1.7.1995 and during the pendency of the Original Applications having been filed by affected parties before Himachal Pradesh Administrative Tribunal, merger orders as well as promotion orders issued on 1.6.1996 were implemented on 9.3.1999 and

17.3.1999, respectively. Moreover, appointment of the appellants was subject to outcome of OA No. 1369/1993, wherein notification of merger dated 1.6.1996 was upheld vide judgment dated 7.8.2009, on the basis of working formula suggested by the Government, which was acceptable to all the parties.

19. There is no force in the contention of the appellants that merging of cadres could not take place by issuance of notification without there being any amendment in the rules, because perusal of Rules, Annexure P-1, nowhere prohibits merger of cadres. Apart from above, it is the prerogative of the State Government to merge two or more cadres into one cadre or to disintegrate cadres into different cadres or to abolish a cadre exercising powers under Article 162 of the Constitution of India. In the present case, though this Court is of the view that notification of merger was issued prior to the appointment of the present appellants as Inspector Grade-I and appellants had no occasion to lay challenge to aforesaid notification admittedly issued in 1996 i.e. prior to their appointment but as emerges from the record, matter with regard to notification of merger remained pending in the Himachal Pradesh Administrative Tribunal and thereafter in this Court, as noticed above, till August, 2009 yet, it is not understood that if appellants were aggrieved with the issuance of notification of merger, what prevented them to lay challenge to the same either by becoming party in the pending proceedings or by way of a substantive petition before the competent court of law, and as such this Court sees no force in the contention put forth on behalf of the appellants that there could be no merger of cadres.

20. It is amply clear from the facts and circumstances above that on the date of appointment of the appellants, as direct recruits (Inspector Grade-I), respondents were already borne on the integrated cadre of Inspector Grade-I in terms of notification of merger dated 1.6.1996 and as such this Court sees no illegality or infirmity in the judgment passed by the learned Single Judge which appears to be based on correct appreciation of facts as well as law and as such same deserves to be upheld.

21. Now, this Court would be dealing with case law referred by the learned counsel for the appellants, in support of his arguments. Learned counsel for the petitioner has relied upon the following case law in support of his contentions:

1. P. Sudhakar Rao & Ors Vs U. Govinda Rao and Ors reported in (2013) 8 SCC 693
2. State of Uttaranchal and Another Vs Dinesh Kumar Sharma reported in (2007) 1 SCC 683
3. A.P. Manchanda Vs State of Haryana reported in 1994 Supp (2) SCC 44
4. State of Bihar Vs Akhouri Sachindra Nath & ors reported in 1991 Supp (1) SCC 334
5. National Agricultural Coop. Marketing Federation of India Vs Union of India reported in (2003) 5 SCC 23
6. Uttaranchal Forest Rangers' Assn (Direct Recruit) & Ors Vs State of U.P. & Ors reported in (2006) 10 SCC 346
7. Chairman, Railway Board Vs C.r. Rangadhamaiah reported in (1997) 6 SCC 623
8. S.P. Shivprasad Pipal Vs Union of India & Ors reported in (1998) 4 SCC 598

22. This Court carefully perused aforesaid law having been cited by the learned Senior counsel for the appellants, perusal whereof clearly suggest that retrospective seniority can not be given to the employees from a date, when they were not borne on the cadre. Similarly, aforesaid judgments suggests that seniority needs to be counted against promotion/appointment in the cadre from the date of issuance of order of substantive appointment. Judgment passed by Apex Court in **National Agricultural Cooperative Marketing Federation of India vs. Union of India** (supra) further lays down that legislative power either to introduce enactment for the first

time or to amend the enacted law with retrospective effect is not only subject to the question of competence but is also subject to several judicially recognized limitations.

23. There can be no quarrel with the aforesaid law having been laid down by the Apex Court in aforesaid judgments that seniority can be given only from the date of substantive appointment. There can be no automatic promotion or appointment to a post on the recommendations of Public Service Commission unless the Government sanctions such promotion and appointment. Similarly, there can be no dispute that promotees not borne on the cadre at the time when direct recruits came to be appointed, can not be given seniority in service over direct appointees. This Court sees no dispute that retrospectivity while giving effect to any notification must not adversely trench upon the entitlement of seniority of others. Retrospective seniority can not be given to employee from the date when he was not even borne in the cadre.

24. This Court, with due respect to aforesaid judgments having been passed by Apex Court, is of the view that the same are not applicable in the present case, for the reasons detailed herein above. In the present case, all the respondents were Inspector Grade-II prior to issuance of notification dated 1.6.1996 and subsequent to issuance of notification of merger, they were merged with the cadre of Inspector Grade-I from 1.7.1995 for all intents and purposes and as such, by no stretch of imagination, it can be said that at the time of appointment of the appellants as direct recruits, against the posts of Inspector Grade-I, respondents were not even borne on the cadre of Inspector Grade-I. Rather, in the present case, after modification of notification dated 1.6.1996, all consequential benefits of pay scale and arrears of pay were given to the respondents with effect from 1.6.1996.

25. True it is that aforesaid notification of merger could not be implemented till 9.3.1999 and 17.3.1999 due to pendency of the Original Applications having been filed by affected parties before Himachal Pradesh Administrative Tribunal and thereafter before this Court, but the fact remains that in the aforesaid proceedings, notification of merger was upheld, as a result of which all the respondents stood merged with the cadre of Inspector Grade-I with effect from issuance of notification dated 1.6.1996.

26. As far as issue of retrospectivity is concerned, notification of merger dated 1.6.1996 was initially made applicable with effect from 1.7.1995, but later on respondent-State with a view to balance equities between the parties, took a conscious decision to make notification of merger effective from 1.8.1995 instead of 1.7.1995, that too with a view to protect promotion of 12 Inspectors ordered on 24.7.1995. Aforesaid decision was also taken by the respondent-State to avoid reversion of similarly situated persons, who were promoted on 1.6.1996, to ensure that they get benefit of FR-22 while fixing their pay. In the instant case, there is no question of retrospective operation of notification of merger but same was only made applicable from 1.8.1995 for the reasons stated above to protect interests of a few employees, who could be adversely affected by the issuance of notification of merger.

27. The Apex Court in **S.P. Shivprasad Pipal vs. Union of India and others** reported in (1998) 4 SCC 598, held that decision to merge cadres is essentially a matter of policy. The power to regulate recruitment and conditions of service is wide and includes the power to constitute a new cadre by merging the existing cadres. The Apex Court has held as under:

> "5. However, when different cadres are merged certain principles have to be borne in mind. These principles were enunciated in the case of State of Maharashtra and Anr. V. Chandrakant Anant Kulkarni & Ors. (1982 1 SCR 665 at page 678) while considering the question of integration of government servants allotted to the services of the new States when the different States of India were reorganised. This Court cited with approval the principles which had been formulated for effecting integration of services of different States. These principles are: In the matter of equation of posts, (1) where there were regularly constituted similar cadres in the different integrating units the cadres will ordinarily be integrated on that basis but (2) where there were no such similar cadres, the

following factors will be taken into consideration in determining the equation of posts:-

(a) Nature and duties of a post;

(b) Powers exercised by the officers holding a post the extent of territorial or other charge held or responsibilities discharged;

(c) The minimum qualifications, if any, prescribed for recruitment to the post and;

(d) the salary of the post.

This court further observed that it is not open to the court to consider whether the equation of posts made by the central Government is right or wrong. This was a matter exclusively within the province of the Central Government. Perhaps the only question the Court can enquire into is whether the four principles cited above had been properly taken into account. This is the narrow and limited field within which the supervisory jurisdiction of the Court can operate.

15. A decision to merge such cadres is essentially a matter of policy. Since the three cadres carried the same pay scale at the relevant time, merging of the three cadres cannot be said to have caused any prejudice to the members of any of the cadres. The total number of posts were also increased proportionately when the merger took place so that the percentage of posts available on promotion was not in any manner adversely affected by the merger of the cadres."

28. Viewed thus, the impugned judgment is upheld, accordingly, there is no merit in the present appeal, as such, same is dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J

Smt. Santosh w/o Sh. Tara Dutt & Another .....Petitioners/Plaintiffs

Versus

Sh. Sanjeev Kumar s/o Sh. Bal Krishan & Others

.....Non-petitioners/Defendants

CMPMO No.426/2015
Order reserved on : 24.11.2016
Date of order: 8.12.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a suit for declaration and injunction- an application for interim relief was also filed, which was allowed and parties were directed to maintain status quo qua the nature, user, possession, construction and alienation – an appeal was filed, which was allowed and the application was dismissed – held, that the finding regarding the execution of the Will cannot be given while deciding the application for interim relief – both the parties are asserting their title and possession- hence, the status quo order is necessary to protect the rights of the parties – revision allowed, order of the Appellate Court set aside and the order of the Trial Court restored.(Para-9 to 16)

Cases referred:

Nawalshankar Ishwarlal Dave and another Vs. State of Gujarat, AIR 1994 Apex Court 1496
Jattu Ram Vs. Hakam Singh and others, SLJ 94(1) SC 68
Guru Amarjit Singh Vs. Rattan Chand, AIR 1994 Apex Court 227
H. Lakshmaiah Reddy Vs. L. Venkatesh Reddy, AIR 2015 SCW Apex Court 3482
Transport Corporation of India Ltd. Vs. Ganesh Polytex Ltd., AIR 2015 Apex Court 826

Biswas & Others Vs. Kalyan Kumar Kisku & Others, AIR 1994 Apex Court 1837 Satyabrata Maharwal Khewaji Trust Vs. Baldev Dass, AIR 2005 Apex Court 104

For Petitioner/Plaintiff : Ms. Tim Saran, Advocate
For Non-petitioners/Defendants : Mr. Shanti Swaroop, Advocate

The following order of the Court was delivered:

P. S. Rana, J.

Present petition is filed under Article 227 of Constitution of India against order dated 01.04.2015 passed by learned District Judge Solan Distt. Solan (H.P.) in Civil Misc. Appeal No.14-S/14 of 2014 wherein learned District Judge Solan set-aside order dated 01.07.2014 passed by learned Civil Judge (Jr. Division) Solan announced in CMA No.10/6 of 2012 filed under order XXXIX Rules 1 & 2 CPC in C.S. No.13/1/2012 title Smt. Santosh and others Vs. Sh. Sanjeev Kumar.

Brief facts of case:

2. Smt. Santosh and others plaintiffs filed civil suit for declaration to the effect that plaintiffs are co-owners in possession of suit land and house situated over suit land and co-defendant No.1 has no right, title and interest in and over suit land in any manner whatsoever and revenue entries showing co-defendant No.1 as absolute owner in possession of suit land are wrong, illegal and null and void. It is further pleaded that mutation No.746 dated 11.04.2002 sanctioned in favour of Smt. Kamlesh wife of co-defendant No.1 behind the back of plaintiffs and on the basis of oral Will is wrong, illegal and null and void and is not binding upon plaintiffs. It is further pleaded that mutation No.939 dated 29.09.2007 sanctioned in favour of co-defendant No.1 after demise of Smt. Kamlesh on the basis of Will dated 22.02.2007 is also wrong, illegal and null and void. It is further pleaded that revenue entries showing co-defendant No.1 as absolute owner in possession of suit land are wrong, illegal and inoperative qua right, title and interest of plaintiffs. Additional relief of permanent prohibitory injunction also sought restraining co-defendant No.1 from causing any interference in the ownership and peaceful possession of plaintiffs and from dispossessing the plaintiffs from suit land and from selling and alienating suit land and also from claiming any compensation from suit land either himself or through his agents servants or family members.

3. Per contra written statement filed on behalf of defendants pleaded therein that suit of plaintiffs is time barred as mutation No.746 was sanctioned on dated 11.04.2002 in favour of deceased Kamlesh. It is further pleaded that in mutation proceedings both plaintiffs have given their statements. It is further pleaded that present civil suit after ten years is not maintainable. It is further pleaded that plaintiffs are estopped to file present suit against defendants due to their act, conduct and acquiescence. It is further pleaded that plaintiffs did not approach civil Court with clean hands. It is further pleaded that plaintiffs have no cause of action against defendants. It is pleaded that suit of plaintiffs is not properly valued for the purpose of Court fee and jurisdiction. It is further pleaded that plaintiffs are guilty of suppressing the material facts from the Court. It is further pleaded that plaintiffs have no locus standi to file present suit. It is further pleaded that co-defendant No.1 is absolute owner in possession of suit land on the basis of Will dated 22.02.2007 executed by deceased Kamlesh in favour of co-defendant No.1. It is further pleaded that house over suit land is constructed by co-defendant No.1 and his deceased wife by obtaining loan from State Bank of Patiala Solan Branch. It is further pleaded that plaintiffs are not co-owners of suit property. It is further pleaded that on the basis of Will mutation No.939 dated 29.09.2007 was legally sanctioned in favour of co-defendant No.1. It is further pleaded that plaintiffs have knowledge about all the mutations and Wills from the beginning. It is further pleaded that plaintiffs have filed present suit without any cause of action. Prayer for dismissal of suit sought. Plaintiff filed replication to written statement and re-asserted the allegations mentioned in plaint.

4. Learned Trial Court framed following issues on dated 23.07.2014:

1) Whether plaintiffs are entitled to decree for declaration to the effect that plaintiffs are owners in possession of suit land and co-defendant No.1 has no right, title and interest over suit land? ….OPP.

2) Whether revenue entries of suit land are illegal and null and void? ….OPP.

3) Whether mutation No.746 dated 11.04.2002 sanctioned in favour of Smt. Kamlesh wife of co-defendant No.1 is illegal, null and void and not binding upon plaintiffs? ….OPP.

4) Whether mutation No.939 dated 29.09.2007 subsequently sanctioned in favour of co-defendant No.1 on the basis of Will dated 22.02.2007 is illegal, null and void? ….OPP.

5) Whether plaintiffs are entitled to decree for consequential relief of permanent prohibitory injunction as prayed for? …OPP

6) Whether suit is time barred? …OPD

7) Whether plaintiffs are estopped to file present suit due to their own act and conduct? …….OPD

8) Whether plaintiffs have no cause of action to file the present suit? ..OPD

9) Whether plaintiffs have not properly valued suit for the purpose of court fee and jurisdiction? …OPD

10) Relief.

Learned Trial Court listed civil suit for plaintiffs witnesses for 14.03.2016.

5. During pendency of civil suit plaintiffs have filed application under order XXXIX Rules 1 & 2 CPC and sought interim relief of ad interim injunction restraining co-defendant No.1 from causing any interference in the ownership and peaceful possession of plaintiffs and sought ad interim injunction restraining co-defendant No.1 from selling and alienating suit land and claiming any compensation qua suit land till disposal of civil suit. Application under order XXXIX Rules 1 & 2 read with section 151 CPC was contested before learned Trial Court by co-defendant No.1. Learned Trial Court allowed the application filed under order XXXIX Rules 1 & 2 CPC by plaintiffs and directed parties to maintain status quo qua nature, user, possession, construction and alienation of suit land till disposal of main suit.

6. Feeling aggrieved against the order passed by learned Trial Courtco-defendant No.1 and proforma defendants No.2 & 3 filed Civil Misc. appeal No.14-S/14 of 2014 before learned District Judge Solan Distt. Solan (H.P.). Learned First Appellate Court allowed the appeal and set-aside the order of learned Trial Court dated 01.07.2014. Learned District Judge Solan dismissed the application filed under order XXXIX Rules 1 & 2 CPC by plaintiffs. Feeling aggrieved against the order of learned District Judge dated 01.04.2015 plaintiffs filed present petition under Article 227 of Constitution of India.

7. Court heard learned Advocate appearing on behalf of petitioners and non-petitioners and Court also perused the entire records carefully.

8. Following points arises for determination:

1) Whether petition filed under Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Relief.

Findings upon point No.1 with reasons:

9. Submission of learned Advocate appearing on behalf of petitioners that petitioners namely Santosh and Sharda Devi are daughters of deceased Rattan Dass and Sh. Rattan Dass did not execute any oral Will in favour of Smt. Kamlesh and on this ground petition be allowed is decided accordingly. Judicial findings whether deceased Rattan Dass has executed

any oral Will in favour of Smt. Kamlesh or not cannot be given at this stage of case. Judicial findings will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

10. Submission of learned Advocate appearing on behalf of petitioners that even Smt. Kamlesh did not execute any Will on dated 22.02.2007 in favour of co-defendant No.1 and on this ground petition be allowed is decided accordingly. Judicial findings whether Smt. Kamlesh has executed any Will in favour of co-defendant No.1 or not cannot be given at this stage of case. Judicial findings will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

11. Submission of learned Advocate appearing on behalf of petitioners that dispute inter se parties in civil suit is about legality of oral Will alleged to be executed by Sh. Rattan Dass in favour of deceased Kamlesh and further dispute inter se parties is about legality of Will dated 22.02.2007 executed by deceased Kamlesh in favour of co-defendant No.1 and both facts will be adjudicated by learned Trial Court during trial of case and till disposal of civil suit prima facie case, balance of convenience and irreparable loss are in favour of petitioners is decided accordingly. It is prima facie proved on record that Santosh, Sharda Devi and Kamlesh are daughters of deceased Rattan Dass and falls in Class-I heirs. It is also prima facie proved on record that deceased Rattan Dass did not execute any written testamentary document in favour of deceased Kamlesh qua suit property. Smt. Kamlesh one of the daughters of deceased Rattan Dass has claimed legal right over entire suit property on the basis of oral Will. It is well settled law that oral Will will be proved in accordance with law during trial of civil suit. It is also prima facie proved on record that co-defendant No.1 is brother-in-law of petitioners. It is also prima facie proved on record that co-defendants No.2 & 3 are daughter and son of co-defendant No.1. In the present case both parties have claimed ownership and possession rights over suit property as of today. Dispute inter se parties is about title. Adjudication about title will be decided by learned Trial Court after giving due opportunity to both parties to lead oral as well as documentary evidence in civil suit. As per section 46 of H.P. Land Revenue Act 1956 suit for declaratory decree by persons aggrieved by entries in record of rights prepared under H.P. Land Revenue Act 1956 can be filed.

12. Submission of learned Advocate appearing on behalf of non-petitioners that in revenue record entire property was recorded in the name of deceased Kamlesh on the basis of oral Will and thereafter recorded in the name of her husband namely Sanjeev Kumar co-defendant on the basis of Will and mutation No.746 dated 11.04.2002 and mutation No. 939 dated 29.09.2007 also sanctioned and on this ground petition be dismissed is decided accordingly. It is well settled law that mutation in revenue record is not evidence of title. It is also well settled law that jamabandi entries are only for fiscal purpose and they do not create or extinguish any title. **See AIR 1994 Apex Court 1496 Nawalshankar Ishwarlal Dave and another Vs. State of Gujarat,SeeSLJ 94(1) SC 68 Jattu Ram Vs. Hakam Singh and others,SeeAIR 1994 Apex Court 227 Guru Amarjit Singh Vs. Rattan Chand**. **SeeAIR 2015 SCW Apex Court 3482 H. Lakshmaiah Reddy Vs. L. Venkatesh Reddy.**

13. Submission of learned Advocate appearing on behalf of non-petitioners that civil suit is not filed within limitation and on this ground petition be dismissed is decided accordingly. It is well settled law that issue of limitation is mixed issue of fact and law. Learned Trial Court has framed issue No.6 relating to limitation in civil suit. It is not expedient in the ends of justice to give judicial findings upon issue No.6 at this stage of case. Learned Trial Court will give judicial findings upon issue of limitation after giving due opportunities to both parties to lead oral and documentary evidence upon issue of limitation.

14. In the present case both parties are asserting their title and possession over suit property. Dispute inter se parties would be resolved in civil suit. Complicated questions of rights, title and interest of parties in suit property are yet to be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. Court is of opinion that in order to avoid multiplicity of judicial proceedings inter se parties order of status

quo is essential in the ends of justice in the present case till disposal of civil suit. **See AIR 2015 Apex Court 826 Transport Corporation of India Ltd. Vs. Ganesh Polytex Ltd.,See AIR 1994 Apex Court 1837 Satyabrata Biswas & Others Vs. Kalyan Kumar Kisku & Others,See AIR 2005 Apex Court 104 Maharwal Khewaji Trust Vs. Baldev Dass.**

15. Submission of learned Advocate appearing on behalf of non-petitioners that mutation in the name of deceased Kamlesh qua suit property was sanctioned with the consent of Smt. Santosh and Smt. Sharda Devi and on this ground petition be dismissed is decided accordingly. Learned Trial Court has framed issue No.7 in civil suit relating to estoppel. It is not expedient in the ends of justice to give judicial findings upon issue of estoppel at this stage of case. Judicial findings relating to estoppel will be given by learned Trial Court after giving due opportunities to both parties to adduce oral and documentary evidence. In view of law that zamabandis entries and entries of mutations are not proof of title it is held that prima facie case and balance of convenience are in favour of petitioners. It is held that petitioners will suffer irreparable loss if ad interim injunction under order XXXIX Rules 1 & 2 CPC is not granted. It is held that in order to avoid multiplicity of judicial proceedings inter se parties grant of ad interim injunction under order XXXIX Rules 1 & 2 CPC is essential in the present case in the ends of justice. Point No.1 is decided accordingly.

Point No.2 (Relief).

16. In view of findings upon point No.1 present petition filed under Article 227 of Constitution of India is allowed. Order of learned District Judge Solan (H.P.) dated 1.4.2015 announced in Civil Misc. Appeal No.14-S/14 of 2014 title Sanjeev Kumar and others Vs. Smt. Santosh and others is set-aside and order of learned Trial Court dated 1.7.2014 affirmed. Parties are left to bear their own costs. Observations will not effect merits of case in any manner and will be strictly confined for disposal of present petition. Parties are directed to appear before learned Trial Court on **23.12.2016.** File(s) of learned First Appellate Court and learned Trial Court alongwith certified copy of order be sent back forthwith. CMPMO No.426/2015 is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Cr.MP(M) No. 1465 of 2016 with Cr.M.P(M) No. 1466 & 1467 of 2016.
Decided on: 8th December, 2016

Cr.M.P(M) No. 1465 of 2016
Sohan Lal .....Petitioner
Versus
State of H.P. .....Respondent.

Cr.M.P(M) No. 1466 of 2016
Pardeep Sharma .....Petitioner
Versus
State of H.P. .....Respondent.

Cr.M.P(M) No. 1467 of 2016
Lalit Sharma .....Petitioner
Versus
State of H.P. .....Respondent.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Sections 341, 323, 325, 307 and 506 of I.P.C – the petitioners sought bail – held, that there are two versions regarding the manner of incident- the injuries do not show that they could have been caused by stick, kicks or fist blows – petition allowed- petitioners ordered to be released on bail of Rs.25,000/-. (Para-3 to 7)

For the petitioners : Mr. I.S. Chandel and Mr. S.S. Rathore, Advocates.
For the respondent : Mr. Neeraj K. Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

This order shall dispose of all the three petitions arising out of FIR No. 188/2016 registered under Section 341, 323, 325, 307, 506 of the Indian Penal Code against the accused-petitioners in Police Station, Theog, District Shimla, with the allegations that on 5.11.2016 around 8.30 p.m. complainant Babloo (Narinder Kumar) met them at Kufri. They stopped him and administered beatings. The accused-petitioners allegedly beaten him with 'danda' whereas his co-accused Lalit and Pradeep with kicks and fisty cuffs. The complainant received injuries on his person. He also apprehended danger to his life at the hands of accused-petitioners.

2. The injured was taken to Civil Hospital, Theog for treatment. He was referred to I.G.M.C. Shimla and there remained hospitalized from 9.11.2016 to 23.11.2016 in Orthopedics Department under the supervision of Professor Orthopedics Dr. Manoj Thakur. Initially, the case was registered against the accused-petitioners only under Section 341, 323, 506 read with Section 34 of the Indian Penal Code. Later on, after obtaining the case summary from the department of Orthopedics I.G.M.C. Shimla and the opinion of the Medical Officer, Civil Hospital, Theog as well as keeping in view the hospitalization of the complainant during the period 9.11.2016 to 23.11.2016, the injury i.e. subluxation C5-C6 was found to be grievous in nature. In view of the opinion so obtained a case under Section 325 and 307 of the Indian Penal Code has also been registered against the accused-petitioners.

3. The investigation conducted at this stage is not suggestive of as to what was the cause of administering beatings to the complainant by the accused-petitioners. Now if coming to the contents of these petitions, the complainant allegedly teased the wife of accused-petitioner Sohan Lal. The said accused asked the complainant as to why he had teased his wife when she was in the 'Ghasani' (pasture). The reply of the complainant was that only a person who has muscle power can do such type of act. Not only this but he allegedly started pelting stones on accused-petitioner Sohan Lal. On noticing the quarrel at the place of occurrence other villagers attracted to it and on this the complainant ran away through 'Ghasani'. There being dark, he fell down on his person and received injuries.

4. Being so, at this stage, there are two version qua the manner in which the occurrence took place. The complainant has not disclosed the cause of administering beatings to him by the accused-petitioners, whereas, as per the explanation set-forth by the accused-petitioners, he was only asked as to why he had teased the wife of one of the accused-petitioners and it is on this he enraged. They had not administered beatings to him and rather the injuries were received by him by way of fall while fleeing away from the place of occurrence on seeing the other villagers coming there. Nothing, however, at this stage can be said about the manner in which the incident sparked off.

5. Much has been said about the nature of injuries on the person of complainant and the opinion obtained from the Medical Officer, Civil Hospital, Theog. That opinion cannot be treated to be conclusive proof, particularly when not obtained from the doctor incharge under whose supervision the complainant remained admitted in I.G.M.C. Shimla or from either of the associates of that doctor. Looking to the nature of injuries as reflected in the MLC, it cannot also be said that the same could have been caused by danda or kicks and fisty cuffs. The accused-petitioners are local residents and residing within the local limits of Police Station, Theog. There is no complaint that they were not available for the purpose of interrogation as and when called upon to do so. The apprehension of the investigating agency that they may hamper the investigation of the case and tamper with the prosecution evidence is also without any substance

as the accused-petitioners seem to be not such an influential person so as to indulge in such activities. Otherwise also, they may not hamper the investigation of the case and tamper with the prosecution evidence, this Court can impose suitable conditions upon them on their failure to do so, the investigating agency will be free to approach this Court for cancellation of the liberty of bail granted to them.

6. Learned counsel representing the accused-petitioners has produced the certified copy of order passed by learned Sessions Judge, Shimla in similar applications, which were filed by the accused-petitioners for grant of bail. Perusal thereof reveals that the said applications were not dismissed on account of accused-petitioners absconded from the Court premises as argued by learned Additional Advocate General and rather on merits.

7. In view of what has been said hereinabove, all the three petitions succeed and the same are accordingly allowed. Consequently, it is directed that in the event of arrest of the accused-petitioners in connection with FIR No. 188/2016 registered in Police Station, Theog, they shall be released on bail subject to their furnishing personal bond in the sum of Rs. 25,000/- each with one surety each in the like amount to the satisfaction of arresting Police Officer/Investigating Officer.They shall further abide by the following conditions:-

(a) make themselves available for interrogation as and when called upon to do so;

(b) not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever.

(c) not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer.

(d) not leave the territory of India without the prior permission of the Court.

8. It is clarified that if the petitioners misuse their liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

9. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of these petitions alone. Petitions stand disposed of accordingly. Dasti ***copy***.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Tek Chand .....Appellant-Defendant

Versus

Govind Kumar .....Respondent-Plaintiff.

RSA No. 557 of 2004.
Reserved on: 2nd December, 2016.
Date of Decision : 8th December, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendant is stranger who is interfering with the suit land without any right to do so- the defendant pleaded that suit land was exchanged by father of plaintiff with G – G had given the suit land to the defendant – defendant had raised construction of three shops and one house over the suit land – the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that the Courts had rejected the exchange deed on the ground that it was not registered and no specific area was mentioned in the same – father of the plaintiff had not raised any objection when the construction was raised by the defendant, which means

that he had agreed to the same – no objection was raised at the time of exhibition of deed of exchange – non-registration will not affect the part performance- the Courts had not properly appreciated the evidence – appeal allowed and suit of the plaintiff dismissed.(Para-8 to 14)

Cases referred:

Aghore Kumar Ganguli and others, AIR 1914 Privy Council 27

Dada Vaku Nikam v. Bahiru Hingu Nikam and others, AIR 1927 Bombay 627

Putta Chelamiah and another versus Venkata Kumara Mahipati Suryarao Bahadur Garu and another, AIR 1930 Madras 1

For the Appellant: Mr. Anand Sharma, Advocate.

For the Respondent: Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Regular Second Appeal stands directed by the defendant/appellant herein against the impugned rendition of the learned District Judge, Chamba, Himachal Pradesh, whereby he dismissed the appeal of the defendant/appellant herein and affirmed the judgment and decree rendered by the learned Civil Judge (Junior Division), Chmaba, District Chamba, H.P., whereby the latter Court decreed the suit of the plaintiff. The defendant/appellant herein stands aggrieved by the judgment and decree of the learned District Judge, Chamba. His standing aggrieved, he has therefrom preferred the instant appeal before this Court for seeking from this Court an order reversing the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff has filed the suit for permanent prohibitory and mandatory injunction against the defendant from interfering and raising the construction over the land comprised in khasra No.2648/210, khata/khatauni No.172/226, measuring 0-9 biswa, situated in Mohal Rajnagar, Tehsil and District Chamba, H.P. The claim of the plaintiff is that he is owner in possession of the suit land. The defendant is stranger to the suit land, having no right, title or interest in it. The defendant has started collecting construction material with intent to raise the construction over the suit land. The defendant was requested to desist from his illegal designs, but of no avail. It has also been pleaded that in case the defendants succeeds to raise the construction over the suit land during the pendency of the suit, in that eventuality, the construction so raised be ordered to be demolished.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections qua the plaintiff having not come to the Court with clean hands and has suppressed the material fact that the suit land was exchanged by the father of the plaintiff namely Raju with one late Smt. Gauri, who in lieu of it, parted with the land comprised in Khasra No.2114 in his favour in the year 1978, and thereafter Smt. Gauri Gave the suit land to the defendant, who got the electric meter installed in the year 1981. On merits it is pleaded that the plaintiff is not owner in possession of the suit land. The suit land was given in exchange by the father of the plaintiff to Smt. Gauri. Since, the said Gauri gave this land to the defendant, as such, he raised the construction of three shops and one house over the suit land in the presence of the father of the plaintiff. Mutation No.850 qua the exchange of the suit land with the land comprised in khasra No.2114 was entered but the same was rejected on 18.2.1986 due to non appearance of the parties. The possession of the defendant is adverse and hostile to the knowledge of the plaintiff, as such, the replying defendant has become owner of the suit land by way of adverse possession.

4. The plaintiff/respondent herein filed replication to the written statement of the defendant/appellant herein, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is owner in possession of the suit land, as alleged? OPP

2. Whether the defendant is raising illegal and unlawful construction over the suit land, as alleged? OPP

3. If issues No.1 and 2 are proved in affirmative, whether the plaintiff is entitled for the relief of mandatory injunction? OPP

4. Whether the plaintiff has not come to the court with clean hands? OPD

5. Whether there was any exchange of land between Smt. Gauri and Raju in respect of the suit land, as alleged? If so its effect? OPD.

6. Whether the plaintiff is debarred by his own act and conduct to file the present suit?OPD.

7. In the alternative, whether the defendant has become owner of the suit land by way of adverse possession, as alleged? OPD.

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the respondent herein/plaintiff. In an appeal, preferred therefrom by the appellant/defendant before the learned first Appellate Court, the latter Court dismissed the appeal.

7. Now the defendant/appellant has instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgement and decree by the learned first Appellate Court. When the appeal came up for admission on 04.03.2005, this Court, admitted the appeal instituted herebefore by the defendant/appellant against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether a person in possession of exchanged land through a written document (Exhibit DA) can challenge the title of the mutually exchanged property of the other party and seek injunction?

2. Whether the learned Courts below could have discarded the document Exhibit DA only on the ground that it was not registered without taking into consideration that the said document could be relied upon for collateral purpose for proving the factum of possession as per Section 49 of the Registration Act?

Substantial Questions of Law No.1 and 2:

8. Jamabandis borne respectively on Ex. DB and on Ex.DD pertaining respectively to the years 1974-75 and 1979-80 make unequivocal depictions therein qua the father of the plaintiff standing recorded thereat as co-owner of the suit land. Under Ex. DA, executed inter se the father of the plaintiff with one Smt. Gauri, an exchange of their respective lands occurred inter se both, whereupon, Gauri acquired the interest in the suit land from Raju also thereupon the latter acquired the apposite interest in the land owned by Gauri. Also therein a recital is borne qua Gauri transferring her interests qua the suit land as stood acquired by her under the relevant exchange occurring with the father of the plaintiff vis-a-vis the defendant. In consonance therewith the defendant raised construction upon the suit land in the year 1978. Uncontrovertedly, the defendant/appellant herein holds possession of the suit land upon which he raised construction in the year 1978.

9. Both the learned Courts below had countervailed the vigour of Ex. DA on anvil of (a) it effecting alienation besides conveyance of title thereunder qua the father of the plaintiff and Smt. Gauri besides also upon the defendant/appellant whereupon its registration under the apposite statute was compulsory, whereas, it remaining unregistered no valid conveyance of title qua the suit land stood bestowed upon the defendant/appellant herein; (b) non occurrence of any depiction therein with specificity qua the specific area delineated to stand transferred vis-a-vis the defendant/appellant and (c) Ex. DA remaining unproven.

10. The efficacy of the aforesaid concurrently recorded pronouncements made by both the learned Courts for enfeebling the vigour of Ex.DA stands extinguished in the face of construction upon the suit land in pursuance to Ex. DA, standing raised by the defendant/appellant in the year 1978 whereat the father of the plaintiff stands displayed in the apposite jamabandi to hold its ownership. Also when thereon he did not protest the raising of construction upon the suit land by the defendant/appellant, he is to be construed to acquiesced to the factum of land whereon construction stood raised by the defendant/appellant in the year 1978 constituting the land qua which an exchange occurred inter se the executants of Ex.DA, whereupon, the non marking therein with specificity the area with respect whereto it occurred is wholly insignificant. Furthermore, the factum of the father of the plaintiff also accepting the valid execution of Ex.DA stands spurred by PW-2 in his cross-examination testifying qua the father of the plaintiff also raising construction upon a part of the land owned by Gauri in Village Rupani also his cultivating the other part thereto, significantly, when the apposite quid pro quo for the exchange which occurred inter se the executants of Ex. DA comprised in the father of the plaintiff therein alienating the suit land to Gauri, who thereunder alienated the suit land to the defendant/appellant, whereas, Gauri in lieu thereto alienating her property in village Rupani vis-a-vis the father of the plaintiff, stood hence fully consumated. In aftermath, with aplomb it can stand concluded qua the executants of Ex. DA acting upon the recitals manifested therein dehors any non marking therein with specificity of khasra numbers along with their dimensions where with respect whereto an exchange occurred also when the executants of Ex.DA without any remonstrance or demur raised at the earliest by each against the other respectively raising construction on the lands respectively brought to exchange under Ex. DA, spurs an inference qua the land(s) whereon they hold possession by raising construction thereon standing accepted by each of the executants of Ex. DA, embodying the corpus of the relevant exchange. Therefore, the conclusion recorded by both the learned Courts below qua for lack of enunciations with specificity in Ex.DA qua the area besides the dimensions of land(s) brought to exchange thereunder it hence lacking in efficacy warrants, its standing foundered.

11. The relevant document whereunder the relevant exchange occurred inter se the parties thereto stood tendered into evidence by the defendant /appellant whereat it stood exhibited as Ex. DA. At the stage contemporaneous to its tendering besides exhibition thereat no protest emanated from the plaintiff qua the recitals occurring therein standing ingrained with a vice of fictitiousness besides with a stain of falsity nor at the time of its standing tendered into evidence by the defendant whereupon it stood exhibited no protest stood evinced thereat at the instance of the plaintiff qua the occurrence of signatures thereon holding no authenticity, whereupon obviously, with the defendant discharging the onus of proving Ex.DA, corollary whereof is qua it being wholly inapt for both the learned Courts below to merely on anvil of DW-2 testifying qua his not knowing the name of the person who scribed Ex.DA, conclude qua, hence, the factum of, for the reasons aforesaid qua the onus of proving it standing discharged by the defendant, standing repelled. Moreover, at no stage it stands unraveled of the plaintiff making any concert to either challenge the occurrence of signatures thereon of the executants of Ex.DA nor obviously when no concert in pursuance thereto stood assayed by the plaintiff qua the occurrence of markings/signatures thereon of the executants thereto standing transmitted to the expert(s) concerned for his holding a comparison with the markings/signatures of the executants occurring thereon with their admitted markings/signatures, for thereupon his rendering an opinion qua their authenticity, fillips an inference qua Ex. DA standing proven to stand validly executed by its respective executants.

12. The effect of the aforesaid discussion holding unfoldments qua the father of the plaintiff, who stands displayed in the jamabandi(s) contemporaneous to the period whereat Ex.DA stood executed to hold exclusive title qua the suit property also thereupon his concomitantly holding an exclusive right to enter into an exchange qua the land(s) enumerated in Ex. DA besides when the aforesaid discussion brings to the fore qua the relevant exchange standing acted upon in the year 1978 by the respective executants of Ex. DA also since at the relevant stage especially when in quick succession to the execution of Ex. DA construction stood raised by the defendant/appellant on the suit land besides also stood raised by the father of the plaintiff upon the land of Gauri, renders the effect, if any of Ex.DA though standing enjoined by the apposite statute to be compulsorily registered whereas its evidently not coming to be registered to not either pale the effect of the aforesaid inference nor the factum of its non registration would render belittled the effect of the aforesaid acquiescence whereupon the concomitant effect is of the plaintiff standing estopped merely for want of registration of Ex. DA to assail qua no valid title thereunder standing conveyed vis-a-vis its executants. In making the aforesaid conclusion this Court anchors it on the statutory doctrine of part performance standing positioned on a pedestal of equity thereupon the sequel emanating therefrom is qua equity supporting transactions alike the one hereat though clothed imperfectly in those legal forms to which finality attaches conspicuously when the bargain has been for the reasons aforestated acted upon hereat, also this Court draws succor from a decision reported in Mohamed Musa and others versus ***Aghore Kumar Ganguli and others, AIR 1914 Privy Council 27***. The aforesaid decision of the Privy Council stands referred to in a subsequent decision reported in ***Dada Vaku Nikam v. Bahiru Hingu Nikam and others, AIR 1927 Bombay 627***, wherewithin the principle of equity postulated in the decision of the Privy Council reported in AIR 1914 Privy Council, 27 besides standing alluded to therein stood also followed, significantly when it stood pronounced therein qua it standing founded upon the principle of natural justice also it aborting perpetration of fraud in land transactions. The decision reported in AIR 1927, Bombay, 627 wherewithin the aforesaid principle stood propounded emanated from the Bomaby High Court on its standing seized with an oral exchange,whereupon, with evidently the contestants thereat acting thereupon, prodded the Bombay High Court to proceed to apply thereon the principle of part performance despite obviously no scribed exchange interse the contestants thereat stood executed nor obviously it stood registered, though contradistinctively hereat a statutory mandate is cast upon the executants of Ex. DA for it to hold completeness of legal form also for it to complete the vestment of title vis-a-vs its respective executants, to compulsorily register it, whereas, it standing evidently not registered may yet not denude its sanctity qua its thereunder vesting title respectively upon its executants, conspicuously, when in a pronouncement recorded by the Bombay High Court in ***Dada Vaku Nikam's case****supra* reported in AIR 1927, Bombay, 627, the latter Court therein invoking qua also an oral agreement of exchange the doctrine of part performance, in sequel whereof, this Court likewise when evidently hereat Ex. DA for reasons aforestated stands acted upon by the parties thereto, stands constrained to conclude qua the benefit of the doctrine of part performance standing available to be derived by the defendant/appellant.

13. Be that as it may, the Madras High Court in its decision reported in ***Putta Chelamiah and another versus Venkata Kumara Mahipati Suryarao Bahadur Garu and another, AIR 1930 Madras 1,*** had even attracted the applicability of the statutory doctrine of part performance vis-a-vis an oral exchange even when obviously the latter remained unscribed whereupon obviously the invincible conclusion is of the statutory doctrine of part performance when apposite evidence in consonance therewith stands adduced as for reasons aforestated stands adduced hereat, it warranting attraction vis-a-vis Ex, DA, rendering thereupon the want of registration of Ex. DA to be wholly inefficacious rather wholly insignificant.

14. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court stand not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have both excluded germane and apposite

material from consideration. Consequently, substantial questions of law are answered in favour of the appellant/defendant and against the respondent/plaintiff.

15. In view of above discussion, the present Regular Second Appeal is allowed and the suit of the plaintiff is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are set aside. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

CWP No. 2082 of 2016 with CWP's No.2083, 2084, 2085 and 2086 of 2016
Reserved on: November 24, 2016
Decided on: December 8, 2016

1. CWP No. 2082 of 2016
Vinod Kumar .....Petitioner
Versus
State of H.P. and others .....Respondents

2. CWP No. 2083 of 2016
Thakur Singh .....Petitioner
Versus
State of H.P. and others .....Respondents

3. CWP No. 2084 of 2016
Puspa Lata .....Petitioner
Versus
State of H.P. and others .....Respondents

4. CWP No. 2085 of 2016
Sham Ved .....Petitioner
Versus
State of H.P. and others .....Respondents

5. CWP No. 2086 of 2016
Ajaib Singh .....Petitioner
Versus
State of H.P. and others .....Respondents

Constitution of India, 1950- Article 226- The trucks owned by the petitioners were ordered to be delisted by H.P. Ex-servicemen Corporation – a writ petition was filed by one B before High Court in which it was found that a few persons were permitted to attach more than one truck – the Court issued various directions – the judgment was accepted and bye-laws were amended – a special leave petition was filed before the Supreme Court, which was dismissed- show cause notices were issued to various persons – separate writ petitions were filed against the notices, which were permitted to be withdrawn – representations were filed, which were rejected- held, that the prayers made in the present petition have already been considered and rejected earlier- amendments were carried out in the bye-laws on the basis of the directions issued by the Court – writ petitioners have no right to seek attachment after the issuance of the direction- writ petition dismissed. (Para- 14 to 17)

For the petitioner(s) : Mr. Amit Singh Chandel, Advocate, in all the petitions.
For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K.

Verma, Deputy Advocate General, for respondent No.1, in all the petitions.
Mr. Mukul Sood, Advocate, for respondents No.2 to 4, in all the petitions.
Mr. K.D. Sood, Senior Advocate with Mr. Dhananjay Sharma, Advocate, for respondent No.5, in all the petitions.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Since common questions of law and facts are involved in all these petitions, and same and similar relief(s) has/have been sought, all were taken up together for disposal. The petitions have been filed on same and similar facts and circumstances. However, for the sake of clarity, facts of CWP No. 2082 of 2016 are being discussed herein below. Main relief(s) prayed for in CWP No. 2082 of 2016 (as also in other connected petitions), are as follows:

"(i) That impugned annexure P-12 dated 19-5-2016, regarding delisting the trucks number HP24-2617 & HP 24-6217 issued in view of the Division Bench Judgment passed in CWP No. 2402/2008 titled as Baldev Singh VS H.P. Ex-servicemen corporation and Others (as annexure P-4) may be quashed and set aside, by reconsidering the judgment passed in CWP No. 2402/2008 titled as Baldev Singh vs H.P. Ex-servicemen corporation and Others (as annexure P-4), in light of the scheme/ legislative intent of the H.P. Ex-servicemen Corporation Act, 1979, by referring the same to the larger Bench of this Hon'ble court, in the interest of law, equity, justice and fair play;

(ii) That regulations made in 102nd meeting of Board of Directors of respondent no. 2 on dated 27th April, 2011 vide issue no. 102/9 as well as clause 10 of the bye laws of H.P. Ex-Servicemen Truck Operators welfare Working Committee (as annexure P-5/B) may be held violative of Article 14 & Article 21 of the Constitution of India as well as in violation of Legislative intent of the H.P. Ex-servicemen Corporation Act, 1979 & Himachal Pradesh General Clauses Act, 1968, therefore, may kindly be quashed and set aside, in the interest of law equity and justice.

(iii) That the appropriate directions may kindly be given to the respondents to allow the petitioner the attachment of his truck with the respondent Nos. 2 and 5 in light of the scheme/ legislative intent of Himachal Pradesh Ex-servicemen corporation Act, 1979, in the interest of Law, Equity and Justice;"

2. Briefly stated the facts of the case, as emerge from the record are that the petitioners are aggrieved by the issuance of order dated 19.5.2016 passed by the respondent, Himachal Pradesh Ex-servicemen Corporation (for short, 'Corporation') pursuant to the representation submitted by the petitioner in terms of judgment dated 26.4.2016 passed by this Court in LPA No. 10 of 2016 and other connected petitions, whereby trucks owned by the petitioners were ordered to be de-listed as per directions issued by the learned Single Judge of this Court on 6.1.2011 in CWP No. 2402 of 2008 titled **Baldev Singh vs. Himachal Pradesh Ex-servicemen Corporation & ors**. Petitioner claiming himself to be Ex-serviceman in terms of Section 2 (f) of the Himachal Pradesh Ex-servicemen Corporation Act, 1979 (in short, 'Act'), applied in the year 2012 for the transfer of attachment of truck in his name being legal heir of his father, who was originally enlisted with the Corporation as Ex-serviceman for transporting cement from Associated Cement Company Limited (in short, 'ACC'). It also emerges from the record that respondent No.2-Corporation has entered into an agreement with ACC, wherein 40% of transportation work of cement is/was allocated to the Corporation. Under the Act, State Government established the Corporation. Chapter IV, "FUNCTIONS AND FUND OF THE

CORPORATION", of the Act provides for welfare and economic upliftment of the Ex-servicemen in the State. It would be apt to reproduce Chapter IV as under:

CHAPTER IV

FUNCTIONS AND FUND OF THE CORPORATION

15. **Function of the Corporation**. – (1) Subject to the provisions of this Act, the functions of the Corporation shall be to provide for the welfare and economic uplift of the ex-servicemen in the State.

(2) Without prejudice to the generality of the foregoing provisions the Corporation may take such steps, as it may think necessary, --

(i) to plan, promote and undertake on its own or in collaboration with or through such ex-servicemen organizations or other agencies as may be approved by the Corporation, programmes of agricultural development, marketing, processing supply and storage of agricultural produce, small scale industry, building construction, transport and such other business, trade or activity as may be approved in this behalf by the Government;

(ii) to provide financial assistance to ex-servicemen or their organisations by advancing to them in cash or in kind loans including loans under hire-purchase system and/or loan towards margin money for any of the purposes specified in clause (i) either directly or through such agency, organisation or institution as may be approved by it;

(iii) to give on hire agricultural or industrial machinery or equipment to ex-servicemen or their organisation;

(iv) to give grants and subsidies to and to guarantee loans taken by the ex-servicemen or their organisation;

(v) to discharge such other functions as may be prescribed or as are supplemental, incidental or consequential to any of the functions conferred on it under this Act.

(3) In discharging its functions, the Corporation shall have due regard to public interest, its solvency and welfare of ex-servicemen.

16. **Capital of the Corporation and its power to borrow or issue bonds and debentures, etc**.—(1) For the purpose of carrying out its functions under this Act, the Corporation may—

(a) be provided with capital by the Government on such terms and conditions as the Government may specify, or by any person, or association of persons or association of persons interested in or dealing with the welfare of ex-servicemen on such terms and conditions as may be mutually agreed, upon between the Corporation and such person or association of persons;

(b) with the previous approval of, and subject to the directions of the Government, borrow money from any bank or other financial institution or any other authority or organisation;

(c) issue bonds and debentures or draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, hundies, bills, warrants, debentures and other negotiable instruments.

(2) The Government may guarantee the repayment of the moneys borrowed by the Corporation under sub-section (1) and the payment of interest thereon.

17. **Ex-servicemen Corporation Fund. –** (1) The Corporation shall maintain a Fund called the Ex-servicemen Corporation Fund (hereinafter referred to as the Fund) to which shall be credited --

(a) all moneys received by it from the Government or from any person or association of persons interested in or dealing with the welfare of ex-servicemen;

(b) such sums of moneys as may from time to time, be realized by way of repayment of loans made from the fund or from interest on loans;

(c) all moneys borrowed under section 16; and

(d) all moneys received by it from any other source.

(2) The moneys in the Fund shall be applied by the Corporation for carrying out its functions under this Act.

(3) All moneys in the fund shall be deposited in the bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934), or in a government Treasury, as may be decided by the Corporation;

Provided that the Corporation may invest or deposit its surplus funds in the Government secureties or in such other manner as it may decide.

3. With a view to achieve aforesaid objectives as mentioned in clause 15 of aforesaid Chapter, Corporation entered into aforesaid agreement with the ACC and secured 40% of transportation work of cement. Since the Corporation did not have its own fleet of trucks, it entered into agreement with the individual ex-servicemen truck operators, for fulfilling the obligation regarding transportation of cement pursuant to the agreement entered between it and the cement company. It also emerges from the record that the Corporation with a view to provide better and transparent management to ex-servicemen truck operators of the State engaged by it through ex-servicemen Welfare Working Committee, for carrying cement to different destinations from Barmana cement factory, framed Bye-Laws providing therein that the Welfare Working Committee shall work under overall supervision and direction of Chairman-cum-Managing Director (for short, 'CMD'). The Welfare Working Committee (in short, 'Committee') comprises of Project Manager as President, one of the District Presidents as Vice President and all the District Presidents as Members of the Committee. In bye-law 4 of the Bye-Laws i.e. 'Detailment of Trucks for Cement Lifting' , following provisions were made: handle

"**Detailment of Trucks for Cement Lifting**

4. (a) It will be the sole responsibility of District Presidents to ensure that the trucks of Ex-Service are registered with H.P. Ex-Servicemen Corporation, Camp Office Barmana for transportation of cement. The trucks owned by civilians/unauthorized persons will not be attached.

(b) Trucks will be registered with the approval of CMD H.P. Ex-Servicemen Corporation and decision taken by CMD in this regard shall be final.

(c) The list of unauthorized trucks attached will be put up in the quarterly meeting of Welfare Working Committee, on which firm decision will be taken.

(d) District wise list of trucks attached will be prepared separately.

(e) District Presidents will ensure that trucks owned by re-employed ex-servicemen are not attached. One person cannot get double benefit at the cost of others who are on waiting list and awaiting their turn for attachment of trucks.

(f) The trucks will be detailed for lifting of cement according to the seniority and no preference will be given to any District in consideration of the location of the consignee. Impartial detailment of the trucks will be supervised by the President and he will ensure that demand of the trucks is correctly taken from the ACC Factory according to the Corporation share and if there is any variation

then he shall report this matter to the Distribution Manager of ACC Barmana under the information to the Chairman-cum-Managing Director.

(g) It will be mandatory for the Welfare Working Committee to implement the decision of Senior Sub Judge Bilaspur dated 19.05.2003 that the carriage work needs to be rationalized and the President Welfare Working Committee is directed to give due and proper work to all the truck operators of all the Districts. Every truck operator should be given work to carry cement to longer as well as shorter distance/destinations so that all truck operators earn almost equal profit."

4. Perusal of aforesaid bye-law suggests that trucks owned by ex-servicemen can only be registered with the Corporation at Barmana for transportation of cement. It further suggests that the most of them are owned by ex-servicemen can not be enlisted. Similarly, Bye-Laws provide that one ex-serviceman can not get double benefit at the cost of others, who are in the waiting list and awaiting their turn for attachment of trucks. It also emerges from the pleadings/records that aforesaid Bye-Laws were amended from time to time and even widows and legal heirs of deceased ex-servicemen were allowed to attach their trucks for transportation of cement.

5. In the year 2011, one ex-serviceman namely Baldev Singh approached this Court by way of CWP No. 2402/2008, with a prayer that the Corporation may be directed to attach his truck with it. Petitioner in that case claimed that since his truck was stolen as such he was entitled to get another truck attached with the Corporation in place of stolen truck. The Corporation instead of attaching his new truck, de-listed the truck which was originally enlisted with the Corporation earlier. Corporation informed the Court in those proceedings that in the year 2002, keeping in view larger interest of ex-servicemen, it was decided that only one truck of one ex-serviceman would be attached with the Corporation. Corporation further claimed that aforesaid resolution of the year 2002 was reiterated in the year 2005 and endeavour of the Corporation is/was to ensure that largest number of ex-servicemen gets the benefit of attachment of their trucks with the Corporation. But it appears that during the pendency of the aforesaid writ petition, petitioner submitted a list of few persons, who were permitted to attach more than one truck, even after passing of aforesaid resolutions in the years 2002 and 2005. In the aforesaid background, Division Bench of this Court vide order dated 7.8.2009 directed the CMD of the Corporation to file an affidavit specifically giving therein details of the members of the Corporation, who were permitted to attach more than one truck with the Corporation after the resolution passed in 2002. Court also asked for information, whether any truck of any member has been delisted on account of the fact that not more than one truck can be attached with the Corporation. Though respondent Corporation filed an affidavit in terms of aforesaid order passed by the Court annexing therewith complete list of members, who were permitted to attach more than one truck even after passing of resolutions dated 17.1.2002 and 6.1.2005 but the fact remains that the Court after noticing the plea of the learned counsel for the petitioner, further discovered that more than 185 ex-servicemen were permitted to attach more than one truck and in some cases as many as four trucks were allowed to be attached, after passing of aforesaid resolutions. Accordingly, Division Bench of this Court was constrained to observe as under:

"The Himachal Pradesh Ex-servicemen Corporation virtually has the monopoly of transporting cement from the A.C.C factory at Barmana in Bilaspur. In certain cases, as per the Policy, only one truck is being attached with the Corporation while in the cases of other persons as many as 4 to 5 trucks have been attached. Though in the affidavit of the Corporation, it is mentioned that there are 185 persons having more than one truck attached with the Corporation but in the counter-affidavit filed on behalf of the petitioner, it is mentioned that there are other persons such as Ex-Sipahi Roop Singh whose name is not in the list but has more than two trucks attached.

The Corporation has been formed by the State Government for the welfare of the ex-servicemen. The purpose is to provide some means of livelihood

to the ex-servicemen after their retirement from the Armed Forces at a young age. There is a massive scope for doing good work by the Corporation. But if the Corporation continues to act in the manner in which it has been acting till now, i.e., in a totally arbitrary and capricious manner, the entire purpose of setting up the Corporation will be set at naught. In such eventuality, we are of the considered opinion that it would be better to wind up the Corporation itself.

From the material placed on record, it is apparent that it is the office bearers of the Corporation who are deriving the maximum benefit of having more than one truck attached. When these District Presidents or other office bearers apply for attachment of trucks then the Corporation does not raise the objections that under the resolutions of 2002 and 2005, not more than one truck of an individual can be attached. Even as per the Corporation, there are 192 persons who were permitted to attach more than one truck after the resolution was passed in the year 2002. It is, therefore, apparent that no sanctity is attached by the Corporation to its own resolutions. However, we do not want to turn the clock back since people who have already made investments and spent huge money on purchase of trucks should not be put at loss all of a sudden.

To put an end to the entire dispute, we want to issue certain directions which must be obeyed in letter and spirit. While issuing these directions, we are taking into consideration the fact that the Himachal Pradesh Ex-servicemen Corporation has been constituted for the benefit of the ex-servicemen. The interest of the ex-servicemen will be served if each ex-serviceman is allowed to attach only on truck with the Corporation. This way, the maximum number of ex-serviceman can be accommodated. This does not in any way debar an ex-serviceman from purchasing or plying the second truck but he cannot get it attached with the Corporation but can ply it in his individual capacity. If the maximum number of ex-servicemen are to be helped and assisted in getting livelihood after retirement, it would be in the interest of justice, if each ex-serviceman is permitted to attach only one truck with the Corporation. We would like to make it clear that the right of the ex-serviceman to get his truck attached can be inherited only by his widow and not by his children unless there are minor children. We would also like to make it clear that in case an ex-serviceman is re-employed in a Government/public sector undertaking, he shall loose his right to have his truck attached with the Corporation."

6. In the aforesaid background, Division Bench of this Court vide judgment dated 6.1.2011 directed the respondent-State as well as Corporation to ensure that Bye-Laws, Rules and Regulations of the Corporation are amended in line with the directions issued by the Court. The Division Bench of this Court passed as many as 15 directions, which were required to be strictly followed by the Corporation for regulating transportation business amongst its members but in the facts and circumstances of present petition, directions No. 9 and 10 would be material, which are as under:

"9. In case an ex-serviceman dies, his widow shall be entitled to inherit the right to have a truck attached till her life time.

10. In case there is no widow or the widow voluntarily gives up her right, the attachment can be transferred to one son/daughter of the ex-serviceman but in such eventuality, the right to ply the truck shall only be for a period of 5 years. After the death of the widow or on expiry of 5 years, the attachment shall cease to exist and the slot shall be given on the basis of seniority."

7. Aforesaid judgment having been passed by the Division Bench of this Court was accepted in toto by the Corporation, because no further appeal was preferred before the Apex Court by it, rather the Corporation suitably amended its Bye-Laws in its 102nd meeting held on 27.4.2011 and incorporated following provisions: -

"10. **Inclusion of Directions /orders given by Hon'ble High court vide CPW -2402/2008 dated 06 Jan 2011.**

(a) In future only one truck of an ex-servicemen shall be attached with the Corporation.

(b) As far as the attachments already made are concerned, if there are more than two trucks of any ex-serviceman attached with the Corporation after 1.4.2011 only two trucks will be attached and the remaining trucks shall not be attached.

(c) The Corporation shall ensure that on and w.e.f. 1.4.2012, only one truck of each ex-servicemen shall be attached. Thus, an ex-servicemen will have a period of one year to either dispose of the excess trucks or to make alternate arrangement for their plying.

(d) The Corporation shall invite applications from all ex-servicemen of Himachal Pradesh by publishing advertisements in two English and two Hindi newspapers having wide circulation in the State. The advertisements be published on or before 31.1.2011 and last date for receipt of applications shall be 28.2.2011.

(e) The ex-servicemen who are desirous of plying and attaching their truck with the Corporation shall file their application latest by 28.2.2011.

(f) The Corporation shall draw up a list of candidates and seniority shall be given in order of retirement, i.e., a person who has retired earlier shall be placed senior in the seniority. If two candidates have retired on the same date then the candidate who has put in longer service in the Armed Forces shall rank higher in seniority. Henceforth all attachment shall be made strictly in accordance with the seniority list, so maintained. This list be drawn up latest by 25.3.2011. The list shall be displayed on the Notice Board of the respondent No.1-Corporation and shall be open for inspection to all ex servicemen. The ex-servicemen can file their objections with the Corporation to the said list.

(g) For the future every year, the respondent-Corporation shall invite applications from ex-servicemen for including their names in the list by issuing advertisement as aforesaid. These advertisements shall be published by 31st December of each year and applications shall be invited latest by 31st of January and the list shall be prepared by 28th of February of the subsequent years. These lists shall be applicable from 1st April of the subsequent years.

(h) The vacant positions for the trucks which are detached only after 1.4.2011 will be offered to the ex-servicemen who are next in the waiting list.

(i) In case an ex-servicemen dies, his widow shall be entitled to inherit the right to have a truck attached till her life time.

(j) In case there is no widow or the widow voluntarily gives up her right, the attachment can be transferred to one son/daughter of the ex-servicemen but in such eventuality, the right to ply the truck shall only be for a period of 5 years. After the death of the widow or on expiry of 5 years, the attachment shall cease to exist and the slot shall be given on the basis of seniority.

(k) No transfer of any attachment with the Corporation shall be permitted. Any ex-servicemen who does not want to ply the truck will have to surrender the attachment to the Corporation who shall offer it to the next person in the seniority list.

(l) In case the ex-serviceman is reemployed, his truck will not be attached and if his truck has been already attached and the Ex-servicemen re-employed in Government service/public sector undertakings, Banks etc. then he

shall have to surrender his right to get the truck attached and the vacant slot shall be given to the Ex-servicemen next in the waiting list.

(m) In case of truck of an Ex-servicemen is stolen or meets with an accident then the Ex-servicemen shall have a right to replace his stolen/ unserviceable truck and get it attached with the Corporation. However, only one truck shall be attached one time.

(n) That when a truck of any Ex-servicemen is attached with the Corporation, the Corporation shall give a distinctive year-wise number to every attached truck and on the body of the truck, the Ex-servicemen shall ensure that the following information is depicted:-

"This truck No._____ is attached with the H.P Ex-Servicemen Corporation vide attachment No._____ of the year _____."

(p) That if there are more than one Society for different cement plants, the Ex-servicemen shall have a right to attach one truck with only one Society and it shall not be open for an Ex-servicemen to become a member of more than one Society and thereby attach more than one truck."

8. At this stage, it may be noticed that a few members of the Corporation being aggrieved and dissatisfied with the aforesaid judgment, filed an SLP before the Apex Court i.e. **Y.K. Awasthi & Ors versus H.P. Ex-Servicemen Corp. & Ors**, which came be dismissed, in limine, on 10.10.2011.

9. Pursuant to aforesaid insertion of bye-law 10 in the Bye-laws of H.P. Ex-servicemen Truck Operator Welfare Working Committee, show cause notice was issued to those persons, who were not held entitled by the Court to attach their trucks with the Corporation. Being aggrieved and dissatisfied with the issuance of show cause notice by the Corporation, present petitioner alongwith others approached this Court by way of CWP's No. 4141/2015, 488/2016, 624/2016, 625/2016 and 626/2016. In the aforesaid petitions, having been filed by the present petitioners, they claimed that prior to passing of judgment dated 6.1.2011 in CWP No. 2402/2008, respondents No.2 and 3 had already issued permission to attach their trucks, which was valid upto 21.10.2017 and as such no show cause notice could be issued to them in terms of aforesaid judgment. Petitioners in those cases also claimed that in the aforesaid judgment since Section 2 (f) of the Act was not taken into consideration, judgment passed in that case can not be made applicable in their case, especially when under the Act, they have been held to be ex-servicemen for all intents and purposes. Petitioners in those cases, further claimed that they are deemed to be ex-servicemen under Section 2 (f) of the Act and a right in their favour accrued immediately after enactment of aforesaid Act and their right of attachment of truck could not have been taken away by subsequent amendment in the Rules, Regulations or Bye-Laws of Corporation, because that would be against the basic Act, which was enacted strictly for the welfare of the families of the ex-servicemen.

10. However, the fact remains that all the aforesaid petitions were dismissed as withdrawn on 26.4.2016 (Annexure P-10) with liberty reserved to the petitioners to file representations to the authority concerned seeking redressal of their grievances. Pursuant to dismissal of the aforesaid petitions, petitioner herein preferred representation (Annexure P-11) before the Corporation. The Corporation vide Annexure P-12, rejected the claim of the petitioner by stating that action of de-listing truck(s) was taken in compliance of directions passed by the Division Bench of this Court. In the aforesaid background, petitioner approached this Court by filing the instant petitions, laying therein challenge to communication dated 19.5.2016 (Annexure P-12). Petitioner in CWP No. 2082/2016 alongwith petitioners in connected matters is claiming attachment of his truck with the Corporation being the legal heir(s) of the deceased ex-serviceman, who prior to death was allowed/permitted to attach his truck with the Corporation for transportation of cement.

11. Mr. Amit Singh Chandel, Advocate, learned counsel for the petitioner(s), vehemently argued that order of de-listing of trucks issued by the Corporation deserves to be set aside being contrary to the provisions contained in the Act as well as Bye-Laws. He further contended that the Corporation has illegally issued notices for delisting the trucks of present petitioners by misreading and mis-interpreting the ratio decidendi of the judgment passed by Division Bench of this Court in CWP No. 2402/2008. He further contended that while passing certain directions in the aforesaid judgment, Division Bench had specifically directed respondents No.1 and 2 to ensure that Bye-Laws, Rules and Regulations are amended in line with the directions contained in judgment dated 6.1.2011 but the Corporation, without effecting any amendment in Bye-Laws, Rules and Regulations, directly incorporated the directions issued by the Court in their Bye-Laws. He further argued that since Division Bench, while passing aforesaid judgment had only issued certain directions and had actually not struck-down the legality or validity of Rules and Regulations already contained in the earlier Act and Bye-laws and it can not be stated that statutory provisions which govern vested rights of the petitioners in the Corporation, from where rights of the petitioners original were created, were declared to be illegal. While concluding his arguments, Mr. Chandel further argued that the observations made by the Court in CWP No. 2402/2008 are obiter observations and as such they are *per incuriam* and no law has been declared by way of such directions so as to take away the vested rights of the petitioners with retrospective effect, more particularly, when claim of Scheme of the Act is prospective. He further argued that while incorporating any amendment in the Bye-Laws in terms of judgment passed by Division Bench of this Court, it was incumbent upon the respondents to adhere to Sections 31 to 34 of the Act. He further contended that in order to further amend Rules, Bye-laws of the Corporation, respondents No.1 and 2 ought to have incorporated amendment by adhering to the provisions of the Act as well HP General Clauses Act, 1968, as amended from time to time, but since, in the present case, aforesaid provisions were not followed and amendments carried out in the Bye-Laws being in violation of the Scheme, deserve to be quashed and set aside. In the aforesaid background, Mr. Chandel, prayed that judgment passed in CWP No. 2402/2008 requires to be reconsidered by this Court and amendment in Bye-Laws deserves to be declared null and void.

12. Mr. Shrawan Dogra, learned Advocate General duly assisted by Mr. Anup Rattan, Additional Advocate General and Mr. Mukul Sood, Advocate, vehemently opposed the aforesaid prayer having been made on behalf of the petitioners by stating that there is no illegality or infirmity in the decision taken by the respondent-Corporation pursuant to the directions passed by this Court in CWP No. 2402/2008. They further argued that the aforesaid judgment has attained finality because the SLP filed by a member of the ex-servicemen Union, was dismissed *in limine*. Mr. Mukul Sood, learned counsel representing respondent-Corporation further contended that the directions passed in CWP No. 2402/2008 by this Court are in the interests of the ex-servicemen community and as such same were immediately accepted by the Corporation by effecting amendment in its Bye-laws.

13. We have heard the learned counsel for the parties and also gone through the record carefully.

14. After perusing pleadings as well as submissions having been made by the respective parties, this Court has no hesitation to conclude that the instant petitions are wholly misconceived and sheer abuse of process of law. Prayer(s) as made in the present petitions have already been considered and rejected by this Court in earlier set of petitions filed by the present petitioners {CWP's No. 4141 of 2015 (Ajaib Singh v. State of HP and others), 488 of 2016 (Puspa Lata versus State of H.P. & others), 624 of 2016 (Thakur Singh versus State of H.P. & others), 625 of 2016 (Vinod Kumar versus State of H.P. & others) and 626 of 2016 (Sham Ved Versus State of H.P. & others)}. In the instant petitions, petitioners, who are legal heirs of the deceased ex-servicemen, are aggrieved by the action of the Corporation, whereby their trucks have been de-listed, in terms of Bye law 10 inserted in the Bye-laws by way of amendment pursuant to directions passed by a Division Bench of this Court in CWP No. 2402/2008. The Division Bench of this Court has already held that in the event of death of ex-serviceman, his widow would be

entitled to inherit right to have attached till her life time. This Court has rightly held that in case there is no widow, or widow voluntarily gives up her right of attachment, said right could be transferred to one son/daughter of the ex-serviceman but in that eventuality, right to ply truck would be restricted to five years after the death of widow or on expiry of five years, attachment would cease to exist and slot would be given on the basis of seniority to other ex-servicemen in the list. On the basis of aforesaid direction, Corporation has carried out amendment in the Bye-laws in its general meeting by incorporating directions issued by this Court, in the Bye-laws and as such all the ex-servicemen are bound by the same. It can be taken note of that aforesaid directions issued by this Court in CWP No. 2402/2008, were accepted by the Corporation without any demur, because same were issued in larger interests of the ex-servicemen, more particularly, aforesaid judgment has attained finality after dismissal, in limine, of SLP, filed against the same.

15. Hence, this Court sees no occasion /reason to accept the contentions raised in the instant petitions. It is not understood how the judgment passed by Division Bench of this Court, which has attained finality, can be reconsidered by this Court, as has been prayed in the instant petitions.

16. Though this court, does not deem it proper to say over and above what has been observed in the judgment in CWP No. 2402/2008, but, definitely, sees no force in the contentions raised by the counsel for the petitioners that the Corporation had no authority to carry out amendment in the Bye-laws, on the basis of directions issued by the Division Bench of this Court. No reliefs, as have been prayed for in the present petitions, can be granted in the present proceedings by this Court, in view of the directions already issued in CWP No. 2402/2008, because that would amount to overreaching the judgment of this Court, which has been further affirmed by the Apex Court.

17. In light of the detailed discussion above, the petitions are without any merit and same are dismissed. Pending applications, if any are also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Bajaj Allianz General Insurance Company Ltd. .....Appellant

Versus

Shrimati Ram Kali and others .....Respondents.

FAO (MVA) No. 379 of 2012.
Date of decision: 9th December, 2016.

Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased was travelling in the vehicle after loading the goods – this fact was not denied in the reply- the plea taken by the insurer that the deceased was travelling in the vehicle as a gratuitous passenger was not proved- the insurer was rightly saddled with liability- appeal dismissed. (Para-3 to 5)

For the appellant: Mr. Aman Sood, Advocate.

For the respondents: Ms. Sheetal Kimta, Advocate, for respondents No. 1 and 2.
Ms. Kamlesh Shandil, Advocate, for respondent No.3.
Mr. O.P. Negi, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 29.3.2012, passed by the Motor Accident Claims Tribunal-I, Solan District Solan, H.P. hereinafter referred to as "the

Tribunal", for short, in MAC Petition No. 2-S/2 of 2009, titled *Shrimati Ram Kali and another versus Shri Bala Ram and others,* whereby compensation to the tune of Rs.2,66,000/- alongwith interest @ 7.5% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimant, Owner and driver have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The positive case of the claimants before the Tribunal was that the deceased was travelling in the offending vehicle bearing registration No. HP-14-B-0567 Canter, after loading the goods. In paras 10 and 24 of the claim petition, the claimants have taken this specific plea, which has not been denied by the respondents-owner and driver. In reply to paras 10 and 24, owner and driver have admitted that the deceased was travelling in the offending vehicle as owner of the goods. The Tribunal has discussed in para 10 of the impugned award that the deceased was travelling in the offending vehicle as owner of the goods. Deceased being third party, the insurer has to satisfy the award.

4. The insurer has pleaded and taken the ground that the deceased was a gratuitous passenger, has not led any evidence. Thus the evidence led by the claimants has remained un-rebutted. Even the insurer has failed to discharge the onus. The factum of insurance as well as the validity of driving licence is not in dispute.

5. Learned counsel for the appellant-insurer argued that the son of the deceased was owner of the vehicle. It is immaterial for the reason that the deceased was third party and insurer has failed to lead any evidence to the effect that there was collusion between the owner and deceased or any willful breach was committed by the owner. Having said so, the Tribunal has rightly made the discussion.

6. Viewed thus, the Tribunal has rightly made the award, needs no interference.

7. Accordingly, the impugned award is upheld and the appeal is dismissed.

8.. The Registry is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

9. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Balwant Singh & others ...Petitioners

Versus

State of Himachal Pradesh & others ...Respondents

CWP No. 3503 of 2015-A

Date of Decision : December 9, 2016

Constitution of India, 1950- Article 226- A road was constructed by the State under PMGSY – acquisition proceedings were initiated but were allowed to lapse- State on its own took decision to initiate fresh proceedings for acquisition of the land but did not do anything- held, that no person can be deprived of his property save and except by following due process of law- right to property is not only constitutional or statutory right but also a human right- the petition allowed and the respondents directed to initiate proceedings for acquisition of the land.(Para-3 to 7)

Cases referred:

Tukaram Kana Joshi & others vs. Maharashtra Industrial Development Corporation & others, (2013) 1 SCC 353

K. B. Ramachandra Raje Urs (Dead) by Legal Representatives vs. State of Karnataka & others, (2016) 3 SCC 422

For the petitioner	:	Mr. C. N. Singh, Advocate, for the petitioners.
For the respondent	:	Mr. R. S. Verma, Addl. Advocate General for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J. (Oral)

It is rather unfortunate that after having taken a decision to initiate proceedings for acquisition of land over which Jhiknipul – Bhamta Road came to be constructed, now the respondents/State by taking a somersault are contesting the claim of the writ petitioners.

2. Record reveals, as is also evident from the response filed by the State, that the road in question came to be constructed by the State under the PMGSY Scheme. It is a Central Government sponsored Scheme and the road stands constructed by the State. It is not a case where the residents of the area themselves constructed the road or prior to its construction, land owners surrendered their rights therein. In fact, at some point in time, acquisition proceedings were initiated but for unexplained reasons, allowed to lapse. Even thereafter the State on its own, or may be on the asking of land owners, did take a decision to initiate fresh proceedings for acquisition of the land in question. Correspondence dated 30.10.2013 (Annexure P-4) and 19.07.2014 (Annexure P-5) is evidently clear in this regard. Yet it did not do anything, forcing the petitioners to approach this Court for redressal of their genuine grievances. Petitioners had been continuously pursuing their remedies before different authorities.

3. Right of property is enshrined in the Constitution. It is a settled principle of law that no person can be deprived of its property, save and except by following due process of law. Under these circumstances the writ petitioners legitimately canvass infringement of violation of such right.

4. Further right to property is now considered to be not only a constitutional or a statutory right but also a human right. Such principle stands fully reiterated and explained by Hon'ble the Supreme Curt of India in *Tukaram Kana Joshi & others vs. Maharashtra Industrial Development Corporation & others,* (2013) 1 SCC 353, as under:

> '8. The appellants were deprived of their immovable property in 1964, when Article 31 of the Constitution was still intact and the right to property was a part of fundamental rights under Article 19 of the Constitution. It is pertinent to note that even after the Right to Property seized to be a Fundamental Right, taking possession of or acquiring the property of a citizen most certainly tantamounts to deprivation and such deprivation can take place only in accordance with the "law", as the said word has specifically been used in Article 300-A of the Constitution. Such deprivation can be only by resorting to a procedure prescribed by a statute. The same cannot be done by way of executive fiat or order or administration caprice. In Jilubhai Nanbhai Khachar v. State of Gujarat & Anr., 1995 Supp (1) SCC 596: AIR 1995 SC 142, it has been held as follows: -
>
> > "48. In other words, Article 300-A only limits the power of the State that no person shall be deprived of his property save by authority of law. There is no deprivation without due sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. In other words, if there is no law, there is no deprivation."
>
> 9. The right to property is now considered to be, not only a constitutional or a statutory right, but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter

and employment etc. Now however, human rights are gaining an even greater multi faceted dimension. The right to property is considered, very much to be a part of such new dimension.

(Vide: Lachhman Dass v. Jagat Ram & Ors., (2007) 10 SCC 448; Amarjit Singh & Ors. v. State of Punjab & Ors., (2010) 10 SCC 43; State of Madhya Pradesh & Anr. v. Narmada Bachao Andolan, 2011 AIR (SC) 1989; State of Haryana v. Mukesh Kumar & Ors., 2012 AIR (SC) 559 and Delhi Airtech Services Pvt. Ltd. v. State of U.P & Anr., 2012 AIR (SC) 573)

10. In the case at hand, there has been no acquisition. The question that emerges for consideration is whether, in a democratic body polity, which is supposedly governed by the Rule of Law, the State should be allowed to deprive a citizen of his property, without adhering to the law. The matter would have been different had the State pleaded that it has right, title and interest over the said land. It however, concedes to the right, title and interest of the appellants over such land and pleads the doctrine of delay and laches as grounds for the dismissal of the petition/appeal.

11. There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking remedy, even if his fundamental right has been violated, under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario altogether. Functionaries of the State took over possession of the land belonging to the appellants without any sanction of law. The appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode. There is a distinction, a true and concrete distinction, between the principle of "eminent domain" and "police power" of the State. Under certain circumstances, the police power of the State may be used temporarily, to take possession of property but the present case clearly shows that neither of the said powers have been exercised. A question then arises with respect to the authority or power under which the State entered upon the land. It is evident that the act of the State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called abuse of power or use of muscle power. To further clarify this position, it must be noted that the authorities have treated the land owner as a 'subject' of medieval India, but not as a 'citizen' under our Constitution."

5. Significantly in the very same decision, Court has dealt with the concept of delay and laches and the manner in which Court has to exercise discretion under Article 226 of the Constitution of India.

6. Contention that the petition is delayed by laches needs to be rejected not only on account of factual matrix as noticed hereinabove but also in view of latest decision rendered by the apex Court in *K. B. Ramachandra Raje Urs (Dead) by Legal Representatives vs. State of Karnataka & others,* (2016) 3 SCC 422, wherein it came to be observed as under:

"28. It has been vehemently argued on behalf of the respondents that the writ petition ought not to have been entertained and any order thereon could not have been passed as it is inordinately delayed and the appellant has made certain false statements in the pleadings before the High Court details of which have been mentioned hereinabove. This issue need not detain the Court. Time and again it has been said that while exercising the jurisdiction under Article 226 of the Constitution of India the High Court is not bound by any strict rule of limitation. If substantial issues of public importance touching upon the fairness of governmental action do arise, the delayed approach to reach the Court will not stand in the way of the exercise of jurisdiction by

the Court. Insofar as the knowledge of the appellant-writ petition with regard to the allotment of the land to Respondent 28 Society is concerned, what was claimed in the writ petition is that it is only in the year 1994 when Respondent 28 Society had attempted to raise construction on the land that the fact of allotment of such land came to be known to the appellant-writ petitioner."

7. Under these circumstances, petition is allowed and the respondents directed to initiate proceedings for acquisition of the land in terms of communications dated 27.7.2005 (Annexure P-1), dated 30.10.2013 (Annexure P-4) and dated 19.7.2014 (Annexure P-5). Steps shall positively be taken within a period of twelve weeks from today.

Petition stands disposed of accordingly, as also pending applications, if any.Copy dasti.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.168 of 2012 a/w FAO No.334 of 2012
Date of decision: 09.12.2016

1. FAO No.168 of 2012

Dolma Devi and others .....Appellants
Versus
Mohinder Kumar Goel and others .....Respondents

2. FAO No.334 of 2012

Oriental Insurance Co. Ltd. .....Appellant
Versus
Dolma Devi and others .....Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was drawing Rs.13,064/- per month as salary- he was 37 years of age at the time of accident – multiplier of 15 was rightly applied – claimants are four in numbers and 1/4th amount was rightly deducted from the monthly income the deceased- the driver had a valid driving licence and insurer was rightly saddled with liability- appeal dismissed. (Para-4 to 7)

FAO No.168 of 2012

For the appellants: Mr.Pardeep Kumar Gupta, Advocate.
For the respondents: Mr.Vikrant Chandel, Proxy Counsel, for respondents No.1 and 2.
Nemo for respondents No.3.
Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate, for respondent No.4.

FAO No.334 of 2012

For the appellants: Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate, for the appellant.
For the respondents: Mr.Pardeep Kumar Gupta, Advocate, for respondents No.1 to 4.
Mr.Vikrant Chandel, Proxy Counsel, for respondents No.5 and 6.
Nemo for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Both these appeals are directed against the common award, dated 15th September, 2011, passed by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P., (for short, the Tribunal), in case MAC No.70 of 2007, titled Dolma Devi and others vs. Mohinder Kumar Goel and others, whereby the claim petition was allowed and compensation to

the tune of Rs.17,83,640/- was awarded in favour of the claimants and the insurer was saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the claimants have filed appeal i.e. FAO No.168 of 2012 for enhancement of compensation and the insurer has challenged the impugned award by the medium of FAO No.334 of 2012 on the ground that the Tribunal has wrongly saddled it with the liability.

3. Heard learned counsel for the parties and gone through the record.

4. Admittedly, the deceased was a Constable in the Police Department and was drawing Rs.13,064/- per month as salary. Salary certificate of the deceased was proved on record as Ext.PW-4/A. The deceased was 37 years of age at the time of accident. The Tribunal has rightly applied the multiplier of 15. Keeping in view the number of claimants i.e. 4, the Tribunal has rightly deducted 1/4th from the monthly income of the deceased towards his personal expenses.

5. Having said so, the Tribunal has rightly made discussion in paragraphs 16 and 17 of the impugned award and awarded compensation, which, by no stretch of imagination, can be said to be meager or excessive.

6. The insurer has questioned the impugned award by the medium of FAO No.334 of 2012 on the ground that the driver was not having a valid and effective driving licence and that the owner had committed willful breach. Copy of the driving licence has been proved on record as Ext.R-2, which does disclose that the driver was having a valid and effective driving licence at the time of accident. The insurer has not led any evidence to prove that the owner had committed willful breach or violation of the terms and conditions contained in the insurance policy. The Tribunal, while determining issues No.3 and 4, has made detailed discussion and has rightly decided the said issues against the insurer.

7. In view of the above discussion, there is no merit in both the appeals and the same are dismissed. Consequently, the impugned award is upheld. Pending CMPs, if any, also stand disposed of.

8. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award, through their respective bank accounts, after proper verification.

CMP No.10100 of 2016 in FAO No.334 of 2012

9. This application has been moved by respondents/claimants No.2 and 3 with the prayer that they may be proceeded in the appeal in their individual capacity, since, during the pendency of the appeal, they attained the age of majority. The application is allowed and the factum of claimants No.2 and 3 of their having attained majority is taken on record.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Krishna Sanitation Society Jatroon, ...Petitioner

Versus

State of Himachal Pradesh and another .....Respondents

CWP No. 2642 of 2016
Decided on: December 9, 2016

Constitution of India, 1950- Article 226- Petitioner submitted a tender, which was the lowest – however, work was not allotted to the petitioner – the petitioner filed the present petition – held, that the petitioner was found to be lowest tenderer – the petitioner had submitted experience

certificate along with PAN and EPF number - a complaint was received against the petitioner that the experience certificate was fictitious and cannot be taken into consideration- the experience certificate shows that the same was not in favor of the petitioner but in the name of K – there was over writing in the same- since the bidder had failed to fulfill the condition of tender notice; hence, a decision was rightly taken to cancel the tender- the Court cannot sit as an expert – writ petition dismissed. (Para-7 to 26)

Cases referred:

State of Jharkhand v. M/s. CWE-SOMA Consortium, AIR 2016 SCW 3366

Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd. AIR 2016 SCW 3385

Central Coalfields Limited v. SLL-SML (Joint Venture Consortium), AIR 2016 SCW 3814

E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3

Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800

Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760

Tata Cellular versus Union of India (1994) 6 SCC 651

Jagdish Mandal versus State of Orissa and others (2007) 14 SCC 517

For the petitioner : Mr. Nipun Sharma, Advocate.

For the respondents : Mr. Rupinder Singh Thakur and Mr. Varun Chandel, Additional Advocate Generals, for respondent No.1.
Mr. Anup Rattan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Instant petition under Article 226 of the Constitution of India has been filed seeking following main reliefs:

> "i) That the impugned order dated 26.9.2016 may kindly be quashed and set-aside.
>
> ii) That the respondents may kindly be directed to issue award letter in favour of the petitioner within time bound period as he fulfill all the conditions including the experience certificate as one o the condition.
>
> iii) That the respondents may kindly be restrained from inviting fresh tender in the matter."

2. Briefly stated the facts of the case are that the petitioner-society i.e. Krishna Sanitation Society Jatroon, which is registered under Societies Registration Act, 2006, pursuant to Short Tender Notice (Annexure P-2) issued by the Secretary, Nagar Panchayat, Chowari, submitted its tender for the following works:

Sl. No.	Name Of Work	Man Power Required	Earnest Money	Time Limits
1.	Cleanliness area Ward No-01 Sudali Chownk to Hanuman Chownk, , Hanuman Chownk to Puran Chand Secretary House , Hanuman Chownk to Referral Hospital Chowari , Main Nazar alongwith All Drains and Roads. Ward No-05:- Sadwan Raipur Road to Senior Secondary School.	10 Nos + 01 Supervisor	22000-00	One year

	Ward No-07:-Sh. Surnder Sharma Shop to Saran Dass Verma House , Vidya Sagar Shop to Mahila Mandal, Chharmari area. Ward No-06:-Complete Ward The Drains/Path and Street of above said wards alongwith Loading and unloading of Garbage. Rehan Basera and Office Building			
2.	Door to Door Garbage collection in Ward No-01 and Ward No-07	02 Nos	5000-00	One year

3. Petitioner claimed that its tender being the lowest was accepted by the respondents on 29.6.2016 and as such it was expecting that award letter would be issued to it immediately, but when it was not issued, petitioner made inquiries from the respondents. On inquiry, petitioner was informed that one M/s J.S. Constructions had filed a complaint to the respondents (Annexure P-4) alleging therein that the tender submitted by the, Krishan Pal Singh, President of the petitioner-Society was faulty because the experience certificate submitted by it prima facie appeared to be fictitious and as such work in terms of Short Tender Notice could not be awarded to the petitioner-Society. In the complaint, complainant alleged that Sulabh International had actually issued certificate of experience of work till 2008 but there is over-writing. Similarlly, complainant alleged that there is contradiction in the PAN card and experience certificate having been furnished by the petitioner society. On the basis of aforesaid complaint, respondents decided not to award work in favour of the petitioner-society. Petitioner being aggrieved of the aforesaid action of not awarding tender in its favour, despite its being lowest bidder approached this Court by way of CWP no. 2492 of 2016, which came to be listed before this Court on 26.9.2016. This Court, on the basis of averments contained in the petition, directed the respondents to seek instructions on 27.9.2016. On 27.9.2016, this Court was informed that the respondents have already passed order dated 26.9.2016 (Annexure P-6), whereby decision has been taken to cancel the tenders on administrative and technical grounds. Perusal of letter dated 26.9.2016 further suggests that decision was taken to invite tender through e-tendering process in terms of instructions issued by the Government. In view of aforesaid, petitioner sought permission to withdraw the petition with liberty to file afresh laying therein challenge to order dated 26.9.2016. In the aforesaid background, present petitioner approached this Court by way of present petition, praying therein for the reliefs as reproduced above.

4. Mr. Nipun Sharma, learned counsel representing the petitioner, vehemently argued that cancellation order issued by the respondents is not tenable as it does not disclose any reason, much less sufficient reason, to cancel the tender on administrative/ technical grounds. Mr. Nipun Sharma, while inviting attention of this Court to the experience certificates purportedly annexed by the petitioner alongwith tender document, (pages-22 and 23 of the paper-book) vehemently argued that reasons cited in the cancellation order (Annexure P-6) are not tenable, rather tender has been cancelled by the respondents to favour other contractors, who were unable to succeed in the bidding process.

5. Mr. Rupinder Singh Thakur, Additional Advocate General appearing for the State and Mr. Anup Rattan, Advocate appearing for respondent No.2, supported the cancellation order (Annexure P-6) and stated that in view of reasons cited in the cancellation order, petitioner has no right to claim work in terms of tender notice because it stands duly proved on record that petitioner had failed to submit experience certificate in sanitation work for the last two years, in the name of the firm alongwith PAN and EPF number. Mr. Rupinder Singh, Additional Advocate General and Mr. Anup Rattan, Advocate, with a view to refute the contentions having been put forth by Mr. Nipun Sharma, Advocate, specifically referred to the experience certificate allegedly annexed with tender documents by the petitioner (page 23) to demonstrate that same was not issued in favour of the petitioner, rather same was issued individually in favour of Shri Krishan Pal Singh son of Shri Sagar Singh, resident of Chowari, District Chamba, who, undisputedly,

happens to be the President of the petitioner-society. Mr. Thakur further argued that bare perusal of experience certificate issued by International Institute of Sulabh System Delhi clearly establishes the allegations of the complainant M/s J.S. Constructions that the same is fictitious because perusal of same clearly suggests that there is over-writing on date. While concluding his arguments, Mr. Thakur stated that since decision has been taken to cancel the tender, present petition deserves to be dismissed having been rendered infructuous.

6. We have heard the learned counsel for the parties and also gone through the records.

7. It is undisputed that pursuant to Short Tender Notice admittedly issued by the respondents i.e. Nagar Panchayat, Chowari, petitioner society applied for work in question and it was found to be the lowest bidder. Similarly, terms and conditions as contained in Short Tender Notice are reproduced herein below:

"TERM AND CONDITIONS FOR CLEANLINESS OF TOWN FOR 2016-17

9. The contractor will ensure to cleanliness of town i.e. Cleanliness of Town Ward No.1, 05, 06, 7, alognwith all drains and streets, Rehan Basera and N.P. office.

10. The contactor has to submit experience Certificate in sanitation work at least 2 years. Alongwith PAN Number, EPF Number.

11. The whole area will be inspected by the Sanitary Supervisor with the contractor/Supervisor daily.

12. No negligence regarding cleanliness of the town will accept. If the cleanliness work of the area affected the tenders will be cancelled within 24 hours without any notice.

13. No gagbage should be visible in the area slop area if visible the area will be cleaned by the workers, f the contractor.

14. The conservancy material viz. shawls, Brooms, Wheel Barrows, Buckets, Phynile, Acid and other material which will be essential for cleanliness will be provided by the contractor.

15. Polythene bags of the area should be collected by the contractors staff and no polythene bags should be visible any where.

16. Since the sanitation work is essential services as such the garbage/refuse removed through Municipal agency. In case of emergency will be done at the cost of the contractor.

17. The contractor will supply the detail of employees i.e. Name of employee, Complete address Identy of employee and location of work place alongwith their Mobile numbers.

18. The next month payment will only be release on the receipt of previous month EPF return and on the basis of daily attendance of workers after the satisfaction /verification of the Sanitary Supervisor."

8. The aforesaid conditions suggest that contractor was required to submit experience certificate for two year in sanitation work alongwith PAN and EPF number. In the instant case, as has emerged from the record, respondents, after completion of bidding process, received complaint from M/s J.S. Contructions and Maharishi Enterprises (Annexure P-4) that the experience certificate submitted by the petitioner-society are fictitious and same can not be taken into consideration while considering the bid of the petitioner-society.

9. True, it is that aforesaid complainants also participated in the tendering process and as such there can be every possibility of lodging false complaint by it against petitioner being competitor but perusal of reply having been filed by the respondents clearly suggests that the petitioner failed to submit two years experience certificate in the name of petitioner-society as was

required in terms of Short Tender Notice. Perusal of experience certificate tendered by the petitioner with the tender document clearly suggests that one of the certificate was not in the name of the petitioner-society, which had actually applied in terms of Short Tender Notice, rather the experience certificate purportedly issued by International Institute of Sulabh System Delhi is/was in favour of Krishan Pal singh son of Sagar Singh, in his individual capacity and not in the name of petitioner-Society i.e. Krishna Sanitation Society. Since tender was submitted in the name of petitioner-Society, it was incumbent upon the petitioner society to place on record certificate, if any, in its favour and not in the name of Shri Krishan Pal singh, who happens to be the President of the Society. Moreover, perusal of experience certificate (page 23) shows that there is over-writing on date as such this Court sees no illegality and infirmity in the action of the respondents in rejecting the tender of petitioner for non-compliance of terms and conditions of Short Tender Notice.

10. Similarly, perusal of certificate (Annexure P-7), which has been issued by Senior Medical Officer, Chowari suggests that same has been issued in the name of Sh. Krishan Pal Singh and not in the name of petitioner-society and same is of no help to the petitioner-society.

11. Apart from above, perusal of impugned order dated 26.9.2016 (Annexure P-6) clearly suggests that tender in question was opened on 29.6.2016 in the office of Nagar Panchayat, Chowari in the presence of applicants i.e. contractors. Five contractors submitted tenders and out of five, three contractors failed to produce the experience certificate as such their bids were not considered. So far as remaining two contractors are concerned, though the petitioner-society was found to be lowest but since it did not furnish certificate as per terms and conditions of tender notice, same was also rejected. Impugned order clearly suggests that petitioner-society had submitted experience certificate of only one year, which was issued by Secretary, Nagar Panchayat, Chowari available at page 22, perusal where suggests that M/s Krishna Sanitation Soceity worked with Nagar Panchayat for one year i.e. November, 2013 to October, 2014 for cleaning and sweeping of Nagar Panchayat area. Since aforesaid certificate in the name of petitioner-society was only for one year, no fault can be found with the decision of respondents in rejecting tender of the petitioner-society for violation of terms and conditions of Short Tender Notice.

12. Similarly, since another tenderer M/s J.S. Constructions though was second lowest but it also did not furnish experience certificate, as such its tender was also rejected. Perusal of aforesaid communication clearly suggests that none of the contractors, who had actually submitted bids in terms of tender notice fulfilled the terms and conditions, accordingly, respondents decided to cancel the tender on administrative and technical grounds and decided to initiate tender process through e-tendering system, in terms of instructions issued by the Government.

13. This Court, after carefully examining the impugned order passed by the respondents, sees no force in the contentions having been raised on behalf of the petitioner that action of the respondents is discriminatory and is the result of colourable exercise of power. Rather, this Court after perusing impugned order, is satisfied and convinced that since all the bidders failed to fulfill the conditions of tender notice, respondents rightly decided to cancel the tender. As such, there is no merit in the petition.

14. Further, by no stretch of imagination, court can assume the role of technical expert, who in their wisdom have cancelled the tender on account of technical /administrative reasons. Since respondents have already taken a conscious decision to recall the tender, this Court sees no occasion to grant relief as prayed for in the petition.

15. It is well settled by now that respondents can withdraw /recall tender at any time, if it is convinced that same is not in accordance with the requirements as indicated in Notice Inviting Tender. Though, in the present case, petitioner claimed himself to be lowest bidder but there is no document suggestive of the fact that pursuant to opening of his tender, he was

awarded work, as such no right has accrued in his favour which would have entitled him to claim the relief as prayed for in the petition.

16. The Apex Court in **State of Jharkhand v. M/s. CWE-SOMA Consortium** reported in AIR 2016 SCW 3366, has held that:

> 13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-
>
> > "Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof." Clause 32.1 of SBD: "…the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action." In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.
>
> 14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness.

17. That Apex Court in **Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd.** reported in AIR 2016 SCW 3385, has held that:

> 13. First and foremost, under tender condition 2.5.5, commercial bids have to strictly conform to the format provided in Annexure 2 of the tender document. Annexure 2 which contains the format for the price bid makes it clear that the salary paid to deployed manpower should not be less than the minimum wage. It further goes on to state in paragraph 3 thereof that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected. On this ground alone, Respondent No.1's bid is liable to be rejected inasmuch as, vide its letter dated 3.9.2015, Respondent No.1 stuck to its original figure of Rs.2,77,68,000/- which is way below the minimum wage fixed by the Government. Secondly, Shri Raval is also right in stating that the without prejudice offer of Rs.3,00,92,346/- is an offer which is not fixed, but open ended. This is clear from the fact that it was up to the Government then to pick up either figure by way of acceptance. This is clearly interdicted by clause 2.5.6 of the tender which states that prices quoted by the bidder have to be fixed, and no open ended bid can be entertained, the same being liable to be rejected straightaway. Such condition is obviously an essential condition of the tender which goes to the eligibility of persons who make offers under the tender.
>
> 14. Unfortunately, even though the High Court noticed the open ended nature of Respondent No.1's bid, it went on to add that the offer of Respondent No.1 shall be treated as matching with the revised minimum wage calculation and that it is nowhere envisaged by the tender conditions that rejection of an offer which may

have the potential of causing loss to the tenderer is present. It is not for the High Court to revisit a condition contained in Annexure 2 read with 2.5.5 of the tender in the manner aforesaid. Once the tender condition states that the tender must strictly conform to the format provided in Annexure 2, and Annexure 2 in turn clearly states that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected, and the High Court cannot hold otherwise. The High Court's further finding that Respondent No.1's offer was "clear" is wholly incorrect. It was a without prejudice offer which muddied the waters and rendered the price quoted by the bidder as variable and not fixed.

18. The Apex Court in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)** reported in AIR 2016 SCW 3814, has further held that:

> 44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.
>
> 55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.
>
> 56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."

19. Admittedly, Court can go into the question of mala fides raised by a litigant, but in order to succeed, much more than a mere allegation is required. Bald and unfounded allegations of mala fides are not sustainable and that mala fides must be specifically pleaded and proved and such allegations of mala fides should be made with all sense of responsibility, otherwise, the maker of such allegations should be ready to face consequences.

20. It is equally well settled that the burden of proving mala fides is on the person making the allegations and the burden is 'very heavy." Reliance is placed upon ***E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3***.

21. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fides are often more easily made than proved and proof of high degree is required to prove the same. Reliance is also placed on ***Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800*** wherein it is held, *"It (mala fides) is the last refuge of a losing litigant."*

22. Reliance is also placed on ***Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760***, whereby it is held by the Apex Court that seriousness of allegations of mala fides demands proof of high order of credibility and the Courts should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office having high responsibility. It was held:

> *"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill- will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the*

employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR 1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579)."

23. Courts can interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India.

24. Principles of judicial review under Article 226 of the Constitution of India would apply to the exercise of contractual powers by the Government only in case the process adopted or decision making process of the authorities is wrong and illegal and in order to prevent arbitrariness or favoritism.

25. Reliance is further placed on ***Tata Cellular*** versus ***Union of India (1994) 6 SCC 651***, whereby Apex Cout has laid down the limitations in relation to the scope of judicial review of administrative decisions in exercise of powers awarding contracts:(SCC pp 687-88, para 94)

26. In the instant case, the decision regarding cancellation of the tender is a bonafide one and is otherwise in the larger public interest because none of the bidders including the petitioner fulfilled the tender condition and as such for a fair and transparent tendering, Department cancelled the tender and decided to resort to e-tendering. Further, e-tendering would increase healthy competition amongst the participants, thereby saving the public exchequer. It is not a fit case to exercise powers of judicial review as there is no violation of the provisions of law and further there is no procedural aberration or error in assessment. It is more than settled that power of judicial review will not be permitted to invoke to protect private interest at the cost of public interest and reliance is placed on a judgment delivered by the Apex Court in ***Jagdish Mandal*** *versus* ***State of Orissa and others(2007) 14 SCC 517*** wherein the Hon'ble Supreme Court has held that before interfering in tender or contractual matters in exercise of judicial review, Courts should ascertain whether process adopted or decision made by the authority is mala fide or intended to favour some and whether process adopted or decision made is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached, and also whether public interest is affected.

27. Applying the aforesaid test to the instant case, the writ petition merits to be dismissed and is accordingly dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Mahesh ...Appellant.
Versus
Prince and others ...Respondents.

FAO No. 126 of 2012
Decided on: 09.12.2016

Motor Vehicles Act, 1988- Section 166- Claimant sustained 40% disability qua his left leg- he remained admitted in the hospital w.e.f. 30.9.2008 till 20.11.2008 – claimant was 10 years of age at the time of incident – he will not be able to seek appointment in the Armed Forces or get the job of his choice after attaining the age of majority – the claimant would have been earning not less than Rs.5,000/- per month after attaining majority- considering the disability, the claimant had suffered Rs.2,000/- per month as loss of income – multiplier of 18 will be applicable – thus, compensation of Rs.2000 x 12 x 18= Rs.4,32,000/- awarded towards loss of future income – Rs.42,805/- awarded under the head medical expenses and Rs.12,000/- awarded under the head transportation charges- compensation of Rs.1 lac each awarded under the heads pain and suffering and loss of amenities of life- thus, total compensation of Rs. 6,86,805/- awarded with interest @ 7.5% per annum.(Para-9 to 27)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
Jakir Hussein versus Sabir and others, (2015) 7 SCC 252
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant: Mr. Dalip K. Sharma, Advocate.
For the respondents: Mr. Sanjeev Rana, Advocate, for respondent No. 1.
Mr. Ashwani Sharma, Advocate, for respondent No. 2.
Ms. Shilpa Sood, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 27th December, 2011, made by the Motor Accident Claims Tribunal-II, Solan, District Solan, Himachal Pradesh (for short "the

Tribunal") in M.A.C.T. Petition No. 36-S/2 of 2009, titled as Mahesh versus Prince and others, whereby compensation to the tune of ₹ 2,98,805/- with interest @ 9% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant-injured and the insurer was saddled with liability (for short "the impugned award").

2. The respondents in the claim petition, i.e. the insurer, owner-insured and driver of the offending vehicle, have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The claimant-injured has questioned the impugned award only on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is – whether the amount awarded is inadequate? The answer is in the affirmative for the reasons to be recorded hereinafter.

5. The claimant-injured invoked the jurisdiction of the Tribunal for grant of compensation, as per the break-ups given in the claim petition, on the ground that he became the victim of the motor vehicular accident, which was caused by the driver, namely Shri Rajinder Kumar, while driving vehicle, bearing registration No. HP-01B-0320, rashly and negligently, on 30th September, 2008, at about 5.00 P.M. near Shalaghat, Tehsil Arki, in which the claimant-injured sustained injuries.

6. The claim petition was resisted by the owner-insured and the insurer of the offending vehicle on the grounds taken in the respective memo of objections. It is apt to record herein that the driver of the offending vehicle was proceeded against ex-parte.

7. The entire controversy involved in this appeal relates to adequacy of compensation, thus, there is no need to reproduce the issues framed by the Tribunal herein.

8. The Tribunal has made discussions to this effect in paras 13 to 19 of the impugned award.

9. The perusal of the record does disclose that the claimant-injured remained admitted at IGMC, Shimla, with effect from 30th September, 2008 to 20th November, 2008. The disability certificate is also on the record as Ext. PW-4/A, in terms of which the claimant-injured has suffered 40% permanent disability qua left leg.

10. The claimant-injured has examined Dr. Sandeep Kashyap as PW-4, who was one of the members of the Medical Board, which has issued the disability certificate, has specifically stated that the injury suffered by the claimant-injured, which is permanent in nature, has resulted in shortening his left leg.

11. It is beaten law of land that in an injury case, the compensation is to be awarded under pecuniary and non-pecuniary heads by making guess work.

12. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,**reported in **AIR 1995 SC 755,Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,**reported in **2010 AIR SCW 6085,Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,**reported in **2011 AIR SCW 4787,**and **Kavita versus Deepak and others,** reported in**2012 AIR SCW 4771**.

13. This Court has also laid down the same principle in a series of cases.

14. Admittedly, the claimant-injured was ten years of age at the time of the accident and was a student. Because of the disability, he will not be able to seek appointment in armed forces or get the job of his choice after attaining the age of majority. The Tribunal has assessed his income to be ₹ 40,000/- per annum, which is not legally and factually correct.

15. By guess work, it can be safely held that the claimant-injured would have been earning not less than ₹ 5,000/- per month even as a labourer after attaining the age of majority. The claimant-injured has suffered 40% permanent disability. Thus, it is held that he has suffered loss of income to the tune of ₹ 2,000/- per month.

16. The Tribunal has applied the multiplier of '18', which is just and appropriate in view of the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act") read with the law laid down by the Apex Court in the case titled as **Sarla Verma and others versus Delhi Transport Corporationand another** reported in **AIR 2009 SC 3104,** and upheld in **Reshma Kumari and others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.**

17. Having said so, the claimant-injured has lost source of future income to the tune of ₹ 2,000/- x 12 x 18 = ₹ 4,32,000/-.

18. The Tribunal has rightly awarded compensation to the tune of ₹ 42,805/- under the head 'medical expenses' and ₹ 12,000/- under the head 'transportation charges', is maintained.

19. The Tribunal has fallen in an error in awarding compensation under the heads 'future pain and suffering' to the tune of ₹ 50,000/- and 'permanent disability' to the tune of ₹ 50,000/-.

20. The Apex Court in its latest decision in the case titled as **Jakir Hussein versus Sabir and others,** reported in **(2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the judgment herein:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> *.....*
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to*

move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."

21. In view of the ratio laid down by the apex Court in the judgment (supra), I am of the considered view that the claimant-injured is entitled to compensation to the tune of ₹ 1,00,000/- under the head 'pain and sufferings' and ₹ 1,00,000/- under the head 'loss of amenities of life'.

22. Having glance of the above discussions, the claimant-injured is held entitled to total compensation to the tune of ₹ 4,32,000/- + ₹ 42,805/- + ₹ 12,000/- + ₹ 1,00,000/- + ₹ 1,00,000/- = ₹ 6,86,805/-.

23. The Tribunal has also fallen in an error in awarding interest at the rate of 9% per annum, which was to be awarded as per the prevailing rates.

24. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281;Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738;Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053;Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982;Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

25. Having said so, I deem it proper to reduce the rate of interest from 9% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

26. In view of the discussions made hereinabove, the amount of compensation is enhanced, impugned award is modified and the appeal is disposed of, as indicated hereinabove.

27. The insurer is directed to deposit the enhanced awarded amount before the Registry within eight weeks. On deposition, the same be released in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account after proper identification.

28. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

M/s. Dr. Reddy's Laboratories Ltd. ...Petitioner.

Versus

State of Himachal Pradesh and another. ...Respondents.

CWP No. 2358/2011
Decided on: 9.12. 2016

Constitution of India, 1950- Article 226- Petitioner is a registered dealer for manufacturing and trading of drugs and medicines – the petitioner has set up a factory for manufacturing drugs at Baddi – a notice was issued to the petitioner – penalty of Rs.84,44,838/- was imposed – an appeal was filed, which was dismissed- the matter was carried before H.P. Tax Tribunal, which set aside the orders passed by Assessing and Appellate Authority but imposed a cost of Rs. 20 lacs for the reason that petitioner could not be permitted to take the benefit of technicalities of law and wrong

committed by the Assessing Authority- held, that statutory Tribunals must function within their bound and their decisions should not be arbitrary, fanciful or based on irrelevant consideration- fiscal statute must be strictly interpreted – there is no equity in tax matter – once it was concluded that the orders passed by Assessing and Appellate Authority were not sustainable in the eyes of law, costs could not have been imposed- the purpose of imposing cost is to indemnify the party for the expenses incurred – writ petition allowed and the order passed by the Tribunal set aside.(Para-10 to 21)

Cases referred:
Rajasthan and others vs. Basant Agrotech (India) Limited, (2013) 15 SCC 1
Vinod Seth vs. Devinder Bajaj, (2010) 8 SCC 1

For the Petitioner: Mr. Goverdhan Sharma, Advocate.
For the Respondents: Mr. Rupinder Thakur, Addl. A.G. with Mr. Pushpinder Jaswal, Dy. A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (oral):

The instant case is rather an unusual one where the Himachal Pradesh Tax Tribunal (for short 'Tribunal') though had quashed all the proceedings against the petitioner but then proceeded to burden it with Rs. 20 lakhs, as costs, that too, only on the ground that *"it should not be allowed to get the benefit of technicalities of law and the wrongs committed by the Assessing Authority*".

2. However, before we proceed to determine the question on merit, it would be necessary to recapitulate few facts, which are as under:

3. The petitioner is a registered dealer under the Himachal PradeshValue Added Tax Act, 2005 (for short 'VAT Act, 2005') and also under the Central Sales Tax Act, 1956) for manufacturing and trading of drugs and medicines in the State of Himachal Pradesh. The petitioner in the year 2005 has set up a factory for manufacturing of drugs at Baddi.

4. The assessment for the year 2005-06 framed by the Assessing Authority was reopened under the VAT Act, 2005 and the petitioner was issued notice in Form Vat-XXXIX.

5. These proceedings culminated in the imposition of penalty upon the petitioner to the tune of Rs. 84,44,838/-. Though an appeal against the same was filed before the Appellate Authority, however, the same was dismissed vide order dated 7.5.2009.

6. The petitioner thereafter filed second appeal before the Tribunal, which was registered as Appeal No. 70/2009 and came up for consideration on 18.9.2010, and as already observed earlier, the Tribunal though set aside the order passed by the Assessing Authority as also the Appellate Authority, however, at the same time proceeded to impose costs of Rs. 20 lakhs on the petitioner only for the reason that it could not be permitted to take the benefit of technicalities of law and the wrongs committed by the Assessing Authority.

7. This would be clearly evident from the operative portion of the order, which reads thus:

> "Therefore, keeping in view the above circumstances it is not necessary to discuss each and every item and attending circumstances of all the items. This court comes to the conclusion that the penalty imposed is in violation of statutory provisions and liable to be quashed and is hereby quashed alongwith order of Appellate Authority but the dealer should not be allowed to get the benefit of technicalities of law and wrongs committed by the Assessing Authority and, therefore, I feel it necessary in the interest of justice and as well as in the

interest of revenue also that the dealer must be burdened with heavy cost while allowing its appeal and costs are quantified as Rs. 20,00,000/- (Rupees twenty lakhs) which I feel is necessary and expedient and the appeal is accordingly disposed of and records of the lower authorities be sent back."

8. We have heard the learned counsel for the parties and have gone through the material placed on record.

9. We are appalled to see the manner in which the appeal has been disposed of.

10. It is more than settled that the statutory Tribunals must function within their bound and their decisions should not be arbitrary, fanciful or based on irrelevant consideration.

11. It is equally settled that fiscal statutes must be strictly interpreted and in determining liability of a subject to tax one must have regard to the strict letter of law and not merely spirit of the statute or the subsistence of the law. If the Revenue satisfies the Court that the case falls strictly within the provision of the law, the subject can be taxed. On the other hand, if the case is not covered within the four corners of the provisions of the taxing statutes, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter.

12. Apart from the above, there is no equity on either side in tax matters and nothing can be read which is not provided for in the statute.

13. The fundamental principle that serves as guidance to understand the fiscal legislations and the duty of the Court while dwelling upon the interpretation of the taxing statute has been construed by the Hon'ble Supreme Court in State of ***Rajasthan and others*** vs. ***Basant Agrotech (India) Limited***, (2013) 15 SCC 1, and it shall be apt to reproduce the relevant paras as under:

"[12] Before we appreciate the controversy that has travelled to this Court, we think it necessary to state the fundamental principles that serve as guidance to understand the fiscal legislations and the duty of the Court while dwelling upon the interpretation of taxing statutes.

[13] In A.V. Fernandez v. The State of Kerala, 1957 AIR(SC) 657, Bhagwati, J. referred to a passage from Partington v. The Attorney General,1869 4 HL 100 at p. 122(B) which is as follows: -

"As I understand the principle of all fiscal legislation it is this : if the person sought to be taxed, comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

[14] The said passage, as has been stated in the said pronouncement, was quoted with approval by the Privy Council in Bank of Chettinad v. Income-tax Commr., 1940 AIR(PC) 183 and the Privy Council had registered its protest against the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal position. Proceeding further the learned Judge stated that:

"It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provision of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

[15] In Commissioner of Salex-tax, U.P. v. Modi Sugar Mills Ltd., 1961 AIR(SC) 1047, Shah, J., speaking for the majority in the Constitution Bench, has observed thus: -

"In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed : if cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."

[16] In Commissioner of Income-tax, Madras v. Kasturi and Sons Ltd., 1999 AIR(SC) 1275, a two-Judge Bench has approvingly quoted a passage from the book "Principles of Statutory Interpretation" by Justice G.P. Singh, Sixth Edition 1966, which is as follows: -

"The well established rule in the familiar words of LORD WENSLEYDALE, reaffirmed by LORD HALSBURY and LORD SIMONDS, means :

"The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words". In a classic passage LORD CAIRNS stated that the principle thus: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute." VISCOUNT SIMON quoted with approval a passage from Rowlatt, J. expressing the principle in the following words:

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." Relying upon this passage Lord Upjohn said : "Fiscal measures are not built upon any theory of taxation".This passage presently finds place at page 826, Twelfth Edition 2012 of "Principle of Statutory Interpretation" by G.P. Singh."

14. Adverting to the facts, what we find more intriguing is that once the Tribunal had come to the conclusion that the orders passed by both the authorities below, i.e. Assessing Authority and Appellate Authority, were not sustainable in the eyes of law and there was merit in the appeal filed by the petitioner, then how it still proceeded to not only impose costs but exorbitant costs.

15. As regards costs, the accepted principle is that the costs shall follow the event. Unless the successful party is guilty of misconduct or there is any other good cause or reason for depriving the party of it.

16. However, imposing costs upon the successful party, that too, only on the ground of it being legally entitled to benefit of a statute is totally unheard of. After all, the object of awarding costs is to indemnify a party against the expenses of the successful party incurred during the process of vindicating its rights before the Court.

17. In ***Vinod Seth*** vs. ***Devinder Bajaj***, (2010) 8 SCC 1, the Hon'ble Supreme Court laid down the following goals, which were intended to be achieved by imposing costs:

(a) expenditure incurred for the giving of any notice required to be given by law before the institution of the suit;

(b) expenditure incurred on any notice which, though not required to be given by law, has been given by any party to the suit to any other party before the institution of the suit;

(c) expenditure incurred on the typing, writing or printing of pleadings filed by any party;

(d) charges paid by a party for inspection of the records of the court for the purposes of the suit;

(e) expenditure incurred by a party for producing witnesses, even though not summoned through courts; and

(f) in the case of appeals, charges incurred by a party for obtaining any copies of judgments and decrees which are required to be filed along with the memorandum of appeal."

18. It is a trite if a person had not been brought within the ambit of charging section of a taxing statute by clear words; he could not be taxed at all, directly or indirectly. What the learned Tribunal in fact has done is virtually nullify the provisions of the statute by indirectly taxing the petitioner by imposing exorbitant costs of Rs. 20 lakhs.

19. It needs no emphasis that no person can be persecuted only for having resorted to a legal remedy, that too, which has ultimately concluded in his favour.

20. In view of the reasons stated hereinabove, we find merit in this petition and the same is allowed and order passed by the Tribunal on 18.9.2010 is quashed and set aside.

21. Normally, in such like cases, matter would be required to be remitted back to the Authority whose order has been set aside, however, in this case, there is no necessity of doing so for the simple reason that the State has not chosen to assail the order passed by the Tribunal whereby the orders passed by the Assessing Authority and thereafter Appellate Authority have been ordered to be set aside. It is only the petitioner, who is aggrieved by the impugned order and has approached this Court by filing the instant petition, whereas, the respondent has remained contended with the order passed by the Tribunal, and the same insofar as the State is concerned, has attained finality.

22. The petition is allowed in the aforesaid terms leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. ...Appellant

Versus

Sh. Nand Lal & another ...Respondents

FAO No. 26 of 2012
Decided on : 09.12.2016.

Motor Vehicles Act, 1988- Section 166- Tribunal awarded compensation of Rs.86,000/- with interest – claimant had stated in the claim petition that he was sitting in the tractor as Labourer with the contractor but it was stated in the affidavit that the claimant was hit by the Tractor on the road – hence, the award set aside – however, Rs.25,000/- awarded under no fault liability.(Para-6 to 9)

For the Appellant : Ms. Shilpa Sood, Advocate.

For the Respondents: Mr. Ramakant Sharma, Senior Advocate with Ms. Soma Thakur, Advocate, for respondent No. 1.
Mr. Maan Singh, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award dated 20th August, 2011, made by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P., Camp at Nalagarh (hereinafter referred to as 'the Tribunal') in Claim Petition No. 6NL/2 of 2008, titled as **Nand Lal** versus **Nanak Chand & another,**whereby compensation to the tune of Rs. 86,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimant and the insurer was saddled with liability (for short, "the impugned award").

2. The claimant and insured-owner have not questioned the impugned award, on any count. Thus, it has attained finality, so far the same relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

4. Learned Counsel for the appellant-insurer argued that the pleadings and proof on the file are at variance and the claim petition ought to have been dismissed. Further argued that the driver was not having a valid and effective driving licence at the time of accident and the offending vehicle, i.e Tractor-Trolley bearing registration No. HP-12A-5274 was meant for agriculture purpose.

5. I have gone through the impugned award and the entire record.

6. In para-8 of the claim petition, claimant has specifically pleaded that he was sitting in the offending tractor as Labourer with the Contractor. But in his affidavit (Ext. PW-1/A) tendered before the Tribunal, he has stated that he was hit by the said tractor on the road, while he was working with the Contractor.

7. The factum of insurance and permanent disability suffered by the claimant is admitted, but the factum of accident is in dispute.

8. Having glance of the aforesaid discussion, I am of the considered view that it is a case of remand, but keeping all the facts in view, I deem it proper to award compensation to the tune of Rs. 25,000/- under the head 'no fault liability', as per the mandate of Section 140 of the Motor Vehicles Act, 1988, with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

9. Accordingly, the claimant is held entitled to Rs. 25,000/- under the head 'no fault liability', with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

10. The Registry is directed to release the award amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in his account.

11 The excess amount, if any, be refunded in favour of the appellant-insurer through payees' account cheque.

12. Accordingly, the impugned award is modified and the appeal is disposed of.

13. Send down the records after placing a copy of the judgment on the file of the claim petition.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No. 459 of 2012 a/w FAO No. 127 of 2013.
Date of decision: 9th December, 2016.

FAO No. 459 of 2012.

Sh. Navdeep Singh and another .....Appellants
Versus
Inder Singh and another .....Respondents.

FAO No. 127 of 2013.

Inder Singh .....Appellant
Versus
Navdeep Singh and others .....Respondents.

Motor Vehicles Act, 1988- Section 149- Tribunal saddled the owner with liability – held, that the driver was having a valid and effective driving licence, which was also renewed- even otherwise, it was for the insurer to plead and prove that the the driver was not having a valid licence and the owner had committed willful breach – the insurance was admitted and the insurer has to satisfy the award- appeal allowed. (Para- 6 to 13)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant(s): Mr. G.S. Rathore, Advocate, for the appellants in FAO No. 459 of 2012 and Mr. Vipan Rajta, Advocate, for the appellant in FAO No. 127 of 2013.

For the respondent(s): Mr.Vipan Rajta, Advocate, for respondent No.1 in FAO No. 459 of 2012.
Mr. Aman Sood, Advocate, for respondent No. 2 in FAO No. 459 of 2012 and for respondent No. 3 in FAO No. 127 of 2013.
Mr. G.S. Rathore, Advocate, for respondent No. 2 in FAO No. 127 of 2013.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

These appeals are directed against the judgment and award dated 28.5.2012, passed by the Motor Accident Claims Tribunal-II, Shimla H.P. hereinafter referred to as "the Tribunal", for short, in MAC No.53-S/2 of 2008, titled *Inder Singh versus Sh. Navdeep Singh and others,* whereby compensation to the tune of Rs.53000/- alongwith interest @ 7.5% per annum with cost assessed at Rs.5000/- came to be awarded in favour of the claimant and owner and driver were saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Both these appeals are outcome of a common award thus, I deem it proper to determine both these appeals by this common judgment.

3. Owner Navdeep Singh and driver Jagdish Kumar, by the medium of FAO No. 459 of 2012 has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling him with the liability and exonerating the insurer and claimant Inder Singh, by the medium of FAO No. 127 of 2013, has questioned the impugned award on the ground of adequacy of compensation, on the grounds taken in their memo of appeals.

4. The factum of accident, rashness and negligence is not in dispute. Thus two points arise for determination in these appeals.

(i) Whether the Tribunal has rightly discharged the insurer from the liability?

(ii) Whether the amount awarded is adequate?

5. Both these points are to be answered against the insurer for the following reasons.

6. The driver of the offending vehicle was having a valid and effective driving licence which was also renewed. The Tribunal has fallen in an error in making discussion in paras 25 and 26 of the impugned award. This Court has already determined the issue in FAO No.172 of 2006 decided on 7.3.2014 titled ***Oriental Insurance Company versus Smt. Shakuntla Devi and others***.

7. Ext. RW1/A is driving licence, perusal of which does disclose that it was renewed on 13.6.2006 up to 11.6.2009 thus, was valid one.

8. Even otherwise, if a licence was not valid or was otherwise not effective, it was for the appellant-insurer to plead and prove that the driver was not having a valid licence and the owner has committed willful breach.

9. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

10. It is also profitable to reproduce para 10 of the judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

11. Having said so, the driver was having a valid and effective driving licence at the time of accident.

12. The factum of insurance is admitted. Thus, the insurer has to satisfy the award.

13. Accordingly, the appeal filed by the owner and driver being FAO No. 459 of 2012 is allowed and the impugned award is modified as indicated hereinabove.

FAO No. 127 of 2013.

14. Adverting to the appeal filed by the claimant, the amount though appears to be adequate and just but the Tribunal has fallen in an error in not awarding compensation for three months during which the claimant remained for bed rest. The income of the claimant has been assessed at Rs.3000/- per month by the Tribunal and thus is entitled to Rs.9000/- in addition to the amount already awarded. Thus, the claimant in all is held entitled to compensation to the tune of Rs.53,000/-+Rs.9,000/-= Rs.62000/- alongwith costs of Rs.5000/-as awarded by the Tribunal.

15. Accordingly, the appeals are allowed, compensation is enhanced and impugned award is modified, as indicated hereinabove.

16. The insurer is directed to deposit the amount within eight weeks from today in the Registry alongwith interest as awarded by the Tribunal. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

17. The statutory amount of Rs.25,000/- stands deposited by the appellant-owner in the Registry. Out of Rs.25,000/- a sum of Rs.10,000/- is also awarded as costs in favour of the claimant, be released to the claimant as and rest of the amount be refunded to the appellant/owner.

18. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Neelam Sharma .....Appellant.
Versus
Ved Prakash .....Respondent.

Cr.Revision No. 104 of 2013.
Reserved on: 24.11.2016.
Decided on : 09/12/2016.

Negotiable Instruments Act, 1881- Section 138- Accused issued two cheques of Rs.4 lacs and Rs.3 lacs for carrying out construction of a set on the slab purchased by the accused- cheques were dishonoured with the remarks 'insufficient funds' – the accused failed to make payment despite the receipt of the notice – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was also dismissed- held in revision that the complainant had not produced the earlier cheques issued by the accused and had not given their serial numbers- he had not produced the bills of the material used by him to complete the construction of the flat- statement of wife of the complainant also made the version of the complainant doubtful - revision allowed- judgments of the trial Court and Appellate Court set aside and the accused acquitted of the commission of offence punishable under Section 138 of N.I. Act. (Para-9 to 12)

For the Appellant: Mr. Satyen Vaidya, Sr. Advocate with Mr. Varun Chauhan, Advocate.
For the Respondent: Mr. Amrender Singh Rana, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The accused revisionist stands concurrently convicted by both the learned Courts below for hers committing an offence punishable under Section 138 of the Negotiable Instruments Act, in sequel whereof a sentence of simple imprisonment of one year besides qua hers defraying compensation to the complainant in an amount of Rs.4,00,000/- stood imposed upon her. The accused standing aggrieved by the concurrently recorded findings of conviction by both the Courts below has concerted through instituting the instant revision herebefore beget its reversal.

2. The brief facts of the case are that the accused executed cheque comprised in Ext.CW-1/B in favour of the complainant in the sum of Rs.4,00,000/-. The said cheque was drawn on the State Bank of India, Shimla. The accused executed and advanced the aforesaid cheque in favour of the complainant for carrying out the construction of a set on the slab purchased by the accused. The accused had also issued another cheque worth Rs.three lacs in favour of the complainant for the aforesaid purpose of construction to be carried out by the complainant. Both of these cheques got dishonoured and another complaint regarding the second cheque was also filed by the complainant. The cheque was drawn by the accused in favour of the complainant for discharge of the legally enforceable debt and liability outstanding against the accused in favour of the complainant. The cheque was dishonoured by the banker of the accused with the remarks of insufficient funds. The information of the dishonour of the cheque was given to the banker of the complainant by the banker of the accused and the complainant sent a notice of demand of the amount intimating the accused in the event of her failure to pay the cheque amount within 15 days of the receipt of the notice, legal action for her criminal prosecution under Section 138 of the Negotiable Instruments Act shall be taken by the complainant. The notice was received by the accused on 15.08.2007 but till date she failed to make the payment. Hence, this complaint.

3. Notice of accusation stood put to the accused by the learned trial Court for hers committing offences punishable under Sections 138 of the Negotiable Instruments Act to which she pleaded not guilty and claimed trial.

4. In order to prove its case, the complainant examined 5 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which she pleaded innocence and claimed false implication. She herself appeared as witness in her defence.

5. On an appraisal of the evidence on record, both the Courts below returned findings of conviction against the accused/petitioner herein.

6. The accused stands aggrieved by the judgement of conviction recorded by both the Courts below. The learned counsel for the petitioner/accused has concertedly and vigorously contended qua the findings of conviction recorded by both the Courts below standing not based on a proper appreciation by it of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends qua the findings of conviction being reversed by this Court, in the exercise of its revisional jurisdiction and being replaced by findings of acquittal.

7. On the other hand, the learned counsel for the complainant has with considerable force and vigour, contended that the findings of conviction, recorded by the Courts below, standing based on a mature and balanced appreciation of evidence on record and hence theirs not necessitating interference rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

9. Cheque comprised in Ext.CW-1/B stood issued by the convict/revisionist to the respondent/complainant. It holds therewithin an amount of Rs.4,00,000/-. On its presentation before the bank concerned whereupon it stood drawn it suffered the ill fate of its refusal qua encashment by the bank concerned, refusal whereof sprouted from non occurrence of sufficient funds thereat in the account of the convict/revisionist.

10. The mere factum of its issuance by the petitioner, though arouses a statutory presumption qua thereupon the petitioner/convict acquiescing qua its standing issued vis-à-vis the complainant in discharge of her apposite liability qua the complainant yet the aforesaid statutory presumption garnerable from the mere factum of its issuance is rebutable by cogent evidence in dislodgement thereof standing adduced by the petitioner/convict, holding unfoldments therein qua in the issuance of Ext.CW-1/B by the petitioner vis-à-vis the respondent/ complainant, she in the amount embodied therein not concerting to discharge any liability vis-à-vis the respondent complainant whereupon the respondent complainant would not be construable to its lawful drawee, contrarily the statutory presumption marshable from its issuance qua its thereupon begetting an inference qua its standing issued by the petitioner convict vis-à-vis the respondent complainant in discharge of her contractual liability qua its drawee would stand dislodged, corollary whereof would be the penal inculpability fastened upon the petitioner/convict arising from its on its presentation before the bank concerned its begetting the ill fate of its for lack of sufficient funds in the accounts of the convict suffering refusal qua its encashment, would stand negated.

11. The petitioner/convict had under a sale deed comprised in Ext.CX/II borne on the file Com.Case No. 169/3 of 2007 purchased properties as stand displayed therein from the wife of the complainant. In sequel to the registered deed of conveyance comprised in Ext.CX/II standing executed inter se the wife of the complainant with the petitioner herein, a civil suit embodied in Ext.DW-1/A stood subsequently instituted by the vendor of Ext.CX/II before the Civil Court concerned wherewithin a declaratory relief qua Ext.CX/II being quashed and set-aside stood ventilated. When the aforesaid factum stands conjunctively construed with the factum of the respondent complainant throughout in his complaint also in his testification espousing qua

the RCC slab purchased thereunder by the petitioner convict from his wife standing completed by him under an agreement arrived at inter se him with the petitioner convict whereas the amount expended thereon by him remaining not fully liquidated by the petitioner convict, the latter in liquidation of her apposite contractual liability towards him thereupon issuing cheque Ext.CW-1/B qua him whereupon he espoused qua the issuance of cheque comprised in Ext.CW-1/B standing issued to him by the convict in discharge of her apposite liability aforesaid. In the aforesaid backdrop, the relevant best evidence is enjoined to emanate qua in the issuance of cheque Ext.CW-1/B by the petitioner/convict purportedly vis-à-vis the respondent complainant, its issuance standing generated by hers thereupon concerting to discharge her liability towards the wife of the complainant arising from hers purchasing property from the vendor of sale deed Ext.CX/II or evidence was enjoined to surface to succor the espousal of the respondent qua its standing issued by the petitioner/convict vis.a.vis him in discharge of her liability qua him arising from hers not liquidating qua him the entire expenditure incurred by him for completing the construction of a flat which hitherto stood purchased from his wife in an incomplete condition. Only an advertence to the apposite evidence qua the aforesaid factum would clinch the trite factum qua whether the respondent was a lawful drawee of Ext.CW-1/B also would clinch the factum qua the statutory presumption arousable from its mere issuance by the petitioner convict vis.a.vis. the respondent complainant qua hers thereupon acquiescing qua hers in issuing it hence assaying to liquidate her contractual liability vis.a.vis the respondent complainant, hence standing strengthened or standing dislodged.

12. The testification of the respondent complainant manifested in his cross-examination wherewithin he has made an assay to propagate therein qua previous to issuance of Ext.CW-1/B by the petitioner qua him the latter also issuing 5 to 6 cheques to him, cheques whereof stood encashed, some whereof being account payees whereas others being payee cheques yet he has been unable to adduce before the learned trial Magistrate the serial numbers borne by the cheques which previous to issuance of each stood issued by the petitioner accused to him, cheques whereof begot encashment. His omission to produce the details or serial number of cheques which stood previous to the issuance of each stood issued by the petitioner convict qua him, cheques whereof stood purportedly encashed begets a sequel of his smothering the best evidence for succoring his testification qua earlier to issuance of Ext.CW-1/B, the petitioner/convict also issuing cheques which stood purportedly encashed whereupon the inevitable inference warranting erection is qua his strategizing the factum of issuance of Ext.CW-1/B by the accused qua him arising from discharge of the afore-echoed purported contractual liability of the petitioner convict towards him. Furthermore, during the course of recording of his testification embodied in his cross-examination his not adducing before the learned Magistrate concerned the apposite bills personifying the material purchased by him to complete the construction of the incomplete flat purchased from his wife by the petitioner convict, is a vivid display of his in the garb of holding cheque bearing Ext.CW-1/B contriving the factum of its issuance spurring from the petitioner convict thereupon concerting to liquidate her liability towards him arising from his completing the construction of an incomplete RCC slab purchased by her from his wife. Now, hereat with the wife of the complainant who alienated RCC slab qua the petitioner convict under Ext.CX-II, subsequently thereto instituting a suit before the civil Court concerned wherein she made a prayer for quashing of sale deed embodied in Ext.CX-II also assumes significance whereform an inference stands aroused qua the issuance of cheques comprised in Ext.CW-1/B spurring from the petitioner convict thereby discharging or liquidating her liability towards the wife of the complainant qua the sale consideration of the property which she purchased from the vendor of Ext.C-2 whereupon it would be inapt to conclude qua in its issuance the petitioner convict concerting to discharge her liability qua the respondent complainant arising from his purportedly completing construction of an incomplete slab purchased by her from his wife. It also appears from a perusal of Ext.D-2 existing on file of Com.Case No. 169/3 of 2007 qua the entire financial liability arising from sale of property by the wife of the respondent complainant to the petitioner convict standing discharged. The date whereon the relevant discharge occurred stands displayed therein to be 11.4.2007 whereas Ext. CW-1/B stood issued in close proximity thereof on15.7.2007. Though Ext.D-2 is a photocopy yet

the signature of the respondent complainant occur therein also the signatures of his wife occur therein besides when on the document aforesaid making the aforesaid disclosures standing tendered into evidence its exhibition remaining un-protested by the respondent complainant also the respondent complainant not disputing the occurrence of his signatures thereon nor is disputing the occurrence of signatures of his wife thereon wherefrom it is to be concluded qua the manifestations held therein holding probative sinew. It appears qua in the issuance of Ext.CW-1/B by the petitioner convict especially when it bears a date holding close proximity, to Ext.D-2 it not standing issued in discharge of any purported contractual liability of the petitioner/convict qua the respondent/complainant. The aforesaid inference garners immense formidability from a statement recorded by the wife of the complainant in Civil Suit Ext.DW-1/A existing on file Com.Case No. 169/3 of 2007 wherein in her cross-examination to which she stood subjected to by the learned counsel for the convict she despite stating in her pleadings qua an incomplete slab standing purchased by the petitioner from her she yet feigning ignorance qua the person who completed its construction wherefrom the espousal of the respondent complainant qua his completing construction of the incomplete RCC slab purchased by the petitioner convict from his wife gets fully blunted, conspicuously also when the property purchased by the accused from the vendor of sale deed embodied in Ext.CX/2 exists in the same building the apposite portion whereof is in the occupation of the wife of the complainant.In aftermath, when the testification of the respondent complainant occurring in his cross-examination wherewithin he has omitted to portray the best evidence comprised in bills/receipts displaying the expenditure incurred by him for completing the construction of the incomplete RCC slab purchased by the petitioner from his wife, for his thereupon sustaining his espousal qua the petitioner convict not defraying to him the expenditure incurred thereon non adduction whereof when stands coagulated with an inference standing erected by this Court on a reading of the testification of his wife occurring in her cross-examination, ensuing sequel therefrom is qua in his holding Ext.CW-1/B his being not its lawful drawee nor also it can be concluded qua in its issuance the petitioner convict acquiescing qua hers thereupon concerting to liquidate her liability vis.a.vis. the respondent complainant. In aftermath, the respondent complainant does not become a lawful drawee of Ext.CW-1/B nor also on its standing dishonoured any penal inculpability stands attracted qua her, contrarily the statutory presumption arousable from its issuance qua thereupon the petitioner convict acquiescing qua hers concerting to liquidate her contractual liability qua the respondent/complainant, stands wholly effaced.

13. In view of the above, I find merit in this revision, which is accordingly allowed. In sequel, the impugned judgement is set-aside. Fine amount be refunded to the petitioner. Personal and surety bonds stand cancelled and discharged. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No. 489 of 2012 alongwith connected matters.
Decided on : 09.12.2016

FAO No. 489 of 2012

New India Assurance Company Limited .....Appellant
Versus
Fata Chand & others .....Respondents

FAO No. 490 of 2012

New India Assurance Company Limited .....Appellant
Versus
Smt. Dilu Devi & others ....Respondents

FAO No. 491 of 2012
New India Assurance Company Limited .....Appellant
Versus
Ms. Geeta Devi & others .....Respondents

FAO No. 492 of 2012
New India Assurance Company Limited .....Appellant
Versus
Smt. Anjula Devi & others .....Respondents

FAO No. 493 of 2012
New India Assurance Company Limited .....Appellant
Versus
Ved Prabhat & others .....Respondents

FAO No. 494 of 2012
New India Assurance Company Limited .....Appellant
Versus
Tej Ram & others .....Respondents

FAO No. 495 of 2012
New India Assurance Company Limited .....Appellant
Versus
Alami Devi & others .....Respondents

FAO No. 496 of 2012
New India Assurance Company Limited .....Appellant
Versus
Parbati Devi Mahara & others .....Respondents

FAO No. 14 of 2013
New India Assurance Company Limited .....Appellant
Versus
Suman Kumari & others ...Respondents

FAO No. 15 of 2013
New India Assurance Company Limited .....Appellant
Versus
Dharmender Gharti & others .....Respondents

FAO No. 16 of 2013
New India Assurance Company Limited .....Appellant
Versus
Mohinder Singh & others .....Respondents

FAO No. 17 of 2013
New India Assurance Company Limited .....Appellant
Versus
Lata Devi & others .....Respondents

FAO No. 18 of 2013
New India Assurance Company Limited .....Appellant
Versus
Satpal Sharma & others .....Respondents

FAO No. 19 of 2013
New India Assurance Company Limited .....Appellant
Versus
Meharu Devi & others .....Respondents

FAO No. 20 of 2013
New India Assurance Company Limited .....Appellant
Versus
Charry @ Manya & others .....Respondents

FAO No. 21 of 2013
New India Assurance Company Limited .....Appellant
Versus
Rajat @ Hareenav Raj & others .....Respondents

FAO No. 22 of 2013
New India Assurance Company Limited .....Appellant
Versus
Shakuntala & others .....Respondents

FAO No. 109 of 2013
New India Assurance Company Limited .....Appellant
Versus
Rakesh Kumar Sood & others .....Respondents

FAO No. 110 of 2013
New India Assurance Company Limited .....Appellant
Versus
Bishnu Bahadur & others .....Respondents

FAO No. 111 of 2013
New India Assurance Company Limited .....Appellant
Versus
Kumari Priya & others .....Respondents

FAO No. 112 of 2013
New India Assurance Company Limited .....Appellant
Versus
Mahender Singh & others .....Respondents

FAO No. 113 of 2013
New India Assurance Company Limited .....Appellant
Versus
Naresh Kumar & others .....Respondents

FAO No. 114 of 2013
New India Assurance Company Limited .....Appellant
Versus
Shanta Devi & others .....Respondents

FAO No. 115 of 2013
New India Assurance Company Limited .....Appellant
Versus
Jagdish Chand & others .....Respondents

FAO No. 64 of 2014
New India Assurance Company Limited .....Appellant
Versus
Daulat Ram & others .....Respondents

FAO No. 66 of 2014
New India Assurance Company Limited .....Appellant
Versus
Prakash Chand & others .....Respondents

FAO No. 67 of 2014
New India Assurance Company Limited .....Appellant
Versus
Jhalu Devi & others .....Respondents

FAO No. 68 of 2014
New India Assurance Company Limited .....Appellant
Versus
Bharevti Devi & others .....Respondents

FAO No. 69 of 2014
New India Assurance Company Limited .....Appellant
Versus
Kamla Devi @ Dhuri & others .....Respondents

FAO No. 350 of 2014
New India Assurance Company Limited .....Appellant
Versus
Indra Devi & others .....Respondents

FAO No. 4119 of 2013
Fata Chand & others .....Appellant
Versus
Pratap Singh & others .....Respondents

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that driver Sunil Kumar was driving the vehicle rashly and negligently- Tribunals held that Sunil Kumar had caused the accident while driving the vehicle rashly and negligently – Rajesh Kumar was convicted by the Criminal Court for driving the vehicle in a rash and negligent manner – this judgment was set aside in appeal and it was held that Sunil Kumar was driving the vehicle - the judgment of the Appellate Court has attained finality – Tribunals had rightly held that accident was caused by the rash and the negligent driving of Sunil Kumar – seating capacity of the vehicle is 42 and 30 claim petitions were filed - the risk of all the claimants is covered – the insurer was rightly saddled with liability- appeals dismissed.(Para-7 to18)

Cases referred:
United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917
National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237
National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others, I L R 2015 (II) HP 825
Hem Ram & another versus Krishan Chand & another, I L R 2015 (III) HP 796

FAO No. 489 of 2012
For the Appellant: Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Ashwani Pathak, Senior Advocate with Mr. Bhim Raj Sharma, Advocate, for respondents No. 1 to 7.
Ms. Ritta Goswami, Advocate, for respondents No. 8 to 14.
Mr. Sameer Thakur, Advocate, for respondent No. 15.

FAO No. 490 of 2012
For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Bhim Raj Sharma, Advocate, vice Mr. Y.P.S. Dhaulta, Advocate, for respondents No. 1 to 4.
Ms. Ritta Goswami, Advocate, for respondents No. 5 to 11.
Mr. Sameer Thakur, Advocate, for respondent No. 12.

FAO No. 491 of 2012
For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Sanjeev Kumar Suri, Advocate, for respondents No. 1 to 7.
Ms. Ritta Goswami, Advocate, for respondents No. 8 to 13 & 15.
Mr. Sameer Thakur, Advocate, for respondent No. 14.

FAO No. 492 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: M/s Bhupender Ahuja Chaman Negi, Advocates, for respondents No. 1 to 4.
Ms. Ritta Goswami, Advocate, for respondents No. 5 to 11.
Mr. Sameer Thakur, Advocate, for respondent No. 12.

FAO No. 493 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 7.
Mr. Sameer Thakur, Advocate, for respondent No. 8.

FAO No. 494 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Sanjeev Kumar Suri, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 6 & 8.
Mr. Sameer Thakur, Advocate, for respondent No. 7.

FAO No. 495 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 to 5.
Ms. Ritta Goswami, Advocate, for respondents No. 6 to 12.
Mr. Sameer Thakur, Advocate, for respondent No. 13.

FAO No. 496 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 & 2.
Ms. Ritta Goswami, Advocate, for respondents No. 4 to 10.
Mr. Sameer Thakur, Advocate, for respondent No. 11.

FAO No. 14 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Ms. Ritta Goswami, Advocate, for respondents No. 2, 5 & 6.
Mr. Sameer Thakur, Advocate, for respondent No. 7.
Nemo for the other respondents.

FAO No. 15 to 22, of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Ms. Ritta Goswami, Advocate, for LRs of respondent No. 2.
Mr. Sameer Thakur, Advocate, for respondent No. 4.
Nemo for other respondents.

FAO No. 109 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Ms. Ritta Goswami, Advocate, for LRs of respondents No. 3, 4, 5, 8 & 9.
Mr. Sameer Thakur, Advocate, for respondent No. 10.
Nemo for other respondents.

FAO No. 110 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. C.S. Thakur, Advocate for respondent No. 1.
Mr. Sameer Thakur, Advocate, for respondent No. 2.

Ms. Ritta Goswami, Advocate, for respondents No. 3 to 8.

FAO No. 111 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Bimal Gupta, Senior Advocate with Ms. Kusum Chaudhary, Advocate, for respondents No. 1 & 2.
Mr. G.R. Palsra, Advocate, for respondents No. 3 & 4.
Ms. Ritta Goswami, Advocate, for respondents No. 5 to 10 & 12.
Mr. Sameer Thakur, Advocate, for respondent No. 11.

FAO No. 112 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 7 & 9.
Mr. Sameer Thakur, Advocate, for respondent No. 8.

FAO No. 113 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 7.
Mr. Sameer Thakur, Advocate, for respondent No. 8.

FAO No. 114 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Maan Singh, Advocate, for respondents No. 1 to 3.
Ms. Ritta Goswami, Advocate, for respondents No. 4 to 10.
Mr. Sameer Thakur, Advocate, for respondent No. 11.

FAO No. 115 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Arvind Sharma, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 8.
Mr. Sameer Thakur, Advocate, for respondent No. 9.

FAO No. 64 of 2014

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. G.R. Palsra, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 8.
Mr. Sameer Thakur, Advocate, for respondent No. 9.

FAO No. 66 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Devender K. Sharma, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 8.
Mr. Sameer Thakur, Advocate, for respondent No. 9.

FAO No. 67 of 2014

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. H.S. Rangra, Advocate, for respondents No. 1 & 2.
Ms. Ritta Goswami, Advocate, for respondents No. 3 to 9.
Mr. Sameer Thakur, Advocate, for respondent No. 10.

FAO No. 68 of 2014

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Surender Saklani, Advocate, for respondents No. 1 to 3.
Ms. Ritta Goswami, Advocate, for respondents No. 4 to 10.
Mr. Sameer Thakur, Advocate, for respondent No. 11.

FAO No. 69 of 2014

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Surender Saklani, Advocate, for respondents No. 1 to 6.
Ms. Ritta Goswami, Advocate, for respondents No. 7 to 10 & 13.
Mr. Sameer Thakur, Advocate, for respondent No. 14.

FAO No. 350 of 2014

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. H.S. Rangra, Advocate, for respondents No. 1 to 4.
Mr. Sameer Thakur, Advocate, for respondent No. 12.
Nemo for the other respondents.

FAO No. 4119 of 2013

For the Appellant : Mr. Ashwani Pathak, Senior Advocate with Mr. Bhim Raj, Advocate.

For the Respondents: Ms. Ritta Goswami, Advocate, for respondents No. 1 to 7 & 9.
Mr. Sameer Thakur, Advocate, for respondent No. 8.
Mr. Ratish Sharma, Advocate, for respondent No. 10.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

All these appeals are outcome of a motor vehicular accident, thus are being clubbled and disposed of by this common judgment and order.

2. 30 claim petitions were filed before various Motor Accident Claims Tribunals, for short 'the Tribunals' and separate awards came to be passed, whereby compensation was granted to the claimants and insurer came to be saddled with liability.

3. The owner and driver have not questioned the impugned awards on any count, thus, all the impugned awards have attained finality, so far the same relate to them.

4. The insurer has questioned the impugned awards on the grounds taken in the memo of appeals.

5. Some of the claimants, by the medium of FAO No. 4119 of 2013, Cross-Objections No. 183 of 2013 in FAO No. 493 of 2012, Cross Objections No. 4001 of 2013 in FAO No. 115 of 2013 and Cross Objections No. 29 of 2014 in FAO No. 67 of 2014, have sought enhancement of the compensation.

6. Three questions arise for determination in these appeals:

(i) Whether the Tribunals have rightly held that Driver Sunil Kumar was driving the offending vehicle, rashly and negligently, at the time of accident?

(ii) Whether the risk was covered?

(iii) Whether the amount awarded is adequate?.

7. All the claimants in their claim petitions have pleaded and proved that driver-Sunil Kumar was driving the offending vehicle rashly and negligently and caused the accident.

8. The Tribunals after scanning the evidence, oral as well as documentary, held that driver-Sunil Kumar has caused the accident, while driving the offending vehicle, rashly and negligently.

9. On the last date of hearing, learned Counsel for the insurer stated that one Rajesh Kumar was convicted by the Chief Judicial Magistrate, Lahaul-Spiti at Kullu, H.P., vide judgment dated 30.12.2014, passed in Criminal Case No. 17-1/2007, whereby it was held that

Rajesh Kumar was driving the offending vehicle, rashly and negligently, at the relevant time. He has produced photocopy of the said judgment, made part of the file.

10. Learned Counsel for the owner and driver stated that the aforesaid judgment was set aside by the Additional Sessions Judge, Kullu, vide judgment dated 05.10.2016, passed in Criminal Appeal No. 9 of 2015, whereby Rajesh Kumar was acquitted and it was held that Sunil Kumar had driven the offending vehicle at the time of accident. He has also produced photocopy of the said judgment, made part of the file.

11. I have gone through both the aforesaid judgments. Learned Additional Sessions Judge in the judgment dated 05.10.2016, passed in Criminal Appeal No. 9 of 2015, has held that Sunil Kumar was driving the offending vehicle at the relevant point of time. It is apt to reproduce 32 of the aforesaid judgment herein:-

> *"32. From the perusal of statement of PW-28, Dr. Paljore that in the prescription slip the name of driver of the bus in question was written as Sunil Kumar and the same was written after due inquiry since he was the driver of the vehicle in question and was mentioned in the MLC by the doctor.*

12. Learned Counsel for the insurer was asked whether any appeal has been filed against the judgment passed in Criminal Appeal No. 9 of 2015, *supra?* He answered the said question in negative.

13. The Tribunals have rightly made the discussion and returned the findings in all the impugned awards that Sunil Kumar had driven the offending vehicle, rashly and negligently, are accordingly upheld.

14. Admittedly, the seating capacity of the offending vehicle is 42 and 30 claim petitions have been filed. Thus, the risk of all the claimants was covered.

15. It is beaten law of land that the insurer has to satisfy the award to the extent of the risk covered and if the claim petitions are more than the risk covered, then it is for the insured-owner to satisfy the same.

16. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce para 24 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."*

17. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

18. This Court in batches of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, and **FAO No. 224 of 2008,** titled as **Hem Ram & another versus Krishan Chand & another,** being the lead case, decided on 29.05.2015, has laid down the same principle.

19. By the medium of FAO No. 4119 of 2013, the claimants have questioned the award passed in M.A.C Petition No. 32 of 2008, titled as Fata Chand & others versus Shri Gauri Dutt & others**,**whereby compensation to the tune of Rs. 3,99,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimants on the ground of adequacy of compensation and sought for enhancement of compensation.

20. Cross-Objections No. 183 of 2013 in FAO No. 493 of 2012, Cross Objections No. 4001 of 2013 in FAO No. 115 of 2013 and Cross Objections No. 29 of 2014 in FAO No. 67 of 2014, have also been filed for enhancement of compensation.

21. In Claim Petition No. 58 of 2008, titled as Shri Ved Prabhat versus Shri Gauri Dutt & others, subject mater of FAO 493 of 2012, the claimants have been granted compensation to the tune of Rs. 15,62,022/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

22. In Claim Petition No. 43 of 2008, titled as Shri Jagdish Chand versus Shri Gauri Dutt & others, subject mater of FAO 115 of 2015, the claimants have been granted compensation to the tune of Rs. 5,15,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

23. In Claim Petition No. 40 of 2011/2007, titled as Jhalu Devi & another versus Gauri Dutt & others, subject mater of FAO 67 of 2014, the claimants have been granted compensation to the tune of Rs. 4,52,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

24. I have gone through the record and the impugned awards and am of the considered view that the Tribunal has rightly made the assessment and it cannot be said that the compensation is excessive or meager, in any way. Accordingly, it is held that the just and appropriate compensation has been granted by the Tribunals in the aforesaid claim petitions.

25. Having glance of the above discussions, all the appeals and the cross-objections are dismissed and the impugned awards are upheld.

26. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards through payees' cheque amount or by depositing the same in their respective accounts.

27. Send down the record after placing copy of the judgment on each of the Tribunal's files.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Limited ...Appellant.
Versus
Smt. Krishna Kumari and others ...Respondents.

FAO No. 384 of 2012
Reserved on: 02.12.2016
Decided on: 09.12.2016

Motor Vehicles Act, 1988- Section 173- Insurer had not sought permission under Section 170 and it cannot question the award on the ground of adequacy of compensation- however, the Appellate Court can pass an order, which should have been passed by the Tribunal, even without any appeal/cross-objections- the age of the deceased was 47 years at the time of accident- monthly income of the deceased was Rs.31,510/- as per the salary certificate – after deducting the contribution towards income tax the annual income of the deceased is Rs.3,50,000/- - claimants are seven in numbers and 1/5th amount was to be deducted towards personal expenses – thus, the claimants have lost Rs.2,80,000/- towards source of income – multiplier of 11 is applicable and claimants have lost Rs.2,80,000 x 11= Rs.30,80,000/- towards the source of the income- compensation of Rs.20,000/- awarded under the heads funeral expenses, loss of love and affection and loss of consortium - the claimants are entitled to the compensation of Rs.30,80,000 + 20,000= Rs.31,00,000/- with interest @ 7.5% per annum.(Para-22 to 54)

Cases referred:

U.P.S.R.T.C. vs. Km. Mamta and others, AIR 2016 Supreme Court 948
Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation, (2013) 11 SCC 517
Giani Ram vs. Ramjilal, 1969 (1) SCC 813
Narayanarao (dead) through LRs and others vs. Sudarshan, 1995 Supp.(4) SCC 463
Mahant Dhangir and another vs. Madan Mohan and others, 1987 (Supp.) SCC 528
T.N. Rajasekar vs. N. Kasiviswanathan and others, AIR 2005 SC 3794
Delhi Electric Supply Undertaking vs. Basanti Devi and another, JT 1999 (7) SC 486
H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc., AIR 1980 Himachal Pradesh 16
United India Insurance Co. Ltd. vs. Dama Ram and others, 1994 ACJ 692
M. Adu Ama vs. Inja Bangaru Raja and another, 1995 ACJ 670
Himachal Road Transport Corporation vs. Saroj Devi and others, 2002 ACJ 1146
National Insurance Co. Ltd. vs. Mast Ram and others, 2004 ACJ 1039
LAC Solan and another vs. Bhoop Ram, 1997(2) Sim.L.C. 229
State Bank of India vs. M/s Sharma Provision Store and another, AIR 1999 J&K 128
Nati Devi and another versus Maya Devi and others, I L R 2016 (III) HP 1074
Sarita Devi & others versus Ashok Kumar Nagar & others, I L R 2016 (III) HP 1958
Raj Pal Yadav and another versus Smt. Jamna Devi and another, I L R 2016 (III) HP 2318

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents: Mr. Adarsh Sharma, Advocate, for respondents No. 1 to 7.
Mr. Vinod Thakur, Advocate, for respondent No. 8.
Mr. Vijay Chaudhary, Advocate, for respondent No. 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Subject matter of this appeal is award, dated 29th May, 2012, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba (HP) (for short "the Tribunal") in M.A.C. Petition No. 16 of 2011, titled as Krishna Kumari and others versus Oriental Insurance Company Ltd. and others, whereby compensation to the tune of ₹ 34,00,000/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ 40,00,000/-, as per the break-ups given in the claim petition on the ground that they became the victims of the vehicular accident, which was caused by the motorcyclist, namely Shri Subhash Kumar, on 29th May, 2011, at about 1.30 P.M., at place Rath near Ballu, Tehsil and District Chamba, while riding motorcycle No. HP-48-6520, in a rash and negligent manner, in which deceased-Bensu Ram, who was the pillion rider, sustained injuries and succumbed to the said injuries.

4. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

5. On the pleadings of the parties, following issues came to be framed by the Tribunal on 20th October, 2011:

> *"1. Whether deceased Bensu Ram died because of rash or negligent driving of vehicle bearing registration No. HP-48-6520 by respondent No. 3 Subhash Kumar on 29th May, 2011 at place Rath as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled to compensation. If so, how much and from whom? OPP*
>
> *3. Whether the petition is not maintainable? OPR*
>
> *4. Whether the driver of the vehicle in question was not holding a valid and effective driving licence to drive the vehicle in question, if so, its effect? OPR-1*
>
> *5. Whether the vehicle in question was being driven against the terms and conditions of Insurance Policy, if so, its effect? OPR-1*
>
> *6. Relief."*

6. In support of their claim, the claimants examined Dr. Dushyant Thakur as PW-1, MHC Pawan Kumar as PW-2, Sh. Somesh Kumar as PW-3, Shri Khem Raj as PW-5 and one of the claimants, namely Smt. Krishna Kumari, stepped into the witness box as PW-4. The motorcyclist has examined HC Ashok Kumar as RW-1. The owner-insured and the insurer of the offending vehicle have not led any evidence.

7. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of ₹ 34,00,000/- with interest @ 7.5% per annum from the date of filing of the petition till its realization in favour of the claimants and saddled the insurer with liability in terms of the impugned award.

8. The claimants, motorcyclist and owner-insured of the offending vehicle have not questioned the impugned award on any ground, thus, has attained finality so far it relates to them.

9. The appellant-insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

10. Learned Senior Counsel appearing on behalf of the appellant-insurer argued that the accident had not occurred due to the rash and negligent driving of the motorcyclist, was due to falling of the stones from hillside, thus, the Tribunal has fallen in an error in saddling the insurer with liability.

11. The argument of the learned Senior Counsel is not tenable for the reasons to be recorded hereinafter.

Issue No. 1:

12. The claimants have specifically pleaded in para 24 of the claim petition that the motorcyclist was driving the offending vehicle in a rash and negligent manner, could not keep control over the vehicle while negotiating the curve due to which the vehicle skidded and deceased-Bensu Ram was thrown into River Ravi.

13. The owner-insured of the offending vehicle has evasively denied the averments contained in para 24 of the claim petition. But, the motorcyclist, while filing reply to para 24 of the claim petition, has admitted the factum of the accident and has averred that he was not driving the vehicle in a rash and negligent manner.

14. It is apt to reproduce para 24 of the reply filed by the motorcyclist, i.e. respondent No. 3 in the claim petition, herein:

> *"24. That para No. 24 of the petition is incorrect hence denied. It is incorrect that driver was driving the vehicle in a rash and negligent manner. It is submitted that driver of the vehicle was driving the vehicle very cautiously and in a safe manner and all of sudden stones fell from uphill which hit the deceased and as a result of which deceased fell in the Ravi River."*

15. The owner-insured of the offending vehicle has not led any evidence. The motorcyclist has denied the rash and negligent driving on his part and has examined HC Ashok Kumar as RW-1, to prove the said factum. He himself has not stepped into the witness box to prove the said factum, thus, adverse inference has to be drawn against him. Viewed thus, the Tribunal, while deciding issue No. 1, has rightly held that the motorcyclist was driving the offending vehicle rashly and negligently at the relevant point of time and caused the accident in which deceased-Bensu Ram lost his life.

16. It was for the motorcyclist to question the said findings, has not questioned the same, meaning thereby, has accepted the findings returned by the Tribunal. Thus, it cannot lie in the mouth of the insurer that the accident was not outcome of the rash and negligent driving of the offending vehicle by the motorcyclist.

17. Even otherwise, the factum of accident is not in dispute. It was for the motorcyclist to take all precautions and exercise due care and caution while riding the offending vehicle, which he has not done. FIR was also lodged against the motorcyclist. Thus, the Tribunal has rightly made the discussions in paras 19 to 21 of the impugned award, need no interference. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

18. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 5.

Issue No. 3:

19. It was for the respondents to prove how the claim petition was not maintainable, have not led any evidence to this effect, thus, have failed to discharge the onus. Even otherwise, the claimants are the victims of the vehicular accident in which they lost their sole bread earner, thus, were well within their rights to maintain the claim petition and the claim petition was maintainable. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issues No. 4 and 5:

20. It was for the insurer to prove that the motorcyclist was not having a valid and effective driving licence to drive the offending vehicle and the same was being driven in violation of the terms and conditions of the insurance policy, has not led any evidence, thus, has failed to discharge the onus.

21. However, I have gone through the record. The driving licence of the motorcyclist is on the record as Ext. R-3, the perusal of which does disclose that the motorcyclist was having a valid and effective driving licence. The factum of insurance is not in dispute. Thus, the Tribunal has rightly decided issues No. 4 and 5 against the insurer. Accordingly, the findings returned by the Tribunal on issues No. 4 and 5 are upheld.

Issue No. 2:

22. Admittedly, the insurer has not sought permission in terms of Section 170 of the Motor Vehicles Act, 1988 (for short "MV Act"), thus, is precluded from questioning the adequacy of the compensation.

23. I deem it proper to record herein that the appeal under Section 173 of the MV Act is alike the appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, "CPC"). Therefore, the Court is under obligation to decide all issues arising in a case both on facts and law after appreciating the entire evidence.

24. The Apex Court in **U.P.S.R.T.C. vs. Km. Mamta and others,** reported in **AIR 2016 Supreme Court 948**, held that Section 173 of the MV Act and the first appeal under Section 96 CPC are alike and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case. It is profitable to reproduce paragraph 24 of the said judgment hereunder:

> *"24. An appeal under Section 173 of the M.V.Act is essentially in the nature of first appeal alike Section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence."*

25. It is apt to record herein that Part VII of the CPC provides for filing of appeals arising out of decrees and orders. Section 96 CPC provides for appeals from original decree. It is apt to reproduce Section 96 CPC hereunder:

> *"**96. Appeal from original decree.** - 1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction the Court authorized to hear appeals from the decisions of such Court.*
>
> *(2) An appeal may lie from an original decree passed ex parte.*
>
> *(3) No appeal shall lie from a decree passed by the Court with the consent of parties.*
>
> *(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees."*

26. Section 107 CPC deals with the "Powers of the Appellate Court" and sub-section (2) thereof, provides specifically that the Appellate Court shall have the same powers and shall

perform as nearly as may be the same duties as are conferred and imposed on the trial Court. It is apt to reproduce Section 107(2) CPC as under:

> ***"107. Powers of appellate court.-***
>
> *(1) .....*
>
> *(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."*

27. Section 176 of the MV Act empowers the State Government to make rules for the purpose of implementing the provisions contained in Sections 165 to 174 of the MV Act. It is apt to reproduce Section 176 of the Act, hereunder:

> ***"176. Power of State Government to make rules.***
>
> *A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:--*
>
> *a) The form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;*
>
> *b) The procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;*
>
> *c) The powers vested in a Civil Court which may be exercised by a Claims Tribunal;*
>
> *d) The form and the manner in which and the fees (if any) on payment of which an appeal may be preferred against an award of a Claims Tribunal; and*
>
> e) *Any other matter which is to be, or may be, prescribed."*

28. In terms of the mandate of Section 176(c) of the MV Act, the Claims Tribunals are vested with the powers of Civil Court.

29. In a Claim Petition, summary procedure is to be adopted and all provisions of Civil Procedure Code are not applicable, rather only some provisions have been made applicable in terms of Section 169 of the MV Act read with Rule 232 of the Himachal Pradesh Motor Vehicles Rules, 1999 (for short "MV Rules"). It is apt to reproduce Rule 232 of the MV Rules herein:

> *"**232. The Code of Civil Procedure to apply in certain cases:-***
>
> *The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."*

30. Now, the question is - whether the Appellate Court while hearing an appeal under Section 173 of the MV Act can pass such an order which ought to have been passed by the Tribunal, without there being any appeal/challenge or cross objections from the person against whom the order has been made? The answer is in the affirmative for the reasons given hereinabove read with the mandate of law laid down by the Apex Court and the High Courts.

31. Part VII and Order 41 CPC deals with the powers and the scope of the Appellate Court in appeal proceedings.

32. The Apex Court in **Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation,** reported in **(2013) 11 SCC 517,** has held that there are no fetters on the powers of the appellate Court to consider the entire case on facts and law, while hearing an appeal under Section 173 of the MV Act. It is apt to reproduce paragraphs 10, 11 and 12 of the said decision hereunder:

"10. When an Appeal is filed under Section 173 of the Motor Vehicles Act, 1939 (hereinafter shall be referred to as the 'Act'), before the High Court, the normal Rules which apply to Appeals before the High Court are applicable to such an Appeal also. Even otherwise, it is well settled position of law that when an Appeal is provided for, the whole case is open before the Appellate Court and by necessary implication, it can exercise all powers incidental thereto in order to exercise that power effectively. A bare reading of Section 173 of the Act also reflects that there is no curtailment or limitations on the powers of the Appellate Court to consider the entire case on facts and law.

11. It is well settled that the right of Appeal is a substantive right and the questions of fact and law are at large and are open to Review by the Appellate Court. Thus, such powers and duties are necessarily to be exercised so as to make the provision of law effective.

12. Generally, finding of fact recorded by Tribunal should not be interfered with in an Appeal until and unless it is proved that glaring discrepancy or mistake has taken place. If the assessment of compensation by the Tribunal was fair and reasonable and the award of the Tribunal was neither contrary nor inconsistent with the relevant facts as per the evidence available on record then as mentioned hereinabove, the High Court would not interfere in the Appeal. In the case in hand, nothing could be pointed out to us as to what were the glaring discrepancies or mistakes in the impugned Award of the Tribunal, which necessitated the Appellate Court to take a different view in the matter."

33. The Apex Court in the case titled as **Giani Ram vs. Ramjilal,** reported in **1969 (1) SCC 813,** held that Order 41 Rule 33 CPC empowers the appellate Court to pass any decree which justice may require. It is apt to reproduce paragraphs 8 and 9 of the judgment herein:

"8. Order 41, Rule 33 of the CPC was enacted to meet a situation of the nature arising in this case. In so far as it is material, the rule provides:

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

The expression "which ought to have been passed" means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.

9. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived, it would, be perpetrating gave injustice to deny to the widow and the two daughters their share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33, CPC ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed."

34. The Apex Court inthe cases titled as **Narayanarao (dead) through LRs and others vs. Sudarshan,** reported in **1995 Supp.(4) SCC 463; Mahant Dhangir and another vs. Madan Mohan and others,** reported in **1987 (Supp.) SCC 528,** and **T.N. Rajasekar vs. N. Kasiviswanathan and others,** reported in **AIR 2005 SC 3794** held that the High Court, in order to do complete justice to the parties, can invoke the powers under Order 41 Rule 33 CPC and pass orders accordingly.

35. The Apex Court in another case titled as **Delhi Electric Supply Undertaking vs. Basanti Devi and another,** reported in **JT 1999 (7) SC 486,** while relying upon its earlier decision in Mahant Dhangir (supra), held in paragraph 19 as under:

> *"19. Conditions as laid in provision of Order 41, Rule 33 are satisfied in the present case. When circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the Court cannot be found wanting when it comes to exercise its powers."*

36. This Court in **H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc.,** reported in **AIR 1980 Himachal Pradesh 16,** held that under Order 41 Rule 33 CPC, wide powers have been given to the appellate Court and once it is seized of a matter in its appellate jurisdiction, it is within its power to do complete justice between all the concerned parties. It is apt to reproduce relevant portion of paras 39 and para 40 of the judgment herein:

> *"39. .....Moreover, theme of Order 41 and especially the wide powers given to the Court under Rule 33 of Order 41 suggests that the intention of the Legislature is to see that 'once the Court is seized of a matter in its appellate jurisdiction, it is able to do complete justice between all the concerned parties. To us, therefore, it is very clear that the provision enabling a respondent to file cross-objections made in Rule 22 is a procedural provision under which even if a respondent has not preferred any appeal, the Court is enabled to do complete justice to the parties by allowing the respondent concerned to prefer cross-objections within the period of limitation. Under these circumstances, with great respect to the learned Judges of the Allahabad High Court, we find ourselves unable to accept their view that provision enabling a respondent to file cross-objections is a substantive provision and not a procedural one.*
>
> *40. In view of our finding that provision for filing cross-objections contemplated by Order 41, Rule 22 is a procedural provision, the ratio of the above referred two decisions of the Supreme Court would at once be attracted, and this Court being seized of an appellate jurisdiction conferred by Section 110-D of the Motor Vehicles Act, It has to exercise that jurisdiction in the same manner in which it exercises its other appellate jurisdiction allowing the respondents in such appeals to prefer cross-objections."*

37. Keeping in view the ratio of the judgment supra, it can safely be held that the appellate Court is competent to pass any order in the interest of justice.

38. The High Court of Rajasthan, while dilating upon the powers of the Appellate Court under Order 41 Rule 33 CPC, in the case titled as **United India Insurance Co. Ltd. vs. Dama Ram and others,** reported in **1994 ACJ 692,** held that the appellate Court can rectify the error invoking Order 41 Rule 33 CPC even in the absence of Cross Objections or appeal by the claimants. It is apt to reproduce paragraph 7 of the said decision hereunder:

> *"7. The Tribunal has not passed award in any case against the owner (insured) of the vehicle. It has passed awards against the appellant insurance company only. It is not in dispute that the Tribunal has categorically held that the said accident took place due to rash and negligent driving of the truck by its driver. As such his employer, namely, Mohd. Rafiq, owner of the said truck, was liable for his negligent act. Thus the Tribunal committed a serious error in not making liable the owner and driver of the offending truck to pay the said amounts of compensation. This error can well be corrected by this court by invoking the provisions of Order 41, Rule 33, Civil Procedure Code, even if no cross-objection or appeal has been filed by the claimants-respondents. It has been observed in Kok Singh v. Deokabai AIR 1976 SC 634, paras 6 and 7, as follows:*
>
> > *(6) In Giani Ram v. Ramji Lal AIR 1969 SC 1144, the court said that in Order 41, Rule 33, the expression 'which ought to have been passed' means 'what*

ought in law to have been passed' and if an appellate court is of the view that any decree which ought in law to have been passed was in fact not passed by the court below, it may pass or make such further or other decree or order as the justice of the case may require.

(7) Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge. Reference of Murari Lal v. Gomati Devi 1986 ACJ 316 (Rajasthan), may also be made here. Similar view has been taken by me while deciding United India Ins. Co. Ltd. v. Dhali 1992 ACJ 1057 (Rajasthan)."

39. The High Court of Orissa at Cuttack in the case titled as **M. Adu Ama vs. Inja Bangaru Raja and another,** reported in **1995 ACJ 670,** has laid down the same principle of law.

40. This High Court in **Himachal Road Transport Corporation vs. Saroj Devi and others,** reported in **2002 ACJ 1146,** held that appellate Court is not precluded from passing order which it considers just in the facts of the case, without there being any cross objection or cross appeal. It is profitable to reproduce paragraph 15 of the said decision hereunder:

"15. Keeping in view the aforesaid decisions of Supreme Court and different High Courts including this Court , we feel that there being no prohibition in law, i.e., either under Motor Vehicles Act or under the provisions of Civil Procedure Code, this Court is not precluded from passing order which it considers just in the circumstances of a case without there being either cross-objection or cross-appeal. As such we are further of the view that Order 41, Rule 33 is fully applicable to the appeals under the Motor Vehicles Act."

41. In the case titled as **National Insurance Co. Ltd. vs. Mast Ram and others,** reported in **2004 ACJ 1039,** the question arose before this High Court was – whether the appellate Court can modify the award in the absence of cross-appeal. This High Court answered in the affirmative. It is apt to reproduce paragraph 13 of the said judgment hereunder:

"13. Because of what has been held in this judgment, it is felt necessary to exercise power vested in this court under Order 41, Rule 33 of the Civil Procedure Code to set aside the findings in the operative portion of the award requiring the appellant to pay the amount and then to recover it from the 'insurer' (it should have been 'insured'?). This is a direction in the impugned award that needs to be set aside. On this aspect, Mr. Sharma had argued that there is no cross-appeal by the owner of the vehicle. To meet such a situation, legislature had enacted Order 41, Rule 33 in the Civil Procedure Code even in cases where an appeal is not filed by a party, like the owner in the present appeal. As such, this plea cannot be accepted."

42. This High Court in another case titled as **LAC Solan and another vs. Bhoop Ram,** reported in **1997(2) Sim.L.C. 229,** modified the awards in exercise of powers under Order 41 Rule 33 CPC.

43. Faced with the similar situation, the Jammu and Kashmir High Court, in a case titled as **State Bank of India vs. M/s Sharma Provision Store and another,** reported in **AIR 1999 J&K 128,** held that a High Court can pass a decree which ought to have been passed by the trial Court. It is apt to reproduce relevant portion of paragraph 7 of the said decision hereunder:

"7. .....This is an exceptional situation which authorises this Court in the present appeal to pass such decree as ought to have been passed or as the nature of the case demands. Similarly discretion vested in this Court under the aforesaid provision of law will not be refused to be exercised simply because respondents have not either filed an appeal or cross-objections."

44. This Court in **FAO No.203 of 2010,** titled as **Nati Devi and another versus Maya Devi and others,** decided on **20th May, 2016, FAO No. 448 of 2011,** titled as **Sarita Devi & others versus Ashok Kumar Nagar & others,** decided on **17th June, 2016,** and **FAO (MVA) No. 599 of 2008,** titled as **Shri Raj Pal Yadav and another versus Smt. Jamna Devi and another,** decided on 24th June, 2016,has taken the similar view.

45. Thus, it can easily be deduced that the mandate of Section 96, Section 107(2) and order 41 Rule 33 CPC is just to rectify the errors and achieve the aim and object of the legislation. The purpose of Order 41 CPC, as discussed hereinabove, is to enable the appellate Court to do complete justice between the parties and to pass order which ought to have been passed while keeping in view the facts and circumstances of the case.

46. Admittedly, the age of the deceased was 47 years at the time of the accident. The monthly income of the deceased assessed by the Tribunal at ₹ 31,510/-, as per the salary certificate, Ext. PW-3/A, is also not in dispute. After making deductions towards the income tax, the Tribunal has rightly assessed the annual income of the deceased to be ₹ 3,50,000/-.

47. The claimants are seven in number. Thus, the Tribunal has also fallen in an error in deducting one-fourth towards the personal expenses of the deceased, one-fifth was to be deducted in terms of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,**. Thus, the claimants have lost source of income to the tune of ₹ 2,80,000/- per annum.

48. The Tribunal has wrongly applied the multiplier of '13'. In view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma's case** and **Reshma Kumari's case (supra)** read with the Second Schedule appended with the Motor Vehicles Act, multiplier of '11' is just and proper.

49. Viewed thus, it is held that the claimants have lost source of income/dependency to the tune of ₹ 2,80,000/- x 11 = ₹ 30,80,000/-.

50. The amount of compensation to the tune of ₹ 20,000/- awarded under other heads, i.e. 'funeral expenses', 'loss of love and affection' and 'loss of consortium' is maintained.

51. Having said so, the claimants are held entitled to compensation to the tune of ₹ 30,80,000/- + ₹ 20,000/- = ₹ 31,00,000/- with interest as awarded by the Tribunal.

52. The factum of insurance is admitted, thus, the Tribunal has rightly saddled the insurer with liability.

53. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of.

54. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts after proper identification.

55. Excess amount, if any, be refunded to the appellant-insurer through payee's account cheque.

56. Send down the record after placing copy of thejudgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Punnu Ram & ors. .....Appellants.

Versus

State of Himachal Pradesh. .....Respondent.

Cr. Appeal No. 69 of 2007
Date of decision:December 9, 2016.

Indian Penal Code, 1860- Section 353 and 333 read with Section 34- Accused assaulted and used criminal force to deter the informant posted as AddaIncharge, HRTC from discharging his duties - they were convicted by the Trial Court- held in appeal that the genesis of the occurrence is change of route of bus- it can be believed that accused being Pardhan of Gram Panchayat may have questioned working of HRTC functionary – the accused P had also sustained injuries- the possibility of informant and other staff members being assailants cannot be ruled out- there is contradiction regarding the name of accused who inflicted injuries – the witnesses had contradicted themselves regarding other aspects of prosecution case – appeal allowed and accused acquitted.(Para-8 to 13)

For the appellants Mr. Rajendra Kishore Sharma, Senior Advocate with Ms. Anita Parmar, Advocate.

For the respondent Mr.Neeraj K. Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Appellants herein are accused in a case registered against them in Police Station, Chamba vide FIR No. 333 of 2002, under Sections 353 and 333 read with Section 34 of the Indian Penal Code with the allegations that on 19.12.2002 around 3:30 P.M. at Chamba Bus Stand they in furtherance of their common intention assaulted and used criminal force to deter the complainant Krishan Chand (PW10), the then Adda Incharge HRTC Region Chamba, a public servant from discharging his duty as such public servant. They allegedly caused grievous hurt to said Shri Krishan Chand.

2. Learned Sessions Judge, Chamba has tried the appellants and convicted them under Section 353 and 333 read with Section 34 of the Indian Penal Code. They all have been sentenced to undergo rigorous imprisonment for one year and pay Rs. 5000/- each as fine under Section 353 read with Section 34 of the Indian Penal Code, whereas to undergo rigorous imprisonment for three years and to pay Rs. 10,000/- each as fine under section 333 read with Section 34 of the Indian Penal Code.

3. The legality and validity of the impugned judgment has been questioned on the grounds, inter-alia, that irrespective of no case for the commission of the alleged offence is made out against either of the convicts they have erroneously been convicted. The contradictions in the prosecution evidence which materially affects its case have been wrongly ignored. The testimony of PW2 Jaiwant Ram that the injury in the hand was caused to the complainant by convict Raj Kumar, whereas as per that of the complainant by convict Punnu Ram, however, such contradictions have not been taken into consideration in its right perspective. The contradictions in the statements of PW2 and complainant i.e. as per the version of PW2 convict Punnu Ram who had made the utterances that "BUS ADDA INCHARGE USKE JUTE KE BRABAR NAHI HAIN" whereas as per that of the complainant "YOU ARE EQUAL TO MY SHOE" have also not been considered by learned trial Judge. It has also been pointed out that the statement of PW2 Jaiwant Ram was not recorded on the day of occurrence rather on the next day. The testimony of PW12 Daulat Ram, the Investigating Officer, however, reveals that the statement of the said

witness was recorded on the same day. Therefore, this aspect of the prosecution case is also contradictory in nature.

4. According to PW2, he was conductor on duty with the bus enroute Chamba to Gagla, however, as per the version of PW10 the complainant it is one Bhupinder who was the conductor of the bus bound for Gagla from Chamba. As per the testimony of PW2 convict Punnu Ram, had caught hold the complainant from his shirt, however, the complainant has not said so while in the witness box as PW10. While as per the testimony of the complainant, the scuffle continued for about 5-6 minutes, whereas as per the version of PW2 for about ten minutes. According to PW1 Surinder Kumar he asked Shiv Kumar Conductor to inform the police, however, the complainant while in the witness box has stated that it is Surinder Kumar who was asked to do so. PW8 Dr. Vinod Sharma being a resident of Bharmour, the native place of PW10 was also interested witness. Therefore, according to the appellants/convicts his testimony could have not been relied upon. Being so, the findings are stated to be recorded on the basis of the evidence highly contradictory in nature and as such the impugned judgment has been sought to be quashed and set aside.

5. Mr. Rajender Kishore Sharma, learned Senior Advocate assisted by Ms. Anita Parmar, Advocate has argued that nothing of the sort as alleged by the prosecution happened on the spot. According to Mr. Sharma, convict Punnu Ram the Pradhan of Gram Pachayat at the relevant time simply asked the complainant Krishan Chand as to how the route of a bus bound to a particular place could have been changed like this. Neither the said accused nor his co-accused assaulted the complainant and it is rather the later who himself scuffled with them and also administered beatings to them. It has also been urged that the material prosecution witnesses are the employees of HRTC and as such, they being interested witnesses, their testimony could have not been relied upon. It is also pointed out that place of occurrence, the bus stand and the drivers-conductors working there in HRTC always present at a bus stand, how the convicts could have dared to assault the complainant or prevent him from discharging his duties as a public servant.

6. On the other hand, Mr. Neeraj K. Sharma, learned Deputy Advocate General while repelling the arguments addressed on behalf of the accused persons has pointed out from the evidence that the accused had consumed liquor and accused Punnu Ram being Pradhan of the Gram Panchayat at that time scolded the complainant for changing the route of the bus bound to Gagla and his co-accused joined hand to beat the complainant and prevent him from discharging his official duties.

7. Learned trial Judge while recording the findings of conviction against all the accused seems to have swayed with passion and has take into consideration the one side version of the episode. Learned trial Judge has not made any effort to find out from the evidence available on record the manner in which the incident sparked off.

8. Admittedly, the genesis of occurrence is change of route of the bus which initially was detailed for Sach from Chamba. Before the departure of the bus to Sach, the bus had to depart for Gagla, however, the bus detailed for Gagla was got struck-up somewhere and the complainant may have taken a decision to detail the bus bound for Sach to Gagla. In this bus the passengers who had to travel to Sach were already sitting. On announcement of change of its route the passengers who had to travel to Gagla had also boarded the same. Accused Punnu Ram and his co-accused had to travel to Gagla, therefore, they had also boarded the said bus. In this manner the passengers going to Sach and towards Gagla side seems to have boarded the same bus. The complainant deployed at that time as Adda Incharge seems to have intervened to see that the passengers of Sach side occupying the bus are made to alight therefrom. The incident as such had sparked off at the spur of moment. It can reasonably be believed that convict Punnu Ram being Pradhan of Gram Panchayat at that time and in public life may have questioned such type of working of HRTC functionaries. It is on this the occurrence seems to have taken place.

9. The medical evidence as has come on record by way of the testimony of PW8 Dr. Vinod Sharma that not only the complainant had received injuries on his person in the occurrence but injuries were also there on the nose left side and lip of accused Punnu Ram. This witness has even noticed swelling in left cheek of accused Raj Kumar. No injury, however, could be detected on the person of accused Surinder Kumar. The place of occurrence being bus stand which generally remained over crowded that too in the evening time because the incident had occurred 3:30 P.M. the accused would have not dared to assault the complainant none else but Adda Incharge for the reasons that there was every likelihood of they being beaten up by the HRTC staff, drivers, conductors and for that matter the passengers also on their indulging in an activity of this nature. As already noticed, accused Punnu Ram being in public life may have put question mark on the working of the HRTC and others and this has enraged complainant Krishan Chand. The possibility of Krishan Chand and other staff members including the drivers/conductors present there being the assailants cannot be ruled out.

10. Cogent and reliable evidence as to which of the accused had inflicted the injuries on the person of the complainant is lacking on record. On the other hand, the so called independent witness Jaiwant PW2 while in the witness box has stated that the injury in the hand of complainant was inflicted by accused Raj Kumar. However, as per own version of the complainant such injury inflicted to him by accused Punnu Ram. In view of such evidence, no liability can be fastened upon either of the accused qua causing such injury in the hand of the complainant. It cannot also be believed to be true that accused Punnu Ram made utterances that ""BUS ADDA INCHARGE USKE JUTE KE BRABAR NAHI HAIN" for the reasons that as per the own testimony of the complainant said accused had not made any such utterances but made utterances that "HE WAS EQUAL TO HIS SHOE". Therefore, very foundation of the genesis pressed in service by the prosecution turns highly doubtful. Though the statement under Section 161 Cr.P.C. of PW2 Jaiwant Ram is shown to have been recorded on the day of occurrence itself i.e. 19.12.2016 however, as per his version while in the witness box the same was recorded on the next day. Though it is not an important circumstance, however, such contradiction casts cloud qua the manner in which the investigation has been conducted in this case. Even there are contradictions as to who was the conductor deployed with the bus in question and the duration of the occurrence continued on the spot. The other contradictions pointed out by Mr. Sharma, learned Senior Advocate though are minor in nature, however, when the prosecution story not inspire confidence also falsify the prosecution case against the accused.

11. True it is, that all the three accused had consumed alcohol. However, as per the medical evidence they were not under the influence thereof. On this score also, it cannot be believed by any stretch of imagination that being under the influence of alcohol they assaulted the complainant and prevented him from discharging his duties as a public servant.

12. For all the reasons hereinabove, and also the inconsistencies and contradictions occurred in the prosecution evidence, no findings of conviction could have been recorded against the accused persons. The present rather is a case where the prosecution has failed to prove its case against the accused beyond all reasonable doubts. The reappraisal of the evidence available on record reveals that on the basis thereof two views emerges on record and as per the settled legal principles in the criminal administration of justice the view favouring the convicts has to be accepted and the benefit of doubt given to them. This Court, therefore, finds the present a fit case where the accused are entitled to the benefit of doubt and consequently acquittal of the charges framed against each of them.

13. In view of the findings as recorded hereinabove, this appeal succeeds and the same is accordingly accepted. Consequently, the impugned judgment is quashed and set aside and the accused acquitted of the charge framed against each of them. The personal bonds executed by each of them shall stand cancelled and the surety bonds discharged. The appeal is accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Sh. Ram Lal ...Appellant.
Versus
Sh. Bishan Singh and others ...Respondents.

FAO No. 135 of 2012
Decided on: 09.12.2016

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that accident was caused by the negligence of the driver of the vehicle – FIR was registered against the claimant – acquittal was recorded on the ground that case was not proved beyond reasonable doubt and not on the ground that the accident was caused by the negligence of other driver- the statement of PW-1 was shattered in the cross-examination – negligence was not proved and the claim petition was rightly dismissed- appeal dismissed.(Para-6 to 11)

For the appellant: Mr. Ashok K. Tyagi, Advocate.
For the respondents: Mr. Rajesh Verma, Advocate, for respondents No. 1 and 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to award, dated 25th February, 2012, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 62-N/2 of 2008, titled as Shri Ram Lal versus Shri Bishan Singh and others, whereby the claim petition filed by the appellant-claimant-injured came to be dismissed (for short "the impugned award").

2. The Tribunal has specifically held that the appellant-claimant-injured was himself driving the scooter rashly and negligently at the time of the accident and dismissed the claim petition in terms of the impugned award.

3. The appellant-claimant-injured has called in question the impugned award on the ground that the Tribunal has fallen in an error in dismissing the claim petition.

4. Thus, the sole question to be determined in this appeal is – whether the Tribunal has fallen in an error in dismissing the claim petition? The answer is in the negative for the following reasons:

5. It was for the appellant-claimant-injured to prove that the accident was caused by the driver, namely Shri Dharmatam Singh, who was driving vehicle bearing registration No. HP-18 A-1368 rashly and negligently, has failed to do so.

6. Admittedly, FIR No. 5/2007, Ext. RW-1/A, was lodged against appellant-claimant-injured, which culminated into final report in terms of Section 173 of the Code of Criminal Procedure (for short "Cr.P.C"), was presented before the Court of competent jurisdiction. The trial was conducted by the Judicial Magistrate 1st Class, Rajgarh, Camp at Sarahan, District Sirmaur, H.P. (for short "the trial Court"). During trial, the statement of the accused, i.e. appellant-claimant-injured, was recorded under Section 313 CrPC. In the said statement, he pleaded not guilty, but had not led any evidence to prove that the FIR was wrongly lodged against him and the accident was caused by the driver of another vehicle.

7. The trial Court, vide judgment, dated 17th July, 2010 in Criminal Case No. 21/2 of 2009/07, titled as The State of Himachal Pradesh versus Ram Lal (Annexure PX) has acquitted the accused, i.e. the appellant-claimant-injured, while holding that the prosecution had failed to prove the case beyond the reasonable doubt and not on the basis that the accident was not

caused by the appellant-claimant-injured, but, by the driver of the another vehicle, namely Shri Dharmatam Singh.

8. It is apt to record herein that the accused, i.e. the appellant-claimant-injured, has not moved an application during the trial before the trial Court for re-investigation or further investigation in terms of Section 173 (8) Cr.P.C. in order to establish that the accident was caused by the driver of the another vehicle, namely Shri Dharmatam Singh and not by him. He contested the case, undergone the trial and earned acquittal from the trial Court, as discussed hereinabove, on the ground that the prosecution had failed to prove its case beyond reasonable doubt.

9. The appellant-claimant-injured filed the claim petition much later before the Tribunal for grant of compensation, as per the break-ups given in the claim petition, was resisted by the respondents and the issues were framed.

10. It was for the appellant-claimant-injured to plead and prove, *prima facie,* that Shri Dharmatam Singh, i.e. the driver of another vehicle involved in the accident, had driven the same rashly and negligently and caused the accident, in which he sustained injuries, has not led any evidence to that extent except PW-4, Shri Hari Mohan. But, the statement of the said witness has been shattered during his own cross-examination and also by HC Jaswant Singh (RW-1), who had conducted the investigation of the case. Thus, the Tribunal has rightly made the discussion right from paras 9 to 21 of the impugned award.

11. Having said so, the impugned award is well reasoned and legal one, needs no interference.

12. Viewed thus, the impugned award is upheld and the appeal is dismissed.

13. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Ashwani Kumar .....Respondent.

Cr. Appeal No. 220 of 2007.

Date of Decision: 9th December, 2016.

Indian Penal Code, 1860- Section 279 and 337- **Motor Vehicles Act, 1988-** Section 187- Accused was driving a vehicle in a rash and negligent manner- the vehicle hit the informant and caused injuries to him- the accused was tried and acquitted by the Trial Court- held in appeal that testimonies of the prosecution witnesses corroborated each other – medical evidence also corroborated their version – the identity of the accused was also established – minor contradictions in the testimonies of witnesses are not sufficient to doubt them- appeal allowed- accused convicted of the commission of offences punishable under Sections 279 and 337 of I.P.C. and 187 of M.V. Act.(Para-9 to 16)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.

For the Respondent: Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Judicial Magistrate 1st Class, Nadaun, District Hamirpur, H.P. rendered on

15.07.2006 in Crl. Case No. 36-I-2003, RBT No. 381-II-2003, whereby, she acquitted the accused/respondent herein for his allegedly committing offences punishable under Sections 279, 337 of the IPC and under Section 187 of the Motor Vehicles Act.

2. The facts relevant to decide the instant case are that the injured/complainant was standing near Inder Pal Chowk on 3.4.2000 at about 9.30 a.m. along with Rajinder Kumar and Mohan Singh. In the meantime, a Van bearing NO. HP-02-6265 came from Hoshiarpur side which was being driven by the accused in a rash and negligent manner as a result of which he struck it with the complainant and caused injuries to him. On the aforesaid facts, FIR was registered in the police station concerned. The police started the investigations in the case and completed all the codel formalities.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 279 and 337 of the IPC and under Section 187 of the Motor Vehicles Act. In proof of the prosecution case, the prosecution examined 10 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which he claimed innocence and pleaded false implication. However, he did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. PW-1 Hoshiar Singh besides PW-5 Rajinder Kumar and PW-6 Mohan Singh, all of whom at the relevant time were standing at the relevant site of occurrence, all depose in unison bereft of any intra se inconsistency qua the genesis of the prosecution case embodied in the relevant FIR borne on Ex.PW1/A. A close circumspect reading of their respective testifications unveil qua therein not occurring any inter se contradictions vis-a-vis their narrations qua the occurrence embodied in their respective examinations-in-chief vis-a-vis the apposite communications qua it articulated in their respective cross-examinations nor also their respective testifications convey qua theirs testifying with any vice of any intra se contradictions. Significantly, the learned trial Court was enjoined to mete deference to their unstained testifications qua the relevant occurrence, whereas, it has for grossly perverse or absurd reasons emanating from it grossly mis-appraising the creditworthy testifications of PW-1, PW5 and PW-6, proceeded to record an order of acquittal vis-a-vis the accused.

10. The MLC qua the victim borne on Ex.PW8/A underscores qua the doctor concerned, who held the victim/complainant to medical examination, noticing occurrence of injuries on his left foot, mouth, right shoulder and on his right hand.

11. The injuries as stand borne therein unfold qua not only the left foot holding injuries but injuries on other portion of the body of the victim also standing begotten thereon, in sequel to a collision occurring inter se the vehicle driven by the accused with PW-1. With PW-8 disclosing in the apposite MLC qua the victim qua there occurring bruises on his left foot weighed with the learned trial Court to underscore the worth of his testification qua the vehicle colliding with his person arousable from the factum qua with the victim evidently standing by the side of the road, thereupon the position occupied thereat by him warranting his suffering an injury on his right foot, injury whereof yet remained omitted to stand underscored in the apposite MLC. However, the aforesaid reasoning as stands propounded by the learned trial Court to belittle the creditworthiness of the testification of PW-1 besides the testifications of other ocular witnesses, who deposed as PW-5 and PW-6 is bereft of any tenacity given the learned trial Court omitting to revere the factum qua injuries other than the one(s) occurring on the left foot of the victim also standing pronounced in the apposite MLC borne on Ex.PW8/A also with the sanctity of the testifications rendered by PW-1 besides by other ocular witnesses to the relevant occurrence, who testified as PW-5 and PW-6 as occurring in their respective examinations-in-chief remaining for reasons aforestated uneroded thereupon they warranted imputation of credence thereon significantly when on theirs standing subjected to the ordeal of a rigorous cross-examination by the learned defence counsel they remained unscathed in the ordeal nor any communications occur therewithin in portrayal qua theirs at the relevant time not eye witnessing the occurrence, thereupon contrarily it was inapt for the learned trial Court to dis-impute credence to their relevant testifications qua the occurrence.

12. Furthermore, PW-4, the owner of the relevant vehicle in his examination-in-chief deposed qua since 2000, the accused/respondent his brother manning the driver's seat of the relevant vehicle. With the aforesaid manifestations occurring in the testification of the owner of the relevant vehicle besides with the learned defence counsel while holding him to cross-examination, his not putting apposite suggestions to him to rip his aforesaid testification of its tenacity wherefrom the inevitable sequel is qua the accused/respondent herein at the relevant time manning the driver's seat of the relevant vehicle also with the accused in his statement recorded under Section 313 of the Cr.P.C., his not making communications therein qua his at the relevant time not manning the driver's seat of the relevant vehicle rather some other person, specifically named by him driving the relevant vehicle at the relevant time, wherefrom, a conclusion can stand erected qua the defence acquiescing qua the accused manning the driver's seat of the relevant vehicle at the relevant time.

13. Be that as it may, delay, if any, occurring in the lodging of the FIR at the instance of the complainant/victim, who stood at the relevant time accompanied by his collegiates PW-5 and PW-6 stands sufficiently explained conspicuously arising from the defence counsel while holding PW-1 to cross-examination his putting an affirmative suggestion to him holding echoings therein qua the college whereto the aforesaid were to proceed standing located at a distance of 10 kilometers from the relevant site of occurrence whereto an affirmative answer stood purveyed by PW-1 besides with the defence counsel while holding PW-5 to cross-examination, putting an affirmative suggestion to him qua on the relevant day PW-1, PW-5 and PW6 standing enjoined to appear in the English paper scheduled to commence from 10 a.m. and lasting upto 1.00 pm., whereto an affirmative answer stood purveyed by PW-5, is an evident disclosure qua the defence thereupon acquiescing qua given the relevant accident occurring at 9.30 a.m., whereas, when for reasons aforesaid PW1 besides PW-5 and PW6 stood enjoined to take their examination scheduled from 10 a.m. to 1.00 p.m. at a place located at a distance of 10-12 kilometer from the site of occurrence qua theirs thereupon standing constrained to not promptly lodge an FIR qua the occurrence with the police station concerned, wherefrom a conclusion can stand drawn qua the delay in the lodging of the FIR standing satisfactorily explained. In sequel, it was inapt for the learned trial Court to conclude qua the delay as has occurred in the lodging of the FIR standing not satisfactorily explained by the prosecution.

14. The contention of the learned counsel appearing for the accused/respondent herein qua with the Investigating Officer in the site plan borne on Ex.PW8/A describing the site

of occurrence to be triangular whereas in his testification his contradicting the aforesaid factum by voicing qua it being circular, would not erode the efficacy nor the credibility of the testifications of PW-1, PW-5 and PW-6, as it appears to arise only for want of inapposite geometrical knowledge of the investigating officer concerned.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

16. Consequently, for the foregoing reasons, the the instant appeal is allowed and judgment of the learned trial Court is set aside. Accordingly, the accused/respondent is convicted for his committing offences punishable under Sections 279 and 337 of the IPC and under Section 187 of the Motor Vehicles Act. Accused/respondent be produced before this Court on 28th December, 2016 for his being heard on the quantum of sentence.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Maharaj Kumar and others .....Respondents.

Cr. Appeal No. 434 of 2007
Reserved on: 22.11.2016
Decided on : 09/12/2016.

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- Sample of Vanaspati was taken, which was found to be adulterated on analysis- the accused was tried and acquitted by the trial Court- held in appeal that the sample was analyzed by Central Food Laboratory after three years- mere failure to pass Baudouin test is not sufficient to convict a person – appeal dismissed.

(Para-10 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.

For the Respondents: Mr. Nimish Gupta, counsel, for respondent No.2.
Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate, for respondent No.3.
Mr. K.D.Sood, Sr. Advocate with Mr.Sanjeev Sood & Mr.Ankit Aggarwal, Advocates for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 25.07.2007 by the learned Chief Judicial Magistrate, Chamba, District Chamba, Himachal Pradesh, in Complaint No. 80(A)-III of 2000, whereby he acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that Food Inspector went to village Sahoo and purchased three packets of Bhoj Vanaspati on 25.2.2000 from accused Maharaj Kumar after disclosing her identity and showing her intention to take the sample for the purpose of analysis. The Food Inspector has paid Rs.45/- to the accused in the presence of witnesses. The sample of Bhoj Vanaspati packets so purchased were wrapped in three wrapping papers and thereafter pasted with gum and paper slip bearing code No.1334. The signatures of accused and witnesses

were taken in such a manner that paper slip and wrapping paper both carried the part of the signatures according to the procedure. One sealed packet of the sample of the Bhoj Vanaspati was sent to the public/chemical analyst for analysis in a sealed wooden box with Form-VII under registered parcel. A copy of Form VII alongwith the specimen impression of the seal used to seal the packets of the sample was sent separately to the Public Analyst vide separate registered letter and remaining two parts of the sample alongwith two copies of Form-VII with seal impression were also handed over to the Local Heath Authority, Chamba. The Public Analyst, Kandaghat found the sample to be adulterated vide report No. 80 dated 6.4.2000. The Food Inspector submitted all the documents concerned of the case in the office of Chief Medical Officer, Chamba and obtained written consent to launch the prosecution against the accused under the Act. The Chief Medical Officer accorded the sanction. The Local Health Authority was informed separately regarding the launching of prosecution and accused was informed through registered post alongwith the copy of Public Analyst Report. The accused persons were summoned and supplied the copy of complaint and documents in compliance of Section 207 Cr.P.C. Upon consideration of complaint and documents there existed a prima facie case against accused No.1. So notice of accusation was put to the accused under Section 16(1)(a)(i) read with Section 7(1) of the Prevention of Food Adulteration Act (hereinafter for short referred to as 'the Act') and also read over and explained to the accused in Hindi, to which the accused person pleaded not guilty and claimed trial. The accused No.1 moved an application under Section 20A of the Act for impleading M/s K.V.Trading Company, Damtal as co-accused. The application of the accused was allowed by the Court on 7.10.2002 and M/s K.V.Trading Company Damtal was impleaded as co-accused in the present case to whom notice of accusation under Section 16(1)(a)(i) was put and this accused has also moved an application under Section 20-A of the Act to implead M/s Suraj Industries Sansarpur Terrace as co-accused who has moved an application as co-accused and the application was duly allowed on 30.04.2003 and accused No. 3 and 4 were impleaded as co-accused in the present case to whom notice of accusation was put on 7.4.2004, under Section 16(1)(a)(i) read with Section 7(i) of the Act to which they pleaded not guilty and claimed trial. The nominee of Suraj Industries Shri S.K.Uppadhaye moved an application under Section 13(2) of the Act for sending the second sample for analysis to Central Food Laboratory on 26.6.2003 which was duly allowed and the second sample was sent to Director Central Food Laboratory, Mysore along with a memorandum containing specimen seal impression and the report of the Central Food Laboratory, Mysore was received by the Court on 28.10.2003. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused a complaint was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for theirs committing offences punishable under Section 16(1)(a)(i) of the Act to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 4 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They chose to lead evidence and examined two witnesses in their defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsels appearing for the respondents have with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based

on a mature and balanced appreciation of evidence on record by it hence theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The accused respondent No.1 Maharaj Kumar died during the pendency of the appeal before this Court. Hence, the prosecution case against him stands abated.

10. Sample of Bhoj Vanaspati comprised in Ext.PW-3/A stood collected by the Food Inspector concerned from the premises of accused/respondent No.1. On its standing dispatched for analysis to the public analyst concerned whereat it stood subjected to analysis, the public analyst concerned in his opinion comprised in Ext.PW-1/A recorded therein the hereinafter extracted conclusions:-

"Examination of label:- All the required particulars are mentioned.

2. Appearance on melting: Clear, free from suspended and other foreign matter.
3. Taste and smell unobjectionable.
4. Staleness or rancidity absent.
5. Added colouring matter- Absent.
6. Moisture=0.024%
7. Melting point=38
8. Butro refractometer reading at 60=40.5.
9. Unsaponifiable matter =0.99% by weight.
10. Free fatty acids (calculated as oleic acid)=0.11%
11. Test for argemone oil= Negative.
12. Baudouin test for sesame oil= negative
13. Test for mineral oil= negative. And I am of the opinion that the contents of the sample give negative baudouin test for sesame oil whereas it should be positive. The vanaspati should contain seasame oil in sufficient guantity to produce at least 2 red unit in a 1 cm. cell on a Lovibond scale as tested by the prescribed procedure. The sample of vanaspati is therefore adulterated."

11. Thereafter the relevant sample stood also dispatched to the Central Food Laboratory, Mysore, whereat on its standing subjected to analysis, its apposite opinion embedded in its apposite report encapsulated in Ext.PA displays qua its standing positive for rancidity besides negative for baudouin test also therewithin a portrayal exists of its holding therewithin fatty acids beyond the permissible limits. Significantly, the retailer besides the manufacturer on the latters' subsequent impleadment alongwith the retailer stood acquitted for the charges whereagainst they stood subjected to face trial before the learned CJM concerned. The legality of the findings recorded by the learned Chief Judicial Magistrate qua the sample of the relevant Food Item on its initially standing subjected to analysis before the Public Analyst, Himachal Pradesh, Kandaghat besides subsequently to analysis before the Central Food Laboratory, Mysore, at the latter laboratory whereat on its standing subjected to analysis, an opinion emanated therefrom qua its standing tested positive for rancidity besides its holding fatty contents beyond the permissible limits do not entail upon this Court for pronouncing their reversal, significantly when the aforesaid demerits occurring in the relevant sample as stand unveiled in the opinion embedded in Ext.PA stood noticed to exist therein after three years elapsing since the collection of the sample of the relevant food item by the Food Inspector concerned from the retail outlet of respondent No.1 besides when the relevant demeritorious occurrence therein or the occurrence therein of fatty acids beyond the permissible limit(s) remained unmanifested in the previous report of the public analyst concerned, opinion whereof embodied in Ext.PW-1/A stood pronounced in prompt sequel to its collection by the Food

Inspector concerned from the retail outlet of respondent No.1 also when therewithin no presence therein of fatty acids beyond permissible limit(s) stands displayed therein whereupon obviously it stood aptly concluded by the learned Chief Judicial Magistrate qua its occurrence therein hence spurring from a delay of three years occurring on its analysis standing made by the Central Food Laboratory, Mysore. The learned Deputy Advocate General has yet with much force and vigour contended qua with the report of the public analyst concerned also the subsequent report of the Central Food Laboratory, Mysore consistently besides with inter se harmony spelling therein qua the sample of the relevant food item on standing subjected to baudouin test begetting the sequel of the relevant sample of the relevant food item displaying negativity qua its reaction vis.a.vis. baudouin test to which it stood subjected to whereupon on anvil of Section 2 sub section (l) and (m) of the Act, which stands extracted hereinafter:

> (l) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which renders it injurious to health;
>
> (m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injuries to health;

He canvasses qua even if penal culpability on invocation of clause (l) thereof is unfastenable qua the accused/respondents arousable from the factum qua the presence of an imperative food ingredient standing detected therein to hold its presence therein in a quantum beyond permissible limits also thereupon it rendering the relevant food item to be injurious to health, significantly when hereat the relevant presence beyond permissible limits of fatty acids in the relevant food item stands pronounced by this Court for reasons aforestated to not invite the inculpability of the accused/respondents qua infraction standing begotten qua the mandate of Section 2(l) of the Act yet dehors the aforesaid penal inculpability constituted in Clause (l) of Section 2 of the Act not warranting attraction vis.a.vis the accused/respondents, nonetheless the apt penal inculpability encapsulated in clause (m) of Section 2, provisions whereof arouse penal inculpability qua the accused/respondents dehors want of presence therein beyond permissible limits of a prohibited food item besides dehors its presence therein not being injurious to health rather conspicuously when the factum of it's occurrence therein spurs from its being a statutory imperative constituent therein also when thereupon the quality or purity of the relevant food item besides its not falling upto the prescribed standards gets substantially affected, thereupon also the relevant statutory penal inculpability of the accused/respondents stands attracted. Nowat when hereat with 'sesame' specifically standing displayed in Appendix A.19(x) of the Prevention of Food Adulteration Rules, (hereinafter referred to as 'the Rules') provisions whereof stand extracted hereinafter:-

> "It shall contain raw or refined sesame (til) oil in sufficient quantity so that when the Vanaspati is mixed with refined groundnut oil in the proportion of 20:80, the colour produced by the Baudouin test shall not be lighter than 2.0 red unit in a 1 cm cell on a Lovibond scale."

to imperatively mark its presence therein i.e. in 'Vansapati' in a quantity sufficient for facilitating the holding of an efficacious/affirmative 'baudouin test' thereon whereupon the sample of 'Vanaspati' on standing tested would portray qua its quality or purity not falling below the prescribed standards enjoins its manufacturer to add 'sesame' in 'Vanaspati' within the mandate of the afore extracted provisions. Before proceeding to adjudicate the aforesaid submission addressed herebefore by the learned Deputy Advocate General, reliance as stands placed by the learned Chief Judicial Magistrate upon the mandate recorded by the Punjab and Haryana High Court in a judgment reported in Municipal Committee Amritsar Vs. Mehar Singh 1972 page 604 wherein the Punjab and Haryana High Court, has on anvil of the statement of the public analyst concerned which existed therebefore unraveling therein qua 'sesame' imported from the mediterranean region evincing no reaction to baudouin test, whereupon it blindfoldedly straightaway bereft of any evidence for sustaining the aforesaid factum recorded a conclusion qua the 'baudouin test' as stood carried hereat upon the relevant food item by the public analyst

concerned in sequel whereto he opined qua its begetting the sequel of its standing tested negative qua yet thereupon no penal culpability standing attracted qua the accused herein. Consequently, the aforesaid reason meted by the learned Chief Judicial Magistrate to hold of the relevant food item on standing subjected to baudouin test its begetting the sequel of its testing negative thereto by merely anvilling it qua hence with 'sesame' occurring in the sample of 'Vanaspati' hereat also standing imported from the mediterranean region by its relevant manufacturer hereat thereupon it too on facing the relevant baudouin test, a result in the negative ensuing therefrom is palpably *per se* highly surmisal, conspicuously when hereat neither any articulation stood bespoken by the accused/respondents in their respective statements recorded under Section 313 Cr.P.C qua the manufacturer hereat importing 'sesame' from the mediterranean region nor also any suggestion in consonance therewith stood put to the prosecution witnesses.

12. Apparently the reasons recorded by the Punjab and Haryana High Court in Municipal Committee, Amritsar (supra) while making an interpretation of clauses (l) and (m) of Section 2 of the 'Act' qua with sesame merely being a facilitator for holding the baudouin test upon the relevant sample of 'Vanaspati' whereas it not evidently standing displayed by the echoings made therebefore by the expert concerned thereat qua it being injurious to health thereupon it concomitantly concluded qua the sample of 'Vanaspati' would hence stand unrendered to be an adulterated food item reiteratedly merely on the holding of 'baudouin test' on the sample of 'Vanaspati' bespeakings emanating therefrom qua its begetting the sequel of its testing negative thereto also visibly stand generated from its misconstruing the import of Appendix A.19(x) of the Rules whereupon the aforesaid reason propounded therein does not constitute a binding adhereable rule nor a ratio decidendi contrarily its overlooking the provisions engrafted in Appendix A.19(x) of the Rules, renders hence the verdict of the Punjab & Haryana High Court (supra) holding therewithin the aforestated reasons for nullifying qua sample of 'Vanaspati' failing the 'baudouin test' being visibly *per incuriam*.

13. The aforestated Appendix A.19(x) of the Rules casts a statutory obligation upon the manufacturer to while manufacturing 'Vanaspati' to add therein 'sesame' in a quantity sufficient for thereupon its efficaciously/affirmatively facilitating the holding of "baudouin test" thereon for thereupon within the ambit of clause (m) of Section 2 of the Act, the purity besides quality of 'Vanaspati' standing efficaciously/affirmatively tested, reiteratedly when thereunder besides in the afore extracted relevant portion of the Rules 'sesame' stands statutorily constituted to be an apt facilitator for the public analyst concerned for an apt determination standing recorded by him qua the quality or purity of Vanaspati also thereupon the mere factum of its presence therein in a quantum defacilitating an efficacious/affirmative holding of baudouin test upon the relevant sample of 'Vanaspati' dehors its minimal inapt statutorily prescribed presence therein not begetting any injury to the health of the consumers would yet invite penal inculpability vis.a.vis. the accused respondents.

14. Be that as it may, the prosecution stood enjoined to adduce cogent evidence in display of the relevant manufacturer in his manufacturing 'Vanaspati' his prior thereto eliciting an opinion from the expert qua the quantum of presence of 'sesame' therein also evidence stood enjoined to be adduced by the prosecution qua the manufacturer of 'Vanaspati' despite eliciting the report of the expert concerned qua the quantum of sesame standing added therein besides its addition therein being construable to be in a quantity sufficient for its hence facilitating the holding of "baudouin test" thereon for thereupon its quality besides purity standing tested, his yet infracting the mandate of the apposite expert besides the prosecution stood enjoined to adduce material comprised in its placing on record the 'label' borne on the relevant parcel of 'Vanaspati' displaying therein the quantum of presence of 'sesame' therein also thereupon it would prove the trite factum qua the quantum of presence of sesame therein holding a quantity insufficient whereupon obviously the holding of an efficacious/affirmative 'baudouin test' thereon stood defacilitated. However, the prosecution has abysmally failed to adduce the aforesaid relevant best evidence. In aftermath, the effect of the aforesaid omission(s) is qua an inference standing enjoined to be erected by this Court qua the manufacturer hereat of 'Vanaspati' not infracting the opinion obtained by him from the expert concerned qua the quantum of sesame to be added to

'Vanaspati' nor also if on the holding of baudouin test on the relevant sample of 'Vanaspati' it sequelled the fate of its testing negative thereupon marking the factum qua quantum of its presence therein being a quantity insufficient for thereupon its facilitating the holding of an efficacious affirmative 'baudouin test' thereon also thereupon if the 'baudouin test' has failed vis.a.vis. the sample of Vanaspati hereat, failure thereof not on anvil of clause (m) of Section 2 attracting penal inculpability vis.a.vis. the accused respondents, even if concomitantly thereupon the relevant sample of 'Vanaspati' stood rendered to not conform to the apposite standards of its quality or purity. Significantly reiteratedly when this Court has erected the aforesaid inference qua the manufacturer not infracting the mandate of the expert concerned comprised in his not in conformity therewith adding the prescribed quantum of 'sesame' therein unless evidence stood adduced comprised in the prosecution also proceeding to prosecute the expert concerned who purveyed an opinion to the manufacturer marking therein the quantum of presence of 'sesame' in 'Vanaspati' or qua the quantum of its addition therein by its manufacturer whereas his apposite prescriptions qua the quantum of its presence therein or its addition therein being in a quantum sufficient or insufficient for respectively efficaciously facilitating the holding of an affirmative 'baudouin test' thereon or defacilitating its holding thereon alone constituted the bench mark for underscoring qua its holding tandem with the apposite regulatory mechanism qua the quantum of 'sesame' to be added in the sample of 'Vanaspati' hereat. The prosecution was also enjoined to with the apposite facilitations of the Court concerned make the relevant collections from the apposite record maintained by the manufacturer holding pronouncements therein qua the manufacturer infracting the apposite mandate of the expert concerned or his not obtaining the opinion of the expert concerned qua the quantum of 'sesame' to be added in the relevant food item besides qua the opinion purveyed by the expert to the manufacturer qua the quantum of sesame to occur in Vanaspati not conforming to the standardized norms qua its standing construed to efficaciously promote the holding of an affirmative 'baudouin test' thereon whereas the aforesaid constituted the germane best evidence qua the relevant facet. In addition, since the manufacturer is evidently not an expert qua quantum of presence or addition of sesame in 'Vanaspati' besides obviously qua the quantum of sufficiency or insufficiency of its presence therein hence reiteratedly enjoined the prosecution to collect the opinion of the expert concerned. However, the prosecution has failed in the aforesaid endeavour. In aftermath, the quantum of addition of 'sesame' in 'Vanaspati' by its manufacturer hereat even if is in an insufficient quantity thereupon, the manufacturer cannot be rendered penally inculpable. Corollary thereof is when the entire responsibility stands cast upon the expert concerned who purveyed an opinion to the manufacturer of 'Vanaspati' for ensuring qua quantum of presence therein of sesame being in a quantity sufficient for thereupon it efficaciously facilitating the holding of an affirmative baudouin test thereon whereas the relevant elicitations qua the factum aforesaid remain uncollected by the prosecution. In sequel therefrom it would be unbefitting to conclude of the manufacturer of Vanaspati intentionally adding sesame in Vanaspati in an insufficient quantity nor it would be befitting to conclude of his thereupon intentionally defacilitating the holding an apposite affirmative 'baudouin test' thereon contrarily it is to be concluded of his not possessing the relevant *mens rea* for any liability qua any penal inculpation standing fastened upon him.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court apart from the facets afore-stated has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

16. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgment is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh .....Appellant.
Versus
Krishna. .....Respondent(s).

Cr. Appeal No. 362 of 2010
Reserved on 15.9.2016.
Date of decision: 9.12.2016.

N.D.P.S. Act, 1985-Section 18 and 20- A motorcycle being driven by accused M and occupied by accused K was intercepted by the police- accused K was found in the possession of 800 grams charas and 150 grams opium- accused M was found to be driving the motorcycle without any permit – the accused were tried and acquitted by the Trial Court- held in appeal that independent witnesses have not supported the prosecution version – timing in the ruqua was changed from 18.30 hours (6:30 P.M.) to 10:00 P.M. - no explanation for the same was given – there was contradiction regarding the person, who had carried out the search and seizure- the testimonies of the prosecution witnesses are contradictory – the Trial Court had rightly refused to place reliance on their testimonies – appeal dismissed.(Para-11 to 21)

Case referred:
Noor Aga V. State of Punjab, (2008) 16 SCC 417

For the appellant Mr. D.S. Nainta and Mr. Virender Verma, Addl. AGs.
For the respondent(s) Mr. G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Challenge herein is to the judgment dated 2.3.2010, passed by learned Special Judge, Mandi, Division at Mandi, H.P. in Sessions Trial No. 5 of 2008, whereby both the accused-respondents (hereinafter referred to as the accused) were acquitted of the charge under Sections 18 & 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' in short), framed against each of them. Accused Mahender Pal Singh was acquitted of the charge framed under Section 181 of the M.V. Act, also. Accused Mahender Pal Singh has expired during the pendency of this appeal. The appeal as such stands abated against the said accused.

2. The learned trial Court on the basis of the evidence available on record while discarding the plea raised in defence by the accused that Section 50 of the NDPS Act has not been complied with has concluded that in view of recovery of charas from the bag being carried by accused Krishna, the compliance of Section 50 of the Act was not required to be made. However, on taking into consideration the contradictions, inconsistencies and improvements in the prosecution evidence, both the accused were given benefit of doubt. In the opinion of learned trial Judge, the recovery of charas weighing 800 grams and opium weighing 150 grams from physical and conscious possession of accused Krishna is not proved beyond all reasonable doubt. The discrepancies qua time of preparation of rukka Ext. PW-4/A, the time when FIR Ext. PW-9/A/1 was registered and the prosecution case that parcels containing recovered charas and opium and sample parcels when produced by the I.O. before PW-4 Amar Nath MHC, Police Station were already sealed with seals "A" & "C" whereas as per the testimony of PW-4 MHC Amar Nath, seal "C" was used by him for resealing the parcels when produced before him, were also taken into consideration by learned trial Court. The cuttings in the date (7 adjusted to 8 by way

of overwriting) on reseal memo Ext. PW-4/C also weighed with learned trial Judge while acquitting both the accused. The prosecution case that the search of lady accused Krishna was conducted by a lady Constable is also not proved on record. Learned trial Judge has also noted that the independent witnesses PW-1 Sher Singh and PW-8 Roshan Lal associated by the I.O. PW-9 Ami Chand have also not supported the prosecution case. The findings that there is no mention about the preparation of NCB form in rukka Ext. PW-4/A are, however, without any substance as reference thereto is very much there in this document. The another ground that as per the report of Chemical Examiner Ext. PW-9/F, the resin contents in the sample of charas being 20.950 grams and in that of opium 15.488 grams, the weight of recovered charas was only 167.600 grams whereas that of opium 23.232 grams and as such even if the same is held to be recovered from accused Krishna, in that event also, it was a case of recovery of small quantity, however, is not available to the accused because a Larger Bench of this Court in State of Himachal Pradesh vs. Mahboob Khan has held that the entire bulk is to be treated as charas unless and until it is proved that some foreign material was found to be mixed therein. As per further ratio of this judgment, the other part of cannabis plaint i.e. leaves, branches and stem etc. if mixed in the recovered mass is also charas.

3. It is, in the above backdrop, the fate of this appeal has to be decided or before that it is desirable to take note of the facts in a nut shell.

4. On 7.9.2007 around 6:00 PM, PW-9 SI Ami Chand along with Constables Gopal Singh and Lekh Ram was conducting traffic checking at Slapper bridge near the gate of Dehar Power House. One motor cycle bearing registration No. HR-36F-0146 TVS Fiero being driven by accused Mahender Pal Singh (since dead) and occupied by lady accused Krishna as pillion rider was stopped for checking by the police. The antecedents of both the accused were ascertained. The documents of the motor cycle were checked. During the course of checking of bag being carried by accused Krishna with her, charas weighing 800 grams and opium weighing 150 grams was recovered from two different polythene carry bags which were kept therein. After resorting to sealing and sampling process, the recovered charas was taken into possession vide memo Ext. PW-7/A. Specimen of seal "A" Ext. PW-7/B was drawn. The NCB form Ext. PW-4/F was also updated in triplicate. The seal after its use was handed over to Roshan Lal (PW-8). The rukka Ext. PW-4/A was sent to Police Station through Const. Lekh Ram (PW-7), on the basis whereof FIR Ext. PW-9/A/1 was registered by the Police. The I.O. prepared the spot map Ext. PW-9/A. The accused were arrested vide arrest memos Ext. PW-9/D and PW-9/E, respectively. They were apprized about the grounds of arrest i.e. the offence they committed and the provision of sentence prescribed therefor. The accused and parcel containing the recovered contraband were produced before PW-4 MHC Amar Nath, Police Station Sundernagar and the officiating SHO who re-sealed the same with seal "C". The motor cycle was taken into possession vide memo Ext. PW-7/A. Accused Mahender Pal Singh was found driving the motor cycle without driving licence. Special report Ext. PW-3/A was prepared and sent to DSP (Headquarters), Mandi through Const. Lekh Ram (PW-7). The samples of recovered charas and opium were sent to FSL Junga. As per the report Ext. PW-9/F, the same after analysis were found to be the sample of charas and opium.

5. The Investigating Agency, on completion of the investigation has filed the Challan against the accused. Learned trial Judge, has framed charge against both of them under Sections 18 & 20 of the ND & PS Act. Accused Mahender Pal Singh was additionally charged with the offence punishable under Section 181 of the M.V. Act, also. They, however, pleaded not guilty and claimed trial.

6. The material witnesses examined by the prosecution in order to sustain charge against the accused are PW-1 Sher Singh, PW-4 Amar Nath, PW-5 Gopal Singh, PW-7 Lekh Ram, PW-8 Roshan Lal and PW-9 SI Ami Chand, the Investigating Officer. The remaining prosecution witnesses are formal, being police officials.

7. Learned trial Court, on appreciation of the evidence has, however, acquitted both the accused for the reasons recorded in the impugned judgment and discussed in para supra also.

8. The State of Himachal Pradesh, aggrieved by the impugned judgment has questioned the legality and validity thereof on the grounds, inter alia, that learned trial Court has failed to appreciate the evidence available on record in its right perspective. The same rather is stated to be appreciated in slipshod and perfunctory manner. The Court below is stated to have based its findings on hypothesis, surmises and conjectures. The reasoning as given by the Court below is stated to be manifestly wrong and unsustainable. The cogent and reliable evidence produced by the prosecution has erroneously been brushed aside. The minor contradictions in the statements of the prosecution witnesses have weighed heavily with learned trial Court while recording the findings of acquittal against the accused. There being overwhelming, cogent and reliable evidence suggesting the involvement of both the accused in the commission of offence, the factum of independent witnesses having turned hostile to the prosecution should have not been given undue weightage. The recovery of charas weighing 800 grams and opium 150 grams from the exclusive and conscious possession of the accused is satisfactorily proved, however, the accused have been acquitted erroneously.

9. Mr. D.S.Nainta, learned Addl. Advocate General while taking us to the evidence available on record has strenuously contended that the trial Court has failed to appreciate the evidence available on record in its right perspective. The impugned judgment, as such, has been sought to be quashed and set aside.

10. On the other hand, Sh. G.R.Palsra, Advocate, learned counsel representing the accused respondent Krishna has urged that for want of cogent and reliable evidence to prove the recovery of contraband allegedly charas and opium from the conscious and exclusive possession of the said accused renders the entire prosecution case highly doubtful. The improvements, contradictions as occurred in the evidence are stated to be fatal to the prosecution case. It has thus been urged that learned trial Court has not committed any illegality or irregularity while acquitting the accused of the charge framed against each of them.

11. At the out set, it is deemed appropriate to observe that the recovery of narcotic drug or psychotropic substance from the conscious and physical possession of the accused is *sine qua non* for recording the findings of conviction against him. We have drawn the support from the judgment of a Division Bench of this Court in Criminal Appeal No. 71 of 2013, titled State of Himachal Pradesh V. Karnail Singh @ Kaila, decided on 8th September, 2016, in which judgment of Bombay High Court in Rubyana alias Smita Sanjib Bali V. State of Maharashtra and others, 1996 Crl. L.J. 148 to conclude that the possession must be conscious and intelligent and mere physical presence of the accused in proximity or even close to something incriminating is not sufficient.

12. Now if coming to the rival contentions in the light of the given facts and circumstances and the evidence available on record, rapat rojnamacha Ext. PW-5/A reveals that the police party headed by Sub Inspector Ami Chand (PW-9), incharge of Police Post, Slapper left for village Slapper for conducting traffic checking at 5.00 p.m. on national highway. As per the prosecution case, when PW-9 along with other police officials were present at Slapper bridge at 6.00 p.m. near the gate of Dehar Power House, both accused arrived there on a motorcycle bearing registration No. HR-36F-0146. The motorcycle was being driven by accused Mohinder Pal Singh (since dead) and the pillion rider was his co-accused Krishna. Admittedly, nothing incriminating was recovered from either of them or from the dicky etc., of the motorcycle. The contraband allegedly charas was recovered from a military coloured bag being carried by accused Krishna with her. The independent witnesses PW-1 Sher Singh and PW-8 Roshan Lal though have admitted their signatures on all the documents put to them while in the witness box, however, they have not supported the prosecution case qua the recovery of charas weighing 800grams and opium weighing 150grams from the bag allegedly being carried by accused Krishna with her in their presence at all. The present as such is a case, which is not supported by the independent witnesses allegedly associated by the I.O at the time of conducting search and seizure on the spot.

13. Learned Additional Advocate General has heavily relied upon the own statement of the I.O and that of Constable Gopal Singh, PW-5 and Constable Lekh Ram, PW-7, none else but two Constables, who as per rapat Rojnamcha Ext. PW-5/A were accompanying the I.O. for conducting traffic checking on the national highway at Slapper. True it is that the official witnesses can be relied upon, however, with all circumspection and caution i.e. their testimony needs to be closely scrutinized. It is held by a Division Bench of this Court in Criminal Appeal No. 3 of 2013 titled Joga Singh V. State of Himachal Pradesh, decided on 7th July, 2016 while placing reliance on the judgment of the Apex Court in Makhan Singh V. State of Haryana, (2015) 12 SCC 247. The relevant extract of the same reads as follows:

> ".....In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places and at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid of to come and depose in favour of the prosecution. Though it is well settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available....."

14. Whether in the given facts and circumstances, the evidence as has come on record by way of testimony of I.O. PW-9, Constable Gopal Singh, PW-5 and Constable Lekh Ram, PW-7 can be relied upon or not, the answer to this poser in all fairness and also in the ends of justice would be in negative for the reason that the recovery of contraband allegedly charas and opium in the manner as claimed in the police report filed under Section 173 of the Code of Criminal Procedure and the documents annexed thereto is highly doubtful. The accused were nabbed at Slapper bridge allegedly at 6.00 p.m. Had the investigation been taken place on the spot in the manner as claimed, it was likely to take only 2-3 hours for completion. The rukka Ext. PW-4/B if seen amply demonstrates that the time of reducing the same into writing was initially at 18.30 hours (6.30.p.m). However, there is cutting in time, which by way of overwriting was changed to 10.00 p.m. The I.O. PW-9 and the witness Lekh Ram, PW-7 have admitted such cutting in this document, however failed to explain the same. Meaning thereby that the accused were not nabbed at 6.00 p.m. at Slapper bridge, however, before that during day time and may be at 1.00-1.30 p.m. as deposed by the independent witness Roshan Lal or 2.00-2.30 p.m. as deposed by PW-8 Roshan Lal while in the witness box. They both have not been cross-examined to elicit something contrary that they were not called at 1.00-1.30 p.m. or 2.00-2.30 p.m. but 6.00 p.m in the evening. The accused, therefore, seems to have been apprehended during day time i.e. around 1.00-1.30 p.m. or 2.00-2.30 p.m. and being so, the rukka was rightly prepared at 18.30 hours (6.30 p.m). The time of prepration of this document, however, has been changed as 10.00 p.m. to the reasons best known to the I.O., which according to us for filling up the lacuna left in the investigation of the case.

15. The updation of NCB forms on the spot is also doubtful for the reason that in the rukka reference qua updation thereof has been added later on and in different ink. Similarly, if coming to the recovery memo Ext. PW-7/B, the reference qua updation of this document is not in continuity and in sequence of the recitals made therein and rather in the end of this document.

16. Interestingly enough, according to PW-7, the personal search of accused Krishna was conducted by him, however, to the contrary, as per version of the I.O. PW-9, her search was conducted by a Lady Constable, who was called from Police Station, Sundernagar by him at sometime in between 6.00 p.m. to 10.00 p.m. His ignorance as to when she reached on the spot belies his testimony that the search of accused Krishna was conducted by a Lady Constable. The story to this effect has also been fabricated and engineered.

17. When the search and seizure seems to be not taken place at 6.00 p.m and rather during day time itself, therefore, it is not known as to why the registration of the case was delayed till 23.40 hours (11.40 p.m.). Otherwise also, had the search and seizure been taken place at 6.00 p.m., as claimed by the prosecution, six hours time was not required to deliver the rukka in

the Police Station at Sundernagar, which as a matter of fact, is connected by Chandigarh-Manali-Leh national highway one of the busiest roads.

18. Interestingly enough, as per re-seal memo Ext. PW-4/C, the parcel containing the recovered charas and opium along with sample parcels were produced before Head Constable Amar Nath, PW-4 and the then MHC, Police Station, Sundernagar as well as officiating SHO. As per this document, the said witness has re-sealed all the parcels with seal 'C', however, if coming to his statement Ext. D-X recorded under Section 161 of the Code of Criminal Procedure, the I.O. PW-9 when produced before him the parcel containing the case property and also the sample parcels, the same were already sealed with seal 'A' and 'C'. Although, when statement Ext. D-X was put to him in his cross-examination, he has denied portion A to A, B to B and C to C thereof being incorrect, however, without any reasonable and plausible explanation as to how his statement under Section 161 of the Code of Criminal Procedure came to be recorded in such a manner and fashion. Meaning thereby that the parcels containing the case property and samples were not re-sealed in the manner as claimed by the prosecution.

19. The contradictions, discrepancies and improvements as discussed hereinabove and occurred in the prosecution evidence renders the testimony of I.O. PW-9 and also Constable Gopal Singh, PW-5 as well as that of Constable Lekh Ram, PW-7 highly doubtful and it would not be appropriate to place reliance on the same in order to record the findings of conviction against the accused.

20. The independent witnesses have turned hostile to the prosecution as according to them, search and seizure have took place on the spot in their presence. As per testimony of PW-1 Sher Singh, a meat seller at Slapper, he admits that the police had come to his shop around 2.00-230 p.m and had taken the scale and weights therefrom. True it is that when put to cross-examination, he has admitted his signatures on the documents and also on the parcels containing the recovered charas and opium as well as on sample parcels, however, as per his testimony, he had signed the same at the instance of police. His education is only up to 2nd or 3rd standard, therefore, it can reasonably be believed that he could have not understood the contents of the documents even if readover and explained to him by the police. Therefore, he seems to have signed these documents at the instance of police without knowing the consequences thereof. Now if coming to the testimony of another independent witness Shri Roshan Lal, PW-8, he has also denied the search and seizure having taken place in his presence, however, according to him he was made to sign the documents by the police. He is matriculate and seems to have deposed falsely, however, when the prosecution case right from the beginning till end hardly inspires any confidence, even if it is believed that this witness has deposed falsely, the final outcome shall remain the same as in the trial Court. The testimony of PW-1 and PW-8 rather leads to the only conclusion that the accused were not apprehended on Slapper bridge at 6.00 p.m and rather during day time i.e. as per testimony of PW-1 1.00-1.30 p.m., whereas, as per that of PW-8 at 2.00-2.30 p.m. Furthermore, as per testimony of PW-8, he was called to the office of CID police near Slapper bridge where many police officials including three Lady Constables were present. Otherwise also, the degree of proof in a case of this nature should be high because there is provision of deterrent punishment against an offender, if otherwise held guilty after holding full trial. We can draw support in this regard from the judgment of apex Court in Noor Aga V. State of Punjab, (2008) 16 SCC 417, wherein it has been held as under:

> *"56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissins, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs. 2,00,000/- as also the presumption of guilt emering from possession of Narcotic Drugs and Psychotropic Substances, the extent of burden to prove the foundational facts on the prosecution, i.e.,"proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is also so because whereas, on the one hand,*

the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concent of "wider civilization". The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev singh, it was stated: (SCC p. 199, para 28)

"28....It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

[See also Ritesh Chakravarti v. State of M.P.)

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however, high may be, can under no circumstances, be held to be a substitute for legal evidence."

21. In view of what has been said hereinabove, we find no illegality or infirmity with the impugned judgment. The same, as such, calls for no interference by this Court. Consequently, the appeal being devoid of any merits is dismissed. The personal bond furnished by accused Krishna stand cancelled and surety discharged.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Tej Singh ....Appellant.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 153 of 2007.
Date of Decision: 9th December, 2016.

Indian Penal Code, 1860- Section 436 and 427- Informant was watching television – he heard murmuring of the persons on the backside – he came out and saw G and accused T – informant went inside – his wife came and noticed that cow shed was put on fire – domestic bitch died in the fire – the accused was tried and convicted by the Trial Court- held in appeal that the witnesses had improved upon their versions making their testimonies doubtful – G was not cited as a witness and adverse inference has to be drawn against the prosecution- the prosecution version was not proved beyond reasonable doubt and the Court had wrongly convicted the accused- appeal allowed- judgment passed by the Trial Court set aside.(Para-9 to 13)

For the Appellant: Mr. Atul Jhingan, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the appellant/convict against judgment recorded by the learned Sessions Judge, Mandi, H.P. in Sessions Trial No.4 of 2005 on 7.5.2007, whereby, he convicted the accused/appellant herein for his committing offences punishable

under Sections 436 and 427 besides sentenced him to suffer imprisonment for the aforesaid offences as under:

Sections	Sentenced imposed
436 of the IPC	Accused stands sentenced to suffer rigorous imprisonment for five years with fine of Rs.10,000/-, in case of default in the payment of fine amount the accused shall further undergo imprisonment for one years.
427 of the IPC	Sentenced to suffer imprisonment for six months and to pay a fine of Rs.1,000/- and in default to undergo imprisonment for 1 month.

2. The facts relevant to decide the instant case are that on the intervening night of 13th and 14th October, 2003, complainant Narotam Ram was watching television at 1045 p.m. in his house. Then he heard murmuring of persons on the back side of his house and the complainant came out and noticed that Ghanshayam and accused Tej Singh were going on the path by the side of the house of the complainant in tipsy condition. The complainant thereafter went to sleep and in the meantime his wife Kala Devi came outside the house to urinate. She raised cries and complainant immediately came outside and noticed that his cowshed has been set on fire and the complainant immediately untethered/untied the cow, buffalo and calf and brought them outside the cowshed. However, a domestic bitch could not be saved and was burnt in the house fire which has spread on all the sides. All the family members tried to extinguish the fire but the same could not be controlled. The complainant incurred loss of 3000 bundles of grass. In the meanwhile other persons from the village, on seeing the fire also tried to extinguish the fire. There were other articles in the cowshed which were also burnt. Tej Singh and Ghanshayam has put his house on fire because of previous enmity. Thereafter complainant Narotam made a telephone call in police post Rewalsar and the same was entered in the daily diary. Thereafter H.C. Joginder Pal rushed to the spot and found that the cowshed of Narotam was completely burnt by fire. Joinderpal recorded the statement of Narotam Ram and the same was sent through constable Subhash Chand to police station Balh for registration of the case. On the basis of which the FIR was registered in the police station concerned. The police started the investigations in the case and completed all the codel formalities.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 436 and 427 of the IPC. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which he claimed innocence and pleaded false implication. However, he did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

6. The convict/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned defence counsel has concertedly and vigorously contended that the findings of conviction recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the

material on record. Hence, he contends that the findings of conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended that the findings of conviction recorded by the Court below are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The entire fulcrum for testing the veracity of the genesis of the prosecution case rests upon the FIR qua the occurrence recorded before the Police Station concerned by the informant/complainant (PW1). The FIR qua the relevant occurrence stands borne on Ex.PC. It stood recorded on anvil of a statement comprised in Ex.PA made before the Investigating Officer concerned by the complainant/informant (PW1). For the prosecution to succeed in its endeavour of proving the charge against the accused/convict it was under an imperative obligation to obtain apposite elicitations from the prosecution witnesses holding bespeakings qua thereupon consonance besides corroboration standing meted by them vis-a-vis the revelations manifested in Ex.PA besides in Ex.PC. The effect, if any, of any contradictions or improvements occurring therefrom in the respective testifications of material prosecution witnesses would belittle the creditworthiness of the genesis of the prosecution case.

10. For making the relevant unearthings qua the prosecution witnesses while testifying qua the embodiments occurring in Ex.PA besides in Ex.PC, theirs making any departure therefrom, an allusion to their respective testifications is imperative. An allusion to the testification of PW-1, on whose previous statement comprised in Ex. PA, FIR comprised in Ex.PC stood registered before the police station concerned underscores the factum of his though in Ex.PA besides in Ex.PC unearthing therein qua accused Tej Singh along with Ghanshayam standing noticed by him from his window to proceed towards their house whereafter he echoes therein qua his closing the window of his house and thereupon his proceeding to his bedroom to sleep, whereupon his wife who had hitherto proceeded outside for easing herself on returning to her homestead apprised him qua their cowshed standing set ablaze. Both in Ex.PA besides in Ex.PC there is no narration by PW-1 qua his wife PW-2 on returning to her homestead after easing herself outside hers thereupon apprising him qua accused Tej Singh setting ablaze their cowshed. Even when the aforesaid articulations remained uncommunicated in both Ex. PA besides in Ex.PC by PW-1, the complainant/informant, he yet proceeded to while testifying in Court make disclosures therein qua his wife who had hitherto proceeded outside for easing herself on returning to her homestead hers apprising him qua their cowshed standing set ablaze by Tej Singh. The effect of the factum probandum aforesaid remaining unnarrated by the informant both in Ex.PA besides in Ex.PC renders his testification qua it to stand stained with a vice of gross improvement besides a vice of a stark embellishment surfacing vis-a-vis his previous statement recorded in writing whereform an inference is erectable qua his testimony qua the aforesaid testified factum qua his wife who had hitherto proceeded outside for easing herself on returning to her homestead hers apprising him qua their cowshed standing set ablaze by the accused being unamenable for credence standing placed thereupon. Furthermore the effect thereof is qua the entire genesis of the prosecution case standing jettisoned.

11. PW-2, the wife of the complainant/informant (PW-1) , who had conveyed the necessary awakenings qua the aforesaid factum to PW-1, though in her testification has also rendered a version ascribing a penally inculpable role to the accused/convict/appellant herein also therein she has made communications qua hers sighting the accused/respondent to set ablaze her cowshed yet the aforesaid testified factum also warrants its standing disimputed credence arousable from the factum qua when the necessary awakenings stood purveyed at the earliest to PW-1, the informant by PW-2, his wife, the entire gamut of the awakenings holding there within also the factum of hers sighting Tej Singh to set ablaze her cowshed stood enjoined to stand communicated by her to the informant for facilitating the latter to make apposite

concurrent communications in Ex.PA besides in Ex.PC, yet with his omitting to do so, constrains an inference qua the aforesaid echoings not standing communicated at the apposite stage by PW-2 to PW-1. Significantly, also thereupon when the aforesaid factum remained unembodied in Ex.PA besides in Ex.PC the necessary sequel therefrom is qua PW 2, his wife who had hitherto proceeded outside for easing herself on hers returning to her homestead hers not apprising him qua their cowshed standing set ablaze by the accused/appellant. Moreover, conspicuously, when both are to be concluded to preceding the lodging of the FIR naturally holding inter se confabulations qua the factum aforesaid also when the aforesaid factum was enjoined to stand narrated thereat by PW-2 to PW-1, its remaining unembodied in Ex.PA, stems an inference qua the aforesaid factum remaining uncommunicated at the earliest by PW-2 to PW-1 wherefrom it is obvious to conclude qua PW-2 subsequent to the lodging of the FIR qua the occurrence hers both in collusion with PW-1 besides in collusion with the Investigating Officer concerned engineering and contriving the factum aforesaid merely for, as evident from record with hers holding enmity with the accused/respondent, hers hence, conjuring to wreak vendetta upon him.

12. Be that as it may, PW-1 had noticed from the window of his house one Ghanshayam accompanying Tej Singh. However, there is no ascription of any incriminatory role to Ghanshayam nor also despite Ghanshayam purportedly accompanying Tej Singh at the relevant juncture, the prosecution though by its joining him as a prosecution witness could unearth from him the truth qua the relevant occurrence, yet it omitted to join Ghanshayam either as a prosecution witness nor obviously Ghanshyam stepped into the witnesses box. Since, the testification of the aforesaid Ghanshayam constituted the best independent evidence for giving succor to the charge significantly when he though may have rendered an uninterested or unbiased version qua the occurrence vis-a-vis the interested inimical version qua it communicated by PW-1 and PW-2 also when for the reasons aforesaid the version of the prosecution witnesses stands stained with a pervasive vice of improvements besides embellishments vis-a-vis the prosecution case especially vis-a-vis the previous statement(s) recorded in writing of PW-1 constrains a conclusion qua the Investigating Officer by colluding with PW-1 and PW-2 his smothering the truth qua the genesis of the occurrence.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

14. Consequently, the instant appeal is allowed and the judgment impugned hereat is set aside. Accordingly, the appellant herein/convict is acquitted of the charge. The fine amount, if any, deposited by the appellant herein before the learned trial Court be refunded to him forthwith. The personal and surety bonds of the appellant stands canceled. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Tek Chand and another .....Petitioners.

Versus

Karam Singh & others. .....Respondents.

Civil Revision No. 52 of 2016
Decided on : 9.12.2016

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed for restraining the defendants from causing any obstruction upon the path existing in the suit land- an application for execution was filed, which was dismissed by the Court- held, that the decree had obtained finality – an oral prayer was made during the pendency of suit and

appeal that the defendant had encroached upon the suit land and a decree of mandatory injunction be passed – however, the prayer was declined in absence of the pleadings – a fresh suit would be barred by the principle of res-judicata- the Executing Court had wrongly dismissed the Execution Petition and the decree holder was deprived of the fruits of the decree obtained by him- petition allowed and order of Executing Court set aside – Executing Court directed to decide the same afresh.(Para-5 to 7)

For the Petitioners: Mr. Devender K Sharma, Advocate.
For the Respondents: Mr. G.R Palsara, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition stands directed against the impugned order recorded by the learned executing Court upon a petition constituted therebefore under Order 21 Rule 32 of CPC by the DHs/petitioners herein (for short "the plaintiffs) whereby the aforesaid petition stood dismissed by it.

2. The learned trial Court pronounced qua the petitioners/plaintiffs (for short "the plaintiffs) an apposite decree of permanent prohibitory injunction whereupon the defendants stood restrained from causing any obstruction upon a path existing on the suit land depicted in Tatima Ex.PW-1/A.

3. During the pendency of the suit before the learned trial Court the defendants purportedly caused obstruction upon the path existing on the aforesaid suit land whereupon the plaintiffs made an oral request before the learned trial Court qua a relief of mandatory injunction standing pronounced by it for directing the defendants to remove the obstruction raised by them upon the path existing upon the suit land. The learned trial Court declined the aforesaid relief to the plaintiffs. The declining of the aforesaid relief to the plaintiffs by the learned trial Court is not ridden with any inherent procedural fallacy given the plaintiffs without begetting apposite amendments in the plaint by instituting therebefore an application under Order 6 Rule 17 CPC theirs merely making therebefore an oral submission for the according of the apposite relief to them, oral relief whereof naturally warranted its standing declined as tenably declined by the learned trial Court. Also evidence, if any, in consonance therewith for hence a decree of mandatory injunction standing pronounced upon the defendants was wholly discardable it naturally being beyond pleadings.

4. The defendants' omitted to assail the decree of permanent prohibitory injunction pronounced vis-à-vis the plaintiffs by theirs carrying an appeal therefrom before the learned first Appellate Court. Consequently the decree of permanent prohibitory injunction pronounced by the learned trial Court attained finality besides conclusivity.

5. Be that as it may despite the defendants' not assailing the decree of the learned trial Court whereby they stood injuncted against causing any obstruction upon the path borne on tatima Ex.PW-1/A reflected in the operative portion of the judgment and decree pronounced by the learned trial Court, the plaintiffs' though carried an appeal therefrom before the learned first Appellate Court whereby they assailed the rendition recorded by the learned trial Court whereby relief of mandatory injunction stood refused vis-à-vis them yet therebefore also they orally submitted qua the defendants' during the pendency of the suit before the learned trial Court causing obstruction upon the path comprised in the aforesaid Khasra Number whereupon they had staked a claim qua an an easementary right of its user for facilitating theirs accessing their house besides made an oral prayer therebefore qua an apposite decree of mandatory injunction standing pronounced against the defendants. The aforesaid oral prayer made by the plaintiffs before the learned trial Court besides before the learned appellate Court stood aptly declined to them for theirs before either of the Courts omitting to beget an apposite amendment in the plaint

by moving an appropriate application constituted under Order 6 Rule 17 CPC. Also the plaintiffs did not concert to assail the relevant findings qua the facet aforesaid embodied in paragraph 22 of the judgment of the First appellate Court, paragraph whereof stands extracted hereinafter by theirs preferring an appeal therefrom before this Court. In sequel thereto finality besides conclusivity stands imputed to the findings recorded by the learned first Appellate Court qua the relevant factum probandum of the defendants' not warranting vis-à-vis them any rendition of any decree of mandatory injunction arising from theirs during the pendency of the suit before the learned trial Court or during the pendency of the suit before the learned First Appellate Court raising obstructions on the path by stacking material thereupon whereby the user of path by the plaintiffs depicted in the decree of permanent prohibitory injunction besides embodied in tatima Ex.PW-1/A stood fully forestalled besides thwarted.

> *"22. Keeping in view the aforesaid evidence led by the plaintiffs, this Court is of the opinion that the aforesaid evidence led by the plaintiff failed to prove on record that during the pendency of the suit the defendants obstructed the said path with cut stones and wood etc. This evidence further reveals that the matter in controversy with the obstruction of the part and granting of mandatory injunction in favour of the plaintiffs was not within the knowledge of the parties. Since, the matter was not in the knowledge of the parties especially the defendants, as such the defendants was having no opportunity to lead evidence in respect of it and in these circumstances in doing justice to one party, the court can not do injustice to another party and the trial court after dealing the matter elaborately and discussing the statements of the parties, rightly did not grant the relief of mandatory injunction in favour of the plaintiffs, such, being the situation, I have no hesitation to conclude that the plaintiffs have in fact failed to prove on record by leading cogent and satisfactory evidence that the defendants during the pendency of the suit obstructed the use of said party and in the absence of any specific pleadings and specific evidence the plaintiffs were not entitled for the relief of mandatory injunction and hence, the judgment and decree under challenge are legal and valid and the same do not require any modification or interference at the hands of this court. As such, this point is decided against the plaintiffs."*

6. Hereat is to be adjudged the compatible worth qua the conclusivity of the findings recorded by the learned First appellate Court qua a decree of mandatory injunction being un-renderable against the defendants vis-à-vis the conclusivity of the apposite verdict rendered by the learned trial Court besides affirmed by the learned First appellate Court arising from the factum of the defendants' not carrying an appeal thereagainst before the learned first Appellate Court wherefrom an inference stands engendered qua the defendants acquiescing to the findings besides qua the conclusivity of the decree pronounced upon them whereupon they stood restrained from obstructing the path depicted in tatima Ex. PW-1/A.

7. For pronouncing an efficacious decision upon the aforesaid facet imperatively when obviously the bar of res judicata besets the plaintiffs against theirs instituting a fresh suit against the defendants vis-à-vis the aforesaid relief preponderantly when it accrued earlier whereat it stood un-ventilated by the plaintiffs significantly when they omitted to avail the apposite statutory mechanism whereupon they stand forestalled besides interdicted to in a freshly constituted suit canvass a relief for its removal by the defendants comprised in the latters standing mandatorily injuncted to remove it whereupon the act of the defendants comprised in theirs obstructing the path decreed for user by the plaintiffs would hence stand rendered un-redeemed, ought to not be necessarily borne in mind. Given the factum aforesaid qua a statutory bar of res judicata forbidding the plaintiffs to institute a fresh suit for redeeming the prohibited act of the defendants comprised in theirs obstructing the path embodied in the apposite tatima also when for reasons aforesaid the defendants acquiesce to the conclusivity of the decree of permanent prohibitory injunction pronounced upon them it is deemed both just and befitting, significantly also for facilitating the plaintiffs to reap the benefit of a conclusively recorded decree of permanent prohibitory injunction dehors any omission on their part to beget an apposite amendment in the plaint seeking embodying therein a relief of mandatory injunction, to record a

finding qua the plaintiffs qua their omissions aforesaid not standing in the way of an efficacious affirmative rendition standing pronounced by the learned Executing Court concerned upon an apposite petition constituted therebefore for execution of the aforesaid decree of permanent prohibitory injunction pronounced against the defendants. In case finality is attached to the findings occurring in paragraph 22 of the judgment of the learned first Appellate Court it would frustrate the working of the binding decree pronounced upon the defendants qua the user by the plaintiffs of a path existing on the suit land. Throughout since the rendition of a conclusively rendered decree of permanent prohibitory injunction pronounced against the defendants upto its efficacious affirmative execution standing ordered by the learned Executing Court comprised in its directing qua appropriate consummatory coercive steps standing taken, its mandate hold full sway besides both the plaintiffs and the defendants are bound to revere its mandate. Even if assumingly no efficacious evidence nor any evidence of cogent worth may stand adduced qua the defendants raising any obstruction upon the suit land yet the decree of permanent prohibitory injunction dehors any obstructive act done by the defendants during the pendency of the suit before the learned trial Court or during the pendency of the appeal before the first appellate Court also dehors no scribed relief in consonance therewith standings prayed for by the plaintiffs would not estop this court to permit the executing court to carry the mandate of the conclusively recorded decree of permanent prohibitory injunction pronounced qua the plaintiffs, conspicuously when thereupon the mandate of the conclusively recorded decree pronounced qua the suit land would beget consummation besides would obviate its frustration. For facilitating its consummation, though the learned executing Court stood enjoined to pronounce an appropriate order, contrarily it by relegating the impact of the aforesaid germane factum probandum comprised in the enforceable executable conclusive decree, has inaptly dismissed the execution petition.

In view of the above there is merit in this petition and the same is allowed. The impugned order stands quashed and set aside. The Execution Petition be decided afresh within three months by the learned Executing Court. All pending applications stand disposed of accordingly. Records be sent back.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Vikas Kapila & another .....Petitioners

Versus

Ashok Sood & another .....Respondents.

CMPMO No. 231 of 2014
Reserved on : 23.11.2016.
Decided on: 9.12.2016

Code of Civil Procedure, 1908- Order 21 Rule 97 read with Section 151- An order of eviction was passed – an application for its execution was filed –the objector filed objections, which were dismissed- held, that the order was passed against the brother of the objector – no application for impleadment was filed by the objector during the main petition, which means that the objector had acquiesced in the passing of the order- the objections were filed to delay the execution – there was no requirement of framing the issues and recording the evidence- petition dismissed.

(Para- 3 to 9)

Cases referred:

Rajinder Singh and others versus Sadhu Ram, Latest HLJ 2014(2)928
Silverline Forum Pvt. Ltd versus Rajiv Trust & another, (1998) 3 Supreme Court Cases 723

For the petitioners: Mr. G.C Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

For the Respondents: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K Vashishta, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant petition stands directed against the impugned order recorded on 17.7.2014 by the learned Court below upon the objections constituted therefore under Order 21 Rule 97 readwith Section 151 of Code of Civil procedure by the petitioners herein wherewithin they resisted the execution of the conclusively recorded rendition pronounced qua JD/non-objector B.M Kapila impleaded herein as respondent No.2. The verdict of dismissal of the apposite objections constituted therebefore by the petitioners herein under the afore-stated provisions of the Code of Civil Procedure whereunder they purveyed their resistance qua execution of a conclusively recorded verdict of eviction of the non-objector/ respondent No.2 herein from the demised premises stands canvassed by the counsel for the petitioners to stand founded upon an inherent procedural fallacy arouse-able from the factum of the learned Court below in blatant transgression of the mandate of a judgment reported in Latest HLJ 2014(2)928 titled as *Rajinder Singh and others* versus *Sadhu Ram* wherewithin this Court had recorded a conclusion qua objections constituted under Order 21 Rule 97 of CPC before the learned Executing Court by the objectors/resisters to the execution of a conclusively recorded decree of eviction pronounced upon the JD warranting trial thereon analogous to trial of a Civil Suit whereupon the executing Court stood enjoined to strike issues on the contentious pleadings of the parties at lis also thereupon it stood enjoined to permit them to adduce their respective evidence thereon whereas apparently with the impugned rendition making a vivid disclosure qua the aforesaid compliance(s) remaining un-begotten renders the impugned rendition to suffer the ill fate of it standing quashed and set aside.

2. The aforesaid submission addressed herebefore by the learned counsel for the objectors/petitioners herein is bereft of his remaining attentive to all the attendant material which exists on record. Initially the conclusively recorded rendition pronounced qua eviction of JD/respondent No.2 herein from the demised premises occurred on 14.9.2004 also the pronouncement aforesaid attained finality whereafter it stood put to execution before the learned Executing Court, only in course whereof objectors/petitioners herein (Successors-in-interest of late Sh. D.N Kapila, brother of the JD) constituted therebefore objections purveying their resistance qua the execution of a conclusively recorded rendition of eviction of the JD/respondent No.2 herein from the relevant demised premises,objections whereof stood anvilled qua his/theirs continuing to hold tenancy qua the relevant premises under the landlord/DH also his/theirs holding possession thereof whereupon they espoused qua the decree in execution not holding any binding effect upon their rights as tenants in the relevant demised premises.

3. The DH/non-objector/respondent No.1 herein repudiated the objections preferred by the objectors/petitioners herein before the learned Executing Court wherein the DH canvassed qua Mr. D.N Kapila surrendering his tenancy in the year 1990 qua the relevant premises whereafter he espoused qua Mr. D.N Kapila thereafter departing for his native place at Nadaun, in sequel whereto JD/respondent No.2 herein stood inducted by him as a tenant in the relevant premises.However the objectors before the learned Executing Court alongwith their apposite objections appended receipts in personification of the DH/landlord receiving rent from Mr. D.N Kapila subsequent to the latter purportedly surrendering his tenancy in the year 1990. However a close perusal thereof underscores the factum of none of the receipts which exist on record subsequent to 1990 displaying thereinqua the landlord/DH receiving therein from the predecessor-in-interest of the petitioners herein the amount of money constituted therein as rent qua the relevant premises. Also a photocopy of the receipt issued by the Physician who attended upon the predecessor-in-interest of the petitioners herein with a disclosure therein of the latter holding his residence in the tenanted premises whereupon the petitioners' assayed qua theirs

predecessor-in-interest thereat holding possession of the tenanted premiseswould not foreclose any inference qua thereupon the predecessor-in-interest of the petitioners herein holding possession of the demised premises, as it merely appears to be a suo moto unilateral display by the predecessor-in-interest of the petitioners herein whereby it acquires a taint of invention besides concoction rendering it to be discardable, nor also any electricity bills appended therewith holding therewithin reflections qua the relevant tariff displayed therein qua consumption of electricity qua the demised premises standing demanded from the predecessor-in-interest of the petitioners herein would hold any tenacity for concluding qua the brother of the JD predecessor-in-interest of the petitioners herein thereupon belying the factum of the JD/respondent No.2 herein holding tenancy of the demised premises, significantly when the demand of tariff qua the relevant premises as stand displayed therein may be a sequel to the JD/respondent No.2 herein not obtaining from the authorities concerned alteration of the electricity connection in his name.

4. The aforesaid discussion though prima-facie unveils an inference qua the impugned rendition pronounced by the learned Court below not suffering from any gross taint yet the counsel for the petitioners herein vehemently insists qua omission of striking of an apposite issue(s) by the learned Court below on the contentious pleadings of the parties at contest also its omission to permit them to adduce their respective evidence thereon prejudicing the espousal therebefore of the petitioners whereupon he contends qua the tenacity of the impugned verdict hereat standing belittled.

5. The insistence made by the learned counsel for the petitioners herein upon the mandate of this Court encapsulated in the verdict relied upon by him supra though holds therewithin the afore-referred legal expostulation of exacting inflexible rigor whereas its mandate standing evidently infracted when may hence entail the inevitable sequel qua the impugned rendition suffering the misfortune of its standing invalidated, yet its sharpness besides gravity stands bluntedby a rendition recorded by the Hon'ble Apex Court in (1998) 3 Supreme Court Cases 723 in a case titled as *Silverline Forum Pvt. Ltd* versus *Rajiv Trust & another,* relevant paragraphs whereof occurring at Sr. No. 12,13 and 14 which stand extracted hereinafter, contrarily therewithin holding qua the learned Executing Court, on standing seized with objections constituted therebefore by the resister or objector to the conclusively recorded rendition of eviction pronounced upon a person holding possession/occupying the relevant premises as a tenant under the DH wherein they ventilate qua theirs thereat holding its possession also thereupon theirs concerting to escape the effect upon them of the conclusively recorded rendition of eviction pronounced upon a person impleaded as a JD therein, the learned executing Court holding the discretion to or its may directing the contesting parties to adduce evidence on the apposite issue(s) as arise(s) for determination on the apposite contentious pleadings of the parties whereupon the ensuing sequel is there being no omnibus fetter nor any preemptory obligation upon the learned Executing Court to always in all eventualities proceed to strike issues on the contentious pleadings reared therebefore by the DH besides by the apposite objector/resister by the latter constituting therebefore a petition under Order 21 Rule 97 sub rule 2 of CPC nor also there being a perennial peremptory dictate upon the learned executing Court to permit adduction of evidence thereon by the relevant combatants thereat.

> "*12. The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the Court is not obliged to determine a question merely because the resistor raised it. The questions which executing Court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided*

during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21, Rule 97(2) of the Code, execution Court can decide whether the question raised by a resistor or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.

13. *In the above context we may refer to Order 21, Rule 35(1) which reads thus :*

> *" 35 "Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."*

14. *It is clear that executing Court can decide whether the resistor or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary."*

6. Now hereat it has to be determined whether the aforesaid condition constituted therein in exception to the general principle qua the learned Executing Court striking issues on the contentious pleadings of the parties at contest thereat besides permitting them to adduce their evidence thereon, stands hereat satiated. For making the aforesaid unearthings the factum of an evident close relationship of brothers existing inter-se the JD/respondent No.2 herein vis-à-vis Mr. D.N Kapila, the predecessor-in-interest of the petitioners herein does inevitably warrant a conclusion qua the apposite objections standing seeped in a vice of a deep collusion occurring inter-se both also theirs being contrived besides engineered merely for preempting the DH to obtain issuance of warrants of possession qua the demised premises from the Executing Court.

7. Aggravated momentum to the aforesaid inference stands evinced from the factum of a legal notice making a disclosure therein qua the counsel representing the petitioners herein issuing/serving upon the DH, a notice, ventilating therein a grievance qua the JD alongwith the predecessor-in-interest of the petitioners herein standing inducted as a tenant in the relevant premises by the DH. The aforesaid disclosure occurring therein makes a palpable display qua the petitioners acquiescing to the factum of joint tenancy existing qua the relevant premises inter-se D.N Kapila and B.M Kapila. The notice aforesaid stood issued on 8.5.2014 hence subsequent to the conclusively recorded pronouncement made on 14.9.2004 by the learned Rent Controller concerned against the JD/respondent No.2 herein.

8. In the afore-stated backdrop the effect of an omission by the respondent No.2 herein to discharge the apposite onus on the relevant issue(s) qua the petition suffering from a vice of non-joinder and mis-joinder of parties when stands coagulated with the afore-stated communications occurring in the notice at hand appended with the petition hereat holding echoings therein qua the respondent No.2 herein/JD alongwith the predecessor-in-interest of the petitioners herein jointly holding tenancy qua the demised premises also when the counsel who served the legal notice upon the DH is also the counsel who represented the JD before the Rent Controller concerned is qua thereupon a graphic display emanating qua the espousal made in the objections reared by the objectors/petitioners herein being an invention besides a concoction merely for preempting the execution of the conclusively recorded renditions of both the learned Courts below. Moreover, the effect of the aforesaid inference is qua with Mr. D.N Kapila residing alongwith Mr. B.M Kapila in the relevant premises his throughout holding awareness qua the pendency of the apposite petition constituted by the DH before the learned Court concerned against Mr. B.M Kapila (his brother) whereupon he was enjoined to seek his impleadment therein

whereas his afore-stated omission begets a sequel of his acquiescing to the apposite conclusive pronouncements made qua his brother Mr. B.M Kapila whereupon the relevant liability of eviction pronounced upon Mr. B.M Kapila is alike the latter binding upon him also.

9. The summon bonum of the above discussion qua the principle held in the pronouncement of the Hon'ble Apex Court (supra), relevant paragraphs whereof stand extracted hereinabove qua there being no rigid fiat upon the learned executing Court to strike apposite issue(s) on the contentious pleadings of the parties in a petition constituted therebefore by the Objectors/resisters under Order 21 Rule 97 (2) of CPC nor it concomitantly being under an inflexible obligation to permit them to adduce their respective evidence thereon unless it is deemed necessary besides expedient for facilitating it to record its pronouncement, when stands applied hereat especially when the afore-stated material makesa loud pronouncement qua the apposite objections as stood preferred therebefore standing engineered besides concocted contrarily when only the apposite objections hold a prima-facie tinge of tenacity besides creditworthiness thereupon alone the learned Executing Court prima-facie standing enjoined to strike issues on the contentious pleadings of the parties besides stood enjoined to permit them to adduce their respective evidence thereonsignificantly when throughout it would be facilitative for recording an effective determination. For reiteration when the aforesaid principle whereupon the learned Executing Court stood enjoined to strike issues upon the contentious pleadings constituted therefore by the combatants therefore stands hinged upon the aforesaid endeavor facilitating it to pronounce an efficacious rendition upon the apposite concert existing therebefore remains unsatiated, thereupon the espousal made by the learned counsel for the petitioners qua for omission(s) thereof the verdict impugned hereat warranting interference necessitates its standing discountenanced. There is no merit in this petition the same is accordingly dismissed. All pending applications stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Shri Madan Mohan son of Shri Kailash Chand ....Revisionist/Tenant

Versus

Smt. Pushpa Devi wife of Shri Amar Chand ....Non-Revisionist/Landlady

Civil Revision No. 52 of 2014
Order Reserved on 24th November 2016
Date of Order 12th December 2016

H.P. Urban Rent Control Act, 1987- Section 14- Landlady filed an eviction petition on the ground that tenant had ceased to occupy the premises – eviction petition was dismissed by the Rent Controller – an appeal was filed and the Appellate Authority remanded the case for afresh decision after framing additional issues – held in revision Appellate Authority can make an inquiry either itself or through the Rent Controller – there is no power of remand with the Appellate Authority – revision allowed and the case remanded to the Appellate Authority for afresh decision.(Para-13 to 17)

Cases referred:

Braham Dass and others vs. Satya Wati and others, 1997(1) SLJ 484 (HP)
Surinder Kaur vs. Mohinder Pal Singh, ILR 1976 HP 620
Krishan Lal Seth vs. Smt. Pritam Kumar, 1961 PLR 865

For the Revisionist: Mr. Anil Jaswal Advocate.
For the Non-Revisionist: Mr. Bhuvnesh Sharma Advocate with Mr.Ashok Kumar Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 24(5) of H.P. Urban Rent Control Act 1987 by tenant against order dated 03.05.2014 passed by learned Appellate Authority in Rent Appeal No. 1 of 2011 title Smt. Pushpa Devi vs. Shri Madan Mohan.

Brief facts of the case

2. Smt. Pushpa Devi landlady filed eviction petition against tenant namely Shri Madan Mohan under Section 14 (2) (v) of H.P. Urban Rent Control Act 1987. It is pleaded that demised premises is non-residential and monthly rent of demised premises is Rs. 770/- (Rupees seven hundred seventy) per month. It is pleaded that demised premises was rented out by original owner Smt. Gayatri Devi vide agreement dated 2.4.1993. It is pleaded that demised premises was purchased by Smt. Pushpa Devi from Gayatri Devi and thereafter Pushpa Devi became landlady of tenant. It is further pleaded that demised premises is situated in ward No. 6 MC area Satya Narain temple street Hamirpur (H.P.) It is pleaded that tenant has ceased to occupy the demised premises since 4/5 years and has started his another business style as Madan Sweet shop in Housing Board colony Ward No. 7 Hamirpur H.P. near the shop of Hans Raj. It is pleaded that tenant has ceased to occupy the demised premises continuously for twelve months preceding the institution of eviction petition. It is pleaded that notice was issued to the tenant. Prayer for eviction of tenant from demised premises sought.

3. Per contra response filed on behalf of tenant pleaded therein that petition is not maintainable. It is pleaded that petition No. 4 of 2002 is pending inter se parties before learned Rent Controller Hamirpur H.P. regarding same demised premises. It is admitted that demised premises was rented out by Smt. Gayatri Devi previous owner at the rate of Rs.770/- (Rupees seven hundred seventy) per month. It is pleaded that tenant is continuously performing the business and using the demised premises as shop-cum-store. It is pleaded that tenant did not cease the possession of demised premises at any point of time. Prayer for dismissal of eviction petition sought.

4. Landlady also filed rejoinder and re-asserted allegations mentioned in petition.

5. As per pleadings of parties learned Rent Controller framed following issues on 11.6.2007:-

1. Whether petitioner is entitled for vacant possession of the premises/shop since the respondent has ceased to occupy the demised premises/shop from the last 4/5 years? OPP

2. Whether petition is not maintainable? ….OPR

3. Whether petition No. RP No. 4 of 2002 is pending between the parties before Rent Controller (II) Hamirpur regarding the same premises? ….OPR

4. Whether respondent is continuously doing the business of the premises/shop and paying the rent regularly? ….OPR

5. Relief.

6. Learned Rent Controller decided eviction petition on 19.5.2011. Learned Rent Controller decided issues Nos. 1, 2 and 4 in negative. Learned Rent Controller decided issue No. 3 partly in yes and partly in no. Learned Rent Controller dismissed eviction petition filed by landlady.

7. Feeling aggrieved against order of learned Rent Controller landlady Smt. Pushpa Devi filed Rent Appeal No. 1 of 2011 under section 24 of H.P. Urban Rent Controler Act 1987 against order dated 19.5.2011 passed by learned Rent Controller. Learned Appellate Authority allowed appeal filed by Smt. Pushpa Devi. Learned Appellate Authority set aside the impugned order dated 19.5.2011 passed by learned Rent Controller and learned Appellate Authority

remanded back the case to the court of learned Rent Controller to decide the same afresh after framing additional issue.

8. Feeling aggrieved against order of learned Appellate Authority revisionist filed present revision petition before H.P. High Court.

9. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and Court also perused entire record carefuly.

10. Following points arises for determination in civil revision petition:-

1. Whether revision petition filed by tenant is liable to be accepted as per grounds mentioned in revision petition?

2. Relief.

11. Findings upon point No.1 with reasons

11.1 PW1 Tapai Parshad posted as Junior Assistant in Excise and Taxation office Hamirpur has stated that he has brought the summoned record. He has stated that return filed w.e.f. 1983 to 30.6.2007. He has stated that nil tax return has been filed by tenant w.e.f. 2003 to 30.6.2007. He has stated that tenant has filed the affidavit. He has stated that there is recital in affidavit dated 30.7.2005 that tenant is running Madan Hardware store since 22.9.1983. He has stated that there is recital in affidavit that tenant is not doing any type of business of sale under sales tax for last two years. He has stated that there is recital in affidavit given by tenant that tenant has no plan to continue business in future. He has stated that there is recital in affidavit given by tenant that if tenant would not continue business within six months then tenant would cancel his sales tax number. He has stated that affidavit is attested by oath commissioner and signed by tenant. He has stated that affidavit was submitted by tenant. He has admitted that sales tax number of tenant is still continue and not cancelled till date.

11.2. PW2 Rajinder Singh posted as Clerk in office of MC Hamirpur has stated that he has brought the summoned record of tenant relating to licence. He has stated that no licence has been issued in the name of tenant relating to hardware sale. He has stated that he could not state whether any hardware shop licence was issued in favour of tenant or not.

11.3 PW3 Pushpa Devi landlady has stated that Madan Mohan is tenant in demised premises. She has stated that she purchased the demised premises from Gayatri Devi in the year 1991. She has stated that she is owner of demised premises after purchase of demised premises. She has stated that tenant has closed the demised premises since five years. She has stated that tenant is not running the business of hardware in demised premises. She has stated that tenant is running sweet shop in Housing Board colony. She has stated that she issued notice to tenant Ext.PW3/A. She has stated that postal receipt is Ext.PW3/B and acknowledgment receipt is Ext.PW3/C. She has admitted that tenant also filed reply to her notice. She has stated that she has received the rent of demised premises till September 2007. She has admitted that tenant has two shops near Satya Narain temple. She has denied suggestion that tenant is running demised premises as store. She has admitted that she has also filed another case before learned Rent Controller relating to demised premises. Self stated that another case is relating to enhancement of rent. She has admitted that electricity meter is not installed in demised premises. She has admitted that no written contractual agreement was executed between her and tenant. She has denied suggestion that tenant is running business from demised premises. She has denied suggestion that she has filed present eviction petition just to evict the tenant in illegal manner.

11.4 PW4 Amar Chand has stated that he is general attorney of landlady and has further stated that copy of general power of attorney is Ext.PW4/A. He has stated that site plan of demised premises is Ext.PW4/B which was prepared by him as per factual position. He has stated that site plan Ext.PW4/B is signed by him. He has stated that demised premises is closed since four years. In cross examination he has admitted that site plan Ext.PW4/B is without scale. He has denied suggestion that site plan is not in accordance with factual position. He has denied suggestion that demised premises is not closed since four years. He has denied suggestion that

demised premises is in running condition. He has denied suggestion that demised premises used as a store by tenant.

11.5 PW5 Kewal Singh has stated that parties are known to him and he has seen demised premises. He has stated that tenant used to run hardware shop in demised premises. He has stated that demised premises is closed since 3-4 years. He has denied suggestion that tenant is running the demised premises as store.

11.6 PW6 Suresh Kumar Assistant Taxation and Sales Officer Hamirpur has stated that tenant has filed assessment for the year 2003-04, 2004-05. He has stated that as per record sale for the year 2003-04 is Rs.37500/- (Rupees thirty seven thousand five hundred) and tax to the tune of Rs.3000/- (Rupees three thousand) was deposited. He has stated that as per record no sale was conducted in the year 2004-05 and further stated that nil return was filed. He has stated that in the year 2005-06 nil return was filed. He has stated that in the year 2006-07 sale of Rs.80000/- (Rupees eighty thousand) shown and tax to the tune of Rs.10000/- (Rupees ten thousand) deposited. He has stated that in the year 2007-08 sale to the tune of Rs.56000/- (Rupees fifty six thousand) shown and tax to the tune of Rs.7000/- (Rupees seven thousand) deposited. He has stated that in the year 2006-07 sale to the tune of Rs.20000/- (Rupees twenty thousand) shown and tax to the tune of Rs.2500/- (Rupees two thousand five hundred) deposited. He has stated that as per record tenant is running business of hardware.

11.7 PW7 Rajesh has stated that parties are known to him. He has stated that tenant is running another shop of sweets in Housing Board colony and further stated that demised premises is closed. He has stated that tenant used to run hardware shop in demised premises earlier. He has stated that his house is situated at a distance of 300 metres where tenant is runing sweet shop. He has stated that tenant is running the sweet shop since 4/5 years. He has stated that landlady is known to him since 10-12 years. He has stated that demised premises is shop and not store.

11.8 PW8 Dinu Ram Shop Inspector has stated that he is posted as shop inspector since 2007 and he has brought the summoned record. He has stated that as per record tenant used to run hardware shop. He has stated that as per record RC was renewed in the year 2004-05. He has stated that after 2005 RC was not renewed. He has admitted that complaint is filed if RC is not renewed under Shop Act. He has stated that for running store RC is required. He has stated that as per record RC is not renewed after 2004.

11.9 RW1 Madan Mohan tenant has stated that he is running shop of hardware since 1983. He has stated that he is using the demised premises as store. He has stated that he did not stop business from 1983 till date. He has stated that landlady has purchased the demised premises from Gayatri Devi. He has stated that electricity connection is not provided in demised premises. He has stated that he did not stop his business in the year 2006-07. He has stated that he is paying tax return. He has stated that sales tax return is Ext.D5 which is signed by him. He has stated that documents Ext.D6 to Ext.D11 are also signed by him. He has stated that he is regularly paying the rent to landlady. He has stated that in addition he is also running sweet shop in Housing Board colony since 2003. He has stated that he has employed servant in sweet shop situated in Housing Board colony. He has stated that present eviction petition filed just to harass him. He has stated that he does not sit in demised premises because same is used as store only. He has admitted that he has executed the agreement of tenancy with Gayatri Devi. He has admitted that there is recital in agreement that he would run the business of hardware in demised premises. He has admitted that Pushpa Devi has purchased the demised premises. He has denied suggestion that demised premises is closed since 2003 when he started running sweet shop in Housing Board colony. He has denied suggestion that demised premises is closed since 6/7 years.

11.10 RW2 Vijay Kumar has stated that he is salesman in sweet shop of tenant situated in Housing Board colony. He has stated that he is salesman since 2002. He has stated that tenant used to sit in hardware shop. He has stated that tenant has two shops and one shop

is used as a store and in another shop tenant used to sit personally. He has stated that tenant did not stop the business of hardware at any point of time. He has denied suggestion that tenant used to sit in counter of sweet shop situated in Housing Board colony. He has denied suggestion that demised premises is closed for the last 5/6 years.

11.11 RW3 Purshottam has stated that he is performing the work of painter since 20-25 years and he has seen the demised premises. He has stated that he is purchasing the articles of hardware from tenant. He has stated that he purchased the articles of hardware in the year 2006-07. He has stated that hardware shop did not remain closed. He has admitted that there are 100-250 hardware shops in Hamirpur. He has denied suggestion that he did not purchase any hardware article from tenant. He has denied suggestion that demised premises is closed since 7/8 years.

11.12 RW4 Raghunath has stated that he has seen hardware shop of tenant. He has stated that he has seen both shops under possession of tenant. He has stated that in the year 1984 he constructed his house and he purchased the entire hardware articles from shop of tenant. He has stated that in the year 2006 and 2008 he purchased Shalimar paint from shop of tenant. He has stated that shops did not remain closed. He has stated that tenant is selling hardware articles as of today. He has denied suggestion that tenant is running the sweet shop since 6/7 years in Housing Board colony. Self stated that his servants are running the sweet shop in Housing Board colony.

11.13 PW9 Tilak Raj in rebuttal has stated that he has brought the summoned record. He has stated that documents Ext.PW9/A to Ext.PW9/C are correct as per original record. He has denied suggestion that tenant is running the sweet shop in Housing Board colony through his servant.

12. Following documentaries evidence adduced by parties. (1) Ext.PW3/A is legal notice issued by landlady to tenant. (2) Ext.PW3/B is postal receipt of notice issued to tenant. (3) Ext.PW3/C is acknowledgment. (4) Ext.PW4/A is copy of general power of attorney executed by landlady in favour of PW4 Amar Chand. (5) Ext.PW4/B is map of demised premises. (6) Ext.PW9/A is application filed under Right to Information Act by Smt. Pushpa Devi landlady. (7) Ext.PW9/B is application filed under Right to Information Act by Smt.Pushpa Devi landlady. (8) Ext.PW9/C is allotment letter by Divisional Forest Officer to Vijay Kumar relating to Van Vihar (café). (9) Ext.P1 is copy of jambandi for the year 2003-04. (10) Ext.RW1/A is response by tenant regarding increase of 10% rent. (11) Ext.RW1/B is acknowledgment receipt. (12) Ext.RW1/C is copy of rent petition No. 4 of 2002 title Smt. Pushpa vs. Shri Madan Mohan. (13) Ext.RW1/D is copy of reply to rent petition No. 4 of 2002. (14) Ext.RW1/E is copy of rent petition No. 1 of 2008 title Smt. Pushpa Devi vs. Shri Madan Mohan. (15) Ext.RW1/F is copy of order dated 24.5.2008 wherein Rent Petition No. 1 of 2008 is dismissed as withdrawn. (16) Ext.RW1/G is legal notice given by landlady to tenant. (17) Ext.RW1/H is legal notice given by landlady to tenant. (18) Ext.RW1/K is registered AD sent to tenant. (19) Ext.RW1/J is response given by landlady relating to notice. (20) Ext.RW1/L is registered AD. (21) Ext.D-1 is reply to legal notice given by tenant. (22) Ext.D2 is legal notice given by landlady to tenant. (23) Ext.D3 is reply to legal notice given by tenant. (24) Ext.D4 is form S.T. challan. (25) Ext.D5 is form Vat-XV. (26) Ext.D6 is challan form. (27) Ext.D7 is form Vat-XV. (28) Ext.D8 is form Vat-II. (29) Ext.D9 is form Vat. (30) Ext.D10 is challan. (31) Ext.D11 is form Vat.

13. Submission of learned Advocate appearing on behalf of tenant/revisionist that learned Appellate Authority under section 24(3) of H.P. Urban Rent Control Act 1987 is not legally competent to remand back whole case to learned Rent Controller to decide the same afresh is decided accordingly. Power of learned Appellate Authority under H.P. Urban Rent Control Act 1987 is defined under Section 24 (3) which is quoted in toto:-

> 24(3) The Appellate Authority shall decide the appeal after sending for the records of case from Controller and after giving the parties an opportunity of

being heard and if necessary after making such further inquiry as it thinks fit either personally or through Controller."

14. It is well settled law that H.P. Urban Rent Control Act 1987 is special act. It is also well settled law that when there is conflict between special act and general act then special act always prevails. It is held that power of appellate authority is defined in a positive manner under section 24(3) of H.P. Urban Rent Control Act 1987. It is held that learned Appellate Authority under H.P. Urban Rent Control Act 1987 can make further inquiry as it thinks fit either personally or through Controller during pendency of appeal. It is held that words "further inquiry" means inquiry for deciding the appeal only. ***See 1997(1) SLJ 484 (HP) Braham Dass and others vs. Satya Wati and others. See ILR 1976 HP 620 Smt. Surinder Kaur vs. Mohinder Pal Singh. See 1961 PLR 865 Shri Krishan Lal Seth vs. Smt. Pritam Kumari.***

15. In the present case learned Appellate Authority framed additional issue to the effect that "whether tenant has ceased to occupy premises in question continuously for a period of twelve months preceding the date of filing eviction petition without reasonable cause. Onus placed upon landlady. Thereafter learned Appellate Authority remanded back case to learned Rent Controller to decide case afresh and dispose of appeal finally.

16. Submission of learned Advocate appearing on behalf of non-revisionist that learned Appellate Authority undersection 24(3) H.P. Urban Rent Control Act 1987 is legally competent to remand whole case to learned Rent Controller for deciding afresh is rejected being devoid of any force in view of rulings cited supra. It is held that there is no power of whole case remand to appellate authority under section 24(3) of H.P. Urban Rent Control Act 1987. It is held that learned Appellate Authority was legally competent to frame additional issue and it is held that learned Appellate Authority was legally competent to make further inquiry relating to additional issue either personally or through Controller during pendency of appeal. It is held that learned Appellate Authority was not competent to remand case as whole to learned Rent Controller for fresh decision in view of rulings cited supra. It is held that learned Appellate Authority has committed procedural illegality in present case. Point No.1 is decided accordingly.

Point No. 2 (Relief)

17. In view of findings upon point No.1 civil revision petition is partly allowed. Order of remand passed by learned Appellate Authority under section 24(3) of H.P. Urban Rent Control Act 1987 dated 03.05.2014 is set aside. Learned Appellate Authority Hamirpur H.P. is directed to dispose of Rent Appeal No. 1 of 2011 afresh in accordance with law. It is further held that learned Appellate Authority during pendency of appeal will be legally competent to make further inquiry as it thinks fit either personally or through Controller relating to additional issue framed by learned Appellate Authority in para No. 15 of order dated 03.05.2014 and thereafter learned Appellate Authority shall dispose of appeal No. 1 of 2011 afresh in accordance with law. Parties are left to bear their own costs. Files of learned Appellate Authority and learned Rent Controller be sent back forthwith along with certified copy of order. Since rent petition is pending since 2007 learned Appellate Authority shall dispose of appeal No. 1 of 2011 within three months after receipt of file. Parties are directed to appear before learned Appellate Authority on ***27.12.2016.*** Revision petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

NTPC Limited. ...Appellant.

Versus

Shri Amar Singh & another. ...Respondents.

RFA No. 325 of 2010

Date of Decision: December 13, 2016.

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam- Reference Court re-determined the market value @ Rs.5 lacs per bigha after relying upon exemplar sale deed and exemplar award –held in appeal that claimants had claimed compensation @ Rs.15 lacs per bigha category/classification wise- the Reference Court is bound to determine market value, which is just fair and reasonable- Collector determined the market value at different rates – exemplar sale deeds were duly proved- similarity of the acquired land with exemplar sale deeds was established- the market value in exemplar sale deeds worked out to be Rs.7,50,000/- per bigha but allowing deduction up to 33.13%, the fair market value was found to be 5 lacs per bigha – similarity of the land in previous award was established with the acquired land – award has attained finality –sale deeds relied upon by the respondents could not form the basis for determining market value as the similarity between the lands was not established – appeal dismissed. (Para-7 to 31)

Cases referred:

Chimanlal Hargonvinddas Versus Special Land Acquisition Officer, Poona and another, AIR 1988 SC 1652; (1988) 3 SCC 751

Special Land Acquisition Officer Versus Karigowda and others, (2010) 5 SCC 708

Viluben Jhalejar Contractor (Dead) by LRs Versus State of Gujarat, (2005) 4 SCC 789

Himmat Singh and others Versus State of Madhya Pradesh and another, (2013) 16 SCC 392

Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others Versus State of Karnataka and another, (2015) 10 SCC 469

Land Acquisition Collector & another Versus Jatinder Singh, decided on 01.06.2016

NTPC Ltd. Versus Kirpa and others, Latest HLJ 2016 (HP) 253

Trishala Jain and another Versus State of Uttranchal and another, (2011) 6 SCC 47

For the Appellant:	Mr. Neeraj Gupta, Advocate, for the appellant-NTPC.
For the Respondents:	Mr.Naresh K. Sood, Sr. Advocate with M/s Aman Sood and Varun Rana, Advocates, for respondent No.1. Mr. Shrawan Dogra, Advocate General with Mr.Puneet Rajta, Dy. AG., for respondent No.2-State.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

If the claimant(s) are held legally entitled for rates, on uniform basis, irrespective of classification and category, then the increase in the amount of re-determination of the market value of the acquired land is only marginal. The rates stand increased from Rs. 4,35,447.26 to Rs. 5,00,000/- per bigha. The Collector himself observed that though the market value of the acquired land situate in Village Kayan, the village in question, could be Rs. 4,90,000/-, but required to be scaled down to Rs. 3,54,244/-, but however, in terms of award No.2 of 2002, Collector Land Acquisition, determined the market value of the acquired land awarding different rates, classification/category wise, ranging from Rs. 90,718.82 to Rs. 4,35,447.26 per bigha.

2. In terms of the impugned award dated 30.07.2010, passed by District Judge, Mandi, H.P., in Reference Petition No.163 of 2003, titled as *Amar Singh Versus LAC, Kol Dam Project, Sunder Nagar, District Mandi and another,* the Reference Court re-determined the market value of the entire acquired land, irrespective of its category/classification, by uniformly awarding a sum of Rs. 5,00,000/- per bigha and while doing so, it referred to and relied upon ten exemplar sale deeds, produced by the claimants as also exemplar award dated 17.01.2009 (Ex.PX), so passed by its Predecessor, whereby market value with respect to land acquired in Village Ropa, came to be determined @ Rs. 5,00,000/- per bigha. Undisputedly villages Ropa and Kayan are adjoining to each other.

3. Certain facts are not in dispute: (i) 252-12-09 bighas of land came to be acquired in Mauja Kayan, Tehsil Sunder Nagar, District Mandi, H.P., with the publication of notification in the official gazette on 19.12.2000, so issued under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act); (ii) The acquisition proceedings concluded with the passing of Collector's award No. 2 of 2002 dated 19.07.2002, under Section 11 of the Act and the State taking over possession of the land; (iii) The purpose of acquisition being construction of Dam, commonly known as Kol Dam; (iv) Dissatisfied with the offer made by the Collector, claimants filed petitions under Section 18 of the Act, which came to be clubbed with Reference Petition No.163 of 2003, and on the basis of common evidence led by the parties, disposed of in terms of impugned award; (v) While the claimants accepted the award, only the beneficiary preferred the present appeal(s) under Section 54 of the Act; (vi) It is the common case of parties that the entire acquired land came to be submerged with the construction of Dam by the beneficiary. Also there is no evidence on record of either any requirement or any developmental activity carried out on the spot.

4. It is contended on behalf of the claimants that since they have not assailed the impugned award, as such, they are satisfied with the market value, so determined by the Reference Court.

5. It be only observed that out of the acquired land, maximum land is of a superior quality.

6. With these admitted/undisputed facts, material placed on record by the parties is being appreciated for just decision of the case.

7. It is a settled principle of law that onus of establishing true market value of the acquired land, higher than the one which stands determined by the Collector, is always upon the claimants.

8. Perusal of the Collector's award reveals that claimants themselves claimed compensation @ Rs. 15,00,000/- per bigha. But then it was category/classification wise.

9. It is a settled principle of law that Collector's award is a mere offer and in the proceedings under Section 18 of the Act, Court is duty bound to determine the market value, which is just, fair and reasonable, on the basis of material placed on record by the parties. The conclusion with respect to re-determination of the market value, in the instant case, is clearly based on the evidence led by the claimants, which cannot be said to have been appreciated erroneously. Material, in its entirety, stands considered by the Court below.

10. With vehemence, Mr. Neeraj Gupta, learned counsel, contends that Reference Court erred in considering the fact that before the Collector, claimants had themselves elected for award of compensation on the basis of classification/category, hence they were precluded from seeking re-determination of the market value of the acquired land on uniform basis.

11. To rebut the same, Mr. Naresh K. Sood, learned Senior Counsel, seeks reliance on the decision rendered by the Apex Court in *Chimanlal Hargonvinddas Versus Special Land Acquisition Officer, Poona and another,* AIR 1988 SC 1652; (1988) 3 SCC 751, wherein the Court made the following observations:-

> "4 The following factors must be etched on the mental screen :
>
> (1) A reference under Section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition Officer in his Award unless the same material is produced and proved before the Court.
>
> (2) So also the Award of the Land Acquisition Officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the court hearing the Reference. It is merely an offer made by the Land Acquisition Officer and the material utilised by him for making his valuation cannot be utilised by the Court

unless produced and proved before it. It is not the function of the court to sit in appeal against the Award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition Officer, as if it were an appellate Court.

(3) The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.

(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose.

(5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under S. 4 of the Land Acquisition Act (dates of Notifications under Ss. 6 and 9 are irrelevant).

(6) The determination has to be made standing on the date line of valuation (date of publication of notification under S. 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.

(7) In doing so by the instances method, the Court has to correlate the market value reflected in the most comparable instance which provides the index of market value.

(8) Only genuine instances have to be taken into account. (Sometimes instances are rigged up in anticipation of Acquisition of land.)

(9) Even post-notification instances can be taken into account (1) if they are very proximate, (2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.

(10) The most comparable instances out of the genuine instances have to be identified on the following considerations :

(i) proximity from time angle

(ii) proximity from situation angle.

(11) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may beevaluated interms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has thereafter to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors.

(14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors :-

(For table see below)

Plus factors	Minus factors
1. Smallness of size.	1. largeness of area.

2. Proximity to a road.	2. situation in the interior at a distance from the road.
3. frontage on a road.	3. narrow strip of land with very small frontage compared to depth.
4. nearness to developed area.	4. lower level requiring the depressed portion to be filled up.
5. regular shape.	5. remoteness from developed locality.
6. level vis-a-vis land under acquisition.	6. some special disadvantageous factor which would deter a purchaser.
7. special value for an owner of an adjoining property to whom it may have some very special advantage.	

> (15) The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say 10000 eq. yds. or more. Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction byway of an allowance at an appropriate rate ranging approx. between 20% to 50% to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be locked up, will be longer or shorter and the attendant hazards.
>
> (16) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.
>
> (17) These are general guidelines to be applied with understanding informed with common sense." (Emphasis supplied)

Reliance is also sought on the decision rendered by the Apex Court in *Special Land Acquisition Officer Versus Karigowda and others,* (2010) 5 SCC 708.

12. Significantly while responding to the reference petition or at the time of recording evidence, such objection never came to be taken by the beneficiary. Even before this Court, it is not a pleaded ground in the memo of appeal. In fact, as is evident from the reference petition, claimants had claimed rates @ Rs. 25,00,000/- per bigha, on uniform basis.

13. In any event, Reference Court is duty bound to determine such market value, which is just, fair and reasonable.

14. The law for award of compensation at uniform rates, when the purpose of acquisition is common and no developmental activity is required to be carried out is no longer *res integra* and stands settled by Hon'ble the Supreme Court in *Viluben Jhalejar Contractor (Dead) by*

LRs Versus State of Gujarat, (2005) 4 SCC 789 (paras 22 and 23); *Himmat Singh and others Versus State of Madhya Pradesh and another,* (2013) 16 SCC 392 (para 34); *Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others Versus State of Karnataka and another,* (2015) 10 SCC 469 (paras 80 and 81); as also this Court in RFA No. 953 of 2012, titled as *Land Acquisition Collector & another Versus Jatinder Singh,* decided on 01.06.2016 and other connected matters. As such, at this point in time, in view of admitted/undisputed factual matrix, as noticed earlier, it would not be permissible for the beneficiary to raise such objections.

15. While determining the market value, Collector accounted for certain sale transactions with respect to the village in question and formed an opinion that even though the market value, irrespective of its classification, would be Rs. 4,90,455.85 per bigha, but however, it did not "appear" to be true representative of the market value for if sale transactions pertaining to a contiguous village i.e. Ahan, were considered then the market value of the acquired land could be Rs. 3,54,244/- per bigha. But then significantly and eventually, the Collector himself determined the market value to be as under:-

Market value determined as per the classification of land

Class of land	Area	LR per bigha	Total LR	Rate per bigha
Barani Abbal	=117-1-2	0.72 p	84.279	435447.26
Barani Doyam	=77-17-15	0.62p	48.290	374969.20
Bagicha Barani	=14-10-11	0.62p	9.007	374969.06
Banjar Kable Kasht	=16-6-15	0.15p	2.450	90695.68
Khadyatar	=3-19-10	0.13p	0.516	78508.87
Gair Mumkin	=22-16-16	0.15p	3.426	90718.82
Grand Total	=252-12-09		147.968	3,54,243.54

16. Record reveals that for establishing their claims, claimants have proved on record the following ten sale transactions (Ex.P-1 to Ex.P-10), through sixteen witnesses, namely, Harender Sen (PW.1), Amar Singh (PW.2), Gandhi Ram (PW.3), Ghamira (PW.4), Bajiru (PW.5), Briju (PW.6), Babu Ram son of Sunder Ram (PW.7), Babu Ram son of Bansi Ram (PW.8), Ranjit (PW.9), Roop Lal (PW.10), Khazana Ram (PW.11), Sohan Singh (PW.12), Sunder (PW.13), Smt. Revatu (PW.14), Smt. Neelam Thakur (PW.15) and Yadvinder (PW.16):-

Exts.	Documents	Date of sale	Area in Bigha	Mauja	Sale price
Ex.P1	Sale deed	20.12.1988	0-3-0	Kayan	Rs. 10,000/-
Ex.P2	Sale deed	5.5.2000	0-2-6	Kayan	Rs. 1,10,000/-
Ex.P3	Sale deed	7.4.2000	0-1-10	Kayan	Rs. 60,000/-
Ex.P4	Sale deed	4.4.2000	0-2-0	Kayan	Rs. 80,000
Ex.P5	Sale deed	7.4.2000	0-2-0	Kayan	Rs. 80,000/-
Ex.P6	Sale deed	26.7.2000	0-2-0	Kayan	Rs. 1,00,000/-
Ex.P7	Sale deed	12.5.2000	0-1-0	Kayan	Rs. 50,000/-
Ex.P8	Sale deed	4.4.2000	0-1-10	Kayan	Rs. 60,000/-
Ex.P9	Sale deed	1.5.2000	0-3-0	Kayan	Rs. 1,20,000/-
Ex.P10	Sale deed	5.5.2000	0-2-6	Kayan	Rs. 1,10,000/-

17. Close examination of testimonies of the aforesaid witnesses would only establish: (i) the sale transactions to have been proven on record, in accordance with law, for the vendor and vendee stepped into the witness box; (ii) Similarity of the exemplar sale deed with that of acquired land vis-a-vis its potential, use and nature stands proved; (iii) the beneficiary never doubted veracity of the witnesses and their testimony about the authenticity and genuineness of the sale transactions; and (iv) the land situate in village Kayan is similar to the land situate in adjoining village Ropa, Tehsil Sunder Nagar, District Mandi, Mohal Tatapani in Tehsil Karsog, District Mandi and Mohal Bahot Kasol in District Bilaspur.

18. There is also no evidence, establishing the fact that the said sale transactions were either speculative or fictitious in nature. There is no evidence establishing that these sale transactions came to be effected in anticipation and vain hope of the claimants of their land being acquired for this very same public purpose. As such, this Court is of the view that the said sale transactions are genuine.

19. Noticeably the District Judge has returned contradictory findings on this issue. In paragraphs 32, 33 and 34, it expressed doubts about the transactions being genuine. But however in the following paragraph 35 itself, itself considered these very sale transactions for justifying re-determination of the market value. While rendering its opinion in paragraphs 32, 33 and 34 of the impugned award, Court below ventured into adventurism and formed its opinion without any basis. Though the market value in terms of these exemplar transactions works out to be Rs. 7,50,000/- per bigha, but by allowing deductions up to the extent of 33.13 %, the Reference Court found the fair market value of the acquired land to be Rs. 5,00,000/- per bigha.

20. An endeavour was made to justify such conclusion by also relying upon award dated 17.01.2009, passed by the Presiding Officer, Fast Track Court Mandi, District Mandi, in Reference Petition No.78/2002/74 of 2005, titled as *Kirpa and others versus LAC, N.T.P.C. (Kol Dam) and another* (Ex.PX).

21. Now if one were to peruse the testimonies of the claimants' witnesses, one would find even this award to have been proven, in accordance with law. In one voice, the witnesses have categorically deposed, which fact stands unrebutted, that "The market value of the land of mohal Ropa, irrespective of classification has been determined at Rs.5 lacs per bigha". Under these circumstances, Reference Court, was right in relying upon the said award (Ex.PX).

22. Apparently, contention that award (Ex.PX) could not be relied upon, also merits rejection for the reason that witnesses themselves have deposed about the similarity of the acquired land with that of exemplar award, on which there is no cross-examination. Their testimony goes unrebutted.

23. Also, and most significantly, in the award (Ex.PX), the Reference Court took into account fourteen sale transactions, pertaining to Village Kayan, which also stand proved by the claimants in the proceedings in question. Hence very same transactions stand commonly proved in both the reference petitions.

24. Also award (Ex.PX), has now attained finality. Decision rendered by this Court in *NTPC Ltd. Versus Kirpa and others,* Latest HLJ 2016 (HP) 253, subject matter of award (Ex.PX), stands affirmed by Hon'ble the Supreme Court of India. In the said decision this Court observed that:-

> "18.Mr. N.K. Sood, Sr. Advocate, has drawn the attention of the Court to Award No.2 of 2002 vide Ext. P-15. Award No. 2 of 2002 pertains to the acquisition of land in village Kyan for Kol Dam Hydel Project. The compensation was awarded at the rate of Rs. 4,35,447.26 paise per bigha. The notification under Section 4 of the Act, as noticed hereinabove, by acquiring the land of Village Ropa, was also published on 11.12.2000. Mohal Kyan is adjoining to Mohal Ropa. It has also come on record that village Ropa is having better quality of land, since it is irrigated vis-a-vis Mohal Kyan. The HP PWD has already purchased land at

village Ropa for a consideration of Rs. 4,62,000/- per bigha. The land of Mohal Kyan was though sold in small plots, in the year 2000, but for approximate price of Rs.40,000/- Rs 50,000/- per biswa. The learned Reference Court has correctly taken into consideration the sale transactions made vide sale deeds Ext. P-1 and Ext. PW-5/A and award No.2 of 2002 Ext. P-15, while determining the market value of the acquired land of the claimants."

25. Noticeably it was award No.2 of 2002, so passed by the Collector, subject matter of the present appeal, was relied upon by this Court while affirming findings returned by the Reference Court in award (Ex.PX).

26. Specific attention is invited to sale transactions dated 17.12.1988 (Ex.RA), 10.08.1989 (Ex.RB) and 17.11.1999 (Ex. RC), so placed on record by the beneficiary. Sale transactions (Ex.RA and Ex.RB) pertain to the adjoining Mohal, whereas, sale transaction (Ex.RC) pertains to the Mohal in question. Record reveals that only certified copies of the sale deeds were tendered in evidence. No doubt, in view of the statutory provisions (Section 51-A of the Act) and the law laid down by the Apex Court in *Cement Corpn. of India Ltd. Versus Purya and others,* (2004) 8 SCC 270, these sale transactions cannot be ignored, but however, there is no evidence on record, establishing comparability of the acquired land with these exemplar sale transactions. No ocular evidence was led by the beneficiary. In this view of the matter, these sale transactions cannot be accounted for, for just determination of a fair market value of the acquired land.

27. Reliance by the beneficiary on the decision rendered by the Apex Court in *Trishala Jain and another Versus State of Uttranchal and another,* (2011) 6 SCC 47, is also misplaced for the decision is rendered in the attending facts and circumstances totally different from the one in hand. Also this Court has otherwise dealt with the issue in the earlier part of the judgment.

28. No other point urged or proved.

29. Hence in the given facts and circumstances, no interference is warranted. It cannot be said that the findings returned by the Reference Court are perverse, illegal or erroneous. As such, present appeal stands dismissed, so also pending application(s), if any.

30. Cross-objection, if any, shall also stand disposed of.

31. Quite evidently, in terms of award No.2 of 2002, so passed by the Collector, several land reference petitions came to be clubbed and disposed of by the common impugned award dated 30.07.2010, passed by District Judge, Mandi, in Reference Petition No.163 of 2003, titled as *Amar Singh Versus LAC, Kol Dam Project and another*. Common evidence was led by the parties in land Reference Petition No.163 of 2003, subject matter of the present appeal. Learned counsel for the parties jointly submit that decision rendered in the present appeal would have an automatic bearing on the other connected appeals, arising out of the very same impugned award, pending before this Court. Registrar (Judicial) to take appropriate instructions from Hon'ble the Chief Justice for listing of such connected appeals, before the appropriate Court, particulars whereof shall also be supplied by learned counsel for the parties.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. ...Appellant.

Versus

Narender Kumar ...Respondent.

Criminal Appeal No.4186 of 2013
Date of Decision : December 13, 2016

Indian Penal Code, 1860- Section 302 and 201- A dead body was found on which FIR was registered – it was found on investigation that accused had consumed liquor with the deceased and had murdered him- the accused was tried and acquitted by the Trial Court- held in appeal that PW-1 (brother of the deceased) had not suspected the involvement of the accused and had stated that deceased was crushed under the vehicle by someone – motive for crime was also not established – K was present in the company of the deceased – the disclosure statement was not made in the presence of independent witnesses- the deceased was heavily intoxicated and possibility of sustaining injuries under the influence of alcohol cannot be ruled out- report of FSL did not connect the accused with the commission of crime- chain of circumstances does not lead to the guilt of the accused- accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-7 to 22)

Cases referred:

Prandas v. The State, AIR 1954 SC 36

Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant	:	Mr. Vikram Thakur, Deputy Advocate General.
For the Respondents	:	Mr. Manoj Pathak, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

On 13.1.2012, Yashwant Singh (PW-5) noticed dead body of a male, lying below a Car bearing No.DL-2C-5286, somewhere between Newti and Kalara, information whereof, was telephonically given to Police Station, Nerwa. Police Party, headed by SI Hari Ram (PW-23), reached the spot and conducted necessary investigation. Statement of Dinesh Chauhan (PW-1), under the provisions of Section 154 of the Code of Criminal Procedure (Ex.PW-1/A) was recorded, which led to registration of FIR No.4/2012, dated 14.1.2012 (Ex.PW-17/A), under Section 302 of the Indian Penal Code at Police Station, Nerwa. On the request the of Investigating Officer, a team of Experts from the State Forensic Science Laboratory, Junga, District Shimla, Himachal Pradesh, inspected the spot on 14.1.2012. They took samples of fingerprint, paint/blood from the vehicle and the blood stained soil. Inquest Report (Ex.PW-10/B) was prepared and dead body sent for postmortem, so conducted by Dr. A.K. Sharma (PW-10), who issued report (Ex.PW-10/C). Investigation revealed the accused to be involved in the crime. Hence, the accused, who was arrested on 28.1.2012, made a disclosure statement on 4.2.2012 (Ex.PW-11/A), to the effect that he could get identified the place where he had consumed liquor with the deceased as also the spot of crime, and pursuant thereto, he got such fact discovered. Investigation further revealed that the accused intentionally and voluntarily caused disappearance of evidence of murder. Police took on record several incriminating articles and with the completion of investigation, which prima revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

2. Accused was charged for having committed offences, punishable under the provisions of Sections 302 and 201 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

3. In order to establish its case, prosecution examined as many as 26 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took plea of innocence and false implication. However, he did not lead any evidence in defence.

4. Finding the testimonies of prosecution witnesses not to be inspiring in confidence, accused stands acquitted on all counts, in terms of impugned judgment dated

29.6.2013, passed by learned Sessions Judge, Shimla, Himachal Pradesh, in Sessions Trial No.16-S/7 of 2012, titled as *State of Himachal Pradesh v. Narender Kumar*.

5. We have heard Mr. Vikram Thakur, learned Deputy Advocate General, on behalf of the State as also Mr. Manoj Pathak, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

6. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

7. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
>
> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

8. Undisputedly, there is no eye-witness to the occurrence of the incident.

9. Prosecution wants the Court to believe that in the night of 13.1.2012, accused Narender Kumar, deceased Suresh Chauhan and Kahan Chand (PW-2), together consumed alcohol, and thereafter accused murdered the deceased and by concealing his blood stained clothes, destroyed the evidence.

10. From the testimony of Dinesh Chauhan (PW-1), brother of the deceased, it is evidently clear that after identifying the dead body, he lodged the report with the police. He suspected that his brother was crushed under the vehicle by someone. Further, only suspicion led him believe it to be an act of murder and not accident. Significantly, save and except for the incriminating material, which allegedly came to be recovered in his presence, he does not disclose

complicity of the accused in the crime. Neither he nor has anyone else deposed about the motive of crime. Also, it is not the case of prosecution that accused harboured any animosity or had reason to murder the deceased.

11. Kahan Chand himself was a suspect, as has also come in the testimony of Investigating Officer. He himself admits to have been in the company of the deceased and the accused. And this was prior to the occurrence of the alleged incident. Deposition of this witness is a lengthy one, but then he does not disclose any circumstance with regard to involvement of the accused in the alleged crime. The theory of 'last seen' holds good qua this witness, as much as it would against the accused. In fact, involvement of this witness in the alleged crime has not been ruled out at all. But none else has deposed against the accused and the deceased lastly seen together.

12. At this juncture, we may observe that even the conduct of the accused cannot be taken as a circumstance, suspecting his involvement in the crime. It is not that he had disappeared or was not available for interrogation. In fact, as and when called for by the police, he made himself available and visited the Police Station, immediately after the occurrence of the incident, and more specifically on 16th, 17th& 18th January, 2012. Accused came to be arrested only on 28.1.2012. But then, there is nothing on record to establish, more specifically from the testimony of the Investigating Officer, as to what prompted arrest of the accused. Other than Kahan Chand, none came forward to disclose that the accused was lastly seen in the company of the deceased. Prosecution wants the Court to believe that accused surrendered on 28.1.2012, but then why would he do that, for there was nothing incriminating against him. It is not the case of prosecution that very same day police recorded his confessional statement. It came to be recorded only on 4.2.2012.

13. Significantly, police wants the Court to believe that involvement of the accused surfaced with the conduct of Test Identification Parade, so held on 31.1.2012, in the presence of Shri Nikhil Aggarwal (PW-21). Surprisingly, it was Kahan Chand, who identified the accused. What was the purpose of conducting such an exercise is not evident from the record, particularly when identity of the accused or Kahan Chand was never in dispute or doubt, which fact is evident from the admission made by the police officials, of both of them having visited the Police Station on previous occasions, i.e. 16th, 17th& 18th January, 2012. In this backdrop, the circumstance of Test Identification Parade loses significance.

14. Identity of the deceased is not in doubt. As per medical opinion (Ex.PW-10/D), he died as a result of ante-mortem traumatic asphyxia. Significantly, the doctor found the deceased to have consumed alcohol, contents whereof, as per opinion of the expert, were found to the extent of 297.02 mg%. This as per medical science is very high, rendering the person be in a state of drunkenness. Possibility of the deceased having died, after sustaining injuries under the influence of alcohol, has not been ruled out by the Investigating Officer.

15. Next circumstance, which is brought to our notice, is the disclosure statement (Ex. PW-11/A), allegedly made by the accused in the presence of police officials. Why no independent witness was associated? remains unexplained. In any event, we do not find version of Constable Naresh Kumar (PW-11) to be inspiring in confidence, more so for the reason that his testimony in Court, is bordering falsehood. He states that prior to 4.2.2012, he never visited Kalara, which fact is contradicted, in fact belied by Constable Kuldeep Singh (PW-12), according to whom, he took photographs of the spot on 14.1.2012 and from the photograph (Ex.PW-12/A-28) so taken by him, we notice that in fact, Constable Naresh Kumar was present on the spot. There is yet another reason for discarding the disclosure statement. Police was already aware of the spot of crime and no new fact came to be discovered, pursuant to the alleged disclosure statement made by the accused.

16. In support of his case, Mr. Vikram Thakur, learned Deputy Advocate General, presses reports (Ex.PW-22/A & 22/B) of the Experts of the State Forensic Science Laboratory, Junga. In our considered view, even these reports do not advance the case of the prosecution any

further. These reports are inconclusive with regard to the fingerprints and samples of blood, allegedly taken from the vehicle. Also, they do not, in any manner, link the accused to the crime. In fact, we find the Investigating Officer to be extremely impartial towards the accused. Why is it that he did not have the fingerprints so taken from the vehicle, matched with that of Kahan Chand (PW-2).

17. Police has established the record of Mobile phone allegedly used by the accused, but then, it does not advance the case of prosecution any further, for it is not disputed that accused is a local resident.

18. From the material placed on record, prosecution has failed to establish that the accused is guilty of having committed the offences, he was charged for. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt.

19. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the accused and no other hypothesis other than the same.

20. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused committed murder of Suresh Chauhan and also intentionally and voluntarily caused disappearance of evidence.

21. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

22. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Dhani Ram. ...Appellant.

Versus

Divisional Manager, Forest Working Division. ...Respondent.

Arbitration Appeal No. 3/2015
Decided on: 14.12.2016

Arbitration and Conciliation Act, 1996- Section 34-Objections were filed against the award of the arbitrator in the Court of Civil Judge (Senior Division), which were dismissed as not maintainable – held, that the proceedings were initiated in the year 1986, when Arbitration Act, 1940 was in force – the Act was replaced in the year 1996, when the proceedings were initiated under the Act of 1940, its provisions would regulate the subsequent proceedings notwithstanding the commencement of 1996 Act- the award was not filed before the Court and the objections could not have been filed directly – the order passed by Civil Judge (Senior Division) set aside- objection were ordered to be returned for presentation before appropriate Court. (Para-2 to 14)

Cases referred:
Milkfood Limited vs. GMC Ice Cream (P) Ltd. (2004) 7 SCC 288
Hasham Abbas Sayyad vs. Usman Abbas Sayyad and others, AIR 2007 (SC) 1077

For the Appellant: Mr. Suneet Goel, Advocate.
For the Respondent: Mr. Bhupinder Pathania, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (oral)**:**

The question posed in this petition is purely a legal one and, therefore, it is not at all necessary to refer to the facts, save and except that the appellant filed objections against the award passed by the Arbitrator in the Court of learned Civil Judge (Senior Division), which were dismissed on the ground that the same were not maintainable, under section 34 of the Arbitration and Conciliation Act, 1996 (for short "Act of 1940"), as the award has been passed under the Arbitration Act, 1940.

2. The moot question, however, is whether the learned Civil Judge (Senior Division) at the first place had the jurisdiction to entertain such objections or the order passed by him is without jurisdiction and is thus *coram non judis*.

3. It is not in dispute that the proceedings, which have ultimately culminated into an award under challenge, had been initiated in the year 1986 and it is for the fourth time that an award has come to be passed on 10.2.2009 by the Arbitrator-cum-Managing Director of the respondent-corporation.

4. A notice of the commencement of the arbitration is the first essential step towards the making of default appointment in terms of Chapter-II of the Arbitration Act, 1940 (for short "Act of 1940").

5. In the instant case, evidently, this notice was issued somewhere in the year 1986 when the provisions of the Act of 1940 alone were in vogue wherein section 8 of the Act conferred the power upon the Court to appoint Arbitrator on an application made in this behalf. Section 20 conferred wide jurisdiction on the Court for directing the filing of the arbitration and appointment of Arbitrator. Section 21 conferred powers on the Court in a pending suit on an agreement of the party to refer the differences between them for arbitration in terms of the Act. The Act provided for filing of the award in the Court on making of a motion by either of the party to make award rule of the Court to have the award set aside on the grounds specified in the award and for an appeal against the decision of such a motion. This Act was replaced by the Act of 1996, which by virtue of section 85 repealed the earlier enactment.

6. Therefore, seminal issue, which arises for consideration at this stage is whether the proceedings would be governed by the Act of 1940 or the Act of 1996.

7. This question is no more *res integra* in view of the judgment rendered by the Hon'ble Supreme Court in ***Milkfood Limited*** vs. ***GMC Ice Cream (P) Ltd***. (2004) 7 SCC 288, wherein it has been clearly held that where the notice of arbitration has been issued under the Arbitration Act, 1940, then the proceedings thereafter would be governed by the Act of 1940 irrespective of the Act of 1996 having come into force. It shall be apt to reproduce the relevant observations as under:

> "[45] 'Commencement of an arbitration proceeding' and 'commencement of a proceeding before an arbitrator' are two different expressions and carry different meanings.
>
> [46] A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for

> commencement of arbitration for different purposes. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons charged with any authority to determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a certain purpose including the purpose of following statutory procedure required therefor. If the provisions of the 1940 Act applies, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the common parlance meaning is given to the expression 'commencement of an arbitration' which admittedly for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regard the procedure under the one Act or the other is required to be followed. It is only in that limited sense the expression 'commencement of an arbitration' qua 'a notice of arbitration' assumes significance."

8. It is not in dispute that under the Act of 1940, there is no provision for filing objections directly in the Court before the award having been filed as per the mandate of section 14 of the Act of 1940 for making it rule of the Court and notice thereof issued to the parties. It is only thereafter while resorting to section 30 of the Act that the award can be set aside, which procedure admittedly has not been followed in the instant case.

9. However, learned Assistant Advocate General would, however, argue that the appellant having taken a chance by filing objections before the Civil Judge (Senior Division) cannot now turn around and question the jurisdiction.

10. I am afraid, such contention cannot be accepted for the simple reason that neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, which otherwise is not competent to try the *lis*.

11. It is well settled and needs no authority that "*where a Court takes upon* itself to *exercise* a *jurisdiction* it has *not possessedits decision amounts* to *nothing"*. Consequently, any order passed by the Court having no jurisdiction is *non est* and its invalidity can be set up when it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. Any order passed by such authority is *coram non judis*.

12. This aspect of the matter has been considered by the Hon'ble Supreme Court in ***Hasham Abbas Sayyad*** vs. ***Usman Abbas Sayyad and others***, AIR 2007 (SC) 1077, wherein it was held as under:

> "[21] The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a court without jurisdiction would be coram non judice being a nullity, the same ordinarily should not be given effect to.
>
> [22] This aspect of the matter has recently been considered by this Court in Harshad Chiman Lal Modi V/s. DLF Universal Ltd. and Another, 2005 7 SCC 791, in the following terms :
>
> "We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in

any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity."

See also Zila Sahakari Kendrya Bank Maryadit v. Shahjadi Begum & Ors., 2006 (9) SCALE 675 and Shahbad Co-op.Sugar Mills Ltd. v. Special Secretary to Govt. of Haryana & Ors. 2006 (11) SCALE 674 para 29]

[23] We may, however hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Sec. 21 of the Code of Civil Procedure; and a decree passed by a court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

13. Consequently, the order passed by Civil Judge (Senior Division) Mandi on 29.12.2014 is *coram non judis* and is accordingly quashed and set aside and the objections preferred by the appellant are ordered to be returned to him for being presented before the competent court. In case the same is done within 30 days of the receipt of the certified copy of the Award, the Court shall extend the benefit of section 14 of the Limitation Act to the appellant and thereafter proceed to decide the objections as expeditiously as possible and in no event later than three months from the date of filing of objections.

14. The appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Lalita Devi ...Appellant.

Versus

State of H.P. and another ...Respondents.

LPA No. 81 of 2016
Reserved on: 07.12.2016
Decided on: 14.12.2016

Constitution of India, 1950- Article 226- Writ petitioner appeared in the teacher eligibility test – the answer key was circulated and objections were invited – the result was declared, keeping in view the report of the expert – the petitioner was declared to be unsuccessful – she challenged the report of the expert- held, that the Courts cannot substitute the expert opinion – the decision of deleting defective/wrong questions and allotting marks on pro-rata basis is legal- the objections were examined by the experts – mistakes were found and thereafter the result was declared – the Court has to respect the opinion of the experts – writ petition dismissed. (Para-7 to 22)

Cases referred:

Pankaj Sharma versus State of Jammu and Kashmir and others, (2008) 4 SCC 273

Kanpur University, through Vice-Chancellor and others versus Samir Gupta and others, (1983) 4 Supreme Court Cases 309

Abhijit Sen and others versus State of U.P. and others, (1984) 2 Supreme Court Cases 319

Showkat Ahmad Dar & Ors. versus State & Anr., 2012 (4) JKJ 141 [HC]
The Secretary, West Bengal Council of Higher Secondary Education versus Ayan Das & Ors., 2007 AIR SCW 5976
Arvind Kumar & others vs Himachal Pradesh Public Service Commission, I L R 2014 (IX) HP 905
Lalit Mohan versus H.P. Public Service Commission, I L R 2015 (VI) HP 61 (D.B.)
Rustam Garg and others versus Himachal Pradesh Public Service Commission, I L R 2016 (II) HP 591 (D.B.)

For the appellant:	Mr. Bhender Kumar Chaudhary, Advocate.
For the respondents:	Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 1. Mr. Lovneesh Kanwar, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this Letters Patent Appeal is to judgment and order, dated 29th April, 2016, made by the learned Single Judge/Writ Court in CWP No. 2648 of 2015, titled as Lalita Devi versus State of H.P. and another, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (for short "the impugned judgment").

2. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. The appellant-writ petitioner appeared in the Teacher Eligibility Test conducted by respondent No. 2, i.e. Himachal Pradesh Board of School Education, Dharamshala (for short "Board") on 30th November, 2014. The answer key was circulated vide press note, dated 9th December, 2014 and time was given for submitting objections, if any, till 18th December, 2014.

4. It appears that objections were filed qua questions No. 30, 73 and 123, were considered by respondent No. 2-Board by referring the matter to the subject experts, the result was prepared after taking note of the expert's opinion and thereafter, the result was declared by respondent No. 2-Board, in terms of which the appellant-writ petitioner was declared to be unsuccessful.

5. Being aggrieved, the appellant-writ petitioner invoked the jurisdiction of the Writ Court by the medium of CWP No. 2648 of 2015 and sought writ of mandamus directing respondent No. 2-Board to award full marks to her in respect of Questions No. 30, 73 and 123 and declare her to have qualified the Teacher Eligibility Test-2014, on the grounds taken in the memo of the writ petition.

6. Respondent No. 2-Board filed reply to the writ petition and has specifically stated that the final answer key was prepared on the basis of the report of the subject experts. It is apt to reproduce paras 3 and 4 of the preliminary submissions in the reply filed by respondent No. 2-Board herein:

> *"3. That the respondent Board had also received the objections on question No. 30, 73 and 123 printed in the booklet series D. These questions were printed at serial No. 17, 75 and 145 in booklet series A. It is pertinent to mention here that there were four booklet series that is A, B, C and D, wherein the questions were similar but jumbled. Hence, the respondent Board had sought the opinion from the subject experts on the questions printed in booklet series A.*
>
> *4. That the respondent Board had prepared the final answer key on the basis of the report of the subject experts and result was prepared on the basis of the final result. The copy of final answer key of booklet series A is annexed as Annexure R-*

2/2. Hence, the present writ petition may kindly be dismissed in the interest of justice."

7. The Courts are not experts, thus, cannot substitute the expert opinion. If the Commission or any Body conducting the examination has to do the needful as per the Rules, after receiving compliant(s), the decision, if any made, cannot be interfered by the Courts.

8. The Apex Court in a case titled as **Pankaj Sharma versus State of Jammu and Kashmir and others,** reported in **(2008) 4 Supreme Court Cases 273,** has held that the decision of the Public Service Commission in deleting the defective/wrong questions and to allot those marks on pro-rata basis and to call the persons for interview if a candidate gets in after getting additional marks on pro-rata basis was legal one. It is apt to reproduce para 50 of the judgment herein:

"50. But there is an additional factor also which supports this view. It is clear from the fact that after the receipt of the complaints, the Commission had issued Press Note on 6-7-2005 and assured the candidates that the Commission would look into the matter and no injustice would be caused to them. The Commission also obtained expert advice and thereafter suo motu decided to delete certain questions by allotting those marks pro-rata to remaining questions. It is, therefore, clear that even according to the Commission, some action was necessary, after the examination was over."

9. The Apex Court in other cases titled as **Kanpur University, through Vice-Chancellor and others versus Samir Gupta and others,** reported in **(1983) 4 Supreme Court Cases 309,** and **Abhijit Sen and others versus State of U.P. and others,** reported in **(1984) 2 Supreme Court Cases 319,** has held that the Courts can pass appropriate directions in appropriate cases in order to avoid delay and recurrence of such lapses.

10. The same view has been taken by one of us (Mansoor Ahmad Mir, Chief Justice) while sitting in Single Bench as a Judge of the High Court of Jammu and Kashmir, in a case titled as **Showkat Ahmad Dar & Ors. versus State & Anr.,** reported in **2012 (4) JKJ 141 [HC].**

11. It would also be profitable to reproduce paras 6 to 9 of the judgment rendered by the Apex Court in a case titled as **The Secretary, West Bengal Council of Higher Secondary Education versus Ayan Das & Ors.,** reported in **2007 AIR SCW 5976,** herein:

"6. The permissibility of re-assessment in the absence of statutory provision has been dealt with by this Court in several cases. The first of such cases is Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors. reported in (1984 (4) SCC 27). It was observed in the said case that finality has to be the result of public examination and, in the absence of statutory provision, Court cannot direct re-assessment/re-examination of answer scripts.

7. The courts normally should not direct the production of answer scripts to be inspected by the writ petitioners unless a case is made out to show that either some question has not been evaluated or that the evaluation has been done contrary to the norms fixed by the examining body. For example, in certain cases examining body can provide model answers to the questions. In such cases the examinees satisfy the court that model answer is different from what has been adopted by the Board. Then only the court can ask the production of answer scripts to allow inspection of the answer scripts by the examinee. In Kanpur University and Ors. v. Samir Gupta and Ors. (AIR 1983 SC 1230) it was held as follows:-

"16. Shri Kacker, who appears on behalf of the University, contended that no challenge should be allowed to be made to the correctness of a key answer unless, on the face of it, it is wrong. We agree that the key answer should be assumed to be correct unless it is proved to be wrong and that it

would not be held to be wrong by an inferential process of reasoning or by a process of rationalization. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well versed in the particular subject would regard as correct. The contention of the University is falsified in this case by a large number of acknowledged text-books, which are commonly read by students in U.P. Those text books leave no room for doubt that the answer given by the students is correct and the key answer is incorrect.

17. Students who have passed their Intermediate Board Examination are eligible to appear for the entrance Test for admission to the Medical Colleges in U.P. Certain books are prescribed for the Intermediate Board Examination and such knowledge of the subjects as the students have is derived from what is contained in those text-books. Those text books support the case of the students fully. If this were a case of doubt, we would have unquestionably preferred the key answer. But if the matter is beyond the realm of doubt, it would be unfair to penalize the students for not giving an answer which accords with the key answer, that is to say, with an answer which is demonstrated to be wrong".

8. Same would be a rarity and it can only be done in exceptional cases. The principles set out in Maharashtra Board' case (supra) has been followed subsequently in Pramod Kumar Srivastava v. Chairman Bihar Public Service Commission, Patna & Ors. (2004 (6) SCC 714), Board of Secondary Education v. Pravas Ranjan Panda & Anr. (2004 (13) 714) and President, Board of Secondary Education, Orissa and Anr. v. D. Suvankar and Anr. (2007 (1) SCC 603).

9. In view of the settled position in law, the orders of learned Single Judge and the Division Bench cannot be sustained and stand quashed."

12. This Court in a case titled as **Mukesh Thakur and another versus Himachal Pradesh Public Service Commission,** reported in **2006 (1) Shim. LC 134,** interfered and quashed the result made by the Commission, was subject matter of Civil Appeals No. 907 and 897 of 2006 before the Apex Court, titled as **Himachal Pradesh Public Service Commission versus Mukesh Thakur and another,** reported in **(2010) 6 Supreme Court Cases 759.** It is apt to reproduce paras 23 to 26 of the judgment herein:

"23. The situation will be entirely different where the court deals with the issue of admission in mid-academic session. This Court has time and again said that it is not permissible for the courts to issue direction for admission in mid-academic session. The reason for it has been that admission to a student at a belated stage disturbs other students, who have already been pursuing the course and such a student would not be able to complete the required attendance in theory as well as in practical classes. Quality of education cannot be compromised. The students taking admission at a belated stage may not be able to complete the courses in the limited period. In this connection reference may be made to the decisions of this Court in *Pramod Kumar Joshi (Dr.) v. Medical Council of India, (1991) 2 SCC 179; State of U.P. v. Dr. Anupam Gupta, 1993 Supp (1) SCC 594 : AIR 1992 SC 932; State of Punjab v. Renuka Singla, (1994) 1 SCC 175 : AIR 1994 SC 932, Medical Council of India v. Madhu Singh, (2002) 7 SCC 258; and Mridul Dhar v. Union of India, (2005) 2 SCC 65.*

24. The issue of revaluation of answer book is no more *res integra.* This issue was considered at length by this Court in *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkurmar Sheth, (1984) 4 SCC 27 : AIR 1984 SC 1543*, wherein this Court rejected the contention that in the absence of the provision for revaluation, a direction to this effect can be issued by the Court. The Court further held that even the policy decision incorporated in

the Rules/ Regulations not providing for rechecking/verification/revaluation cannot be challenged unless there are grounds to show that the policy itself is in violation of some statutory provision. The Court held as under: (SCC pp. 39-40 & 42, paras 14 & 16)

> "14. .....It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act...
>
> * * *
>
> 16. .....The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act."

25. This view has been approved and relied upon and re-iterated by this Court in *Pramod Kumar Srivastava v. Bihar Public Service Commission, (2004) 6 SCC 714,* observing as under: (SCC pp. 717-18, para 7)

> "7. ... Under the relevant rules of the Commission, there is no provision wherein a candidate may be entitled to ask for revaluation of his answer book. There is a provision for scrutiny only wherein the answer books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has been any mistake in the totalling of marks of each question and noting them correctly on the first cover page of the answer book. There is no dispute that after scrutiny no mistake was found in the marks awarded to the appellant in the General Science paper. *In the absence of any provision for revaluation of answer books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for revaluation of his marks."*
>
> (emphasis added)

A similar view has been reiterated in *Muneeb-Ul-Rehman Haroon (Dr.) v. Govt. of J&K State , (1984) 4 SCC 24 : AIR 1984 SC 1585; Board of Secondary Education v. Pravas Ranjan Panda, (2004) 13 SCC 383; Board of Secondary Education v. D. Suvankar, (2007) 1 SCC 603; W.B. Council of Higher Secondary Education v. Ayan Das, (2007) 8 SCC 242 : AIR 2007 SC 3098; and Sahiti v. Dr. N.T.R. University of Health Sciences, (2009) 1 SCC 599.*

26. Thus, the law on the subject emerges to the effect that in the absence of any provision under the statute or statutory rules/regulations, the Court should not generally direct revaluation."

13. The Apex Court, after discussing the law and judgments, which were governing the field till the date of the decision, has laid down the tests.

14. Coming to the merits of the case in hand, it appears that the purpose of inviting objections from the candidates before the examiner examines the papers and declares the result is just to examine those objections before declaring the result.

15. In the instant case, it has specifically been averred by respondent No. 2-Board, as discussed hereinabove, that they have invited the objections, asked the subject experts to

examine the objections, objections were examined, some mistakes were found, were rectified and thereafter, the result was declared. Thus, no case for interference is made out.

16. Had respondent No. 2-Board not invited the objections or had failed to take into account the said objections and the expert's opinion, in that eventuality, the judicial review was permissible.

17. Respondent No. 2-Board has specifically pleaded that the candidates have filed objections to the answer key. It has also furnished opinion of subject experts on the objected questions alongwith the reply.

18. At the costs of repetition, it is beaten law of land that the Courts are not experts, have to respect the opinion of the experts and cannot substitute the same. In the instant case, the experts have examined the questions and given their opinion. Thus, the objections raised by the candidates have been considered and judicial review is not permissible. Therefore, the writ petition was not maintainable on this count.

19. The same principle has been laid down by this Court in a batch of writ petitions, **CWP No. 9169 of 2013,** titled as **Vivek Kaushal & others versus Himachal Pradesh Public Service Commission,** being the lead case, decided on 17th July, 2014; **CWP No. 6812 of 2014,** titled as **Arvind Kumar & others versus Himachal Pradesh Public Service Commission,** and other connected matters, decided on 16th October, 2014; **CWP No. 3866 of 2015,** titled as **Lalit Mohan versus H.P. Public Service Commission,** decided on 2nd November, 2015; and **CWP No. 699 of 2016,** titled as **Rustam Garg and others versus Himachal Pradesh Public Service Commission,** decided on 29th March, 2016.

20. It is pertinent to record herein that the judgment rendered by this Court in **Vivek Kaushal's case (supra)** stands upheld by the Apex Court vide order, dated 7th August, 2014, rendered in Special Leave to Appeal (C) Nos. 20992 to 20995 of 2014.

21. Having glance of the above discussions, the Writ Court has rightly appreciated the controversy after applying the tests laid down by the Apex Court and this Court.

22. Viewed thus, the impugned judgment is well reasoned and legal one, needs no interference.

23. Having said so, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

NTPC Ltd., Kol Dam ...Appellant.

Versus

Balam Singh & another ...Respondents.

RFA No. 296 of 2012

Date of Decision: December 14, 2016.

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam- Land Acquisition Collector awarded the compensation at different rates- reference was made – exemplar sale deeds were produced, which were subsequent to initiation of acquisition proceedings- no material was placed on record to establish its similarity of potential, use, kind and nature with the acquired land – the Court has awarded compensation in respect of other acquired land of the same Tehsil on uniform basis irrespective of classification nature and category of land- Reference Court awarded compensation on uniform basis by taking the highest rate so determined by the Collector himself after relying upon several decisions of the Apex Court – the Reference Court had rightly determined the compensation- appeal dismissed.(Para-4 to 10)

Cases referred:
NTPC Ltd. Versus Kirpa and others, Latest HLJ 2016 (HP) 253
Haridwar Development Authority Versus Raghubir Singh and others, (2010) 11 SCC 581

For the Appellant: Mr. Kul Bhushan Khajuria, Advocate, for the appellant-NTPC.
For the Respondents: Mr. Ashwani Pathak, Sr. Advocate with Mr.Sandeep Sharma, Advocate, for respondent No.1.
Mr. R.S. Verma, Addl. AG., for respondent No.2-State.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

In terms of the impugned award dated 08.11.2011, passed by Additional District Judge, Mandi, Camp at Karsog, H.P., in Reference Petition No.55 of 2008, titled as *Balam Singh Versus LAC (Kol Dam), Bilaspur and another,* so filed under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), Reference Court, has re-determined the market value of the entire acquired land by awarding Rs. 6,08,980/-the highest rate awarded by the Collector Land Acquisition with respect to the best quality of land. Significantly, Reference Court has not enhanced any amount other than uniformly applying the said rate with respect to entire 3-12-0 bighas of land, acquired for public purpose i.e. construction of Kol Dam.

2. Certain facts are not in dispute: (i) 3-12-0 bighas of land came to be acquired in village Kidiya, Tehsil Karsog, District Mandi, H.P., with the publication of notification in the official gazette on 12.12.2000 so issued under Section 4 of the Act; (ii) The acquisition proceedings concluded with the passing of the Collector's Award No. 55 of 2006, dated 16.07.2006, so issued under Section 11 of the Act, whereby he determined the market value at the following rates and the State taking over possession of the land:-

Village	**Classification of land**	**Market value per bigha**
Sarour	Dhani Abal	Rs.6,08,980.00
Thogi	Dhani Dom	Rs.5,03,071.00
Kidiya	Barani Abal, Abadi, Khalwara etc.	Rs.3,70,684/-
Randol	Barani Dom	Rs.2,97,871.00
Thali	Barani Som	Rs.1,98,580.00
	Bagicha Barani /Kulahu	Rs.6,61,935.00
	Banjar Kable Kasht/Banjar Jadid	Rs.99,290.00
	Khadyatar Gair Mumkin	Rs.79,472.00

(iii) The purpose of acquisition being construction of Dam, commonly known as Kol Dam; (iv) Dissatisfied with the offer made by the Collector, claimants filed petition under Section 18 of the Act, and on the basis of evidence led by the parties, disposed of in terms of impugned award; (v) While the claimants accepted the award, only the beneficiary preferred the present appeal(s) under Section 54 of the Act; (vi) It is the common case of parties that the entire acquired land came to be submerged with the construction of Dam by the beneficiary. Also there is no evidence on record of either any requirement or any developmental activity carried out on the spot.

3. With these admitted/undisputed facts, material placed on record by the parties is being appreciated for just decision of the case.

4. Record reveals that claimant Balam Ram examined himself as PW.1, claiming value of the acquired land to be Rs. 15,00,000/- per bigha. Now significantly, except for

documentary evidence (Ex.P1), he did not place on record any exemplar sale deed. Though beneficiary did not lead any ocular evidence, but placed on record one exemplar sale deed (Ex.R1).

5. These documents, rightly stand rejected by the Reference Court for the reason that these sale transactions are subsequent to the initiation of acquisition proceedings and in any event there is nothing on record to establish its similarity of potential, use, kind and nature with that of the acquired land.

6. Noticeably with respect to other acquired land, in the same Tehsil, even this Court has awarded compensation, on uniform basis, irrespective of the classification, nature and category of land. In fact, in one such case reported in *NTPC Ltd. Versus Kirpa and others,* Latest HLJ 2016 (HP) 253, with respect to acquisition proceedings pertaining to the very same public purpose stands affirmed by the Apex Court.

7. Noticeably, Reference Court, while awarding compensation on uniform basis, by taking the highest rate, so determined by the Collector himself, referred to and relied upon several decisions rendered by the Apex Court and more pertinently so rendered in *Haridwar Development Authority Versus Raghubir Singh and others,* (2010) 11 SCC 581, wherein it is held as under:-

> "7. The question whether the acquired lands have to be valued uniformly at the same rate, or whether different areas in the acquired lands have to be valued at different rates, depends upon the extent of the land acquired, the location, proximity to an access road/Main Road/Highway or to a City/Town/Village, and other relevant circumstances. We may illustrate:
>
> (A). When a small and compact extent of land is acquired and the entire area is similarly situated, it will be appropriate to value the acquired land at a single uniform rate.
>
> (B). If a large tract of land is acquired with some lands facing a main road or a national highway and other lands being in the interior, the normal procedure is to value the lands adjacent to the main road at a higher rate and the interior lands which do not have road access, at a lesser rate.
>
> (C). Where a very large tract of land on the outskirts of a town is acquired, one end of the acquired lands adjoining the town boundary, the other end being two to three kilometers away, obviously, the rate that is adopted for the land nearest to the town cannot be adopted for the land which is farther away from the town. In such a situation, what is known as a belting method is adopted and the belt or strip adjacent to the town boundary will be given the highest price, the remotest belt will be awarded the lowest rate, the belts/strips of lands falling in between, will be awarded gradually reducing rates from the highest to the lowest.
>
> (D). Where a very large tract of land with a radius of one to two kilometers is acquired, but the entire land acquired is far away from any town or city limits, without any special Main road access, then it is logical to award the entire land, one uniform rate. The fact that the distance between one points to another point in the acquired lands, may be as much as two to three kilometers may not make any difference."

8. The Reference Court, rightly held the acquired land to fall within category (D).

9. Even the Collector, in his award observed that the value of the adjoining village i.e. Tatapani was more. It acknowledged the fact that deduction by 5% was to be effected with respect to village Kidiya only for the reason that it did not have facilities like road, hospital etc.

10. No other point urged or proved.

11. Hence in the given facts and circumstances, no interference is warranted. It cannot be said that the findings returned by the Reference Court are perverse, illegal or erroneous. As such, present appeal stands dismissed, so also pending application(s), if any.

12. Cross-objection, if any, shall also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Ms. Rajni Devi Sharma ...Petitioner

Versus

Union of India & Others ...Respondents

CWP No.187 of 2016
Judgment Reserved on: 30.11.2016
Date of decision: 14.12.2016

Constitution of India, 1950- Article 226- Deceased was posted in CRPF – he was found unconscious on his bed and was taken to hospital, where he was declared brought dead due to myocardial infraction- ordinary family pension was sanctioned to his widow- she claimed that her husband had died on account of illness in the snowbound hostile area- cause of death is directly attributable to government service – held, that rules provide that there should be causal connection between the death and the government service – if the disease is contracted because of continued exposure to a hostile work environment, subjected to extreme weather condition or occupational hazards resulting in death or disability, same are to be accepted as attributable to or aggravated by government service – the deceased was serving in insurgency hit area – he had no prior history of chronic heart disease – his death was caused by multiple factors like hostile work environment and extreme weather condition- writ petition allowed and petitioner held entitled to the benefit of extraordinary pension. (Para-12 to 31)

Cases referred:

Param Pal Singh vs. National Insurance Co.Ltd. and another, 2013 ACJ 526

Kamlesh Devi vs. State of Punjab, 2002(1) SCT 929

For the Petitioner: Mr.Onkar Jairath, Advocate.

For Respondents: Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

In the instant case, petitioner is a widow of deceased soldier Suman Kumar, who, at the time of his death, was serving as Assistant Sub Inspector in Central Reserve Police Force *(for short 'CRPF')* at Kishtwar in the State of Jammu & Kashmir. Late Shri Suman Kumar was initially recruited as Constable General Duty in CRPF in the year 1988 and was allotted the Constabulary No.880897767 and since then he remained posted at various stations. But, after his promotion to the post of ASI, he was posted in snowbound area of Tehsil and District Kishtwar of Jammu & Kashmir. Unfortunately, on 9.1.2014, deceased husband of the petitioner was found lying in an unconscious state on his bed and accordingly he was rushed to nearby hospital in Kishtwar, where he was declared dead by the doctors. Postmortem report suggests that late Shri Suman Kumar died of severe Myocardial Infraction *(for short 'M.I.')* which led to cardiopulmonary arrest.

2. Perusal of Annexure P-2, communication sent by Commandant-76 Battalion, CRPF, to Inspector General, CRPF, Western Sector, Chandigarh, reads as under:

> *"Opinion as to cause of death: - After going autopsy of deceased, Dr.Opinion, patient has died from severe M.I., which leads to cardiopulmonary arrest and subsequent death."*

3. Authority vide aforesaid communication also termed death of deceased ASI to be natural death and accordingly pension papers were processed for payment of admissible benefits, thereby allotting PPO No.239031411510 in favour of present petitioner being wife of deceased solider i.e. ASI Suman Kumar, granting her ordinary family pension in terms of Central Civil Services Rules, 1939.

4. By way of present petition, petitioner has claimed that she was entitled to be granted extra-ordinary family pension as defined in Central Civil Services (Extraordinary Pension) Rules, 1939 *(for short 'CCS(EOP) Rules')* because her husband died on account of illness while he was serving snowbound hostile area of Kishtwar. Petitioner further claimed that cause of death is/was directly attributable to the Government service, since her deceased husband was on active duty at that particular point of time and in all probabilities he suffered *'M.I.'* on account of aggravated demands of duty and tough terrain.

5. Mr.Onkar Jairath, learned counsel appearing for the petitioner, vehemently argued that action of the respondents in denying extraordinary pension in terms of Rule-3 of CCS(EOP) Rules is in violation of Rules occupying the field because it is an admitted case of respondents that at the time of initial recruitment of late Shri Suman Kumar in the CRPF and thereafter at the time of his posting in Kishatwar area being ASI, he was medically fit and he was not suffering from any kind of disease much less *'M.I.',* which ultimately led to his death. As per Mr.Jairath, mere factum of his being medically fit at the time of his posting at Kishtwar strengthen the claim of the petitioner that cause of death of the husband of the petitioner is directly attributable to the Government service, especially when deceased ASI Suman Kumar was on active duty at that particular point of time that too in the insurgency hit area Kishtwar in the State of Jammu & Kashmir.

6. In support of his arguments Mr.Jairath invited the attention of this Court to the judgment of Hon'ble Apex Court passed in ***Param Pal Singh vs. National Insurance Co.Ltd. and another, 2013 ACJ 526.*** Mr.Jairath also invited the attention of this Court to the following judgments passed by Hon'ble Punjab and Haryana High Court in ***Kamlesh Devi vs. State of Punjab, 2002(1) SCT 929, Promila Devi vs. Union of India and Others, CWP No.1399 of 2011(O&M), Smt.Kunta Devi vs. Union of India & Others, CWP No.17135 of 2009***, wherein death on account of *'M.I.'* has been held to be directly attributable to the service conditions.

7. Mr.Jairath further contended that ***Smt.Kunta Devi's*** case *supra* stands duly complied with by the respondents, which fact is evident from copy of order dated 21.2.2012 passed by Hon'ble Punjab and Haryana High Court in ***COPC No.3073 of 2011 (O&M)*** in ***CWP No.17135 of 2009,*** placed on record, wherein Hon'ble Court has directed the Pay and Accounts Officer, Central Pension Accounting Office, Ministry of Finance, Government of India, to issue PPO in favour of the petitioner. The Contempt Petition was disposed of with the direction to grant extraordinary family pension from the due date, as early as possible, but not later than two months from the date of receipt of certified copy of the aforesaid order.

8. Mr.Ashok Sharma, learned Assistant Solicitor General of India, while appearing on behalf of respondents refuted the aforesaid claim having been put forth on behalf of the petitioner by stating that petitioner was not entitled for grant of extraordinary pension in terms of Rule 3-A(1)(a) of the CCS(EOP) Rules, because death of the husband of the petitioner had no connection with the Government service and in no term it was attributable to Government Service.

9. Mr.Sharma, while inviting the attention of this Court to the aforesaid Rules, vehemently argued that for entitlement to extraordinary pension in the light of aforesaid Rules, death should be accepted as due to Government service, provided it is certified that it was attributable and aggravated by Government service. He further argued that to have benefit of aforesaid Rules for grant of extraordinary pension, there should be a casual connection between death and Government service. He also invited the attention of this Court to the guidelines issued by the Authorities for determining the aforesaid factors while deciding issue with regard to grant of extraordinary pension. According to learned Assistant Solicitor General, as per CCS(EOP) Rules Schedule-II, cases have been categorized in five distinct categories for determining the compensation payable for death or disability under different circumstances and he further stated that at best case of the husband of the petitioner could be considered under category-'A', wherein it has been specifically held that death and disability due to natural causes is not attributable to Government service e.g. chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty etc.

10. While concluding his arguments, Mr.Sharma forcefully contended that since husband of the petitioner died due to *'M.I.'*, there is neither any casual connection between the death and Government service nor same is attributable and aggravated by Government service and as such Authorities rightly granted ordinary family pension in favour of the present petitioner after the death of her husband, who was serving in CRPF. Mr.Sharma further argued that judgment having been relied upon by learned counsel representing the petitioner has no application in the present facts and circumstances, however, he fairly admitted that judgment passed by Hon'ble Punjab and Haryana High Court in ***Kunta Devi's*** case *supra* was accepted by the Authorities and extraordinary pension was granted to the petitioner in that case.

11. We have heard learned counsel for the parties and gone through the record of the case.

12. It is not in dispute that husband of the petitioner was serving as ASI in snowbound area of Tehsil and District Kishtwar of Jammu & Kashmir at the time of his death i.e. on 9.1.2014. It is also not in dispute that at the time of death of aforesaid ASI late Shri Suman Kumar, he was in active service of CRPF. Similarly, there is no quarrel, if any, with regard to cause of his death, who, as per medical information, died of severe *'M.I.'* which led to cardiopulmonary arrest.

13. Though respondents have released ordinary pension to the petitioner, but her claim for grant of extraordinary pension has been rejected on the ground that death of her husband due to heart attack was natural and in no term could be said to be attributable and aggravated by his service. Since final order issued by Court of inquiry dated 18.2.2014 termed the death of the husband of the petitioner as natural and not attributable to or aggravated by Government Service/Service Conditions, respondents rejected the claim of the petitioner for grant of extraordinary pension while applying the provisions contained under Rule 3-A of CCS(EOP) Rules which provides as under:-

> "3-A(1)(a) Disablement shall be accepted as due to Government service, provided that it is certified that it is due to wound, injury or disease which:-
>
> i) Is attributable to Government Service, or
>
> ii) Exited before or arose during Government service and has been and remains aggravated thereby.
>
> (b) Death shall be accepted as due to Government service provided it is certified that it was due to or hastened by:
>
> i) a wound, injury or disease which was attributable to Government service,
>
> or

(ii) the aggravation by Government service of a wound, injury or disease which existed before or arose during Government service

(2) There shall be a casual connection between

i) disablement and Government service; and

ii) death and Government service, for attributability or aggravation to be conceded. Guidelines in this regard are given in the appendix which shall be treated as part and parcel of these Rules."

14. The aforesaid Rules clearly suggest that for the grant of extraordinary pension in favour of individual deceased soldier, death should be accepted as due to Government service with further certification that it was due to wound, injury or disease which was attributable to Government service. Rules further suggest that there should be casual connection between death and Government service, for attributability or aggravation to be conceded. It would also be profitable to reproduce here-in-below Schedule-II of CCS(EOP) Rules, 1939, wherein factors have been defined for determination of compensation payable for death and disability under different circumstances:-

"Category 'A' Death or disability due to natural causes not attributable to Government service. Examples would be chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty etc.

Category 'B' Death or disability due to causes which are accepted as attributable to or aggravated by Government service. Diseases contracted because of continued exposure to a hostile work environment, subjected to extreme weather conditions or occupational hazards resulting in death or disability would be examples.

Category 'C' Death or disability due to accident in the performance of duties. Some examples are accidents while traveling on duty in Government vehicles or public transport, a journey on duty is performed by service aircraft, mishaps at sea, electrocution while on duty, etc.

Category 'D' Death or disability attributable to acts of violence by terrorists, anti social elements etc., whether in their performance of duties or otherwise. Apart from cases of death or injury sustained by personnel of the Central Police organizations while employed in aid of the Civil administration in quelling agitation, riots or revolt by demonstrators, other public servants including Police personnel etc, bomb blasts in public places or transport, indiscriminate shooting incidents in public etc , would be covered under this category.

Category 'E' Death or disability arising as a result of (a) attack by or during action against extremists, anti-social element, etc, and (b) enemy action in international war or border skirmishes and warlike situations, including cases which are attributable to (i) extremists acts, exploding mines, etc., while on way to an operational area (ii) kidnapping by extremists; and (iii) battle inoculation as part of training exercises with live ammunition."

15. In Category-'A' of the aforesaid Schedule, diseases, like heart and renal diseases, prolonged illness, accidents while not on duty have been termed to be not attributable to Government service.

16. But, in Category-'B' of the aforesaid Schedule, death or disability due to continued exposure to a hostile work environment, subjected to extreme weather conditions or occupational hazards have been accepted as attributable to or aggravated by Government service.

17. Similarly, death or disability occurred on account of accident while traveling on duty in Government vehicles or public transport, a journey on duty by service aircraft, mishaps at

sea and electrocution have also been accepted as attributable to and aggravated by Government service.

18. Reply filed on behalf of respondents as well as arguments having been made by learned Assistant Solicitor General of India clearly suggests that case of the present petitioner, who died from *'M.I.',* was considered by the Authorities under Category 'A', wherein chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty have not been termed as attributable to or aggravated by Government service.

19. At this juncture, it would be relevant to refer to following paras of reply filed by the respondents:

"Para 6. … … …In this instant case the husband of the petitioner died from severe MI (Myo cardial infraction) which leads to cardiopulmonary arrest and subsequent that, which was the type of a heart attack as petitioner mentioned in para no.4 of list of events and falls under category "A" wherein it is clearly mentioned that "Death or disability due to natural causes not attributable to Government service. Examples would be chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty etc. etc.

It is pertinent to mention here that the work accident while on duty is defined the other mishaps apart from examples like heart and renal disease, thus petitioner is entitled the extra ordinary pension under category "A" only.

Para 7. That in reply to this para, it is submitted that the husband of the petitioner died due to M.I which leads to cardiopulmonary arrest but the disease is neither attributable to the Govt.job nor aggravated during the same. It is submitted that late husband of the petitioner was medically SHAPE-I and he was advised to reduce weight, fat free diet and also regular exercise by the Medical officer of 76 Bn. CRPF. The petitioner wrongly interpreted the accident while on duty, whereas it is clearly mentioned in category "A" that the death, disability due to chronicle ailment like heart and renal disease comes under the category "A".

It is pertinent to mention here that the cold weather does not have direct connection with cardiopulmonary arrest. Apart from these the late husband of the petitioner was provided winder bears and other facilities to prevent the effect of the cold. Therefore, the averment of the petitioner is totally wrong and misconceived.

Para 8. That the contents of this para are wrong, hence denied. As submitted in para supra, the death of the husband of the petitioner was neither directly attributable to the Govt. service nor aggravated during the service. Since the medical category of the petitioner was of SHAPE-I, hence it cannot be said that the same is attributable to the Govt. service and cold weather does not have any direct connection with Cardiopulmonary arrest."

20. In nutshell, case of the respondents is that husband of the petitioner died due to natural cause i.e. *'M.I.'* which is not attributable to Government Service and as such being covered under Category "A", petitioner is not entitled to grant of extraordinary pension in terms of aforesaid Rules.

21. True, it is that chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty have been declared to be not attributable to or aggravated by Government service under Category "A", but, if Category "B" is perused carefully, it clearly suggests that if disease is contracted because of continued exposure to a hostile work environment, subjected to extreme weather condition or occupational hazards resulting in death or disability same are to be accepted as attributable to or aggravated by Government service.

22. In the instant case, this Court cannot loose sight of the fact that at that relevant time late husband of the petitioner being ASI was in active service of CRPF and there is no denial

of the fact that he was serving insurgency hit area i.e. Kishtwar (J&K). Similarly, this Court is fully conscious of extreme weather condition of the area of Kishtwar, especially in the month of January, when that entire area is submerged with snow.

23. In the aforesaid background, this Court deems it fit to refer to the aforesaid paras of reply filed by the respondents, wherein it has been repeatedly stated that deceased ASI Suman Kumar was fully fit and his medical category was of SHAPE-I; meaning thereby that deceased ASI Suman Kumar had no prior history of chronic heart disease.

24. Similarly, this Court finds no document having been placed on record by the respondents suggestive of the fact that at the time of unfortunate death of late ASI he was suffering from same kind of chronic disease, as stands mentioned in aforesaid Category "A" in Schedule-II of Rule 3. Though in para-7 respondents, while stating that late husband of petitioner was medically SHAPE-I, have stated that he was advised to reduce weight, fat free diet and also regular exercise by the Medical Officer of 76 Bn. CRPF. But, as has been observed above, there is no medical record placed on record by the respondents suggestive of the fact that the petitioner was not medically fit at the time of his death. Rather, respondents themselves have submitted that late husband of the petitioner was medically SHAPE-I and it cannot be said that death is attributable to Government service and cold, weather had no direct connection with cardiopulmonary arrest.

25. This Court, after taking note of the aforesaid specific averments contained in the reply filed by the respondents regarding medically fitness of late husband of the petitioner, has every reason to conclude that case of late husband of the petitioner could not be considered in the light of Category "A" as stands defined in Schedule-II. Rather, this Court is convinced and satisfied that late husband of the petitioner suffered from *'M.I.'* which led to his death due to multiple factors i.e. hostile work environment at Kishtwar, due to insurgency coupled with extreme weather condition that too in the month of January and as such case of late husband of petitioner was required to be dealt with in terms of Category-"B" and not Category-"A". Since late husband of the petitioner has no past history of chronic ailment as defined in Category "A" *supra*, the disease (*'M.I.')* contracted by him during service is required to be deemed to be because of continued exposure to a hostile work environment and due to extreme weather condition and as such same can be termed to be attributable to or aggravated by Government service. Action of respondents in denying extraordinary pension to the petitioner after death of his husband does not appear to be reasonable and in accordance with the Rules occupying the fields. This Court can also take note of the fact that had the husband of the petitioner suffering from chronic heart disease, he would have not been posted at a place like Kishtwar, which is admittedly insurgency hit area. Similarly, when petitioner, at the time of his posting at Kishtwar, was medically fit and was placed under Category of SHAPE-I, it can be safely concluded that he had no past history of heart disease and as such it can be safely inferred that husband of the petitioner suffered sudden heart problem which led to his death.

26. Hon'ble Apex Court in ***Param Pal Singh vs. National Insurance Co.Ltd. and another, 2013 ACJ 526,*** while dealing with the case under Workmen's Compensation Act, 1923, interpreted the words, *"in the course of employment"* Hon'ble Apex Court held that *"in the course of employment"* mean *"in the course of work which the workman is employed to do and which is incidental to it".* It would be profitable to reproduce following paras of the judgment, wherein the Hon'ble Apex Court has held:-

> "26. Again in yet another celebrated decision of this Court in Ibrahim Mahmmod Issak, 1961 ACJ 422 (SC), this Court has set down the principles applied in such cases as under in paragraph 5:
>
> > "5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words "in the course of the employment" mean "in the course of the work which the workman is employed to do and which is incidental to it." The words "arising out of employment" are understood to mean that "during the course of the

employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered." In other words, there must be a casual relationship between the accident and the employment. The expression "arising out of employment" is again not confined to the mere nature of the employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises 'out of employment'. To put it differently, if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act. In Lancashire and Yorkshire Railway Co. v. Highley, (1917) AC 352, Lord Summer laid down the following test for determining whether an accident "arose out of the employment." (Emphasis added)

27. Applying the various principles laid down in the above decisions to the facts of this case, we can validly conclude that there was CAUSAL CONNECTION to the death of the deceased with that of his employment as a truck driver. We cannot lose sight of the fact that a 45 years old driver meets with his unexpected death, may be due to heart failure while driving the vehicle from Delhi to a distant place called Nimiaghat near Jharkhand which is about 1152 kms. away from Delhi, would have definitely undergone grave strain and stress due to such long distance driving. The deceased being a professional heavy vehicle driver when undertakes the job of such driving as his regular avocation it can be safely held that such constant driving of heavy vehicle, being dependant solely upon his physical and mental resources & endurance, there was every reason to assume that the vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his life span. Such an 'untoward mishap' can therefore be reasonably described as an 'accident' as having been caused solely attributable to the nature of employment indulged in with his employer which was in the course of such employer's trade or business.

28. Having regard to the evidence placed on record there was no scope to hold that the deceased was simply travelling in the vehicle and that there was no obligation for him to undertake the work of driving. On the other hand, the evidence as stood established proved the fact that the deceased was actually driving the truck and that in the course of such driving activity as he felt uncomfortable he safely parked the vehicle on the side of the road near a hotel soon whereafter he breathed his last. In such circumstances, we are convinced that the conclusion of the Commissioner of Workmen's Compensation that the death of the deceased was in an accident arising out of and in the course of his employment with the respondent No.2 was perfectly justified and the conclusion to the contrary reached by the learned Judge of the High Court in the order impugned in this appeal deserves to be set aside. The appeal stands allowed. The order impugned is set aside. The order of the Commissioner for Workmen's Compensation shall stand restored and there shall be no order as to costs."(pp.537-538)

27. Similarly, Hon'ble Punjab & Haryana High Court in ***Kamlesh Kumari vs. Union of India, (2002) 1 SCT 929***, held as under:-

"The word "Accident" also occurs in Section 3 of the Workmen's Compensation Act, 1923 but here too it has not been defined and it has come to acquire a settled meaning and denotes some unexpected event happening without design even though there may be negligence on the part of the person

meeting with an accident. It would, therefore, include not only such obvious occurrence as collisions, tripping over floor obstacles, fall of roof, but also less obvious ones causing injury as strain which causes rupture, exposure to a draught causing chill, exertion causing apoplexy and shock causing neurasthenia. It would also include a heart attack which is an unexpected event happening without design".

28. Hon'ble Division Bench of Punjab and Haryana High Court in the aforesaid judgment, while interpreting word *"accident"*, has also held that any unexpected event happening without design even though there may be negligence on the part of the person meeting with an accident can be termed as *"accident"*. Hon'ble Division Bench, in the aforesaid judgment, has further held even exposure to a draught causing chill, exertion causing apoplexy and shock causing neurasthenia and heart attack which is unexpected event happening without design as an accident.

29. In the present case, as has been observed above, the petitioner at the time of his death was posted in the area, which is insurgency hit area and has extreme chillness during the month of January coupled with the fact that same is a hostile area and as such there are multiple reasons which compels this Court to conclude that *'M.I.'* suffered by the petitioner was on account of continued exposure, hostile work, environment and extreme weather condition. This Court also perused the judgment passed by the Hon'ble Punjab and Haryana High Court in ***Promila Devi's*** case *supra*, which specifically dealt with issue of grant of extraordinary pension under Rule 3-A of the CCS(EOP) Rules, 1939, that too in case of employee of Central Reserve Police Force.

30. Aforesaid judgments further suggest that in those cases too persons had died due to *'M.I.'* and it was held to be attributable to Government Service. Further perusal of order dated 21.2.2012, passed in ***COPC No.3073 of 2011(O&M),*** i.e. ***Kunta Devi's*** case *supra,* clearly suggests that aforesaid judgments having been passed by the Hon'ble Punjab & Haryana High Court was accepted by the respondent i.e. C.R.P.F. and extraordinary pension was granted to the petitioner(s) therein. Hence, grievance of the petitioner in this writ petition, being fully covered by the aforesaid judgments, also deserves to be accepted.

31. Consequently in view of the aforesaid discussion this petition is allowed and the petitioner is held entitled to the benefits of the extraordinary family pension and other allied benefits, as provided by Rule 3-A of CCS(EOP) Rules. The needful be done as expeditiously, as possible, preferably within two months.

32. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Prem Chand .....Respondent.

Cr.Appeal No.226 of 2008
Decided on: 14/12/2016.

Code of Criminal Procedure, 1973- Section 377- Accused was convicted by the Trial Court and sentenced to undergo imprisonment for a period of 6 months- an appeal was filed, which was partly allowed and the sentence of imprisonment was modified – the accused was sentenced to undergo imprisonment till the rising of the Court - an appeal has been filed against the sentence imposed pleading that the sentence is inadequate – held, that only the sentence imposed by the Trial Court can be enhanced under Section 377 of Cr.P.C– in this case sentence was imposed by

the appellate court- hence, appeal is not maintainable – permission granted to file a revision petition. (Para-4)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The learned Judicial Magistrate 1st Class, Manali pronounced an order of conviction upon the accused for his committing an offence punishable under Section 325 IPC. The learned Judicial Magistrate concerned also sentenced him to undergo rigorous imprisonment for a period of six months besides sentenced him to pay a fine of Rs.2000/-, in default whereof he stood sentenced to undergo further simple imprisonment for a period of one month. The convict/accused standing aggrieved by the judgment recorded upon him by the learned Judicial Magistrate concerned whereupon he stood convicted for the offence for which he stood charged besides his standing aggrieved by the imposition of the afore-stated sentences upon him by the learned trial Court, he made a concert to assail them by preferring an appeal therefrom before the learned appellate Court. The learned appellate Court on standing seized with an appeal preferred therebefore by the accused/convict affirmed the apposite conviction pronounced upon him by the learned Judicial Magistrate concerned whereas it modified the sentence of imprisonment of six months imposed upon him by the learned trial Court to a sentence of his suffering imprisonment till the rising of the Court.

2. Imminently, the State of Himachal Pradesh did not under Section 377 of the Code of Criminal Procedure prefer any appeal before the learned first appellate Court for seeking enhancement of the sentence of imprisonment of six months imposed by the learned Judicial Magistrate concerned upon the accused/convict in a term higher than the aforesaid term of imprisonment. However, the State of Himachal Pradesh, through the instant appeal, constituted herebefore under Section 377 of the Cr.P.C. has sought enhancement of the term of imprisonment imposed upon the accused/convict by the learned first appellate Court whereupon he stood directed to suffer imprisonment till the rising of the Court, on anvil of it being grossly disproportionate vis-à-vis the concurrent renditions of conviction pronounced upon him by both the learned Courts below wherewithin both the learned Courts below concluded qua his committing a heinous offence constituted under Section 325 IPC.

3. The learned counsel appearing for the respondent/accused has contended qua the instant appeal constituted herebefore under Section 377 Cr.P.C. being statutorily not maintainable herebefore significantly with the State of Himachal Pradesh on conviction of the accused by the learned trial Magistrate on his facing trial therebefore, in sequel whereto a sentence of imprisonment as occurs in its apposite verdict stood imposed upon him, omitting to therefrom institute an appeal under Section 377 Cr.P.C. before the learned first appellate Court whereas it thereat held the apposite statutory empowerment to make a concert therebefore for enhancing the sentence of imprisonment as stood pronounced by the learned trial Magistrate upon the accused/convict on the latter's facing trial before the learned trial Magistrate concerned, in a term higher than the one to which he stood sentenced to undergo, on anvil of the sentence of imprisonment imposed upon the accused/convict by the learned trial Magistrate being grossly inadequate besides grossly disproportionate vis-à-vis the order of conviction recorded upon him by the trial Magistrate qua the charge he faced therebefore under Section 325 IPC.

4. For testing the tenacity of the aforesaid submission addressed herebefore by the learned counsel for the respondent/accused, an allusion to the relevant provisions engrafted in Section 377 Cr.P.C. is imperative, provisions whereof stand extracted herein-after:-

"377. Appeal by the State Government against sentence.-

> (1) Save as otherwise provided in sub-section (2), the State Government may, in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy-
>
> (a) to the Court of Session, if the sentence is passed by the Magistrate and
>
> (b) to the High Court, if the sentence is passed by any other Court.
>
> (2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [1] the Central Government may also direct] the Public Prosecutor to present an appeal against the sentence on the ground of its inadequacy-
>
> (a) to the Court of Session, if the sentence is passed by the Magistrate; and
>
> (b) to the High Court, if the sentence is passed by any other Court.
>
> (3) When an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence."

An incisive perusal whereof makes a graphic disclosure qua on imminent workability of sub-section (2) thereof standing evinced, workability whereof evidently is un-evincible herebefore, the State Government holding a discretion to from an order of conviction besides a sentence imposed upon an accused on the latter's standing tried by any Court other than the High Court, to seek enhancement of the sentence pronounced upon the accused/convict by the learned trial Court, on anchorage of it being grossly inadequate, by its proceeding to prefer an appeal therefrom before the Court of Sessions, conspicuously, if the sentence stands recorded by the Sessions Court, also therefrom the State Government holds a statutory empowerment to before the High Court ventilate its apposite grievance under Section 377 Cr.P.C. The initial statutory bestowment under the afore-extracted provisions of the Code of Criminal Procedure, upon the State of Himachal Pradesh, to on an order of conviction besides a sentence of imprisonment standing pronounced upon the accused on his trial standing held by the learned trial Magistrate concerned, to on grounds of inadequacy of sentence imposed upon the convict/accused by the learned trial Magistrate seek its enhancement by its making an apposite motion thereunder before the Court of Sessions whereas evidently hereat, the aforesaid initial statutory bestowment conferred upon the State of Himachal Pradesh comprised in its by preferring an appeal under Section 377 Cr.P.C. before the learned Sessions Court assail the sentence pronounced upon the convict/accused by the learned trial Magistrate whereupon it held the statutory facilitation to seek enhancement of the sentence as stood imposed upon the accused on his trial standing held by the trial Magistrate, stood demonstrably omitted to be availed by the State of Himachal Pradesh, whereupon it is statutorily forbidden to avail herebefore the provisions of Section 377 Cr.P.C. for its thereupon making an apposite statutory endeavour for assailing besides seeking enhancement of the sentence pronounced upon the convict by the learned Additional Sessions Judge. The aforesaid statutory provisions also stand aroused from the factum of the sentence pronounced upon the convict by the learned Additional Sessions Judge on the latter's standing seized with an appeal preferred therebefore by the accused/convict not rendering the apposite pronouncement made by the learned Additional Sessions Judge being amenable to a construction qua its making ensuing from the learned Additional Sessions Judge trying the accused, reiteratedly when evidently the trial of the accused stood conducted by the learned trial Magistrate whereupon he stood convicted besides sentenced thereat alone the State Government held the statutory leverage to avail the apposite statutory provisions engrafted in Section 377 Cr.P.C. for its thereupon assailing before the learned Sessions Judge the sentence of imprisonment imposed upon the accused by the trial Magistrate besides seek its enhancement

therefrom. Reinforcingly, it was apt for the State Government to assail under Section 377 Cr.P.C. the sentence pronounced upon the accused/convict by the learned appellate Court only when it had held the accused to trial. However, when the learned appellate Court did not try the accused rather when the trial of the accused stood conducted by the learned trial Magistrate on consummation whereof the accused stood convicted besides stood sentenced to undergo imprisonment whereupon his standing aggrieved by the apposite pronouncement recorded by the learned trial Magistrate he preferred an appeal before the learned appellate Court wherebefore despite the State Government holding the apposite statutory empowerment to therebefore contest the adequacy of sentence imposed upon the accused by the trial Court its yet waiving its apposite statutory empowerment renders its concert herebefore by anviling it upon Section 377 Cr.P.C. to warrant its standing discountenanced by this Court. The objection raised by the learned counsel for the respondent/accused qua the maintainability of the instant appeal constituted before this Court by the State under Section 377 Cr.P.C., is upheld. However, at this stage, the learned Deputy Advocate General seeks permission of this Court to withdraw the instant appeal with liberty reserved to the appellant herein to institute an appropriate revision petition before this Court for assailing the pronouncement of sentence imposed upon the accused/convict by the learned appellate Court. Prayer accepted. Accordingly, the appeal stands dismissed as withdrawn. However, liberty stands reserved to the appellant herein to by instituting an apposite revision petition before this Court, impugn the sentence pronounced upon the accused/convict by the learned first appellate Court. Also it shall be open to the appellant herein to avail the benefit of Section 14 of the Limitation Act. Records of the Courts below be sent back forthwith.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Dr. Sushant Deshta ...Petitioner.

Versus

State of H.P. and others ...Respondents.

CWP No. 4508 of 2015
Judgment reserved on : 16.11.2016
Date of decision: 15. 12. 2016.

Constitution of India, 1950- Article 226- The delimitation process for ZilaParishadTikkar Ward was concluded on 20.8.2015 – petitioner raised objections and delimitation was set aside – a direction was issued to complete the delimitation process in accordance with Rule 9 of H.P. Panchayati Raj (Election) Rules, 1994 – model code of conduct came into force in the meantime – the final order of delimitation was passed – writ petitions were filed, which were dismissed as infructuous – the order passed by Deputy Commissioner completing the process of delimitation was challenged and the appeal was allowed- writ petition was filed challenging the order of election petition and the notification – held, that democracy is a basic feature of the Constitution- a specific procedure has been prescribed under the Rules and there is no possibility of deviating from the same – the procedure prescribed under the Rules is mandatory and has to be scrupulously followed – proposal regarding delimitation was required to be forwarded to the offices of ZilaParishad, Panchayat Samiti and Gram Panchayat for inviting objections – proposals were to be affixed on the notice board by the Secretaries of respective ZilaParishad, Panchayat Samiti and Gram Panchayat in the presence of two independent witnesses- no such exercise was undertaken – the language of the objections was same – Deputy Commissioner recorded the joint statements of the objectors – objections were not decided specifically – non-consideration of relevant material would make the order perverse and the Court has power to interfere with the same in exercise of judicial review – the authority is bound to given reasons in support of the objections - the order passed by Deputy Commissioner set aside- final order of delimitation also quashed and set aside.(Para-11 to 68)

Cases referred:
People's Union for Civil Liberties (PUCL) and another vs. Union of India and another (2003) 4 SCC 399
Dattatraya Moreshwar vs. The State of Bombay and others, AIR 1952 SC 181
State of U.P. and others vs. Babu Ram Upadhya, AIR 1961 SC 751
Raza Buland Sugar Co. Ltd. Rampur vs. Municipal Board, Rampur, AIR 1965 SC 895
Sharif-Ud-Din vs. Abdul Gani Lone, (1980) 1 SCC 403
Nazir Ahmad vs. King Emperor (AIR 1936, PC 253)
Rao Shiv Bahadur Singh and anr. vs. State of Vindh-P, AIR 1954, SC 322; Deep Chand vs. State of Rajasthan, AIR 1961 SC 1527
State of Uttar Pradesh vs. Singhara Singh and Ors, AIR 1964, SC 358
Chandra Kishore Jha vs. Mahavir Prasad, 1999 (8) SCC 266
Dhananjaya Reddy vs. State of Karnataka, 2001 (4) SCC 9
State of Jharkhand & Ors vs. Ambay Cements and anr. (2005) 1 SCC 368
Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited, 2008 (4) SCC 755
Zuari Cement Ltd vs. Regional Director, ESIC, Hyderabad & Ors., AIR 2015, SC 2764
Uddar Gagan Properties Ltd. vs. Sant Singh and Ors. 2016 (5) JT 389
Daya Ram vs. Raghunath (2007) 11 SCC 241
Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank vs. Jagdish Sharan Varshney and others (2009) 4 SCC 240
Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others (2010) 9 SCC 496

For the Petitioner	Mr. B.C. Negi, Senior Advocate, with Mr. Raj Negi, Advocate.
For the Respondents	Mr. Shrawan Dogra, Advocate General, with Mr. Rupinder Singh and Ms. Meenakshi Sharma, Addl. A.Gs. with Mr. Kush Sharma, Deputy Advocate General, for respondents No. 1 and 2. Ms. Nishi Goel, Advocate, for respondent No.3. Mr. Sunil Mohan Goel, Advocate, for respondent No.4. Mr. B.S. Chauhan, Advocate, with Mr. Munish Datwalia, Advocate, for respondents No. 5 to 7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The instant writ petition has been filed for directing the respondents authorities to retain the Zila Parishad Ward Tikkar in its original form i.e. as existing in the year 2010 and the orders to the contrary, be quashed and set-aside.

Certain undisputed facts may be noticed.

2. The delimitation process for the Zila Parishad Tikkar Ward was concluded on 20.8.2015. However, based upon the objections raised by the petitioner, delimitation qua the constituencies of Zila Parishad Shimla including Tikkar Ward was set-aside by the Divisional Commissioner, Shimla vide his order dated 9.9.2015 and the matter was remanded back to the Deputy Commissioner, Shimla to complete the delimitation process in accordance with Rule 9 of the Himachal Pradesh Panchayati Raj (Election) Rules, 1994 (for short Election Rules). However, before these objections could be decided, the State Election Commission vide notification dated 6.10.2015 issued the Model Code of Conduct and vide another notification dated 9.10.2015 the State Election Commission had given effect to Clause 12.1 of the Model Code of Conduct which inter alia provided as under:

> *"12.1. The structural, classification or area of the Panchayats and Municipalities shall not be altered during a period of one hundred twenty days ending on the date on which the five year term of the said institutions are due to expire, no decision taken earlier shall be implemented during this period."*

3. In compliance to the order of remand, the Deputy Commissioner again issued the final order of delimitation on 15.10.2015 qua the constituencies of Zila Parishad, Shimla which included the Zila Parishad Ward, Tikkar. In the meanwhile, certain writ petitions came to be filed before this Court assailing therein the delimitation process. However, vide judgment dated 28.10.2015 writ petitions were dismissed as having rendered infructuous in view of notification dated 9.10.2015 (supra).

4. It is averred that it was after passing of the judgment by this Court on 28.10.2015 that the State Election Commission vide notification dated 2.11.2015 withdrew Clause 12.1 (supra) as had been given effect to vide notification dated 9.10.2015. In the meantime, the petitioner assailed the subsequent order passed by the Deputy Commissioner on 15.10.2015 by filing an appeal before the learned Divisional Commissioner and the same was allowed vide judgment dated 6.11.2015. It is alleged that the respondents-authorities on 6.11.2015 itself set into motion delimitation process qua Zila Parishad Wards in question.

5. On 9.11.2015 the proposal for delimitation was required to be kept open for inspection in the office of the concerned Zila Parishad, Panchayat Samiti, Gram Panchayats. However, as the proposal qua delimitation was not received, the same was not done. It is further averred that majority of the Panchayat Secretaries of the Gram Panchayats falling within the Zila Parishad Ward, Tikkar have categorically stated that till 12.11.2015 no proposal for delimitation of Zila Parishad had been received by the concerned Gram Panchayats and the copies of such letters have been annexed as Annexure P-11 with the petition. At the same time, it is also averred that some of the persons did object by filing objections and the same were rejected without application of mind in a slip shod and cursory manner vide the impugned order dated 16.11.2015 and the delimitation qua Zila Parishad Ward Tikkar and other Zila Parishad Wards in District Shimla have been retained as had been previously detailed vide letters dated 3.10.2015 and 15.10.2015, respectively.

6. Based upon the aforesaid averments, the petitioner has sought quashing the notification dated 2.11.2015 (Annexure P-15) whereby the State Election Commission withdrew Clause 12.1 as had been given effect to vide notification dated 9.10.2015 (Annexure P-8). In addition thereto, the petitioner has also sought quashment of order dated 16.11.2015 (Annexure P-13) whereby respondent No.2 dismissed the objections filed by the petitioner and the further notification issued on 16.11.2015 (Annexure P-14) whereby he passed the final order of delimitation, as would be evident from the relief clause which reads thus:-

> "i) *Issue a writ of certiorari to quash Annexure P-15, 16 i.e. notifications dated 2.11.2015 (whereby Election Commission withdrawn notification dated 9.10.2015).*
>
> *(ii) Issue a writ of mandamus directing the respondent authorities not to implement Annexure P-15, 16 i.e. notifications dated 2.11.2015.*
>
> *(iii) Issue a writ of certiorari to quash Annexure P-13, 14 i.e. office order dated 16.11.2015 and letter dated 16.11.2015.*
>
> *(iv) Issue a writ of mandamus directing the respondent authorities not to implement Annexure P-13, 14 i.e. office order dated 16.11.2015 and letter dated 16.11.2015.*
>
> *(v) Issue a writ of mandamus directing the respondent authorities to retain Zila Parishad Ward Tikkar in its original form as existing in the year 2010."*

7. The Principal Secretary, Panchayati Raj and Deputy Commissioner, Shimla (respondents No.1 and 2) have filed joint reply wherein they have raised certain preliminary

objections and thereafter contested the claim of the petitioner on merits. The factual sequence of events has not been denied. It is averred that there was no procedural lapse on the part of the respondents either at the time of inviting or while deciding the objections regarding delimitation and in support of their claim, have relied upon the objection filed by the petitioner to contend that the proposal for delimitation was given wide publicity. In addition thereto, it has been averred that e-mail of draft notification of Zila Parishad Ward Tikkar was sent to the concerned executive officer Panchayat Samiti-cum-Block Development Officers for compliance and wide publicity was made in press and notification was also affixed in Zila Parishad office and DPO Office and this is the usual procedure of communication with the BDO Office.

8. As regards the notification dated 9.10.2015 and subsequent notification dated 2.11.2015, it is averred that these notifications have been issued by the State Election Commission and have no effect on the delimitation of Zila Parishad as it is only applicable to the re-organization of Gram Panchayat.

9. The Election Commission (respondent No.3) has filed its separate reply wherein it is averred that in pursuance to the provisions enshrined under Article 243E(3)(a) of the Constitution of India and Section 120 (2) (a) of the Himachal Pradesh Panchayati Raj Act, 1994, the State Election Commission has to conduct elections of Panchayati Raj Institutions before the expiry of five years term which was to expire on 21.1.2016. Therefore, in order to complete the election process, the Commission requires about 120 days to complete the statutory requirement and, therefore, enforced Clause 12.1-organizational-status-quo of the Model Code of Conduct so that the structural classification or area of the Panchayat and municipalities would not be altered during the period of 120 days ending with the date on which the five years term of the said institutions were due to expire. Accordingly, the notification dated 9.10.2015 was issued. However, thereafter, the Commission received requests from the Department of Urban Development and Department of Panchayati Raj vide their letters dated 2.11.2015 whereby they had requested the Commission to enforce the Clause 12.1 of the Model Code of Conduct only from the date of implementation i.e. 9.10.2015 or else it would result in delimitation and reservation in respect of those Panchayats which were altered due to inclusion of the areas in certain Municipalities, creation of Municipal Corporation, Dharamshala etc. The request was considered and the Commission found justification in the same and, therefore, in order to avoid fresh delimitation, the clarification/amendment was issued to implement the clause. The intention of the Commission was to enforce the Clause 12.1 of the Model Code of Conduct with immediate effect on 9.10.2015 as finds mention in notification itself but was constrained to amend the same in view of representations mentioned supra which then led to issuance of notification dated 2.11.2015.

10. During the pendency of the petition, three persons who claimed to have contested the elections, moved an application being CMP No. 6571 of 2016 seeking their impleadment as parties and the same was allowed vide order dated 24.8.2016 and the applicants were impleaded as respondents No. 5 to 7 in the writ petition. These respondents have not chosen to file separate reply and during the course of arguments have adopted the reply as also the arguments addressed on behalf of the official respondents.

I have heard learned counsel for the parties and have gone through the material placed on record.

11. There can be no gainsaying that democracy is a basic feature of the Constitution. The democratic set-up of the country has always been recognized as a basic feature of the Constitution, like other features example Supremacy of the Constitution, Rule of law, Principle of separation of powers, Power of judicial review etc.

12. In ***People's Union for Civil Liberties (PUCL) and another vs. Union of India and another (2003) 4 SCC 399***, the Hon'ble Supreme Court held as under:

> *"94. The trite saying that 'democracy is for the people, of the people and by the people' has to be remembered for ever. In a democratic republic, it is the will of the*

people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as observed by this Court in Lily Thomas Vs. Speaker, Lok Sabha [(1993) 4 SCC 234] quoting from Black's Law Dictionary. The citizens of the country are enabled to take part in the Government through their chosen representatives. In a Parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makers and custodians of Government. People look to them for ventilation and redressal of their grievances……"

13. It was on account of 73rd amendment to the Constitution by which Part-IX consisting of Article 243 to Article 243(O) has been introduced in the Constitution. The Constitution of Panchayats has been prescribed under Article 243-B and same reads thus:

"243B. Constitution of Panchayats

(1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part

(2) Notwithstanding anything in clause (1), Panchayats at the intermediate level may not be constituted in a State having a population not exceeding twenty lakhs."

14. It is in the light of the aforesaid provisions of the Constitution that one has to examine the provisions of the H.P. Panchayati Raj Act, 1994 (for short 'Act'), H.P. Panchayati Raj Rules or for that matter the H.P. Panchayati Raj (Election) Rules, 1994 (for short Election Rules) as these have been enacted so as to bring these in conformity with the amended provisions of 73rd amendment of the Constitution.

15. Section 8 of the Act, provides for Constitution of Gram Panchayats and reads thus:

"8. Constitution of Gram Panchayats.-

(1) There shall be a Gram Panchayat for a Gram Sabha and every Gram Sabha shall, in the prescribed manner, elect from amongst its members a [Pradhan and Up-Pradhan] of the Sabha who shall also be called the [Pradhan and Up-Pradhan] of the Gram Panchayat and shall also elect from amongst its members an Executive Committee called the Gram Panchayat consisting of such number of persons not being less than seven and more than fifteen, including [Pradhan and Up-Pradhan] as the Government may by notification determine:

[Provided that the number of members excluding [Pradhan and Up-Pradhan] to be assigned to each Gram Sabha, shall be determined on the following scale:-

(a) with a population not exceeding 1750 .. five

(b) with a population exceeding 1750 but not exceeding 2750 .. seven

(c) with a population exceeding 2750 but not exceeding 3750 ..nine

(d) with a population exceeding 3750 but not exceeding 4750 ..eleven

(e) with a population exceeding 4750 ..thirteen:]

Provided further that the number of members of a Gram Panchayat, excluding [Pradhan and Up-Pradhan] shall be determined in such a manner that the ratio between the population of the Gram Sabha and the number of seats of members in such a Panchayat to be filled by election shall, so far as practicable, be the same throughout the Sabha area:

[Provided further that the member of the Panchayat Samiti, representing a part or whole of the Gram Sabha area shall also be the member of the concerned Gram Panchayat(s) and shall have the right to vote.]

(2) Seats shall be reserved in a Gram Panchayat--

(a) for the Scheduled Castes, and

(b) for the Scheduled Tribes,

and the number of seats so reserved shall bear, as nearly as may be, same proportion to the total number of seats in the Gram Panchayat as the population of the Scheduled Castes or the Scheduled Tribes in the Sabha area bears to the total population of the Sabha area:

Provided that in case no reservation of seats is possible as aforesaid due to small population of the Scheduled Castes and the population of Scheduled Castes of the Sabha area is atleast five percent of the total population of the Sabha area, one seat shall be reserved for the Scheduled Castes in such a Gram Panchayat:

Provided further that where there is no eligible candidate belonging to the Scheduled Castes to be elected as a member of the Gram Panchayat, no seat shall be reserved for Scheduled Castes:

Provided further that in non-tribal areas where there is Scheduled Tribes population in a Gram Sabha, seats shall be reserved for such members of the Scheduled Tribes within the reservation provided for the members of the Scheduled Castes and the determination of seats to be reserved amongst the Scheduled Castes and Scheduled Tribes shall be in proportion to their population in that Gram Sabha.

Explanation. *- The expression "non-tribal area" for the purpose of this proviso shall mean the areas other than the Scheduled Areas specified in relation to the State of Himachal Pradesh.*

(3) [One-half] of the total number of seats reserved under sub-section (2) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3-A) [One-half] (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Gram Panchayat shall be reserved for women.]

(4) The State Government may, by general or special order, reserve such number of seats for persons belonging to Backward Classes in a Gram Panchayat, not exceeding the proportion to the total number of seats to be filled by direct election in the Gram Panchayat as the population of the persons belonging to Backward Classes in that Gram Sabha area bears to the total population of that area and may further reserve [one-half] of the total seats reserved under this sub-section for women belonging to Backward Classes.

(5) The seats reserved under sub-sections (2),(3), (3-A)] and (4) shall be allotted by rotation to different constituencies in the Sabha area in such manner as may be prescribed.

(6) If for any reason the election to any Gram Panchayat does not result in the election of required number of persons as specified in sub-section (1), the Deputy

Commissioner, shall within one month from the date on which the names of the elected persons are published by him under section 126 arrange another election to make up the deficiency."

16. Section 124 of the Act, reads thus:

*"**124. Territorial Constituencies**.- For the convenience of the election and also after every increase increase or decrease of the Panchayat area, the Deputy Commissioner shall, in accordance with such rules as may be prescribed in this behalf by the State Government-*

(a) divide the Panchayat area into as many single member territorial constituencies as the number of members are required to be elected:

(b) determine the extent of each territorial constituency; and

(c) determine the territorial constituency or constituencies in which seats are reserved under this Act.]

17. Chapter-II of the Election Rules, deals with the delimitation of Constituencies of Panchayats and the relevant Rules contained therein reads thus:

"DELIMITATION OF CONSTITUENCIES OF PANCHAYATS

3. Gram Sabha area to be divided into constituencies.-

(1) For the purpose of holding of election of members to a Gram Panchayat the Sabha area shall be divided into constituencies.

(2) The number of constituencies under sub-rule (1) shall be deter-mined in accordance with the provisions of section 8.

***4. Limits of constituencies.-** (1) As far as practicable each constituency shall have equal population and each constituency shall be geographically compact and contiguous in areas and shall have natural boundaries, such as roads, paths, lanes, streets, streams, canal , drains, jungles, house No., ridges or such other marks which can easily be distinguished.*

(2) The constituency shall be delimited from the map of the Gram Sabha starting from North towards East and ending towards South to West direction.

(3) one member shall be elected from each constituency.

(4) The limits of each constituency shall be defined in all four direc-tions as follows:-

(i) Bounded on the North by .....

(ii) Bounded on the South by .....

(iii) Bounded on the East by .....

(iv) Bounded on the West by .....

5. Proposal for delimitation of constituencies and its publication.-

The Deputy Commissioner or any other officer, authorised by him in this behalf shall cause to be published a proposal for delimitation of constituencies by dividing a Gram Sabha area into constituencies and shall also indicate the territorial limits of each such constituency and shall keep the proposal open for inspection in the office of the Gram Panchayat, Panchayat Samiti within the territorial jurisdiction of which such sabha area falls and by affixing a copy of the same at two conspicuous places within such sabha area for inviting public objections thereon, within 7 days.

***6. Disposal of objections and final order**.-The Deputy Commissioner, or any other officer authorised by him in this behalf, on receipt of objections, if any, under rule 5 shall inquire into the same and shall consider them within a period of seven days or such a shorter time as may be fixed by the Government and final order of*

delimitation of constituencies shall be made by him only after recording brief reasons for the acceptance or rejection of the objections.

***7. Name and number of constituency**.-Each constituency shall be known by the number given to that constituency, serially and it shall also be given a name, if practicable.*

***8. Delimitation of constituencies of a Panchayat Samiti**.-(1) The Deputy Commissioner or any other officer authorised by him in this behalf shall divide the Panchayat Samiti area into as many single member territorial constituencies as the number of members is required to be elected under sub-section (3) of section 78.*

(2) While delimiting the constituencies of a Panchayat Samiti, constituency of the Gram Panchayat shall be a unit. The constituencies shall be delimited from the map of the Panchayat Samiti area starting from North towards East and ending towards South to West, and every constituency of a Panchayat Samiti shall be assigned a serial number and the name of the Constituency of Panchayat Samiti. The name of constituency of a Panchayat Samiti may be assigned on the name of a Gram Sabha having largest population in that constituency.

(3) The limits of each constituency shall be defined in all four directions as follows:-

(i) Bounded on the North by .....

(ii) Bounded on the South by .....

(iii) Bounded on the East by .....

(iv) Bounded on the West by .....

(4) The Deputy Commissioner or any other officer authorised by him in this behalf, shall cause to be published a proposal for delimitation of constituencies by dividing a Samiti area into single member constituencies and shall also indicate the territorial limits of each such constituency and shall keep the proposal open for inspection in the office of the Panchayat Samiti and in each of offices of Gram Panchayats falling within the Panchayat Samiti area and by affixing copy of such proposal at two conspicuous places in each Sabha area for inviting public objections thereof, within seven days.

(5) The Deputy Commissioner, or any other officer authorised by him in this behalf on receipt of objections, if any, under sub-rule (4) shall inquire into the same and shall consider them within a period of seven days or such shorter periods as may be fixed by the Government and final order of delimitation of constituencies shall be issued by him only after recording in brief the reasons for the acceptance or rejection of such objection.

***9. Delimitation of constituencies of a Zila Parishad**.-*

(1) The Deputy Commissioner shall divide the Zila Parishad area into as many single member territorial constituencies as the number of members are required to be elected under sub-section (2) of section 89.

(2) While delimiting the constituencies of Zila Parishad, Sabha area shall be a unit. The constituencies shall be delimited from the map of the Zila Parishad area starting from North towards East and ending towards South to West and every constituency shall be assigned serial number and the name. The name of constituency may be assigned on the name of a Gram Sabha having the largest population in that constituency.

(3) The limits of each constituency shall be defined in all four directions as follows:-

(i) Bounded on the North by .....

(ii) Bounded on the South by .....

(iii) Bounded on the East by .....

(iv) Bounded on the West by .....

(4) The Deputy Commissioner, shall cause to be published a proposal for delimitation of constituencies by dividing a Zila Parishad area into single member constituencies and also indicate the territorial limits of each such constituency and shall keep the proposal open for inspection in the office of the Zila Parishad, Panchayat Samiti and in each of the offices of Gram Panchayats falling within the Zila Parishad area and by affixing a copy of such proposal at two conspicuous places within each Sabha area for inviting public objections thereon, within seven days.

(5) The Deputy Commissioner on receipt of objections, if any, under sub-rule (4) shall inquire into the same and shall consider them within a period of seven days and final order of delimitation shall be issued by him only after recording in brief the reasons for the acceptance or rejection of such objections.

***10. Appeal**.-Any elector aggrieved by the orders of the Deputy Commissioner may file an appeal to the Divisional Commissioner within a period of 10 days and who, after giving an opportunity of being heard to the appellant shall decide the same within a period of 15 days and communicate his orders thereon to the Deputy Commissioner. The order passed by the Divisional Commissioner shall be final.*

11. Final publication of delimitation of constituencies.-

(1) The delimitation made under rules 6, 8 and 9 shall be amended in the light of the orders of the Divisional Commissioner, if any, made under rule 10 and the delimitation shall be finalised within a period of 30 days from the date of publication of the proposal in this behalf. A copy of the final orders of the delimitation of constituencies of the Panchayats shall be affixed on the notice boards of the offices of the Deputy Commissioner, Zila Parishad, Panchayat Samiti, Gram Panchayat and at such other places as the Deputy Commissioner may decide and the copies of the same shall also be sent to the State Election Commission and the State Government.

(2) An elector may obtain a copy of the final delimitation order by making an application to the Deputy Commissioner or to the Secretary of the Zila Parishad, Panchayat Samiti, Gram Panchayat, as the case may be, who shall make available the same to the said elector on payment of rupees five per page or part thereof against cash receipt.]"

18. The aforesaid provisions make it crystal clear that a specific procedure has been prescribed under the statutory rules and, therefore, there is no possibility of making any deviation therefrom by the authorities concerned.

19. Now, the further question that would arise for consideration is as to whether the procedure envisaged for proposal of delimitation of Zila Parishads is mandatory or directory. While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting such a provision and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is passed for the purpose of enabling the doing of something and prescribes the formalities for doing certain things.

20. In ***Dattatraya Moreshwar vs. The State of Bombay and others, AIR 1952 SC 181,*** the Hon'ble Supreme Court has laid down that law which creates public duties is directory but it if confers private rights it is mandatory. Relevant passage from this judgment is quoted below:

"It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provision of a statute relate to the performance of a public duty and the

case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done."

21. In ***State of U.P. and others vs. Babu Ram Upadhya, AIR 1961 SC 751,*** a Constitution Bench of the Hon'ble Supreme Court considered the issue as to whether the provision involved in the said case was mandatory and held as under:

"For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

22. In ***Raza Buland Sugar Co. Ltd. Rampur vs. Municipal Board, Rampur, AIR 1965 SC 895,*** the Hon'ble Supreme Court held that whether a provision is mandatory or directory, would, in the ultimate analysis, depend upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

23. In ***Sharif-Ud-Din vs. Abdul Gani Lone, (1980) 1 SCC 403,*** the Hon'ble Supreme Court while considering the provisions of sub-section (3) of Section 89 of the J & K Representation of People Act, 1957, held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance of the rule may be enough and where the statute provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory. The Hon'ble Supreme court held as under:-

"In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question is to sub-serve and its design and the context in which it is enacted. If the object of the law is required to be defeated by non-compliance with it, it has to be regarded as mandatory....Whenever the statute provides that a particular act is to be done in a particular manner and also lays down that the failure to compliance with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

24. On the basis of the aforesaid exposition of law, it can conveniently be held that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Further, whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed.

25. Examined in the light of the law referred to above, this Court entertains no doubt that the procedure as prescribed under Chapter-II of the Election Rules is mandatory and is, therefore, required to be scrupulously followed. Statutory provisions have a very serious repercussion and it, therefore, implicitly makes it imperative and obligatory on the part of the authority to have strict adherence to such provisions.

26. It is not in dispute that it was in exercise of the powers under Rule 10 that the Divisional Commissioner had initially vide order dated 9.9.2015 and thereafter subsequently vide order dated 6.11.2015 set-aside the entire process of delimitation of the constituencies of Zila

Parishad, Shimla on the ground that this exercise was in violation of Rule 9 of the Election Rules (supra). Pertinently, though, vide subsequent order dated 6.11.2015, the appeal filed by the petitioner was accepted, yet, this was not followed by an order of remand, however, that part of the order as passed by the Divisional Commissioner can only be taken to be an oversight having no effect on the merits of the case. However, at the same time, this Court will have to fall back on the initial order passed by the Divisional Commissioner on 9.9.2015 as to what precisely was required to be done by respondent No.2 after the order passed by him had been set aside, the relevant portion whereof reads thus:

> *"In view of the above discussions, the appeal is accepted and the order for final delimitation issued qua the constituencies of Zila Parishad Shimla, District Shimla is set aside and case is remanded back to the Deputy Commissioner, Shimla with the direction to complete the delimitation proceedings afresh as per Rule 9 of the H.P. Panchayati Raj (Election) Rules, 1994. It will also be appropriate for the Deputy Commissioner, Shimla to direct the Block Development Officers, Panchayat Secretaries and District Panchayat Officer concerned to display the draft notification on the notice board in the presence of two independent witnesses and send a certificate to this effect to them for record purposes. A copy of this order be sent to the Deputy Commissioner Shimla through special messenger for taking further action and case file of this Court be consigned to the Record Room after due completion."*

27. From the aforesaid extracted portion of the order, it would be evidently clear that respondent No.2 in order to complete the delimitation proceedings afresh and thereby comply with the order passed by the Divisional Commissioner was required to ensure:

> *(i) that the process of delimitation is undertaken afresh as per Rule 9 of the Election Rules;*
>
> *(ii) ensure that the Block Development Officers, Panchayat Secretaries and District Panchayat Officer concerned, display the draft notification on the notice board in the presence of two independent witnesses and send a certificate to this effect to him for record purposes.*

28. In order to satisfy myself as to whether these directions had in fact been complied with in letter and spirit, the records of the Deputy Commissioner were summoned. The records reveal that immediately after passing of the order by the Divisional Commissioner on 6.11.2015 and even before the receipt of copy thereof, a note in vernacular was put up to the Deputy Commissioner, the English translation whereof reads as under:

> "***In the ofice of District Panchayat Officer***
>
> *Kindly peruse: With reference to the appeal filed by Dr. Sushant Deshta, S/o Sh. Devender Deshta, R/o village Khangta, P.O. Tikkar, Tehsil Rohru, District Shimla, H.P., Sh. Ritesh Keprat S/o Sh. Hariman Prakash Keprat, R/o village and Post office Purag, Tehsil Kotkhai, District Shimla and Sh. Gopal Sharma S/o Sh. Vasudev Sharma, village Moonga, P.O. Chamba, Tehsil Suni, District Shimla, H.P. and others against the Notification dated 15.10.2015, issued by the Deputy Commissioner regarding delimitation, Ld. Divisional Commissioner on 6.11.2015, in the presence of District Panchayat officer, other officials of the office and appellants set aside and quashed the Notification dated 15.10.2015 as the Notification regarding re-constitution of the Zila Parishads has not been issued in accordance with the provisions of Act/Rules. In this regard it is submitted that notifications regarding delimitation of the wards of Zila Parishad, Shimla have already been issued twice earlier. Therefore, in compliance of the orders of the Ld. Divisional Commissioner dated 6.11.2015, notification regarding delimitation will have to be issued afresh and it will not be desirable to wait for the written orders of Ld. Divisional Commissioner because very little time is left for the election of the Panchayati Raj institutions and delimitation of constituencies is a lengthy process.*

It is further submitted that notification regarding delimitation of the Panchayati Raj Institution was issued on 20.8.2015 and appeal against the said notification could be filed before the Hon'ble Divisional Commissioner from 21.8.2015 to 30.8.2015. During this period 10 appeals were filed before the Ld. Divisional Commissioner which was heard by him on 9.9.2015. While deciding the aforesaid appeals, he observed that wards of Zila Parishad have been notified by the Deputy Commissioner on the basis of the Census of 2011 whereas in the draft notification, ward and villages were notified as per the elections held in 2010, which leads to uncertainty as to whether the Deputy Commissioner entertained the objections from the general public or not. He has pointed out in his order that as per the provisions of rule 9(4) and 9(5), a draft proposal was required to be prepared at the first instance and thereafter objections/queries of the public were to be received. Final notification was to be issued after considering the objection & passing appropriate orders regarding objections He also observed that proposal regarding the delimitations were not prepared as per rules and public was not given appropriate opportunity to file the objections.

He accepted all the aforesaid appeals and set aside the orders of Deputy Commissioner regarding delimitation of the wards of Zila Parishad with the direction to start afresh the delimitation process as per Rule 9 of the Panchayati Raj (Election) Act, 1994. Further, Block Development officers, Panchayat Secretaries and District Panchayat Officers were directed to display the draft notification on the notice board in the presence of two independent witnesses.

Complying with the aforesaid orders of Ld. Divisional Commissioner, final proposals of delimitation of wards of Zila Parishad as existed in 2010 were considered as the draft proposals and accordingly on 3.10.2015, draft proposals regarding delimitation were re-issued. On 15.10.2015, after hearing the objections received in this regard, notification was issued by Deputy Commissioner and appeal against the said notification could be filed before the Hon'ble Divisional Commissioner w.e.f. 16.10.2015 to 25.10.2015. During this period, 3 appeals were filed before Ld. Divisional Commissioner which were heard by him and on 6.11.2015, he set aside the orders of Deputy Commissioner. He also observed in his order that the Deputy Commissioner did not comply the orders passed by his office on 9.9.2015 and the same discrepancy was noticed in the notification regarding delimitation issued on 3.10.2015 which was found in the draft notification issued on 7.8.2015 and the orders passed by him have not been adhered to.

In this regard it is submitted that Ld. Hon'ble Divisional Commissioner ordered that the objections raised by the appellants be included in the proposals and thereafter draft notification regarding the de-limitation be issued. After hearing the objections received on these draft notifications and passing an order qua their appropriateness. The orders be included in the final publication and the notification be issued.

Sir, in compliance of the orders of Hon'ble Divisional Commissioner, proposal of delimitation of the wards of Zila Parishad has been prepared as per Section 124 of the Himachal Pradesh Panchayati Raj Act, 1994 and as per the provisions contained in the Rule 5, 8, 9 of the Himachal Pradesh Panchayati Raj(Election) Rules, 1994.(flag "K") and copies of proposal regarding delimitation of wards will be forwarded to the offices of Zila Parishad, Shimla, all Panchayat Samitis and Gram Panchayats for inviting objections and same will be affixed on the notice boards by the secretaries of respective Zila Parishads'/Panchayat Samiti and Gram Panchayats' in the presence of two independent witnesses whose signatures will also be obtained. Further concerned secretaries of Zila Parishads'/Panchayat Samiti and Gram Panchayats will furnish certificate in this

regard. To complete the further proceeding in respect of de-limitation of wards, the following schedule shall be followed:

Sl. No.	*Particulars of proceedings*	*Prescribed time period*	*Authorized officer/place*
1.	*Publication of the delimitation process of the wards of Zila Parishad.*	*6.11.2005*	*By the Deputy Commissioner, Shimla*
2.	*Displaying the lists of the wards of Zila Parishad for perusal*	*w.e.f. 7.11.2015 to 13.11.2015(7 days')*	*Offices of the concerned bodies*
3.	*Hearing of the objections in respect of the delimitation of the wards of Zila Parishad.*	*16.11.2015*	*By the Deputy Commissioner, Shimla*
4.	*Passing of the final orders by the Deputy Commissioner in respect of the publication of delimitation process of the wards of Zila Parishad after hearing the objections raised in this respect.*	*16.11.2015*	*By the Deputy Commissioner, Shimla*
5.	*Filing of the appeal against the final orders passed by the Deputy Commissioner regarding the publication of delimitation process of the wards of Zila Parishad after hearing the objections raised in this respect.*	*w.e.f. 17.11.2015 to 26.11.2015 (with in 10 days')*	*To the Divisional Commissioner, Shimla*
6.	*Decision regarding the appeals by the Divisional Commissioner*	*27.11.2015 to 1.12.2015*	*By the Divisional Commissioner, Shimla*
7.	*After deciding the appeals by the Divisional Commissioner, final publication regarding the delimitation of the wards*	*2.12.2015*	*By the Divisional Commissioner, Shimla*

File is submitted for favour of consideration, approval and signatures, please.
Sd//"

29. A perusal of the aforesaid noting reveals that the respondents even before the receipt of the copy of the order passed by the Divisional Commissioner very well knew and understood the content and directions passed by the Divisional Commissioner whereby the proposal regarding delimitation of wards was required to be forwarded to the offices of Zila Parishad, Shimla, all Panchayat Samitis and Gram Panchayats for inviting objections and same were to be affixed on the notice boards by the Secretaries of respective Zila Parishads'/ Panchayat Samiti and Gram Panchayats' and this was to be effected in the presence of two independent witnesses whose signatures were to be obtained.

30. However, the further scrutiny of record reveals that practically no such exercise, in fact, had been undertaken by the respondents. There is nothing on the record to indicate that the proposal regarding delimitation for inviting the objections was affixed on all notice boards by the Secretaries of the concerned authorities and further there is no document evincing the signatures of two independent witnesses that were required to be obtained, which clearly indicates that the directions passed by the Divisional Commissioner had not at all been complied with before issuance of final order of delimitation.

31. No doubt, some objections had been filed. However, from a closer scrutiny of these objections, it transpires that though some of the persons could lay their hands on the proposal regarding delimitation and had filed their specific objections. While some of the persons filed random objections without even having any knowledge regarding the proposed delimitation and had clearly stated so about the non display of the proposal regarding delimitation.

32. It is also borne out from the record that three persons i.e. Sunder Singh Nainta, Suresh Salakta and Pratap Zinta filed three separate objections, but the contents thereof were the same and reads thus:

"To

The Deputy Commissioner,
Shimla, District Shimla.

Subject: Objections with respect to the delimitation of the Zila Parishad wards/constituencies of the Panchayati Raj Institutions for the year 2015.

Sir,

With reference to your office letter No. PCH-SML/Delimitation Ward 2015-2232-42 regarding the de-limitation of the Zila Parishad, Ward Tikkar, hereby submit our objections as follows:

1. As per the census of 2011, the total population of the Zila Parishad ward Tikkar in 2010 was 23459 which comprised the seven Panchayats of Rohru, Vidhan Sabha constituency viz., Sheel, Bral, Katlah, Karchari, Karasa, Ukhali, Mahaidali and Shekhal respectively with the total population of 9443 and 8 Panchayats' of Jubbal Kotkhai i.e. Kativan, Kutari, Pujarali No.3, Dharara, Hanstari, Pujarali No.4, Sharontha and it constituent a single ward. New ward of Seema Rantadi has been carved out of aforesaid seven Panchayats with populations of 9443,Lower Koti & Munchar Panchayat of Arhal ward and Samoli and Semma Rantad; Panchayats of Dhagoli Ward. The total population of this ward is only 17369 whereas the 8 Panchayats of Tikkar area having population of 14016 has been annexed in Kotkhai. We object this move. If new ward is required to be made, then it should be carved out from the 8 Panchayats of Tikkar area which have the highest population of 14016.

2. That the 8 Panchayat(s) of aforesaid Tikkar ward, proposed to merge with Kotkhai area, having different geographical conditions, means of communication, transport and administrative access.

3. That if the delimitation of the aforesaid ward of Zila Parishad has been undertaken on the basis of the Vidhan Sabha constituencies, whether it has been implemented in the entire Shimla District? If no, then restore the status of 2010 in respect of this ward too.

4. That the Seao ward of Gram Panchayat, Pujarli No.4 which falls in the Vidhan Sabha constituency of Rohru has been included in the Kotkhai constituency.

Therefore, in view of the aforesaid objection, the Deputy Commissioner, Shimla is requested to issue the appropriate orders in the interest of general public.

Thanking you.

Applicant

Date: 12.11.2015 *Sd/-*

Place: Shimla. *Sunder Singh Neta."*

33. One Neelam Saraik also filed objections, which reads thus:

"To

The Deputy Commissioner,
Shimla, District Shimla.

Subject: Regarding objection with respect to the delimitation of Zila Parishad ward, Tharola.

Sir,

With reference to subject cited above, it is submitted that presently, it has been proposed to denotify the Zila Parishad ward, Tharol, Development Block, Jubbal-Kotkhai and to annex it in the Tikkar and Kalbog. Further, Panchayats of Jai Peeri Mata Ward have also been proposed to be included in them. Due to these alterations, Tharola ward will cease to exist which will be against the geographical and social conditions of this area. Apart from this, it will have an adverse effect at the administrative level. Proposed ward will be divided into two different Development Blocks and Sub Divisions which will create many hardships for people in getting their work done. Similarly, representatives of people will also face difficulties in executing the work of public. This adjustment will lead to many difficulties. Therefore, I completely disagree with this process and the status of 2010 be maintained.

Therefore, keeping in view the aforesaid intention and feelings of general public, I, as an elected representativeand in full state of mind, file my objection in this regard.

If necessary, you can call me to present my views personally. I will always be available for that.

Thanking you.

Yours faithfully,
Sd/-
Neelam Saraik."

34. One Ritesh Kaprate also filed random objections, which reads thus:

"To

The Deputy Commissioner, Shimla,
District Shimla, H.P.

Subject: Regarding Delimitation of Tharola Ward,
Tehsil Kotkhai, District Shimla.

Sir,

This is in reference to your office notification No. PCH-SML/delimitation ward 2015-2232-42 for following objections:-

1. It is submitted that above mentioned notification regarding delimitation is without jurisdiction and against provision of law, especially when the State Election Commission vide its latest notification dated 09.11.2015 has clarified that

the notification dated 9th October, 2015 issued by the State Election Commission will have its prospective effect and the subsequent notification are not sustainable under the law.

2. It is submitted that the authorities has failed to follow the procedure prescribed under Rule 9 (4) of the Himachal Pradesh Panchayati Raj Election Rules, 1994, especially when the proposed draft of the area required to delimited from the area of Zila Parishad was neither published nor intimated to the respective affected Panchayats. The reasonable opportunity for raising the objections and hearing was not properly provided.

Therefore, your goodself is requested to restore the status of 2010 in larger public interest.

Thanking you.

Yours sincerely,

Dated: 13th Nov.,2015. *Sd/-*

Place: Shimla. *(Ritesh Keprate)."*

35. Whereas Ajay Goandka, Prem Raj Janartha, Ajay Tegta, Shamsher Sunta, Hitesh Dhanta, Virender Nainta, Nishant Kumar, Rajat Chauhan, Ankur Chauhan and Pushkar Chauhan though filed separate objections, but the contents thereof is verbatim the same and reads thus:

"Dated: 13.11.15.

To

The Deputy Commissioner,
Distt. Shimla, Himachal Pradesh.

Subject:- Objections w.r.t. notification dated 6.11.2015 vide : PHC-SML/Delimitation/Ward-2015-2232-42.

Dear Sir,

It is submitted to your kind self that I intend to file objections for the above captioned matter regarding delimitation of Zila Parishad Ward, Tikkar (Sub-division, Rohru) as under:-

1. That the Panchayats as mentioned in the draft delimitation notification of Tikkar ward i.e. Dharara, Hanstari, Kadiwan, Kuthari, Pujarli-3, Pujarli-4, Sharontha & Tikkar falls in Rohru Sub Division and development block whereas other remaining nine panchayats falls in Jubbal block & with Sub-Division, Theog.

2. That the Panchayat(s) which have been proposed to merge with Tikkar ward are geographically and topographically separated by physical barriers which are not easily accessible.

3. That the delimitation of Zila Parishad Ward on the basis of parliamentary constituency is against the established principles of law and is thus unconstitutional.

4. That it is apparent from the perusal of notification dated 09.10.2015 from the office of Election Commission that there shall not be delimitation of Zila Parishad ward(s) in the 2015 Panchayat elections.

5. That the draft notification in question has been notified in violation of established procedures of law, as the order passed by Ld. Divisional Commissioner dated 06.11.2015 whereby Ld. Div. Commissioner has quashed and set-aside the order for final delimitation issued on 15.10.2015 by Deputy Commissioner, Shimla.

6. That the proposed draft notification is not viable in its present form as it shall create a situation of pandemonium among the residents of concerned area as Tikkar ward wil fall in two different blocks and it will further increase the complexity.

7. That it is apparent from the entire series of events which has conspired till date that some political motives as well as an element of favourism is involved for the benefit of some politically influential persons.

It is, therefore, desired keeping in view the aforementioned facts that the status of year 2010 be maintained in the interest of law and justice.

Yours sincerely,
Sd/-
Ajay Gondka
S/o Sh. Khushi Ram Gondka,
Vill. Gujandli, P.O., Tikkar,
Tehsil Rohru, Distt. Shimla(HP)."

36. The Deputy Commissioner, i.e. respondent No.2 instead of deciding these objections individually, invented a noval procedure of having a joint statement of all the objectionists prepared and the same reads thus:

"JOINT STATEMENT ON BEHALF OF ALL THE OBJECTIONIST.

Dated: November 16, 2015.

We are placing on record Annexure A-1 which is a copy of statement stating that till dated 9.11.2011, no publication of the drat notification pertaining to delimitation of Ward Tikkar, proposed vide letter No. PCH-SML/delimitation/Ward-2015-2232-42, dated 6.11.2015 was received and hence was not affixed in the concerned Panchayat areas as is required under the provisions of law and moreover, statutory time period for filing objections is to be calculated thereon, i.e. after affixation has been effected.

We are also placing on record copy of Model Code of Conduct (as Annexure A-2) dated 6th October, 2015 pertaining to State Election Commission, Himachal Pradesh in which Section 12.1 reads as under:-

> *"The structural, classification or area of the Panchayats and Municipalities shall not be altered during a period of one hundred and twenty days ending on the date on which the five years term of the said institutions are due to expire, no decision taken earlier shall be implemented during this period."*

It is also averred that the draft Notification regarding the delimitation is without jurisdiction and the provisions of law as first proviso of clause 2.1 of the Himachal Pradesh Panchayats and Municipalities Model Code of Conduct, 2015 provides that the Commission may enforce different provisions of this Code on different dates and hence Commission enforced Clause 12.1 "Organizational Status Quo" of the said Code on 9th October, 2015 with immediate effect and the Commission had no intention to enforce the said Clause retrospectively. It means that Model Code of Conduct" was in force from 9th October, 2015. Moreover, Election Commission in its detailed Notification No. SEC-16-70-2014-4513-15, dated 2nd November, 2015 has stated that Notification dated 9th October, 2015 by the State Government, if not given effect, the delimitation of the Wards in respect of affected Panchayats and Municipalities will have to be undertan de-novo and Commission will have to generate the new draft electoral rolls as per delimitation, which will further delay the Election process (Annexure A-3).

It is further averred that objectionists fail to understand by any stretch of imagination that on which grounds the draft notification dated 6.11.2016 has been prepared as the Ld. Divisional Commissioner on dated 6.11.2015 has quashed and set-aside the order for final delimitation issued on 15.10.2015 and automatically all proceedings thereto ought to have been stand quashed. Hence, it is apparent on the fact of record and from the entire series of events which has conspired till date that there is a major procedural lapse in the entire process so initiated.

It is, therefore, prayed in this premise that status-quo of the year 2010 be maintained for the sake of larger public interest and in the interest of law and justice.

R O & A C

Sd/-

Objectionists: *DEPUTY COMMISSIONER, SHIMLA.*

1. Sd/- Susheel Gautam, Adv.

2. Sd/- Ritesh Keprate.

3. Sd/- Neelam Saraik.

4. Sd/- Mohinder Singh.

5. Sd/- Sunder Singh Nainta.

6. Sd/- Hitesh Dhanta."

37. This joint statement appears to have been got signed by only six of the objectionists and decided by a common order dated 16.11.2015, which reads thus:

"**Office Order**

Subject: *Representation/Objections on the proposed draft of delimitation of Zila Parishad ward Shimla circulated vide letter No.PCH-SML/Delimitation/ward-2015-2232-42 dated 6.11.15.*

The proposed/draft notification of delimitation of Zila Parishad Shimla was issued vide letter No.PCH-SML/Delimitation/ward-2015-2232-42 dated 6.11.2015 in compliance with the Hon'ble Divisional Commissioner Shimla order dated 6.11.2015. This draft proposal was issued by also taking into consideration the objections/suggestions made by the applicants to the Hon'ble Divisional Commissioner, Shimla on the final notification made by undersigned on 15.10.2015. This draft notification of dated 6.11.2015 of delimitation of Zila Parishad Shimla was circulated to the public through respective Zila Parishad office, BDO office and Gram Panchayat institutions to be made public for objection to all the concerned Panchayat Samitis and Gram Panchayat of District Shimla w.e.f. 7.11.2015 to 13.11.2015. The general public was also asked to submit their objections if any. The date of hearing of these objections was fixed on 16.11.2015 in the office of undersigned after giving reasonable time. The draft notification was made as per the provisions of the Section 124 of the H.P. Panchayati Raj Act, 1994 and all the provisions of this section were adhered strictly.

On the above proposed draft notification of delimitation of Zila Parishad Shimla 15 (fifteen) objections are received. The representatives were given opportunity of being heard and their written statements was also recorded. After perusal of the record placed before me objections raised by the representatives were appreciated and dealt under Rule 6 of H.P. Panchayati Raj (Election) Rule, 1994 as follows:-

1) It was objected that the draft notification was not sent to the concerned Gram Panchayats and the area of the ward is not compact and contiguous. After considering the facts it is concluded that while preparing the draft notification of delimitation of Zila Parishad Shimla, utmost care have been given to make each

Zila Parishad ward Topographically and Geographically compact, contiguous, well connected by roads, telecommunication and natural boundaries. All 15 objection were received for this ward only. It is also mentioned here that the area of Zila Parishad ward Seema Rantari is a part of old Socio-geographic area from the time of pre-independence. This area is situated on the right and left side of the Pabber river. This area falls under Sub-division, Rohru and also Development Block, Rohru. As stated above and in para-2 due opportunity to the public was provided to represent on the draft. 15 (fifteen) objections are presented by the representatives by due date i.e. 16.11.2015, is itself a proof of that.

2. It is also objected that the due process has not been adopted while preparing and notifying the draft notification of delimitation of Zila Parishad Wards and procedural lapses are committed. It is worthwhile to mention here that the draft notifications of delimitations of Zila Parishad Shimla circulated for objection on 7.8.2015 and on 3.10.2015 were on the accepted final proposal for the delimitation of Panchayati Raj Institutions on which the election were held in year 2010. The provisions of H.P. Panchayati Raj Act, 1994 and H.P.Panchayati Raj (Election) Rules, 1994 are strictly adhered to. Hence, no procedural lapses are committed while preparing and notifying the draft proposals of delimitation earlier as the proposal was to seek suggestions or objections on the existing Zila Parishad Wards.

3. It was also objected that the draft proposal of delimitation of Zila Parishad ward can not be made in the light of State Election Commission notification dated 9.10.2015. In this context, it is clarified that the State Election Commission has clarified vide letter No. SEC-16-68/2011-I-4661 dated 3.11.2015 that their notification dated 9.10.2015 enforcing clause 12.1 of the model code of conduct is not applicable on delimitation of wards within Panchayats.

In view of the above observations all the 15 number of objections received against the delimitation of Zila Parishad Ward, Tikker are rejected as this ward has been constituted in the larger public interest keeping in view the Topographical and Geographical compactness, Historical, Cultural, Socio-political aspects, Natural barriers and connectivity with transportation and telecommunication not to forget the existing administrative sub-division and Development Block, Rohru.

The objections submitted are hence, rejected and the draft notification is made final. The notification of delimitations of the Zila Parishad ward be finally notified.

Sd/-
Deputy Commissioner,
Dated: 16.11.2015. Shimla. ”

38. The contents of the aforesaid order makes it clear that in totality as many as 15 objections had been received by the Deputy Commissioner, yet majority of objections as had been raised therein have not even been dealt with in the impugned order. This is clearly evident from the perusal of the objections and the decision taken thereupon.

39. It would be noticed that the objections as referred to in para 32 supra, specifically pertained to the annexation of 8 panchayats of Tikkar Ward in Kotkhai and it was specifically stated that if at all new ward is required to be made then it should be carved out from the 8 Panchayats of Tikkar area having the highest population of 14016. It was also pointed out that the 8 Panchayats of Tikkar ward that were proposed to be merged with Kotkhai were having different geographical conditions, means of communication, transport and administrative access. Similar objection was raised qua inclusion of Seao ward of Gram Panchayat, Pujarli No.4 in the Kotkhai constituency.

40. As regards the objections referred to in para 33 (supra), the proposed delimitation was challenged on the ground that though it has been proposed to denotify the Zila Parishad Ward, Tharol, Development Block, Jubbal-Kotkhai and to annex it in the Tikkar and Kalbog by inclusion of Panchayats of Jai Peeri Mata Ward, however that would result in Tharola ward being obliterate as it would cease to exist and same would be against the geographical and social conditions of this area. It was also pointed out that apart from the above, it will also have an adverse effect at the administrative level and proposed ward would result in division of two different development blocks and sub divisions which would create many hardships for people in getting their work done. Similarly, representatives of the people would also face difficulties in executing the work of the public and such adjustment is bound to lead many difficulties.

41. The objections as referred to in para 34 (supra) have been filed randomly wherein it has been categorically averred that the proposed delimitation is without jurisdiction and against the provision of law especially when the State Election Commission vide its latest notification dated 9.11.2015 has clarified that the notification dated 9.10.2015 earlier issued by it would have prospective effect and, therefore, the subsequent notification is not sustainable in the eyes of law. Apart from that, it has been categorically submitted that the authorities have failed to follow the procedure prescribed as envisaged under Rule 9 (4) of the H.P. Panchayati Raj Election Rules, 1994, especially when the proposed draft of the area required to delimited from the area of Zila Parishad was never published nor intimated to the respective affected Panchayats. It has specifically been averred that reasonable opportunity of raising the objections and hearing had not been provided for before the order of delimitation.

42. Now, adverting to the objections as raised by the objectors whose names find mention in para 35 (supra), it would be noticed that specific objections against the proposed merger of the Panchayats had been preferred wherein it was pointed out that the draft delimitation notification of Tikkar ward, which otherwise comprises of Dharara, Hanstari, Kadiwan, Kuthari, Pujarli-3, Pujarli-4, Sharontha and Tikkar falls in Rohru Sub Division and Development Block, whereas the other remaining nine panchayats fall in Jubbal block and with sub division, Theog, which are geographically and topographically separated by physical barriers and are not easily accessible. The delimitation of Zila Parishad Ward on the basis of parliamentary constituency was also objected to as being against the established principles of law and thus unconstitutional. It was specifically stated that the proposed draft notification was not viable in its present form and was bound to create a situation of pandemonium among the residents of concerned area as Tikkar ward would fall in two different blocks and it would further increase the complexity. Lastly, it was stated that the proposed delimitation was actuated by political motives and had an element of favouritism with the backing of some politically influential persons.

43. As has been noticed in para 36 (supra), the respondent No.2 instead of dealing with the objections individually, prepared a joint statement on behalf of the so called all the objectionists wherein none of the aforesaid objections have in fact even been noticed much less considered and obviously, therefore, the decision based upon the so called these objections is no decision in the eyes of law and cannot withstand judicial scrutiny.

44. In addition thereto, it would also be noticed that the petitioner alongwith the petition has appended as many as eight certificates issued by the Secretaries of various Gram Panchayats certifying that the notification regarding delimitation of wards dated 6.11.2015 had never been received by these Panchayats and pertinently all the certificates have been issued on 13.11.2015 or thereafter.

45. The respondents have failed to place on record of this writ petition any contemporaneous official record so as to controvert these allegations. More importantly even the records produced before this Court do not indicate that the notification regarding delimitation had been displayed on all the notice boards of the Block Development Officers, Panchayat Secretaries and District Panchayat Officers and have further failed to prove that this exercise was undertaken in the presence of two independent witnesses as had been directed by the Divisional

Commissioner in the order of remand. No certificate evincing this fact has been placed on record, meaning thereby, that not only the order passed by the Divisional Commissioner was not complied with while undertaking the exercise of delimitation, but even the provisions of Rule 9 were never adhered to and given a complete goby.

46. Now, the crucial question that emerges and calls for attention of this Court is the scope of judicial review in such matters. This Court entertains, no doubt that the power of judicial review in matters of the present kind is limited, but this Court definitely has the competence to examine whether the respondent No.2 (Deputy Commissioner) has applied its mind to the material available on record before passing the impugned order and further oversee as to whether these findings suffer from vice of arbitrariness or perversity etc.

47. It is settled law that non-consideration of relevant material renders an order perverse. A finding is said to be perverse when the same is not available or supported by evidence brought on record or the same are against law and suffer from vice of procedural irregularities. Arbitrariness in State action can be demonstrated by existence of different circumstances. Whenever both the decision making process and the decision taken are based on irrelevant facts, while ignoring relevant considerations, such an action can normally be termed as arbitrary. Where the process of decision making is followed but proper reasoning is not recorded for arriving at a conclusion, the action may still fall in the category of arbitrariness. Rationality, reasonableness, objectivity and application of mind are some of the pre-requisites of proper decision making. The concept of transparency in the decision making process of the State has also become an essential part of our Administrative law.

48. It is more than settled that an action to be taken in a particular manner as provided by a statute, must be taken, done or performed in the manner prescribed or not at all. More than eighty years back, the Hon'ble Privy Council in ***Nazir Ahmad vs. King Emperor (AIR 1936, PC 253)*** held that where a power is given to do a certain thing in a certain way, the things must be done in that way or not at all and this has been approved and further expanded by the Hon'ble Supreme court in catena of judgments (Refer: ***Rao Shiv Bahadur Singh and anr***. vs. ***State of Vindh-P***, AIR 1954, SC 322; ***Deep Chand*** vs. ***State of Rajasthan***, AIR 1961 SC 1527; ***State of Uttar Pradesh*** vs. ***Singhara Singh and Ors***, AIR 1964, SC 358; ***Chandra Kishore Jha*** vs. ***Mahavir Prasad***, 1999 (8) SCC 266 ; ***Dhananjaya Reddy*** vs. ***State of Karnataka***, 2001 (4) SCC 9; ***State of Jharkhand & Ors*** vs. ***Ambay Cements and anr.*** (2005) 1 SCC 368 ; ***Gujarat Urja Vikas Nigam Limited*** vs. ***Essar Power Limited***, 2008 (4) SCC 755 ; ***Zuari Cement Ltd*** vs. ***Regional Director, ESIC, Hyderabad & Ors***., AIR 2015, SC 2764 ; and ***Uddar Gagan Properties Ltd***. vs. ***Sant Singh and Ors***. 2016 (5) JT 389.).

49. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusion alterius"* meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following some other course is not permissible.

50. It would be noticed that as per the provisions contained in Rule 9, the Deputy Commissioner while considering the objections under sub-rule 4 was required to enquire into the same and pass final order of delimitation after recording in brief the reasons for acceptance or rejection of such objection. What the Rule postulates is not that the Deputy Commissioner is to write a detailed judgment nevertheless brief reasons for the decision had to be indicated inasmuch as it is an order affecting the rights of the parties and must therefore be supported by reasons. The order has to be reflective of due cogitation and requisite rumination. It must reflect application of mind, consideration of facts in proper perspective and appropriate ratiocination. The reasons ascribed may not be lengthy, but they should be cogent, germane and reflective. It is to be borne in mind, to quote from *Wharton's Law Lexicon:*

> *"The very life of law, for when the reason of a law once ceases, the law itself generally ceases, because reason is the foundation of all our laws."*

51. The necessity for giving reasons and making the order a speaking one has travelled all along to be a necessary ingredient in a justice delivery system. The Hon'ble Supreme Court has repeatedly stressed that an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties must be a speaking one.

52. In ***Daya Ram vs. Raghunath (2007) 11 SCC 241***, the Hon'ble Supreme Court held as under:

> *"Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reasons is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking order. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."*

53. In ***Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank vs. Jagdish Sharan Varshney and others (2009) 4 SCC 240***, the Hon'ble Supreme Court held that "*whether there was an application of mind or not can only be disclosed by some reasons."*

54. Towards the impressing need to inform reasons for a decision and the manner in which they are to be informed, the Hon'ble Supreme Court has succinctly summarized the legal position in ***Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others (2010) 9 SCC 496,*** in the following terms:-

> *"(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
>
> *(b) A quasi-judicial authority must record reasons in support of its conclusions.*
>
> *(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*
>
> *(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*
>
> *(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.*
>
> *(f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*
>
> *(g) Reasons facilitate the process of judicial review by superior Courts.*
>
> *(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.*
>
> *(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-37).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v.Spain (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

55. Therefore, the further question that arises for consideration is as to whether the respondent No.2 while passing the impugned order has infact applied its mind and given reasons for his conclusion or has simply arrived at a conclusion without disclosing any reasons. As observed earlier, the real objections which were filed by the objectors were never considered by respondent No.2 and even the objections which were so considered by him, are bereft of any reason as is clearly evident from the perusal of impugned order (Annexure P-13) para-37 (supra). However, for better understanding and appreciation of the question posed before me, it will once again be necessary to refer to the impugned order of delimitation, the relevant portion whereof is extracted below:-

"*1) It was objected that the draft notification was not sent to the concerned Gram Panchayats and the area of the ward is not compact and contiguous. After considering the facts it is concluded that while preparing the draft notification of delimitation of Zila Parishad Shimla, utmost care have been given to make each Zila Parishad ward Topographically and Geographically compact, contiguous, well connected by roads, telecommunication and natural boundaries. All 15 objection were received for this ward only. It is also mentioned here that the area of Zila Parishad ward Seema Rantari is a part of old Socio-geographic area from the time of pre-independence. This area is situated on the right and left side of the Pabber river. This area falls under Sub-division, Rohru and also Development Block, Rohru. As stated above and in para-2 due opportunity to the public was provided to represent on the draft. 15 (fifteen) objections are presented by the representatives by due date i.e. 16.11.2015, is itself a proof of that.*

2. It is also objected that the due process has not been adopted while preparing and notifying the draft notification of delimitation of Zila Parishad Wards and procedural lapses are committed. It is worthwhile to mention here that the draft notifications of delimitations of Zila Parishad Shimla circulated for objection on 7.8.2015 and on 3.10.2015 were on the accepted final proposal for the delimitation of Panchayati Raj Institutions on which the election were held in year

2010. The provisions of H.P. Panchayati Raj Act, 1994 and H.P.Panchayati Raj (Election) Rules, 1994 are strictly adhered to. Hence, no procedural lapses are committed while preparing and notifying the draft proposals of delimitation earlier as the proposal was to seek suggestions or objections on the existing Zila Parishad Wards."

56. It would be noticed that respondent No.2 while adjudicating upon the objections made specific note of two objections namely:-

(i) the area of the ward is not compact and contiguous; and

(ii) that the draft notification has not been sent to the concerned Gram Panchayats.

But then without discussing and assigning reasons, respondent No.2 concludes by stating "*after considering the facts it is concluded that while preparing the draft notification of delimitation of Zila Parishad Shimla utmost care have been given to make each Zila Parishad ward Topographically and Geographically compact, contiguous, well connected by roads, telecommunication and natural boundaries."* How and on what basis respondent No.2 arrived at the aforesaid conclusion is anybody's guess. What weighed and worked in his mind is not reflected in the impugned order and, therefore, I have no hesitation to conclude that the extracted portion above is only a conclusion devoid of any reasons.

57. Similarly, as regards the objection regarding draft notification having not been sent to the concerned Gram Panchayats, respondent No.2 while dismissing the objection has observed as under:-

" *It is worthwhile to mention here that the draft notifications of delimitations of Zila Parishad Shimla circulated for objection on 7.8.2015 and on 3.10.2015 were on the accepted final proposal for the delimitation of Panchayati Raj Institutions on which the election were held in year 2010. The provisions of H.P. Panchayati Raj Act, 1994 and H.P.Panchayati Raj (Election) Rules, 1994 are strictly adhered to. Hence, no procedural lapses are committed while preparing and notifying the draft proposals of delimitation earlier as the proposal was to seek suggestions or objections on the existing Zila Parishad Wards."*

58. Evidently, even the aforesaid extracted portion is undoubtedly only a conclusion and how the same was arrived at is again anybody's guess. What was the material available with respondent No.2 or what prevailed upon him to arrive such a conclusion is again not spelt out. After-all, whether the notifications were sent to the concerned Gram Panchayats or not was a matter which was required to be established and proved by contemporaneous official records and reference whereof was essentially to be made in the impugned order. That apart, how and on what basis respondent No.2 concludes that there have been no procedural lapses committed while preparing and notifying the draft proposals of delimitation had to be clearly spelt out in the impugned order.

59. Thus, on the basis of impugned order, it cannot be said that the relevant factors have been objectively considered before passing the impugned order. The minimum that was expected of respondent No.2 was atleast to support his order with reasons which ought to have been cogent, clear and succinct, more especially, when the order passed by him was subject to appeal. As already concluded, the decision being bereft of any reasons is a result of caprice, whim and fancy of respondent No.2 and suffers from vice of arbitrariness as also non-application of mind.

60. In light of the various pronouncements of the Hon'ble Supreme Court noticed above, it is unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by Courts and statutory or other authorities exercising quasi judicial functions. I only need to reiterate that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the

repository of such power. There is nothing like a power without any limits or constraints. That is so even when a Court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.

61. The decision making process of respondent No.2 is itself so flawed that the impugned order cannot be allowed to stand even for a moment. It does not require Solomon's wisdom to state that it is absolutely sans reasons, bereft of analysis and shorn of appreciation. That apart, the inquiry conducted by respondent No.2 is in violation of the directions passed by the Divisional Commissioner and cannot otherwise strictly be said to be in compliance to Rule 9 of the Election Rules.

62. As observed by the Hon'ble Supreme Court, the absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before the higher forum and, therefore, the order passed by respondent No.2 is clearly not sustainable in the eyes of law.

63. Though, the learned Advocate General would contend that in case a fresh exercise is directed to be undertaken by the Deputy Commissioner, the same would only result in undoing the things which have already been settled.

64. I am afraid that such contention may be a valid and may weigh with the Court while dealing with service matters, more particularly, matter regarding interse seniority, but the same has no applicability in matters pertaining to elections which have to be decided strictly in accordance with the provisions of law i.e. Act, Rules etc. and these provisions have to be complied with and implemented with its rigours and have to be scrupulously followed.

65. Even otherwise, the aforesaid principle does not apply to the instant case as it is not even the case of the respondents that the petitioner has not approached this Court expeditiously for the relief or has been fence a sitter, who has allowed the things to happen and then approached the Court to put-forth a stale claim and thereby tried to unsettle the settled matters. The final order of delimitation in the instant case was published by respondent No.2 on 16.11.2015 and the instant petition thereafter was promptly filed by the petitioner on 23.11.2015.

66. The provisions contained in the various legislations including the Panchayati Raj Act, Rules and Election Rules are salutary and are intended to strengthen the fabric of our democracy at grass root level by curbing unprincipled and unethical practices and the rule of law are the basic features of democracy. The concept of free and fair elections are necessary concomitant and attribute of democracy.

67. In view of the aforesaid discussion, the order passed by the Deputy Commissioner, Shimla dated 16.11.2015 cannot be sustained. Accordingly, I find merit in this petition and the same is allowed. The order passed by respondent No.2 on 16.11.2015 (Annexure P-13) whereby he rejected the objections to the delimitation is quashed and set aside and consequently the final order of delimitation dated 16.11.2015 (Annexure P-14) is also quashed and set aside. The respondents are directed to undertake the delimitation of Zila Parishad Ward, Tikkar, afresh, that too, strictly in accordance with the orders passed by the Divisional Commissioner on 9.9.2015 (Annexure P-3) and also in accordance with the rules occupying the field.

68. The petition is disposed of in the aforesaid terms, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

M/s Techno Plastic Industries .....Petitioner
Versus
M/S Kiran General store and another .....Respondents.

Cr.MMO No. 324 of 2015
Date of Decision: 15.12.2016

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque, which was dishonoured on presentation- the accused pleaded guilty and was convicted by the Trial Court- sentence of fine equivalent to the amount mentioned in the cheque was imposed - held, that the accused can be sentenced to an imprisonment for a term, which may extend upto two years and fine which may extend to double the cheque amount – however, discretion has been conferred upon the Magistrate to impose appropriate sentence – the fact that the accused has pleaded guilty was a relevant fact to be taken into consideration while imposing sentence – the complainant has suffered no inconvenience by the sentence- petition dismissed. (Para-2 and 3)

For the petitioner: Mr. Anshul Attri, Advocate.
For the Respondents: Mr. Vivek, Advocate vice counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition stands directed by the petitioner herein against the impugned order rendered by the learned Judicial Magistrate, Ist Class-II, Nurpur, District Kangra, H.P. on 27.8.2015 in case No. 125-IV/2015, whereby the learned trial Court in sequel to the accused pleading guilty to the relevant charge convicted him for commission of an offence punishable under Section 138 of the Negotiable Instruments Act, also thereupon it imposed upon him a sentence of fine equivalent to the amount borne on the dishonored Negotiable instrument. Also a perusal of the impugned order discloses qua the accused on depositing the fine amount before the learned trial Court thereupon the complainant/petitioner herein standing entitled to receive it as compensation.

2. The learned counsel appearing for the complainant/petitioner has herebefore submitted with vigor qua the sentence afore-stated imposed upon the convict/accused being amenable for interference by this Court, its not holding concurrence with the mandate of Section 138 of the Negotiable Instruments Act. He submits qua the sentence of imprisonment prescribed therein also standing imposable upon the convict besides sentence of fine constituted in a sum double than the one borne in the dishonored instrument also being statutorily imposable upon the accused/convict whereas the aforesaid sentence(s) remaining un-imposed upon the convict by the learned Magistrate, renders the impugned order to beget an open infraction of its mandate. However the aforesaid submission is not amenable for acceptance significantly when the provisions of section 138 of the Act holding therewithin a mandate upon the Magistrate concerned, to on proven commission of an offence under Section 138 of the Act, his holding a discretionary jurisdiction to alternatively impose a sentence of imprisonment upon the convict for a term which may extend up to 2 years also his holding jurisdiction to in alternate thereto impose a sentence of fine upon him which may extend upto twice the amount of the dishonoured cheque besides he holds jurisdiction to impose both the aforesaid sentences upon the accused/convict. The statutory discretionary empowerment conferred upon the Judicial Magistrate concerned to impose the aforesaid alternative sentence(s) upon the convict or to impose all the sentences conjointly upon the convict does render the imposition by the learned Magistrate upon the accused/convict a sentence of fine equivalent to the amount borne on the dishonored Negotiable instrument to warrant no interference, conspicuously when the statutory discretion vested in him

to impose a sentence of fine upon the convict extending to double the amount borne on the dishonoured Negotiable instrument stands not couched in a mandatory phraseology rather stands couched in a directory phraseology whereupon the imposition of a sentence of fine equivalent to the cheque amount upon the convict/accused by the learned Magistrate concerned does not suffer from any gross perversity or absurdity unless evidence stood adduced qua his while exercising the apposite statutory discretion his evidently acting with malafides. Significantly, when the aforesaid evidence remained un-adduced hereat, the statutory discretion exercised by the learned Magistrate in imposing the pronounced sentence upon the accused is un-bereft of any taint.

3. Further more the statutory discretion vested in the Magistrate concerned in the imposition of alternative sentence(s) aforesaid upon the convict, in exercise whereof he imposed upon the accused/convict the impugned sentence of fine also remains undemonstrated by the counsel for the complainant to stand exercised capriciously or arbitrarily. Contrarily with the Magistrate concerned while under the impugned award imposing upon the convict/accused a sentence of fine equivalent in a sum borne on the dishonoured negotiable instrument hers also ordering qua on its deposit its standing released to the complainant besides given the factum qua the convict/accused pleading guilty to the relevant charge whereupon consumption of time which would stand otherwise consumed by the learned trial Court for concluding the trial stood curtailed whereupon also hence the revisionist/complainant suffered no inconvenience, does also constrain this Court to record an inference of the statutory discretion exercised by the Magistrate concerned to impose the impugned sentence of fine upon the convict standing exercised in a just, fair and reasonable manner.

4. In view of the above, the present petition is dismissed. Impugned order stands maintained and affirmed. All pending applications stand disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

NTPC Ltd.(Kol Dam) ...Appellant.
Versus
Sukh Ram & others ...Respondents.

RFA No. 118 of 2014
Date of Decision: December 15, 2016.

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam – Land Acquisition Collector determined the compensation @Rs.4,69,955/- for cultivated land and Rs.1,04,416/- for uncultivable land – Reference petition was filed and the Reference Court determined the market value @ Rs.4,69,955/- per bigha – held in appeal that sale deeds were tendered in evidence but in absence of evidence regarding the similarity of the acquired land with exemplar sale deed, the deeds cannot be taken into consideration to determine the market value of the acquired land –the sale deed pertained to two different villages and very small chunk of lands - the reference Court had rightly declined to take exemplar sale transactions into consideration- appeal dismissed. (Para- 5 to 12)

Cases referred:
Cement Corpn. of India Ltd. Versus Purya and others, (2004) 8 SCC 270
Haridwar Development Authority Versus Raghubir Singh and others, (2010) 11 SCC 581

For the Appellant: Mr. Chandernarayan Singh, Advocate, for the appellant-NTPC.
For the Respondents: Mr. R.S. Verma, Addl. AG., for respondent No.19-State.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

In terms of the impugned award dated 18.02.2014, passed by Additional District Judge, Ghumarwin, District Bilaspur, H.P., (Camp at Biaspur), , in Reference Petition No.141-4 of 2008, titled as *Sukh Ram & others Versus LAC, Bilaspur and another,* so filed under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), Reference Court, has re-determined the market value of the entire acquired land by awarding Rs. 4,69,955/-, the highest rate awarded by the Collector Land Acquisition with respect to the best quality of land. Significantly, Reference Court has not enhanced any amount other then uniformly applying the said rate with respect to entire 29-0 bighas of land, acquired for public purpose i.e. construction of Kol Dam.

2. Certain facts are not in dispute: (i) 29-0 bighas of land came to be acquired in village Harnora (III File), Tehsil Sadar, District Bilaspur, H.P. with the publication of notification in the official gazette on 14.08.2004, so issued under Section 4 of the Act; (ii) The acquisition proceedings concluded with the passing of the Collector's Award No.58 of 2007 dated 25.04.2007, so issued under Section 11 of the Act, whereby he determined the market value at the following rates and the State taking over possession of the land:-

> "The market value for Cultivated (Majrua) Rs. 4,69,955.00 (Rupees Four Lacs Sixty Thousand Nine Hundred and Fifty Five) only and for Un-cultivated (Gair-Majrua) Rs.1,04,416.00 (Rupees One Lac Four Thousand Four Hundred and Sixteen) only as applied in Award No.5 of 2003 in village Harnora already approved by Distt. Collector, Bilaspur vide No.BLP-ADRA-4(9)/94-II-24142 dated 20-6-2002 appear to be just and reasonable for the land under acquisition in this award. Therefore, the rates already approved as discussed above have been applied in this award. *(Annexure-C)* ."

(iii) The purpose of acquisition being construction of Dam, commonly known as Kol Dam; (iv) Dissatisfied with the offer made by the Collector, claimants filed petitions under Section 18 of the Act, which came to be clubbed (with Reference Petition No.141-4 of 2008) and on the basis of common evidence led by the parties, disposed of in terms of impugned award; (v) While the claimants accepted the award, only the beneficiary preferred the present appeal(s) under Section 54 of the Act; (vi) It is the common case of parties that the entire acquired land came to be submerged with the construction of Dam by the beneficiary. Also there is no evidence on record of either any requirement or any developmental activity carried out on the spot.

3. With these admitted/undisputed facts, material placed on record by the parties is being appreciated for just decision of the case.

4. In the instant case, Reference Court has re-determined the market value of the acquired land by awarding the amount @ Rs. 4,69,955/- per bigha. It took into account the highest rate so awarded by the Collector Land Acquisition.

5. Record reveals that parties did place on record exemplar sale deeds in support of their respective claims. Whereas, as against claim of Rs. 15,00,000/- per bigha, so set up by the claimants, beneficiary tried to justify the passing of the award by the Collector. Now significantly, the claimants placed on record four sale deeds (Ex.P1 to Ex.P4) and beneficiary also placed on record four sale deeds (x.R1 to Ex.R4). But however, none of the witnesses i.e. Nathu Ram (PW.1), Kulbir Singh (PW.2), who stepped into the witness box could depose with regard to the similarity of the acquired land with that of the exemplar sale deeds. Also three sale deeds pertaining to land sold in village Chamyon and the sale transaction pertaining to village Harnora was only with respect to 0-12-0 bighas of land.

6. Insofar as beneficiary is concerned, sale deeds only came to be tendered in evidence which though could have been considered by the Reference Court in view of the law laid

down by the Apex Court in *Cement Corpn. of India Ltd. Versus Purya and others,* (2004) 8 SCC 270. But however, in the absence of any evidence with regard to similarity of the acquired land with that of these exemplar sale deeds, even such sale deeds cannot be taken to be true reflective value of the acquired land. Also two of such sale transactions pertain to different villages and remaining two sale transactions pertain to very small chunk of land admeasuring 0-1-0 bigha. Hence, Reference Court did not take exemplar sale transactions in re-determining the market value of the acquired land.

7. Insofar as other issue of enhancement of the amount is concerned, one finds that Reference Court rightly applied principle of law laid down in *Haridwar Development Authority Versus Raghubir Singh and others,* (2010) 11 SCC 581, relevant portion of which reads as under:-

> "7. The question whether the acquired lands have to be valued uniformly at the same rate, or whether different areas in the acquired lands have to be valued at different rates, depends upon the extent of the land acquired, the location, proximity to an access road/Main Road/Highway or to a City/Town/Village, and other relevant circumstances. We may illustrate:
>
> (A). When a small and compact extent of land is acquired and the entire area is similarly situated, it will be appropriate to value the acquired land at a single uniform rate.
>
> (B). If a large tract of land is acquired with some lands facing a main road or a national highway and other lands being in the interior, the normal procedure is to value the lands adjacent to the main road at a higher rate and the interior lands which do not have road access, at a lesser rate.
>
> (C). Where a very large tract of land on the outskirts of a town is acquired, one end of the acquired lands adjoining the town boundary, the other end being two to three kilometers away, obviously, the rate that is adopted for the land nearest to the town cannot be adopted for the land which is farther away from the town. In such a situation, what is known as a belting method is adopted and the belt or strip adjacent to the town boundary will be given the highest price, the remotest belt will be awarded the lowest rate, the belts/strips of lands falling in between, will be awarded gradually reducing rates from the highest to the lowest.
>
> (D). Where a very large tract of land with a radius of one to two kilometers is acquired, but the entire land acquired is far away from any town or city limits, without any special Main road access, then it is logical to award the entire land, one uniform rate. The fact that the distance between one points to another point in the acquired lands, may be as much as two to three kilometers may not make any difference."

8. The Reference Court, rightly held the acquired land to fall within the category (D) of the aforesaid ratio.

9. No other point urged or proved.

10. Hence in the given facts and circumstances, no interference is warranted. It cannot be said that the findings returned by the Reference Court are perverse, illegal or erroneous. As such, present appeal stands dismissed, so also pending application(s), if any.

11. Cross-objection, if any, shall also stand disposed of.

12. Quite evidently, in terms of award No.58 of 2007, so passed by the Collector several land reference petitions came to be clubbed and disposed of by the common impugned award dated 18.02.2014, passed by Additional District Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur), in Reference Petition No.141-4 of 2008, titled as *Sukh Ram and others Versus LAC, Bilaspur and another.* Common evidence was led by the parties in land Reference Petition No.28 141-4 of 2008, subject matter of the present appeal. Learned counsel for the parties

contend that decision rendered in the present appeal would automatically apply to other connected matters which are pending before this Court. Registrar (Judicial) to take appropriate instructions from Hon'ble the Chief Justice for listing of such connected appeals before the appropriate Court, particulars whereof shall also be supplied by learned counsel for the parties.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Shankar Lal and others ...Appellants

Versus

State of Himachal Pradesh and another ...Respondents

LPA No. 121 of 2011
Reserved on: December 7, 2016
Decided on: December 15, 2016

Constitution of India, 1950- Article 226- Petitioners were appointed as beldar/plant observers – they were promoted to the post of Field Assistants - post of Field Assistants was merged with the post of horticulture Sub-Inspector by the State Government – petitioners claimed the pay scale of Horticulture Sub-Inspector on the basis of this notification – University claimed that it had its own ordinance and was not bound by the notification issued by the State Government- writ Court held that the University had framed its own recruitment and promotion Rules and had not taken any decision to merge the posts and dismissed the writ petition- held, that University has its own pay scale- no decision was taken to merge the post of Field Assistant with Horticulture Sub-Inspector – therefore, the petitioners cannot claim the pay scale of Horticulture Sub-Inspector – appeal dismissed. (Para-10 to 26)

Cases referred:

State of Haryana and others versus Charanjit Singh and others etc. etc., AIR 2006 scc 161
New Delhi Municipal Council versus Pan Singh & Ors., 2007 AIR SCW 1705
State of Madhya Pradesh and others versus Ramesh Chandra Bajpai, (2009) 13 SCC 635
State of Punjab & Anr. Versus Surjit Singh & Ors., 2009 AIR SCW 6759
Steel Authority of India Limited and others versus Dibyendu Battacharya, (2011) 11 Supreme Court Cases 122
Union Territory Administration, Chandigarh and others versus Manju Mathur and another, (2011) 2 Supreme Court Cases 452
Hukum Chand Gupta versus Director General, Indian Council of Agricultural Research and others, (2012) 12 Supreme Court Cases 666
State of Himachal Pradesh and another versus Tilak Raj, 2014 AIR SCW 6581

For the appellants Mr. Bharat Thakur, Proxy Counsel.

For the respondents: Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for respondent No.1.
Mr. Balwant Singh Thakur, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

This Letters Patent Appeal is directed against judgment dated 21.9.2010 rendered by the learned Single Judge of this Court in CWP(T) No. 4716 of 2008 titled **Shankar Lal**

and others versus State of Himachal Pradesh and another, whereby the writ petition filed by the appellants-petitioners (here-in-after, 'petitioners') was dismissed.

2. Facts in brief are that petitioners were initially appointed as Beldars/ Plant Observers. They were promoted to the post of Field Assistant in the pay scale of Rs.400-600. Petitioners claimed that on the basis of letter dated 21.6.1986 (Annexure P-2 of writ petition), State ordered merger of posts of Field Assistants with the posts of Horticulture Sub-Inspectors in the pay scale of Rs.450-800/-. Petitioners claimed that they were not granted aforesaid pay scale. Petitioners have relied upon Statutes 5.6(1) and 6 of the respondent-University seeking pay scale of Rs.450-800 (later revised to Rs.1200-2100). Annexure P-2 dated 21.6.1986 reads as under:

> "I am directed to refer to your No. 15-65/79-Udyan-I dated the 20th November, 1985 and to say that Governor, Himachal Pradesh is pleased to allow the scale of Rs.450-800 to the posts of Field Assistants presently in the scale of Rs.400-600. This revision will come into force w.e.f. 1.1.78 on notional basis and monetary benefits will accrue to the concerned incumbents w.e.f. 1.3.1986. The pay of the incumbents in the revised scale of Rs.450-800 (from the scale of Rs.400-600) will be fixed in accordance with the provisions of Audit Instruction(1) below F.R. 22 and they will be eligible to exercise option in accordance with the provision of F.R. 23 within a period of three months, failing which option will be deemed to have been exercised in favour of revised scale. Option once exercised will be final.
>
> The Governor is further pleased to order that the posts of Field Assistants shall be merged with those of Horticulture Sub-Inspectors."

3. Clauses 5.6(1) to 5.6(3) of Chapter V of "Statutes Regarding The Classification, Qualifications And Appointment Of Employees Of The University Other Than The Officers and Teachers" reads as under:

> "5.6(1) The scales of pay of the posts of category A, B, C and D employees of the University shall be as prevalent at present. Conditions and rules for the release of higher scales of pay, for admissibility of special pay and other allowance to the employees shall be the same as applicable from time to time to the employees holding corresponding posts in Himachal Pradesh Government. But the rules of local allowance shall be as admissible to Government servants at the concerned stations of posting.
>
> (2). The Board shall have the powers to review the conditions for the release of scales and the scales of pay and allowances attached to any post of the University as and when the same are revised by the Himachal Pradesh Government for their own employees.
>
> (3) For such posts in the University as do not exist under the Himachal Pradesh Government, the University reserves the powers to frame its own pay scales, which shall, as far as possible, be in consonance with the pay scales of comparable posts in the Himachal Pradesh Government/sister Universities in the State."

4. Clause 6 of Chapter VI, "Scales of Pay" provide as under:

> 6.(1) Notwithstanding anything contained in Chapters III, IV and V of the Statutes, the scales of pay to be prescribed by the Board shall follow the pattern given in the succeeding clauses of this Chapter.
>
> (2) The conditions and rules for grant of scales of pay, for admissibility of special pay and allowances [other than the allowances mentioned in clause (5) below] to all Officers (other than Estate Officer), teachers, Deputy Registrars, Assistant Registrar, Deputy Students' Welfare Officers, Assistant Students' Welfare Officers, Sports Officers and other posts on the UGC pattern, shall be the same as prescribed by the University Grants Commission from time to time.

(3) The conditions and rules for the grant of scales of pay, for admissibility of special pay and allowances [other than the allowances mentioned in clause (5) below] to the Estate Officer and other employees of the University shall be the same as applicable from time to time to the employees holding corresponding posts in Himachal Pradesh Government.

(4) For such posts in the University as do not exist under the Himachal Pradesh Government and which do not fall within the UGC pattern of scales, the pay scales and allowances [other than the allowances mentioned in clause (5) below] shall be such as the Board may determine having regard to the functions, duties, status and qualifications of such posts, in relation to other posts in the University.

(5) In granting the Hill Compensatory Allowance, House Rent Allowance and other local allowances (other than DA and ADA) Himachal Pradesh Government pattern shall be followed.

(6) The incumbents of various posts in the University shall be entitled to the pay scales, special pay and other allowances admissible to them on the date of commencement of these Statutes unless revised by the Board."

5. The respondent-University in its reply before the writ Court, took stand that Statute 5.6(1) is regarding the scale of pay of University employees and it is clear in the chapter that pay scale of Technical Staff should be equal with the Department of Agriculture/Horticulture/ Forests/Fisheries/ Animal Husbandry/Education or where the University has evolved its own pay scales, the same will be revised by keeping in view the relative position of pre-revised scales. The posts of Field Assistant Grade-I are treated equivalent with that of Horticulture Sub-Inspectors, as far as grant of scale is concerned and University is providing same scale to the Field Assistant Grade-I which is being granted to Horticulture Sub-Inspectors. However, respondent-University also stated in its reply that it is not bound to frame Recruitment and Promotion Rules parallel to that of the Horticulture Department. In case, scale of Horticulture Sub-Inspector is revised by the Government, University is bound to grant same scale to the Field Assistant Grade-I.

6. The learned Single Judge also held in the impugned judgment that the post of Field Assistant is feeder cadre for promotion to the post of Field Assistant Grade-I and as such pay scales of both the posts are different. Moreover, respondent-University has framed its own Recruitment and Promotion Rules and it has never taken any decision to merge posts of Field Assistants with that of Horticulture Sub-Inspector. As such petitioners could not seek benefit of revision of pay scales notionally from 1.1.1978 and monetary benefits from 1.3.1986, as claimed in the petition. Accordingly, the petition was dismissed. Now, the petitioners have challenged the aforesaid judgment of the learned Single Judge by preferring the present appeal.

7. Mr. Bharat Thakur, learned Advocate representing the petitioners vehemently argued that the judgment passed by the learned Single Judge is not sustainable as the same is not based upon correct interpretation of Statutes 5.6(1) and 5.6(3) and as such same can not be allowed to sustain. Mr. Thakur further stated that the petitioners are entitled to the benefit of automatic revision of pay scale from Rs.400-600 to Rs.450-800 in terms of revision order of the State Government dated 17.5.1986, on notional basis from 1.1.1978, 10.8.1982 and 8.3.1983, respectively and financial benefits from 1.3.1986 with all consequential benefits including seniority, arrears of pay scale revision. Mr. Thakur, specifically invited attention of this Court to clause 5.6(1) of Chapter V of the Statutes regarding classification, qualifications and appointment of employees of the University other than officers and teachers to suggest that the scale of pay of all the employees of categories A, B, C and D, shall be the same as applicable from time to time to the employees holding corresponding posts in the Himachal Pradesh Government. As per the counsel representing the petitioners, Statutes 5.6(1) and 6 of the respondent-University provide that petitioners are entitled to pay scale of Rs.450-800, which was subsequently revised to Rs.1200-2100.

8. Mr. Balwant Singh Thakur, learned counsel representing respondent No.2-University supported the impugned judgment passed by the learned Single Judge. As per Mr. Balwant Singh Thakur, pay scale of Rs.450-800 has been granted to the Field Assistant Grade I and post of Field Assistant is in the feeder cadre for promotion to the post of Field Assistant Grade I. As per Mr. Balwant Singh Thakur, respondent-University has framed new Rules on 25.8.1988, wherein post of Field Assistant is in the feeder cadre for promotion to the post of Field Assistant Grade I and as such petitioners can not be granted pay scale of Rs.450-800 because the post of Field Assistant Grade I has been compared to that of Horticulture Sub-Inspector and, as and when the State Government revises/increases the pay scale of Horticulture Sub-Inspector, corresponding category of Field Assistant Grade I shall also get the same. In the aforesaid background, Mr. Balwant Singh Thakur, submitted that there is no illegality or infirmity in the judgment passed by the learned Single Judge and same deserves to be upheld.

9. We have heard the learned counsel for the parties and also gone through the records of the case carefully.

10. True it is that perusal of Statute 5.6 clearly suggests that pays scales of technical staff other than laboratory staff are to be equated with the departments of Agriculture/Horticulture/ Forests / Fisheries/ Animal Husbandry/ Education, however, the University has evolved its own pay scales and same are required to be revised by keeping in view the relative position in the pre-revised pay scales. In the instant case, petitioners, on the basis of letter dated 17.5.1986/21.6.1986 (Annexure P-2 of the writ petition) issued by the State of Himachal Pradesh, whereby posts of Field Assistant have been ordered to be merged with that of Horticulture Sub-Inspector in the pay scale of Rs.450-800 are claiming grant of revision of pay scale of Rs.450-800 as was ordered by the State Government from retrospective date.

11. Record reveals that vide communication dated 6.4.1992 (Annexure P-14 of Writ Petition), respondent-University rejected the claim of the petitioners namely Shankar Lal by stating that matter with regard to revised pay scale of Rs.450-800 of Field Assistant on parity with the Department of Horticulture was put up before the Joint Coordination Committee of both the Universities on 16.1.1992, whereby following decision was taken:

> "Since the Technical combine was framed with a view to providing promotional avenues to the Technical Staff, the categories of which did not exist in the State Government, and as such Committee did not favour the abolition of Technical Combine."

12. Petitioners being aggrieved by aforesaid rejection of the revision, approached the Himachal Pradesh Administrative Tribunal, by filing OA No. 2194 of 1997, which was later transferred to this Court and registered as CWP(T) No. 4716 of 2008, seeking following main relief(s):-

> "(i) That the applicants be held lawfully entitled for the grant of revised pay scale of Rs.450-800 on the State Government pattern with effect from the respective dates.
>
> (ii) That the decision of respondent-2/University as conveyed to the applicants vide Annexure P-14, dated 6-4-92 be declared illegal and be set aside, along-with all consequential benefits of arrears of pay, further promotions etc. to the applicants.
>
> (iii) That the respondents be directed to grant the scale of Rs.450-800 to the applicants on State Government pattern with effect from the corresponding date alongwith all consequential benefits thereof, such as, arrears of salary and further promotions etc. win a time bound period.
>
> (iv) That the respondents be directed to recast the seniority list of Field Assistants/Field Assistants Grade I strictly in accordance with the State Government decision and the applicants be placed at appropriately in the seniority list and be promoted further in case they become eligible in accordance

with the rules. Any other seniority list/contrary decision of respondent-2/University be declared illegal and be quashed as far as it is in conflict with the State Government as contained in Annexure P-2."

13. It also emerges from the record that prior to framing of its own Recruitment and Promotion Rules, the respondent-University had been following the Recruitment and Promotion Rules of Krishi Vishva Vidyalaya notified on 27.3.1986, wherein pay scale of Field Assistant was Rs.400-600 and that of Field Assistant Grade I was Rs.450-800. But with effect from 4.8.1986, respondent-University framed its own Rules, whereby they placed Field Assistant in the pay scale of Rs.400-600 and Field Assistant Grade I in the pay scale of Rs.450-800. In the instant case, petitioners were promoted to the post of Field Assistant Grade I on 28.10.l987 31.5.1988 and 2.6.1986, respectively. Subsequently on 25.8.1988, respondent-University also framed new Rules, wherein post of Field Assistant was kept in the feeder cadre for promotion to the post of Field Assistant Grade I and as such petitioners can not be granted pay scale of Rs.450-800. Perusal of Rules framed by the respondent-University vide notification dated 25.8.1988 provides following procedure for appointment/promotion to the posts of Field Assistant and Field Assistant Grade I:

DR. YASHWANT SINGH PARMAR UNIVERSITY OF HORTICULTURE & FORESTRY, SOLAN-173230.

"PROMOTION RULES FOR FIELD STAFF"

Sr. No.	Name of the post	Mode of recruitment and ratio in which the posts are to be filled up		Educational qualification	Length of approved service	Field of Choice/Feeder posts	Composition of Promotion Committees
		By promotion	By direct recruitment				
(1.)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1.	Field Assistant (Rs.400-600)	25%	75%	Matriculation Or Middle Or Literate	Three years Or With ten years Or With eighteen years	From amongst category 'D' Employees Do Do	1. Director/Dean concerned .. Chairman 2. Other Deans/Directors .. Member 3. Heads of the Depts/Res. Station Concerned … Member 4. Registrar or his nominee .. Member
2.	Field Assistant	75"%	25%	Matriculation	Five years	Field Asstt.	-do-

	Gr. I (Rs.450-800)						

14. It is apparently clear that promotion to the post of Field Assistant should be made from amongst 'D' category employees and the post of Field Assistant Grade I is to be filled up 75% by promotion from amongst the Field Assistants and 25% by direct recruitment. Rules, further suggest that pay scale of Rs.450-800 stands revised to Rs.1200-2100. Since the respondent-University has framed its own Promotion Rules for filling up posts of Field Assistant and Field Assistant Grade I, and further the respondent-University has not taken any decision to merge the posts of Field Assistant with higher post of Field Assistant Grade I/Horticulture Sub-Inspector, this Court sees no force in the contentions having been put forth on behalf of the petitioners that they are entitled to be dealt in accordance with Notification dated 21.6.1986 (annexure P-2) issued by the Himachal Pradesh Government, whereby posts of Field Assistants have been ordered to be merged with that of Horticulture Sub-Inspectors, because as per Promotion Rules of the respondent-University, it has evolved its own pay scales of Rs. 400-600 for the post of Field Assistant and Rs. 450-800 for the post of Field Assistant Grade I, as such, petitioners can not claim revision of pay scales from 1.1.1978 on notional basis with monetary benefits from 1.3.1986, in terms of letter dated 21.6.1986 (Annexure P-2) issued by Himachal Pradesh Government ordering merger of Field Assistants with that of Horticulture Sub-Inspectors in the pay scale of Rs. 450-800.

15. At the cost of repetition, it is stated that as per new Rules having been framed by the respondent-University, higher post in the hierarchy is of Field Assistant Grade I, which is required to be filled in 75% by promotion from Field Assistants and 25% by direct recruitment. In view of aforesaid discussion, this Court does not find any illegality in the findings returned by learned Single Judge that the post of Field Assistant is feeder post for promotion to the post of Field Assistant Grade I and as such pay scales of both the posts are different.

16. Leaving everything aside, it clearly emerges from record that respondent-University has framed its own Promotion Rules and no decision has ever been taken to merge the posts of Field Assistant with Field Assistant Grade I/Horticulture Sub-Inspector, thus the petitioners are not entitled to the benefit of revision of pay scales in terms of letter dated 21.6.1986 (Annexure P-2). Otherwise also, respondent-University has specifically stated that as per own case of petitioners, post of Field Assistants in the State Government have been merged with that of Horticulture Sub-Inspectors as such there is no cadre of Field Assistants in the State Government and it is not understood qua which post/category, petitioners are claiming parity.

17. The Apex Court in a case titled as **State of Haryana and others versus Charanjit Singh and others etc. etc**., reported in AIR 2006 Supreme Court 161, held that the principle of '**equal pay for equal work**' has no mechanical application in every case. It is apt to reproduce para 17 of the judgment herein:

> "17. Having considered the authorities and the submissions we are of the view that the authorities in the cases of Jasmer Singh, Tilak Raj, Orissa University of Agriculture & Technology and Tarun K. Roy lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a Court of law. But equal pay must be for equal work of equal value. The principle of equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in

administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities made a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regards. In any event the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a Court, the Court must first see that there are necessary averments and there is a proof. If the High Court, is on basis of material placed before it, convinced that there was equal work of equal quality and all other relevant factors are fulfilled it may direct payment of equal pay from the date of the filing of the respective Writ Petition. In all these cases, we find that the High Court has blindly proceeded on the basis that the doctrine of equal pay for equal work applies without examining any relevant factors."

18. It would also be profitable to reproduce para 13 of the judgment rendered by the Apex Court in **New Delhi Municipal Council** versus **Pan Singh & Ors.,** reported in 2007 AIR SCW 1705, herein:

> "13. They, thus, formed a class by themselves. A cut-off date having been fixed by the Tribunal, those who were thus not similarly situated, were to be treated to have formed a different class. They could not be treated alike with the others. The High Court, unfortunately, has not considered this aspect of the matter."

19. The Apex Court in cases titled as **State of Madhya Pradesh and others** versus **Ramesh Chandra Bajpai**, reported in(2009) 13 Supreme Court Cases 635, and **State of Punjab & Anr.** Versus **Surjit Singh & Ors**., reported in 2009 AIR SCW 6759, has discussed the development of law right from the year 1960 till 2009. It is apt to reproduce para 30 of the judgment delivered in Surjit Singh's case supra, herein:

> "30. Mr. Swarup may or may not be entirely correct in projecting three purported different views of this Court having regard to the accepted principle of law that ratio of a decision must be culled out from reading it in its entirety and not from a part thereof. It is no longer in doubt or dispute that grant of the benefit of the doctrine of 'equal pay for equal work' depends upon a large number of factors including equal work, equal value, source and manner of appointment, equal identity of group and wholesale or complete identity."

20. The Apex Court in the case titled as **Steel Authority of India Limited and others** versus **Dibyendu Battacharya**, reported in (2011) 11 Supreme Court Cases 122, has discussed the development of law and the judgments made by the Apex Court right from the year 1968, in paras 18 to 29 of the judgment. It is apt to reproduce paras 30 and 31 of the judgment herein:

> 30. In view of the above, the law on the issue can be summarised to the effect that parity of pay can be claimed by invoking the provisions of Articles 14 and 39(d) of the Constitution of India by establishing that the eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The functions may be the same but the skills and responsibilities may be really and substantially different. The other post may not require any higher qualification, seniority or other like factors. Granting parity in pay scales depends upon the comparative evaluation of job and equation of posts. The person claiming parity, must plead necessary averments and prove that all things are equal between the concerned posts. Such a complex issue cannot be adjudicated by evaluating the affidavits filed by the parties.
>
> 31. The onus to establish the discrimination by the employer lies on the person claiming the parity of pay. The expert committee has to decide such issues, as the fixation of pay scales etc. falls within the exclusive domain of the executive. So long as the value judgment of those who are responsible for administration i.e. service conditions etc., is found to be bonafide, reasonable, and on intelligible criteria which has a rational nexus of objective of differentiation, such differentiation will not amount to discrimination. It is not prohibited in law to have two grades of posts in the same cadre. Thus, the nomenclature of a post may not be the sole determinative factor. The courts in exercise of their limited power of judicial review can only examine whether the decision of the State authorities is rational and just or prejudicial to a particular set of employees. The court has to keep in mind that a mere difference in service conditions does not amount to discrimination. Unless there is complete and wholesale/ wholesome identity between the two posts they should not be treated as equivalent and the Court should avoid applying the principle of equal pay for equal work.

21. The Apex Court in **Union Territory Administration, Chandigarh and others** versus **Manju Mathur and another**, reported in(2011) 2 Supreme Court Cases 452, held that similarity of designation or nature or quantum of work is not determinative of entitlement to equality in pay scales.

22. The Apex Court in **Hukum Chand Gupta** versus **Director General, Indian Council of Agricultural Research and others**, reported in (2012) 12 Supreme Court Cases 666, held as to how parity can be claimed or granted. It is apt to reproduce relevant portion of para 20 of the judgment herein:

> 20. ..... There cannot be straitjacket formula for holding that two posts having the same nomenclature would have to be given the same pay scale. Prescription of pay scales on particular posts is a very complex exercise. It requires assessment of the nature and quality of the duties performed and the responsibilities shouldered by the incumbents on different posts. Even though, the two posts may be referred to by the same name, it would not lead to the necessary inference that the posts are identical in every manner. These are matters to be assessed by expert bodies like the employer or the Pay Commission. Neither the Central Administrative Tribunal nor a writ court would normally venture to substitute its own opinion for the opinions rendered by the

experts. The Tribunal or the writ court would lack the necessary expertise to undertake the complex exercise of equation of posts or the pay scales."

23. A Division Bench of this Court in a case titled as **Roshan Lal** versus Ho**n'ble High Court of Himachal Pradesh and another**, being CWP No. 873 of 1993, decided on 27th October, 1994, held that even if a post of one cadre is created in two departments and different pay scales are granted, that cannot be a ground to claim parity. In order to claim parity, the writ petitioners have to indicate that their jobs, duties, responsibilities and functions are similar. In this case, the Court has examined whether the post of Book Binder sanctioned in the High Court and Secretariat of the State Government and in other departments are entitled to same pay scale? No doubt, the post of Book Binder was created in all these departments, but it was held that it is for the writ petitioner to plead and prove that he was performing the same type of work and responsibilities and other factors are similar. This Court, after discussing all facts and factors, rejected the plea for grant of parity and the writ petition was dismissed. It is apt to reproduce relevant portion of the judgment herein:

> "Having heard the learned counsel for the petitioner, we find no justification in the submission. It is too much of the employee of the High Court to claim that the High Court should be equated with the Printing and Stationery Department of the State Government. Even on the basis of job, there would be no similarity. The Printing and Stationery Department would have continuous and different varieties of work needing a different type of Book Binder than the Book-Binder in the High Court."

24. A similar view has been taken by this Court in case titled as **Himachal Pradesh State Electricity Board** versus **Rajinder Upadhaya & others**, being LPA No. 51 of 2009, decided on 11th September, 2014, LPA No. 11 of 2012, titled as **The Principal Secretary (Personnel) & another** versus **Pratap Thakur**, decided on 22nd September, 2014 and CWP No. 4184 of 2010 decided on 17.10.2014 titled **Beli Ram** versus **Hon'ble High Court of Himachal Pradesh and another**.

25. A similar view has also been taken by the apex Court while setting aside the judgment made by this Court in a latest judgment reported in 2014 AIR SCW 6581 titled **State of Himachal Pradesh and another** versus **Tilak Raj.** It is apt to reproduce para 22 of the said judgment herein.

> "22. It is also clear that disputed question of facts were involved in the petitions because according to the respondents, who were petitioners before the High Court, nature of work done by them was similar to that of the work of other Laboratory Attendants or Laboratory Assistants. Without looking at the nature of work done by persons working in different cadres in different departments, one cannot jump to a conclusion that all these persons were doing similar type of work simply because in a civil suit, one particular person had succeeded after adducing evidence. There is nothing on record to show that the High Court had examined the nature of work done by the respondents and other persons who were getting higher pay scale. The High Court had also not considered the fact that qualifications required for appointment to both the posts were different. In our opinion, the High Court should not have entertained all these petitions where disputed questions of fact were required to be examined. Without examining relevant evidence regarding exact nature of work, working conditions and other relevant factors, it is not possible to come to a conclusion with regard to similarity in the nature of work done by persons belonging to different cadres and normally such exercise should not be carried out by the High Court under its writ jurisdiction. It is settled law that the work of fixing pay scale is left to an expert body like Pay Commission or other similar body, as held by this Court in several cases, including the case of S.C. Chandra v. State of Jharkhand, 2007 8 SCC 279. Moreover, qualifications, experience, etc. are also required to be

examined before fixing pay scales. Such an exercise was not carried out in this case by the High Court."

26. Having said so, there is no merit in the appeal and same is dismissed, alongwith pending applications, if any. Judgment passed by the learned Single Judge is upheld.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

The State of Himachal Pradesh & others ...Appellants.

Versus

Shri Bhagat Ram & others ...Respondents.

RFA No. 57 of 2013 a/w connected matters.
Reserved on: 28.11.2016.
Decided on: 15.12.2016

Land Acquisition Act, 1894- Section 18- Land Acquisition Collector had awarded compensation on the basis of the settlement –held, that statutory benefits payable under the Act cannot be waived by the Land Owners – there can be no estoppel against the law- the benefits were rightly granted by the Reference Court – appeal dismissed. (Para-3 to 7)

For the Appellants: Mr. R.S Thakur, Additional Advocate General.
For the Respondents: Mr. Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Since common questions of fact and law stand raised for consideration in all the appeals, hence they are taken up together for disposal.

2. The instant appeals stand directed by the State of Himachal Pradesh against the impugned rendition recorded by the learned Reference Court whereby it in the amount constituted therewithin assessed compensation qua the lands of the respondents/landowners. The solitary contention addressed by the learned Additional Advocate General for unsettling the rendition recorded by the learned Reference Court stands hinged upon the factum qua with the respondents/landowners evidently entering into a consensual settlement with the appellants herein whereby they displayed their consent to receive the amount constituted therein as compensation amount assessable qua their lands as stood brought to acquisition thereupon the apt consensual settlement(s) warranted an inference qua theirs thereunder waiving besides abandoning their entitlement to seek any levy of the statutory benefits contemplated in the Land Acquisition Act on the consensually settled compensation amount whereas in the impugned rendition the learned Reference Court levying statutory benefits on the consensually agreed/settled compensation amount qua the apposite lands which stood proposed thereat to be brought to acquisition by the appellants herein warrants its standing quashed and set aside.

3. For determining the tenacity of the aforesaid submission addressed herebefore it is imperative to make an allusion to the apposite recitals manifested in the consensual statement(s) respectively made/recorded by the landowners (RW-3/D and Ex.RW-3/E in RFA No. 57 to 83 of 2013 (Ex. RW-5/D and Ex.RW-5/E in RFA Nos. 1,2,3,4 and 6 of 2013) with the authorities concerned wherewithin the respondents/landowners display their acquiescence to receive 8 lacs per bigha as compensation for their lands as stood proposed thereat to be brought to acquisition. Significantly therewithin no vivid display occurs of the respondents/landowners while accepting a sum of Rs.8 lacs per bigha as compensation amount for their lands which stood

proposed thereat to be brought to acquisition, theirs also making a palpable explicit communication therein qua the aforesaid consolidated sum of 8 lacs per bigha agreed by them to be the compensation amount qua their lands which stood proposed thereat to be brought to acquisition including also the statutory benefits levy-able thereon. In sequel the factum of non-occurrence therein with explicitly the aforesaid factum probandum does benumb the espousal of the learned Additional Advocate General qua with the landowners under the aforesaid statement(s) communicating their acceptance qua Rs. 8 lacs constituting the compensation amount for their lands which stood thereat proposed to be brought to acquisition theirs also unveiling therein the apposite willingness qua the amount aforesaid also including therein all statutory benefits levy-able thereupon nor also he can hence argue qua the respondents/landowners waiving besides abandoning their statutory rights qua the relevant statutory benefits standing levied thereon by the learned Reference Court.

4. Be that as it may a perusal of the apposite reference transmitted for adjudication by the Land Acquisition Collector concerned to the learned Reference Court unfolds qua preceding the Land Acquisition Collector concerned recording his award qua the acquired lands of the respondents/landowners wherein he meted deference to the consensual settlement(s) arrived at inter-se the respondents/landowners with the authorities concerned qua the relevant facet qua compensation amount assessable qua the lands of the respondents/landowners, his omitting to elicit the participation of respondents/landowners, sequel whereof is qua the consent award pronounced by the land Acquisition Collector concerned qua the lands of the respondents/landowners anvilled upon the relevant consensual settlement arrived inter-se them with the authorities concerned qua the relevant facet of compensation amount qua their lands which stood proposed thereat to be brought to acquisition, obviously hence standing vitiated with a stain of its infracting the rule of Audi alteram partem. Since the participation of the landowners in the proceedings preceding the pronouncement of an apposite award by the LAC concerned determining therein the compensation amount vis-à-vis the landowners concerned qua their lands which stood brought to acquisition would have facilitated emergence of the trite fact qua theirs while recording their respective consensual settlement(s) with the authorities concerned qua the compensation amount manifested in their respective consensual statement(s) to stand constituted in a sum of Rs. 8 lacs per bigha, theirs, while agreeing qua Rs.8 lacs per bigha constituting the sum of compensation assessable qua their lands which stood proposed thereat to be brought to acquisition, theirs also thereby acquiescing qua the amount aforesaid including also therewithin all the statutory benefits levyable thereon.

5. As afore-stated with the apposite consensual statement(s) recorded by the landowners with the authorities concerned omitting to make an explicit disclosure therein qua the respondents/landlords while accepting Rs.8 lacs as compensation amount qua their lands which stood proposed thereat to be brought to acquisition theirs also making a candid disclosure therein qua the aforesaid amount also including all the statutory benefits peremptorily levy-able thereon whereupon this Court has erected an inference qua hence the plain language of their consensual statement(s) not purveying any leverage to any construction standing made thereupon qua the respondents/landowners waiving their entitlement to seek levy of statutory benefits thereon when stands construed with the award of the Land Acquisition Collector concerned for the reasons afore-stated standing ingrained with a vice of his infracting the rule of Audi alteram partem begets a formidable inference of the respondents/landowners not abandoning their rights to seek levy of statutory benefits on the compensation amount which stood consensually agreed by them to be constituted in a sum of Rs. 8 lacs per bigha.

6. Even otherwise all the statutory benefits levyable on the judicially determined compensation amount are imperatively levyable thereon. Significantly when the levying of statutory benefits even on compensation amount determined by the Land Acquisition Collector besides judicially determined by the learned Reference Court spurs from a peremptory/mandatory dictate of the apposite statutory provisions, similarly with the respondents/landowners while consensually agreeing qua Rs. 8 lacs per bigha comprising the

relevant compensation amount qua theirs lands which stood proposed thereat to be brought to acquisition rendered the levying thereon of all the apposite statutory benefits to be their statutory entitlement. In aftermath with the levying of the apposite statutory benefits on the compensation amount being hence an inflexible statutory fiat peremptoriness whereof holding application even on the relevant compensation amount which stood consensually agreed to be received by the respondent landowners qua their respective lands, thereupon the levying thereon of the peremptory statutory benefit(s) was an unrelenting statutory exercise.

7. In aftermath no waiver can stand fastened upon the landowners qua the relevant consensual compensation amount not thereon begetting any levy of all the relevant statutory benefits nor the fiat of the principle of waiver or estoppel is workable qua any compensation amount consensually agreed to be received by the respondents/landowners unless cogent evidence stood displayed qua theirs with explicitly in the relevant writings marking the fact qua the consensually agreed relevant figure of compensation amount also including therewithin the statutory benefits whereas with the relevant echoings occurring in the relevant statements(s) not explicitly marking the aforesaid factum, the apposite conclusion therefrom reiteratedly is qua the respondents/landowners neither waiving their entitlement to seek levy of statutory benefits, on the consensually agreed compensation amount nor also they can stand estopped to claim levy thereon of the relevant statutory benefits.

8. Consequently there is no infirmity in the impugned award(s). The present appeals stand dismissed. Impugned award(s) stand maintained and affirmed. All pending applications are disposed of accordingly. The Registry is directed to place photocopies of this judgment on each file of the connected matters.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Vikas Sharma ....Petitioner

Vs.

State of Himachal Pradesh ....Respondent

Cr.M.M.O. No. 353 of 2016

Date of decision: 15th December, 2016.

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Section 376 and 417 of I.P.C against the petitioner- petitioner and second respondent were training together and were having a live in relationship – the petitioner had promised to marry the second respondent but had married elsewhere – FIR was registered against the petitioner at the instance of the second respondent – it was pleaded that no offence has been made out against the petitioner and FIR be quashed – held, that it was established that the petitioner did not have the intention to marry the second respondent from the inception- second respondent had surrendered her mind, body and soul only because of the promise that petitioner would marry her – whether the physical contact was established between the parties with consent and without commitment of marriage would be seen during the course of trial – petition dismissed. (Para-3 to 9)

Case referred:

Amit Kapoor versus Ramesh Chander and another (2012) 9 SCC 460

For the petitioner :Mr. Aman Parth Sharma, Advocate.

For the respondent :Mr. Rupinder Singh, Additional Advocate General, with Mr. J.S. Guleria, Assistant Advocate General, for respondent No. 1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (oral)

Heard, Shri Amarn Parth Sharma, learned counsel for the petitioner and Shri Rupinder Singh, Additional Advocate General. Though the case was listed for admission, however, with the consent of the parties, it is taken up for final hearing.

2. The petitioner is arraigned as an accused for the offence punishable under Sections 376 and 417of IPC (for short 'Code'). It transpires that second respondent herein is complainant and it is an admitted fact that the petitioner and the second respondent, while pursuing MBA were training together and were having a live-in relationship. It further transpires that there was some discord in the relationship.

3. It is the specific case of second respondent that she had established physical contact/relationship with the petitioner only because he had promised to marry her but later on he solemnized his marriage elsewhere, compelling the prosecutrix to register the aforesaid case against the petitioner. Quashing of the FIR has been prayed on the ground that no offence is made out and it is averred that when a man and woman are mature and know the consequences of the act then mere promise to marry on future date does not attract punishment.

4. In ***Amit Kapoor*** *versus* ***Ramesh Chander and another (2012) 9 SCC 460***the Hon'ble Supreme Court has evolved the principal for proper exercise of jurisdiction with regard to quashing of criminal proceedings either under Section 379 or under Section 482 Cr.P.C. or together, as the case may be, and the same is summarized as follow:-

> "1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.
>
> 2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.
>
> 3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.
>
> 4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.
>
> 5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.
>
> 6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.
>
> 7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

{Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [AIR 1982 SC 949]; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors. [AIR 1988 SC 709]; Janata Dal v. H.S. Chowdhary & Ors. [AIR 1993 SC 892]; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors. [AIR 1996 SC 309; G. Sagar Suri & Anr. v. State of U.P. & Ors. [AIR 2000 SC 754]; Ajay Mitra v. State of M.P. [AIR 2003 SC 1069]; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [AIR 1988 SC 128]; State of U.P. v. O.P. Sharma [(1996) 7 SCC 705]; Ganesh Narayan Hegde v. s. Bangarappa & Ors. [(1995) 4 SCC 41]; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors. [AIR 2005 SC 9]; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors. [AIR 2000 SC 1869]; Shakson Belthissor v. State of Kerala & Anr. [(2009) 14 SCC 466]; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors. [(2009) 7 SCC 234]; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr. [(2009) 11 SCC

203]; Sheo Nandan Paswan v. State of Bihar & Ors. [AIR 1987 SC 877]; State of Bihar & Anr. v. P.P. Sharma & Anr. [AIR 1991 SC 1260]; Lalmuni Devi (Smt.) v. State of Bihar & Ors. [(2001) 2 SCC 17]; M. Krishnan v. Vijay Singh & Anr. [(2001) 8 SCC 645]; Savita v. State of Rajasthan [(2005) 12 SCC 338]; and S.M. Datta v. State of Gujarat & Anr. [(2001) 7 SCC 659]}.

16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence."

5. It is evident from the material produced on record that there was close relationship between the petitioner and second respondent. Therefore, if the allegations that the petitioner had committed breach of promise to marry, in normal circumstances would alone not be a crime and complainant can only claim damage and would hardly constitute a case to be prosecuted for cheating on that ground alone. However, if the allegations of the complainant of cheating are coupled with the allegations that the petitioner had continued sexual relationship with her on the promise of marry and thereafter resiled then things would definitely be different. More particularly, if it is also established that the petitioner right from inception did not have the intention to marry, then obviously in such cases both the provisions of Section 417 coupled with Section 376 would be attracted.

6. If it that be the test, then there is sufficient material available on record, which does indicate that second respondent had surrendered not only her mind but body and soul to the petitioner only because of solemn promise that he would eventually marry her.

7. After having won the confidence of second respondent and after having sexually used and abused the second respondent, the petitioner cannot now turn out and claim that no offence is made out, more particularly, when it has already come on record that he has solemnized his marriage elsewhere.

8. Whether physical contact established by the petitioner with the second respondent was consensual and without commitment of marriage as is sought to be canvassed by the petitioner is essentially a matter which has to be seen and determined during the course of the trial? Therefore, no case for quashing of FIR at this stage is made out.

9. Accordingly, there is no merit in the petition and the same is dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Cholamandlam MS General Insurance Company Limited ...Appellant.

Versus

Smt. Shakuntla Devi and others ...Respondents.

FAO No. 337 of 2012
Decided on: 16.12.2016

Motor Vehicles Act, 1988- Section 173- Insurer contended that the accident was not caused by the driver of the offending vehicle but by the deceased himself – however, the owner/insured and the driver have not questioned these findings and the insurer has no locus to question the same – insurer does not have the right to challenge the adequacy of compensation as it had not obtained the permission under Section 170 of Motor Vehicles Act- however, the Appellate Court is to do

complete justice between the parties – the income of the deceased was Rs. 15,630/- per month- the deceased was bachelor and 50% of the amount has to be deducted towards personal expenses – claimants have lost dependency of Rs.7,800/- per month- the age of the deceased was 23 years and multiplier of 15 was applicable – Tribunal had wrongly applied the multiplier of 18- claimants have lost source of dependency to the tune of Rs.7,800 x 12 x 15= Rs.14,04,000/- - claimants are entitled to the compensation of Rs.10,000/- each under the heads loss of love and affection, loss of estate and funeral expenses- total compensation of Rs.14,34,000/- awarded along with interest @ 7.5% per annum. (Para- 10 to 48)

Cases referred:

U.P.S.R.T.C. vs. Km. Mamta and others, AIR 2016 Supreme Court 948
Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation, (2013) 11 SCC 517
Giani Ram vs. Ramjilal, 1969 (1) SCC 813
Narayanarao (dead) through LRs and others vs. Sudarshan, 1995 Supp.(4) SCC 463
Mahant Dhangir and another vs. Madan Mohan and others, 1987 (Supp.) SCC 528
T.N. Rajasekar vs. N. Kasiviswanathan and others, AIR 2005 SC 3794
Delhi Electric Supply Undertaking vs. Basanti Devi and another, JT 1999 (7) SC 486
H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc., AIR 1980 Himachal Pradesh 16
United India Insurance Co. Ltd. vs. Dama Ram and others, 1994 ACJ 692
M. Adu Ama vs. Inja Bangaru Raja and another, 1995 ACJ 670
Himachal Road Transport Corporation vs. Saroj Devi and others, 2002 ACJ 1146
National Insurance Co. Ltd. vs. Mast Ram and others, 2004 ACJ 1039
LAC Solan and another vs. Bhoop Ram, 1997(2) Sim.L.C. 229
State Bank of India vs. M/s Sharma Provision Store and another, AIR 1999 J&K 128
Nati Devi and another versus Maya Devi and others, I L R 2016 (III) HP 1074
Sarita Devi & others versus Ashok Kumar Nagar & others, I L R 2016 (III) HP 1958
Raj Pal Yadav and another versus Jamna Devi and another, I L R 2016 (III) HP 2318
Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120
United India Insurance Co. Ltd. and others vs Patricia Jean Mahajan & others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant:	Mr. Neeraj Gupta, Advocate.
For the respondents:	Nemo for respondents No. 1 and 2.
	Mr. Jagdish Thakur, Advocate, for respondent No. 3.
	Nemo for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 30th April, 2012, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh (for short "the Tribunal") in M.A.C. Case No.

50 of 2009, titled as Shakuntla Devi and another versus Bhupinder Kaur and others, whereby compensation to the tune of ₹ 16,98,040/- with interest @ 8% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ 25,00,000/-, as per the break-ups given in the claim petition, on the ground that they became the victims of the vehicular accident, which was caused by the driver, namely Shri Jai Gopal, while driving tipper, bearing registration No. HP-69-0723, rashly and negligently on 8th March, 2009, at about 5.15 P.M., at Village Nandpur, in which deceased-Pardeep Singh @ Ajay Sandu sustained injuries, was taken to Regional Hospital, Una, wherefrom was referred to PGI, Chandigarh, where he succumbed to the said injuries.

4. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

5. On the pleadings of the parties, following issues came to be framed by the Tribunal on 8th June, 2011:

> *"1. Whether Sandeep Singh died as a result of injuries sustained in accident due to rash and negligent driving of respondent No. 2 Jai Gopal while driving vehicle No. HP-69-0723? OPP*
>
> *2. If issue No. 1 is proved, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *3. Whether the petition is not maintainable? OPR*
>
> *4. Whether petition is bad for non-joinder of necessary parties i.e. the owner and insurer of motorcycle No. HP-20 B-0155 as alleged? OPR-3*
>
> *5. Whether respondent No. 2-driver of vehicle No. HP-69-0723 was not holding valid and effective driving licence at the time of accident? OPR-3*
>
> *6. Whether vehicle was being plied without valid and effective route permit, registration certificate and fitness certificate in violation of the terms and conditions of the insurance policy as alleged? OPR-3*
>
> *7. Relief."*

6. The claimants have examined three witnesses and one of the claimants, namely Smt. Shakuntla Devi, herself stepped into the witness box as PW-3 to substantiate their claim. The owner-insured of the offending vehicle has examined two witnesses in support of his defence and the driver, namely Shri Jai Gopal, himself stepped into the witness box as RW-3. The insurer has not led any evidence.

7. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of ₹ 16,98,040/- with interest @ 8% per annum from the date of filing of the petition till its realization in favour of the claimants and saddled the insurer with liability in terms of the impugned award.

8. The claimants, owner-insured and driver of the offending vehicle have not questioned the impugned award on any ground, thus, has attained finality so far it relates to them.

9. The appellant-insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

Issue No. 1:

10. Learned counsel appearing on behalf of the appellant-insurer argued that the accident was not caused by the driver of the offending vehicle, but was caused by the deceased himself while driving the motorcycle. The owner-insured and the driver of the offending vehicle have not questioned the said findings. Thus, the insurer has no locus to question the same.

11. It is not the case of the appellant-insurer that there was collusion between the owner-insured and driver of the offending vehicle and the claimants. Had it taken the said defence and led evidence, question would have been different. Neither it has taken such defence nor has led any evidence. However, I have gone through the discussion made by the Tribunal in paras 11 to 17 of the impugned award, are legally and factually correct, need no interference. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 6.

Issues No. 3 to 6:

13. The appellant-insurer has not questioned the findings returned by the Tribunal on issues No. 3 to 6. However, I have gone through the record and am of the view that the Tribunal has rightly made the discussion in paras 23 to 25 of the impugned award. Accordingly, the findings returned by the Tribunal on issues No. 3 to 6 are upheld.

Issue No. 2:

14. Admittedly, the insurer has not sought permission in terms of Section 170 of the MV Act, thus, is precluded from questioning the adequacy of the compensation.

15. I deem it proper to record herein that the appeal under Section 173 of the MV Act is alike the appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, "CPC"). Therefore, the Court is under obligation to decide all issues arising in a case both on facts and law after appreciating the entire evidence.

16. The Apex Court in **U.P.S.R.T.C. vs. Km. Mamta and others,** reported in **AIR 2016 Supreme Court 948**, held that Section 173 of the MV Act and the first appeal under Section 96 CPC are alike and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case. It is profitable to reproduce paragraph 24 of the said judgment hereunder:

> *"24. An appeal under Section 173 of the M.V.Act is essentially in the nature of first appeal alike Section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence."*

17. It is worthwhile to record herein that Part VII of the CPC provides for filing of appeals arising out of decrees and orders. Section 96 CPC provides for appeals from original decree. It is apt to reproduce Section 96 CPC hereunder:

> *"**96. Appeal from original decree.** - 1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction the Court authorized to hear appeals from the decisions of such Court.*
>
> *(2) An appeal may lie from an original decree passed ex parte.*
>
> *(3) No appeal shall lie from a decree passed by the Court with the consent of parties.*
>
> *(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees."*

18. Section 107 CPC deals with the "Powers of the Appellate Court" and sub-section (2) thereof, provides specifically that the Appellate Court shall have the same powers and shall

perform as nearly as may be the same duties as are conferred and imposed on the trial Court. It is apt to reproduce Section 107(2) CPC as under:

> ***"107. Powers of appellate court.-***
>
> *(1) …….*
>
> *(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."*

19. Section 176 of the MV Act empowers the State Government to make rules for the purpose of implementing the provisions contained in Sections 165 to 174 of the MV Act. It is apt to reproduce Section 176 of the Act, hereunder:

> ***"176. Power of State Government to make rules.***
>
> *A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:--*
>
> *f) The form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;*
>
> *g) The procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;*
>
> *h) The powers vested in a Civil Court which may be exercised by a Claims Tribunal;*
>
> *i) The form and the manner in which and the fees (if any) on payment of which an appeal may be preferred against an award of a Claims Tribunal; and*
>
> j) *Any other matter which is to be, or may be, prescribed."*

20. In terms of the mandate of Section 176(c) of the MV Act, the Claims Tribunals are vested with the powers of Civil Court.

21. In a Claim Petition, summary procedure is to be adopted and all provisions of CPC are not applicable, rather only some provisions have been made applicable in terms of Section 169 of the MV Act read with Rule 232 of the Himachal Pradesh Motor Vehicles Rules, 1999 (for short "MV Rules"). It is apt to reproduce Rule 232 of the MV Rules herein:

> ***"232. The Code of Civil Procedure to apply in certain cases:-***
>
> *The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."*

22. Now, the question is - whether the Appellate Court while hearing an appeal under Section 173 of the MV Act can pass such an order which ought to have been passed by the Tribunal, without there being any appeal/challenge or cross objections from the person against whom the order has been made? The answer is in the affirmative for the reasons given hereinabove read with the mandate of law laid down by the Apex Court and the High Courts.

23. Part VII and Order 41 CPC deals with the powers and the scope of the Appellate Court in appeal proceedings.

24. The Apex Court in **Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation,** reported in **(2013) 11 SCC 517,** has held that there are no fetters on the powers of the appellate Court to consider the entire case on facts and law, while hearing an appeal under Section 173 of the MV Act. It is apt to reproduce paragraphs 10, 11 and 12 of the said decision hereunder:

"10. When an Appeal is filed under Section 173 of the Motor Vehicles Act, 1939 (hereinafter shall be referred to as the 'Act'), before the High Court, the normal Rules which apply to Appeals before the High Court are applicable to such an Appeal also. Even otherwise, it is well settled position of law that when an Appeal is provided for, the whole case is open before the Appellate Court and by necessary implication, it can exercise all powers incidental thereto in order to exercise that power effectively. A bare reading of Section 173 of the Act also reflects that there is no curtailment or limitations on the powers of the Appellate Court to consider the entire case on facts and law.

11. It is well settled that the right of Appeal is a substantive right and the questions of fact and law are at large and are open to Review by the Appellate Court. Thus, such powers and duties are necessarily to be exercised so as to make the provision of law effective.

12. Generally, finding of fact recorded by Tribunal should not be interfered with in an Appeal until and unless it is proved that glaring discrepancy or mistake has taken place. If the assessment of compensation by the Tribunal was fair and reasonable and the award of the Tribunal was neither contrary nor inconsistent with the relevant facts as per the evidence available on record then as mentioned hereinabove, the High Court would not interfere in the Appeal. In the case in hand, nothing could be pointed out to us as to what were the glaring discrepancies or mistakes in the impugned Award of the Tribunal, which necessitated the Appellate Court to take a different view in the matter."

25. The Apex Court in the case titled as **Giani Ram vs. Ramjilal,** reported in **1969 (1) SCC 813,** held that Order 41 Rule 33 CPC empowers the appellate Court to pass any decree which justice may require. It is apt to reproduce paragraphs 8 and 9 of the judgment herein:

"8. Order 41, Rule 33 of the CPC was enacted to meet a situation of the nature arising in this case. In so far as it is material, the rule provides:

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

The expression "which ought to have been passed" means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.

9. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived, it would, be perpetrating gave injustice to deny to the widow and the two daughters their share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33, CPC ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed."

26. The Apex Court inthe cases titled as **Narayanarao (dead) through LRs and others vs. Sudarshan,** reported in **1995 Supp.(4) SCC 463; Mahant Dhangir and another vs. Madan Mohan and others,** reported in **1987 (Supp.) SCC 528,** and **T.N. Rajasekar vs. N. Kasiviswanathan and others,** reported in **AIR 2005 SC 3794** held that the High Court, in order to do complete justice to the parties, can invoke the powers under Order 41 Rule 33 CPC and pass orders accordingly.

27. The Apex Court in another case titled as **Delhi Electric Supply Undertaking vs. Basanti Devi and another,** reported in **JT 1999 (7) SC 486,** while relying upon its earlier decision in Mahant Dhangir (supra), held in paragraph 19 as under:

> *"19. Conditions as laid in provision of Order 41, Rule 33 are satisfied in the present case. When circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the Court cannot be found wanting when it comes to exercise its powers."*

28. This Court in **H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc.,** reported in **AIR 1980 Himachal Pradesh 16,** held that under Order 41 Rule 33 CPC, wide powers have been given to the appellate Court and once it is seized of a matter in its appellate jurisdiction, it is within its power to do complete justice between all the concerned parties. It is apt to reproduce relevant portion of paras 39 and para 40 of the judgment herein:

> *"39. .....Moreover, theme of Order 41 and especially the wide powers given to the Court under Rule 33 of Order 41 suggests that the intention of the Legislature is to see that 'once the Court is seized of a matter in its appellate jurisdiction, it is able to do complete justice between all the concerned parties. To us, therefore, it is very clear that the provision enabling a respondent to file cross-objections made in Rule 22 is a procedural provision under which even if a respondent has not preferred any appeal, the Court is enabled to do complete justice to the parties by allowing the respondent concerned to prefer cross-objections within the period of limitation. Under these circumstances, with great respect to the learned Judges of the Allahabad High Court, we find ourselves unable to accept their view that provision enabling a respondent to file cross-objections is a substantive provision and not a procedural one.*
>
> *40. In view of our finding that provision for filing cross-objections contemplated by Order 41, Rule 22 is a procedural provision, the ratio of the above referred two decisions of the Supreme Court would at once be attracted, and this Court being seized of an appellate jurisdiction conferred by Section 110-D of the Motor Vehicles Act, It has to exercise that jurisdiction in the same manner in which it exercises its other appellate jurisdiction allowing the respondents in such appeals to prefer cross-objections."*

29. Keeping in view the ratio of the judgment supra, it can safely be held that the appellate Court is competent to pass any order in the interest of justice.

30. The High Court of Rajasthan, while dilating upon the powers of the Appellate Court under Order 41 Rule 33 CPC, in the case titled as **United India Insurance Co. Ltd. vs. Dama Ram and others,** reported in **1994 ACJ 692,** held that the appellate Court can rectify the error invoking Order 41 Rule 33 CPC even in the absence of Cross Objections or appeal by the claimants. It is apt to reproduce paragraph 7 of the said decision hereunder:

> *"7. The Tribunal has not passed award in any case against the owner (insured) of the vehicle. It has passed awards against the appellant insurance company only. It is not in dispute that the Tribunal has categorically held that the said accident took place due to rash and negligent driving of the truck by its driver. As such his employer, namely, Mohd. Rafiq, owner of the said truck, was liable for his negligent act. Thus the Tribunal committed a serious error in not making liable the owner and driver of the offending truck to pay the said amounts of compensation. This error can well be corrected by this court by invoking the provisions of Order 41, Rule 33, Civil Procedure Code, even if no cross-objection or appeal has been filed by the claimants-respondents. It has been observed in Kok Singh v. Deokabai AIR 1976 SC 634, paras 6 and 7, as follows:*
>
> > *(6) In Giani Ram v. Ramji Lal AIR 1969 SC 1144, the court said that in Order 41, Rule 33, the expression 'which ought to have been passed' means 'what*

ought in law to have been passed' and if an appellate court is of the view that any decree which ought in law to have been passed was in fact not passed by the court below, it may pass or make such further or other decree or order as the justice of the case may require.

(7) Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge. Reference of Murari Lal v. Gomati Devi 1986 ACJ 316 (Rajasthan), may also be made here. Similar view has been taken by me while deciding United India Ins. Co. Ltd. v. Dhali 1992 ACJ 1057 (Rajasthan)."

31. The High Court of Orissa at Cuttack in the case titled as **M. Adu Ama vs. Inja Bangaru Raja and another,** reported in **1995 ACJ 670,** has laid down the same principle of law.

32. This High Court in **Himachal Road Transport Corporation vs. Saroj Devi and others,** reported in **2002 ACJ 1146,** held that appellate Court is not precluded from passing order which it considers just in the facts of the case, without there being any cross objection or cross appeal. It is profitable to reproduce paragraph 15 of the said decision hereunder:

"15. Keeping in view the aforesaid decisions of Supreme Court and different High Courts including this Court , we feel that there being no prohibition in law, i.e., either under Motor Vehicles Act or under the provisions of Civil Procedure Code, this Court is not precluded from passing order which it considers just in the circumstances of a case without there being either cross-objection or cross-appeal. As such we are further of the view that Order 41, Rule 33 is fully applicable to the appeals under the Motor Vehicles Act."

33. In the case titled as **National Insurance Co. Ltd. vs. Mast Ram and others,** reported in **2004 ACJ 1039,** the question arose before this High Court was – whether the appellate Court can modify the award in the absence of cross-appeal. This High Court answered in the affirmative. It is apt to reproduce paragraph 13 of the said judgment hereunder:

"13. Because of what has been held in this judgment, it is felt necessary to exercise power vested in this court under Order 41, Rule 33 of the Civil Procedure Code to set aside the findings in the operative portion of the award requiring the appellant to pay the amount and then to recover it from the 'insurer' (it should have been 'insured'?). This is a direction in the impugned award that needs to be set aside. On this aspect, Mr. Sharma had argued that there is no cross-appeal by the owner of the vehicle. To meet such a situation, legislature had enacted Order 41, Rule 33 in the Civil Procedure Code even in cases where an appeal is not filed by a party, like the owner in the present appeal. As such, this plea cannot be accepted."

34. This High Court in another case titled as **LAC Solan and another vs. Bhoop Ram,** reported in **1997(2) Sim.L.C. 229,** modified the awards in exercise of powers under Order 41 Rule 33 CPC.

35. Faced with the similar situation, the Jammu and Kashmir High Court, in a case titled as **State Bank of India vs. M/s Sharma Provision Store and another,** reported in **AIR 1999 J&K 128,** held that a High Court can pass a decree which ought to have been passed by the trial Court. It is apt to reproduce relevant portion of paragraph 7 of the said decision hereunder:

"7. .....This is an exceptional situation which authorises this Court in the present appeal to pass such decree as ought to have been passed or as the nature of the case demands. Similarly discretion vested in this Court under the aforesaid provision of law will not be refused to be exercised simply because respondents have not either filed an appeal or cross-objections."

36. This Court in **FAO No.203 of 2010,** titled as **Nati Devi and another versus Maya Devi and others,** decided on **20th May, 2016, FAO No. 448 of 2011,** titled as **Sarita Devi & others versus Ashok Kumar Nagar & others,** decided on **17th June, 2016,** and **FAO (MVA) No. 599 of 2008,** titled as **Shri Raj Pal Yadav and another versus Smt. Jamna Devi and another,** decided on 24th June, 2016,has taken the similar view.

37. Thus, it can easily be deduced that the mandate of Section 96, Section 107(2) and order 41 Rule 33 CPC is just to rectify the errors and achieve the aim and object of the legislation. The purpose of Order 41 CPC, as discussed hereinabove, is to enable the appellate Court to do complete justice between the parties and to pass order which ought to have been passed while keeping in view the facts and circumstances of the case.

38. Admittedly, the age of the deceased was 23 years at the time of the accident. The Tribunal has rightly assessed the monthly income of the deceased to be ₹ 15,630/- in terms of the Bill/salary statement of the deceased, Ext. PW-4/B.

39. The deceased was bachelor at the relevant point of time. Thus, the Tribunal has rightly deducted one half towards his personal expenses in terms of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120**. Thus, the claimants have lost source of income to the tune of ₹ 7,800/- per month.

40. The Tribunal has wrongly applied the multiplier of '18'. In view of the ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the MV Act, multiplier of '15' is just and proper.

41. Viewed thus, it is held that the claimants have lost source of income/dependency to the tune of ₹ 7,800/- x 12 x 15 = ₹ 14,04,000/-.

42. The claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'.

43. Having said so, the claimants are held entitled to compensation to the tune of ₹ 14,04,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 14,34,000/- .

44. The Tribunal has also fallen in an error in awarding interest @ 8% per annum, which was to be awarded as per the prevailing rates.

45. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281;Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738;Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053;Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982;Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

46. Having said so, I deem it proper to reduce the rate of interest from 8% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

47. The factum of insurance is admitted, thus, the Tribunal has rightly saddled the insurer with liability.

48. Having glance of the above discussions, the impugned award is modified and the appeal is disposed of, as indicated hereinabove.

49. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts after proper verification.

50. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

51. Send down the record after placing copy of thejudgment on the Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Gautam Nath and another .....Appellants

Versus

Shri Duni Chand and others .....Respondents.

FAO (MVA) No. 120 of 2012.
Date of decision: 16th December, 2016.

Motor Vehicles Act, 1988- Section 149- Driver was driving a tipper un-laden weight of which is 2800 kg. – it falls within definition of light motor vehicle – the driver had a licence to drive light motor vehicle- no endorsement of PSV was required – the driver had a valid licence at the time of accident – the Tribunal wrongly discharged the insurer from liability- appeal allowed and insurer directed to satisfy the award. (Para- 9 to 22)

Cases referred:
Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd. AIR 1999 SC 3181
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC 217

For the appellants: Mr. G.R. Palsara, Advocate.
For the respondents: Nemo for respondents No. 1 to 3.
Mr. Jagdish Thakur, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 19.1.2012, passed by the Motor Accident Claims Tribunal II, Mandi, District Mandi, H.P. hereinafter referred to as "the Tribunal", for short, in MACT No. 38 of 2007, titled *Duni Chand and others versus Sh. Gautam Nath and others,* whereby compensation to the tune of Rs.2,36,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants and owner and driver came to be saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimants and insurer have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to him.

3. Owner and driver have questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellants argued that the Tribunal has fallen in an error in discharging the insurer from the liability and prayed that the insurer be saddled with the liability.

5. Claimants being the victims of a vehicular accident, filed claim petition before the tribunal for the grant of compensation to the tune of Rs. 15 lacs, as per the break-ups given in the claim petition, which was resisted by the respondents and following issues came to be framed.

1. *Whether the deceased Chaman Lal died due to rash and negligent driving of Tipper No. HP-58-1710 by respondent Leela Prakash as alleged? OPP.*
2. *If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so to what amount and from whom? OPP.*
3. *Whether there was breach of terms and conditions of insurance policy? OPR.*
4. *Whether the driver was not holding valid and effective driving license at the time of accident? OPR-3.*
5 *Relief.*

6. Claimants have examined three witnesses and one of the claimants, namely Duni Chand also stepped into the witness-box as PW3. Respondents examined two witnesses, namely, Prem Singh and Leela Prkash driver of the offending vehicle No. HP-58-1710.

7. The Tribunal, after scanning the evidence oral as well as documentary, held that the claimants have proved that driver Leela Prakash had driven the offending vehicle bearing registration No. HP-58-1710 (Tipper) rashly and negligently and had caused the accident. There is no dispute about such findings. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

8. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 and 4 around which the entire controversy revolves. It was for the insurer to lead evidence to prove that the owner has committed willful breach, has not led any evidence. Thus, has failed to discharge the onus. The Tribunal has decided issue No. 4 without making any discussion. Driver was having licence to drive light motor vehicle, copy of which is on record as Ext. RW2/A, which does disclose that the driver was competent to drive LMV transport.

9. Admittedly, the driver was driving Tipper bearing registration No. HP-58-1710, the unladen weight of which is 2800 kilograms, as per the Registration Certificate, Ext. RW1/A, thus falls within the definition of “Light Motor Vehicle” as given in Sections 2 (21) and 2 (28) of the Motor Vehicles Act, for short “the Act”.

10. The learned counsel for the appellants argued that the issues stand already determined by this Court in series of appeals.

11. The same issue was raised before the Supreme Court in case titled ***Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.*** reported in ***AIR 1999 SC 3181***. It is apt to reproduce paras 10, 11 and 14 of the said judgment herein:

> *“10. Definition of "light motor vehicle" as given in clause (21) of Section 2 of the Act can apply only to a "light goods vehicle" or a "light transport vehicle". A "light motor vehicle" otherwise has to be covered by the definition of "motor vehicle" or "vehicle" as given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be non-transport vehicle as well.*
>
> *11. To reiterate, since a vehicle cannot be used as transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose, and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question, would remain a*

light motor vehicle. The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of accident, the vehicle was not carrying any goods, and thought it could be said to have been designed to be used as a transport vehicle or goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.

12-13 …. ….. …..

14. Now the vehicle in the present case weighed 5,920 kilograms and the driver had the driving licence to drive a light motor vehicle. It is not that, therefore, that insurance policy covered a transport vehicle which meant a goods carriage. The whole case of the insurer has been built on a wrong premise. It is itself the case of the insurer that in the case of a light motor vehicle which is a non-transport vehicle, there was no statutory requirement to have specific authorisation on the licence of the driver under Form 6 under the Rules. It had, therefore, to be held that Jadhav was holding effective valid licence on the date of accident to drive light motor vehicle bearing Registration No. KA-28-567."

12. This Court in **FAO No. 54 of 2012** titled ***Mahesh Kumar and another*** vs**. *Smt. Piaro Devi and others*** decided on 25th July, 2014, held that such type of vehicle is LMV. It is apt to reproduce paras 10,11,14,16,18 and 19 of the said judgment herein:

"10.I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

"2. ……..

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

11. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

12-13. …… …… …..

14. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In

this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

15.My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** -*

(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

15- …. ….. …..

16. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

17. ….. ……. …….. …….

*18. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:*

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any

vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

19. The Apex Court in another case titled as ***National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,*** *reported in* ***2008 AIR SCW 906,*** *has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:*

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

13. Applying the ratio, the vehicle in question is a "Light Motor Vehicle".

14. Same principles of law have been laid down by this Court in FAOs No. 385 of 2007 & 388 of 2007, decided on 14.11.2014, FAOs No. 33 & 55 of 2010, decided on 17.10.2014, FAO No. 293 of 2006 decided on 4.4.2014, and ***FAO No. 319 of 2012*** decided on 2.12.2016.

15. Having said so, the Tribunal has wrongly decided issue No. 4. Accordingly, it is held that the driver was holding a valid and effective driving licence at the time of accident and owner has not committed any breach.

16. It was for the insurer to plead and prove the insurer has committed willful breach in terms of **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

17. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself

as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

18. Having glance of the above discussion, findings on issue No. 3 are set aside and is decided in favour of the claimants and against the insurer.

19. Viewed thus, the Tribunal has fallen in an error in discharging the insurer from the liability.

20. Factum of insurance is not in dispute. Thus, the insurer has to satisfy the award.

21. In view of the above, the appeal is allowed, impugned award is modified and the insurer is directed to satisfy the award.

22. The insurer is directed to deposit the amount alongwith interest, as awarded by the Tribunal, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification. Statutory amount deposited by the appellants, is awarded as costs in favour of the claimants, be released accordingly.

23. Send down the record forthwith, after placing a copy of this judgment.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Hari Chand and another ..... Appellants

Versus

Chaya Kumari and others ..... Respondents

FAO No.415 of 2012 a/w
CO No.172 of 2013
Date of decision: 16.12.2016

Motor Vehicles Act, 1988- Section 149- Driver had a valid licence to drive a light motor vehicle – it was nowhere provided that the driver was not competent to drive a motorcycle or a scooter – the Tribunal had fallen into error in holding that the driver did not have a valid and effective driving licence to drive the vehicle – it was for the insurer to prove the breach of the terms and conditions of the policy and mere plea is not sufficient to seek exoneration. (Para-8 to 13)

Motor Vehicles Act, 1988- Section 166- Deceased was running a tea shop and was earning Rs.8,000/- per month – however, no documentary proof was filed – the income of the deceased can be taken as Rs.6,000/- per month or Rs.200/- per day- after deducting 1/3rd amount towards the personal income, loss of source of dependency will be Rs.4,000/- per month – the

deceased was 55 years of age and multiplier of 10 is applicable- thus, the claimants are entitled to Rs.4,000 x 12 x 10= Rs.4,80,000/- under the head loss of source of dependency – claimants are also entitled to Rs.10,000/- each under the heads loss of estate, loss of love and affection, loss of consortium and funeral expenses – the deceased remained admitted in the hospital w.e.f. 14th May, 2011 till 21st May, 2011 and must have spent some amount on the treatment – compensation of Rs.50,000/- awarded under the head treatment- claimants are entitled to Rs.4,80,000 + 40,000+ 50,000= Rs.5,70,000/- along with interest @ 7.5% per annum.

(Para-14 to 23)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellants:	Mr.G.R. Palsara, Advocate.
For the respondents:	Mr.Adarsh Sharma, Advocate, for respondents No.1 and 2. Mr.Bhender Kumar Chaudhary, Advocate, for respondent No.3. Mr.P.S. Chandel, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 25th July, 2012, passed by the Motor Accident Claims Tribunal, Kullu, District Kullu, H.P., (for short, "the Tribunal") in Claim Petition No.22 of 2011, titled Chaya Kumari and others vs. Hari Chand and others, whereby the claim petition was allowed and compensation to the tune of Rs.3,76,400/-, with interest at the rate of 9% per annum, came to be awarded in favour of the claimants No.1 and 3, and the owner and the driver came to be saddled with the liability, (for short the "impugned award").

2. Feeling aggrieved, the owner and the driver have challenged the impugned award by the medium of instant appeal, the claimants have filed Cross Objections No.172 of 2013 for enhancement of compensation, while the insurer has not laid challenge to the impugned award on any ground.

3. Facts of the case, in brief, are that on 14th May, 2011, at about 8.00 p.m., at Jhiri, District Mandi, H.P., original respondent No.2, namely, Karam Chand had driven the scooter bearing No.HP-34-7757 rashly and negligent, hit the deceased Pawan Kumar, as a result of which he sustained multiple injuries, was shifted to Zonal Hospital, Kullu, referred to PGI Chandigarh, where he succumbed to the injures, on 21st May, 2011. FIR bearing No.41/2011,

dated 15.5.2011, was lodged at Police Station, Aut, District Mandi, H.P. It was pleaded that the deceased was running a tea shop and was earning Rs.8,000/- per month. Hence, the claim petition for compensation to the tune of Rs.10.00 lacs, as per the break-ups given therein.

4. The claim petition was resisted by the respondents by filing replies. On the pleadings of the parties, the Tribunal framed the following issues:

> *"1. Whether Pawan Kumar died on 14.5.2011 in a motor vehicle accident on account of rash and negligent driving of respondent No.2? OPP*
>
> *2. If issue No.1 is proved in affirmative, to what amount of compensation and at what rate of interest, the petitioners are entitled? OPP*
>
> *3. Whether the respondent -3 is liable to make payment of compensation as indemnifier? OPP*
>
> *4. Whether the vehicle in question was driven in breach of terms and conditions of the insurance policy? OPR-3*
>
> *5. Whether respondent No.2 was not having valid and effective driving licence to drive the vehicle? OPR-3*
>
> *6. Relief."*

5. In order to prove their claim, the claimants examined PW-1 Dr.Akshit Chandel and PW-3 HC Khem Chand, while one of the claimants, namely, Sumit Kumar stepped into the witness box as PW-2. On the other hand, the driver and the owner have examined Devi Ram as RW-1while the insurer has not led any evidence.

6. The Tribunal, after scanning the evidence, held that the claimants have proved that Karam Chand had driven the scooter rashly and negligently on the fateful day and had caused the accident, in which the deceased sustained injuries and succumbed to the same lateron. The said findings recorded by the Tribunal on issue No.1 are not in dispute. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

7. Before I deal with issues No.2 and 3, I deem it proper to take up issues No.4 and 5 at the first place.

Issue No.4

8. It is beaten law of the land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms and conditions contained in the policy and mere plea here and there cannot be a ground for seeking exoneration.

9. The Apex Court in case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531,** has taken the similar view**.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; but must also*

establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

10. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is 8 *:fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

11. Thus, it was for the insurer to plead and prove that the offending vehicle was being driven in violation of the terms and conditions contained in the insurance policy, has not led any evidence to that effect, thus, has failed to discharge the onus. The findings recorded by the Tribunal on issue No.4 are not legally and factually correct and are liable to be set aside. Accordingly, the findings on issue No.4 are set aside and the said issue is decided against the insurer.

12. As far as issue No.5 is concerned, it has been proved on record that the driver, namely, Karam Chand, was having a valid and effective driving licence to drive a Light Motor Vehicle. The driving licence has been proved on record as Ext.RW-1/A, a perusal of which does disclose that the driver was competent to drive a Light Motor Vehicle. It was nowhere stipulated in the said driving licence that the driver was not competent to drive a motor cycle or scooter. The Tribunal has fallen into an error in holding that the driver was not having a valid and effective driving licence to drive the offending vehicle. Accordingly, the findings returned by the Tribunal on issue No.5 are liable to be set aside and the same are set aside. The said issue is decided against the insurer.

13. In so far as issue No.3 is concerned, the factum of insurance is admitted. As has been discussed above, the insurer has failed to prove that the offending vehicle was being driven, at the relevant point of time, in contravention of the terms and conditions contained in the insurance policy. Therefore, this issue is decided in favour of the claimants and against the insurer and the insurer is held liable to pay the compensation.

14. Coming to issue No.2, which pertains to the quantum of compensation, the deceased, as has been pleaded, was running a tea shop at the time of accident and was earning Rs.8,000/- per month. Qua the income of the deceased, no documentary proof has been proved on record, but, it has come in the statement of PW-2 Sumit Kumar that the deceased was earning Rs.8,000/- per month, which has remained uncontroverted. The Tribunal has wrongly assessed the income of the deceased at Rs.4,000/-. As per the pleadings and the evidence on record, it can safely be said that the deceased was earning Rs.6,000/- per month i.e. Rs.200/- per day. Thus, it is held that the deceased, at the time of death, was earning Rs.6,000/- per month and after deducting 1/3rd towards his personal expenses, loss of source of dependency to the claimants can be said to be Rs.4,000/- per month.

15. The Tribunal has wrongly applied the multiplier of 11. The deceased, at the time of accident, was 55 years of age. In view of the law laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120** read with the 2nd Schedule attached with the Act, multiplier of 10 is just and appropriate and is applied in the present case.

16. Having said so, the claimants are held entitled to Rs.4,000/- x 12 x 10 = Rs.4,80,000/- under the head 'loss of source of dependency'.

17. In addition, the claimants are also held entitled to Rs.10,000/- each, i.e. Rs.40,000/- in all, under the heads 'loss of estate', 'loss of love and affection', 'loss of consortium' and 'funeral expenses'.

18. Apart from the above, the claimants have superficially pleaded in the claim petition and also proved by leading evidence that the deceased, after the accident, remained admitted in the hospital w.e.f. 14th May, 2011 (the date of accident) till 21st May, 2011, when he succumbed to the injuries sustained by him. Thus, during this period, the claimants would have spent considerable amount for the treatment of the deceased. Thus, supposedly, I award Rs.50,000/- under the head 'treatment'.

19. Having said so, the claimants are held entitled to compensation to the tune of Rs.4,80,000/- + Rs.40,000/- + Rs.50,000/- = Rs.5,70,000/-.

20. The Tribunal has also fallen into an error in awarding interest at the rate of 9% per annum. It is beaten law of land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in** ***(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,*** **reported in** ***2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,*** **reported in** ***(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,*** **reported in** ***2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,*** **reported in** ***2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,*** **reported in** ***(2015) 4 Supreme Court Cases 433,*** **and** ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,*** reported in ***(2015) 4 Supreme Court Cases 434,*** and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,*** being the lead case, decided on **19.06.2015**.

21. Having said so, it is held that the amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till the deposit thereof.

22. Yet again, the Tribunal has wrongly not awarded anything in favour of claimant Sumit Kumar, who is the son of the deceased. Accordingly, it is held that the amount of compensation shall be apportioned amongst all the claimants equally.

23. The amount of compensation, alongwith interest, shall be deposited by the insurer before the Tribunal below within a period of eight weeks from today and on deposit, the same be released in favour of the claimants forthwith. In case the owner/appellant has already deposited the amount of compensation, the same be released in his favour alongwith up-to-date interest accrued thereon, through payee's account cheque, after the amount is deposited by the insurer and released to the claimants.

24. In view of the above discussion, the appeal and the cross objections are allowed and the impugned award is modified, as indicated above. The appeal and cross objections stand disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Mohammad Farman and another ....Petitioners/applicants.

Vs.

State of H.P. .....Respondent/ Non-applicant.

Cr. MP No. 1281 of 2016, Cr. MP No. 1283 of 2016 Cr. MP No. 1304 of 2016&Cr. MP No. 1292 of 2016 in Cr. Revision No.: 73 of 2013

Date of Decision: 16.12.2016

Probation of Offenders Act, 1958- Section 6 read with Section 11- Applicants pleaded that accused were less than 21 years of age at the time of their conviction and it was mandatory for the Court to grant the benefit of Probation Of Offenders Act- held, that the Trial Court had considered the question, whether the benefit of Probation of Offenders was to be granted to the accused or not and taking into consideration the nature of the offence, the Trial Court had decided not to extend the benefit – this decision was not challenged in appeal or revision- a discretion has been vested in the Trial Court to grant the benefit of Probation or decline the same and the Court cannot be compelled to grant the benefit in all cases – application dismissed.

(Para-5 to 14)

Cases referred:

Ramji Missar and another Vs. State of Bihar AIR 1963 Supreme Court 1088

Rattan Lal Vs. The State of Punjab AIR 1965 Supreme Court 444

For the petitioners/ applicants: Mr. Rakesh Manta, Advocate.

For the respondent/Non-applicant: Ms. Parul Negi, Dy. A.G.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

Cr. MP No. 1281 of 2016&Cr. MP No. 1283 of 2016

This Court vide its judgment dated 02.11.2016, dismissed the Criminal Revision Petition filed by the present applicants against judgments passed by the Court of learned Judicial Magistrate, 1st Class, Court No. 1, Kasauli in Criminal Case No. 73/2 of 2009 dated 08.08.2011 and Court of learned Sessions Judge, Solan in Criminal Appeal No. 33-S/10 of 2011 dated 08.03.2013, respectively, whereby the present applicants were convicted by the learned trial Court, which judgment was upheld by the learned appellate Court.

2. By way of these applications, applicants have averred that while dismissing the revision petition, this Court erred in not granting benefit of Probation of Offenders Act, 1958 to the convicts as is envisaged under Section 6 read with Section 11 of the Probation of Offenders Act, 1958, keeping in view the fact that at the time when the crime was committed, both the accused were less than 21 years of age and even when the judgment was announced by the learned trial Court, the age of accused was less than 21 years.

3. According to Mr. Manta, there is no unfettered discretion vested in this Court so as not to comply with the provisions of Section 6 of the Probation of Offenders Act, 1958 and according to him, because the age of the convicts at the time when the crime was committed was less than 21 years, it was mandatory for this Court to have had granted them benefit of Probation of Offenders Act. For this purpose, Mr. Manta has relied upon the judgment of Hon'ble Supreme Court in **Ramji Missar and another** Vs. **State of Bihar** AIR 1963 Supreme Court 1088 and **Rattan Lal** Vs. **The State of Punjab** AIR 1965 Supreme Court 444.

4. I have heard Mr. Rakesh Manta, learned counsel for the applicants/petitioners as well as learned Deputy Advocate General.

5. A perusal of the judgment passed by the learned trial Court demonstrates that after convicting the accused and before imposing sentence upon them, learned trial Court considered the factum as to whether the benefit of Probation of Offenders Act was to be granted to the accused or not and after due application of mind, it held that keeping in view the facts and circumstances of the case, the benefit of Probation of Offenders Act cannot be extended to the accused. The findings so returned by the learned trial Court are quoted hereinbelow:

> *"27. Keeping in view the facts and circumstances and the manner in which the complainant was assaulted by the convicts much lenient view cannot be taken and the facts and circumstances of the case too suggest that it is also not a case where the benefit of Probation of Offenders Act can be given to the convicts. The complainant was very brutally assaulted by the convicts without any reason and it shows their high headedness. Owing to these facts and circumstances, neither much lenient view can be taken not the benefit of Probation of Offenders Act can be given to the convicts. However, keeping in view the fact that convicts are facing the trauma of the trial for the last three years and are first offenders a little lenient view is taken and the convicts are sentenced to undergo simple imprisonment for one year and fine of Rs.1000/- (Rs. One thousand only) each for the commission of offence punishable under Section 325 read with Section 34 of the Indian Penal Code. In default of payment of fine the convicts shall further undergo simple imprisonment for thirty days."*

6. Therefore, it is not a case where learned trial Court after convicting the accused, imposed sentence upon them in ignorance of the provisions of Section 6 of the Probation of Offenders Act.

7. A perusal of the grounds of appeal taken by the convicts before the learned appellate Court demonstrate that there was no challenge in the grounds of appeal to the adjudication made by the learned trial Court of not granting the convicts the benefit of Probation of Offenders Act. Similarly, even before this Court in the revision petition, there was no specific challenge laid to the order passed by the learned trial Court of not granting benefit of Probation of Offenders Act to the convicts and all that was stated in the revision petition was that the Courts below could have extended the benefit of Probation of Offenders Act to the convicts.

8. In my considered view, whether or not the benefit of Probation of Offenders Act is to be granted is a discretion vested with the Courts and though this discretion has to be exercised in a judicious manner by the learned Courts and not in an arbitrary manner, however, the convicts cannot force a Court to mandatorily grant a convict benefit of Probation of Offenders Act, if the convict happens to be less than 21 years of age at the time when the crime was committed, as is being canvassed by the petitioners. Neither Rule 6 of the Probation of Offenders Act nor Rule

11 of the same mandatorily directs a Court of law to grant benefit of Probation of Offenders Act to an accused if the accused happens to be less than 21 years of age at the time of commission of the offence, as is in fact the plea of the learned counsel for the petitioners. The Hon'ble Supreme Court in neither of the judgments relied upon by the petitioners has laid down this law that if an accused is less than 21 years of age as on the date when the offence is committed, then mandatorily he has to be granted benefit of Probation of Offenders Act.

9. Even otherwise, in my considered view, the judgments relied upon by the learned counsel for the applicants/petitioners do not have any applicability in the facts of the present case, because therein the factual position was totally different as High Court in the matter reported in ***AIR 1963 Supreme Court 1088***, had refused to exercise its powers under Section 11 of the Probation of Offenders Act on the ground that at the time when the accused were convicted by the learned trial Court, they were more than 21 years of age. It is not the factual position in this case, because admittedly it is not as if the learned trial Court refused to grant the accused benefit of Probation of Offenders Act on the ground that at the time when the judgment was announced by the learned trial Court, they were more than 21 years of age.

10. As I have already held above, learned trial Court has not denied the benefit of Probation of Offenders Act on the basis of erroneous or wrong consideration of age of the accused. It has denied the benefit of Probation of Offenders Act after taking into consideration the facts of the case.

11. Similarly, the factual position on which the Hon'ble Supreme Court adjudicated in ***AIR 1965 Supreme Court 444*** is also not akin to the factual position in this case, because in that case, the issue was with regard to retrospective operation of the Probation of Offenders Act.

12. There is no force in the arguments of learned counsel for the applicants/petitioners that because the applicants were less than 21 years of age as on the day when the crime was committed, therefore, they were entitled to be extended the benefit under Sections 3 & 4 or Section 6 of the Probation of Offenders Act, as a matter of right.

13. Recently, the Hon'ble Supreme Court in **Mohd. Hashim** Vs. **State of UP & Ors.**, Criminal Appeal No. 1218 of 2016, decided on 28.11.2016 has held:

> *"20. Presently, we shall advert to the second plank of the submission advanced by the learned counsel for the appellant. In Rattan Lal vs. State of Punjab7 . Subba Rao, J., speaking for the majority, opined thus:-*
>
> *"The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated, the Act distinguishes offenders 7 AIR 1965 SC 444 Page 15 15 below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case; including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act."*
>
> *We have reproduced the aforesaid passage to understand the philosophy behind the Act.*
>
> *21. In this regard, it is also seemly to refer to other authorities to highlight how the discretion vested in a court under the PO Act is to be exercised. In Ram Prakash vs. State of Himachal Pradesh8 , while dealing with Section 4 of the PO Act in the context of the Prevention of Food Adulteration Act, 1954, the Court opined that the*

word 'may' used in Section 4 of the PO Act does not mean 'must'. On the contrary, as has been held in the said authority, it has been made clear in categorical terms that the provisions of the PO Act distinguishes offenders below 21 years of age and those 8 AIR 1973 SC 780 Page 16 16 above that age and offenders who are guilty of committing an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. Thereafter, the Court has proceeded to observe:- "While in the case of offenders who are above the age of 21 years, absolute discretion is given to the Court to release them after admonition or on probation of good conduct in the case of offenders below the age of 21 years, an injunction is issued to the Court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case, including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act. (Ratan Lal vs. State of Punjab (supra) and Ramji Missir vs. the State of Bihar (AIR 1963 SC 1088)."

14. Therefore, in view of the findings returned above, these applications are dismissed.

Cr. MP No. 1304 of 2016&Cr. MP No. 1292 of 2016

15. As this Court has not interfered in the applications filed under Section 11(1) of the Probation of Offenders Act, 1958, these applications are accordingly dismissed as infructuous.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. .....Appellant

Versus

Sh. Pawan Kumar and others .....Respondents.

FAO (MVA) No. 451 of 2012 a/w connected matters.

Date of decision: 16th December, 2016.

Motor Vehicles Act, 1988- Section 149- Interrogatories were sent to District Judge, Mathura, who had sent the report to the Tribunal showing that the original licence was not issued in the name of the driver Shakti Chand – however, the insurer had not proved the said report – the licence was renewed at Kangra and the renewal was not fake – the burden was upon the insurer to establish that the insurer had committed willful breach of the terms and conditions of the policy, which was not proved – insurer was rightly saddled with liability- however, the rate of interest reduced to 7.5% per annum. (Para-5 to 17)

Cases referred:

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant(s): Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.

For the respondent(s): Ms. Anjali Soni Verma, Advocate, for the claimants in respective appeals.
Mr. Rita Goswami, Advocate, for owner and driver in respective appeals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

These appeals are outcome of one motor vehicle accident allegedly caused by driver, namely, Shakti Chand, while driving vehicle bus bearing registration No. HP-39-5281, rashly and negligently on 19.2.2009. Thus, I deem it proper to determine all these appeals by this common judgment.

2. Claimants had filed separate claim petitions before Motor Accident Claims Tribunal-II Kangra at Dharamshala, for short "the Tribunal" for the grant of compensation, as per the break-ups given in their respective claim petitions. The claim petitions were resisted by all the respondents and issues came to be framed by the Tribunal in all the claim petitions. I deem it proper to reproduce one set of issues framed in MACP No. 26-K/2009, subject matter of FAO No. 451 of 2012 herein.

1. *Whether on account of rash and negligent driving by respondent No. 2 on 19.2.2009 caused the death of deceased Subham Chaudhary? OPP*
2. *If issue No. 1 is proved in affirmative to what amount of compensation the petitioners are entitled and from whom? OPP*
3. *Whether the offending vehicle bearing registration No.HP-39-5281 as over loaded and violated the terms and conditions of the insurance policy? OPR*
4. *Whether the deceased was travelling in the vehicle No. HP-39-5281 as gratuitous passenger? OPR.*
5. *Whether the respondent No. 2 was not holding valid and effective driving licence at the time of accident? OPR*
6. *Whether respondent No. 1 was not having valid route permit, registration certificate, and fitness certificate?*
7. *Whether the accident is the result of mechanical defect? OPR*
8. *Relief.*

3. Compensation came to be granted by the Tribunal, in favour of the claimants in different claim petitions vide separate awards and insurer was saddled with the liability, hereinafter referred to as "the impugned awards", for short. The details of compensation awarded in the claim petitions vide impugned awards are as under:-

Sr. No.	Claim petition No/title	Decided on	Compensation awarded	Subject matter of appeal.
1.	MACP No.26-K/2009 titled Pawan Kumar and another versus Ajay Goshwami and	31.8.2012	Rs.1,80,000/- alongwith interest @7.5% per annum.	FAO(MVA) No. 451 of 2012.

	others			
2.	MACP No.34-K/II-2009 titled Smt. Gaytri Devi and another versus Shakti Chand and others	12.12.2012	Rs.3,48,800/- alongwith interest @9% per annum.	FAO(MVA) No. 98 of 2013.
3.	MACP No.60-K/II-2009 titled Neelam Kumari versus Shakti Chand and others	12.12.2012	Rs.10,945/- alongwith interest @9% per annum	FAO(MVA) No. 99 of 2013.
4.	MACP No.33-K/II-2009 titled Smt. Sarla Devi versus Shakti Chand and others	12.12.2012	Rs.2,33,600/- alongwith interest @9% per annum	FAO(MVA) No. 100 of 2013.
5.	MACP No.61-K/II-2009 titled Bikku @ Priya Darshan versus Shakti Chand and others	12.12.2012	Rs.1,18,670/- alongwith interest @9% per annum	FAO(MVA) No. 101 of 2013.
6.	MACP No.32-K/2009 titled Amar Singh versus Ajay Goswami and others	30.11.2012.	Rs.1,04,000/- alongwith interest @7.5% per annum	FAO(MVA) No. 198 of 2013.
7.	MACP No.28-K/2009 titled Nirmala Devi and others versus Ajay Goshwami and others	15.1.2013	Rs.3,08,000/- alongwith interest @7.5% per annum.	FAO(MVA) No. 4049 of 2013.
8.	MACP No.26-K/2009 titled Santoh Kumari and others versus Ajay Goshwami and others	15.1.2013	Rs.6,32,000/- alongwith interest @7.5% per annum	FAO(MVA) No. 4054 of 2013.
9.	MACP No.29-K/2009 titled Simro Devi and another versus Ajay Goshwami and others	15.1.2013.	Rs.1,88,000/- alongwith interest @7.5% per annum	FAO(MVA) No. 4051 of 2013.
10.	MACP No.34-K/2009 titled Sonu Kumari versus Ajay Goswami and others	29.7.2013	Rs.75,500/- alongwith interest @7.5% per annum	FAO(MVA) No. 4191 of 2013.
11.	MACP No.38-K/2009 titled Sunita Devi versus Ajay Goswami and others	29.7.2013	Rs.34,000/- alongwith interest @7.5% per annum.	FAO(MVA) No. 4192 of 2013.

4. Claimants, owner-insured and driver have not questioned the impugned awards on any ground. Thus, the same have attained finality so far as they relate to them.

5. The appellant/ insurer has questioned the impugned awards on the following grounds;

(i) That the compensation awarded is excessive;

(ii) That it is case of overloading,

(iii) That the driver was not having a valid and effective diving licence at the time of accident.

6. All the three grounds are not well founded and sustainable, for the following reasons.

7. I have gone through all the impugned awards. The amount awarded is rather meager. Unfortunately, the claimants have not questioned the same and even have not prayed for the enhancement, are maintained. However, the Tribunal has fallen in an error in awarding interest at a higher rate in four claim petitions, subject matter of FAOs No. 98 of 2013, 99 of 2013, 100 of 2013 and 101 of 2013. The interest was to be awarded at the rate of 7.5% per annum, for the following reasons.

8. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

9. Accordingly, interest @7.5% per annum is awarded from the date of claim petitions till realization of the amount in four appeals, referred to supra.

10. It is stated that the insurer has not questioned the impugned awards in other claim petitions for the reasons that the amount awarded was meager and in terms of the mandate of Motor Vehicles Act, for short "the Act" the appeal was not competent. It is worthwhile to mention herein that it is not the case of the insurer that the claim petitions were filed more than the risk covered. Seating capacity of the offending vehicle was 29 and the claim petitions have been filed for the compensation, viz-a-viz risk covered.

11. The Tribunal has rightly directed the insurer to satisfy the awards. Even otherwise, in case more claim petitions would have been filed, insurer had to satisfy the highest award. The Tribunal has awarded the amount relating to 29 claim petitions. Accordingly, this ground is also turned down.

12. Learned counsel for the insurer has argued that the interrogatories were sent to the District Judge, Mathura, for doing the needful, who has sent the report to the Tribunal, which does disclose that the original driving licence was not issued in the name of driver Shakti Chand and that has not been taken into consideration by the Tribunal. The driving licence is on record and it is recorded by the Tribunal that the original licence was not issued in favour of the driver aforesaid. But unfortunately, insurer has not taken any steps to prove the said report. However, be that as it may, the admitted case of the parties is that the driving licence was renewed in Kangra at Dharamshala and renewal is not fake. It was for the insurer to prove that the owner-insured was knowing that the licence was fake and that the insurer has committed willful breach in terms of **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

13. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

14. Viewed thus, this ground also fails and is accordingly turned down.

15. Factum of insurance is not in dispute. Thus, the insurer has to satisfy the award.

16. Having glance of the above discussion, all the appeals are disposed of, impugned awards, except four, are upheld and the impugned awards so far the same relate to FAOs No. 98, 99, 100 and 101 of 2013, are modified, as indicated hereinabove.

17. The insurer is directed to deposit the amount alongwith interest @ 7.5% within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, through payees' account cheque, or by depositing the same in their bank accounts, after proper verification. Excess amount , if any be refunded to the appellant/insurer accordingly.

18. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Om Parkash ... Appellant
Versus
Smt. Madhu Chandel and another ... Respondents

RSA No.229 of 2008
Reserved on: 25.11.2016
Date of decision:16.12.2016

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit for specific performance and in the alternative for damages – it was pleaded that plaintiff had entered into an agreement to purchase the suit land for a consideration of Rs.98,000/- - a sum of Rs.70,000/- was paid as earnest money- the balance was to be paid at the time of the execution of the sale deed – the defendants failed to execute the sale deed- hence, the suit was filed – the suit was dismissed by the Trial Court- an appeal was preferred, which was partly allowed- held in second appeal that both the Courts found that agreement to sell was executed between the parties – sum of Rs.70,000/- was paid as earnest money- - Courts also found that Rs.28,000/- was not paid by the plaintiff on or before the due date – a substantial amount was paid to the defendants at the time of execution of the agreement – the suit should have been decreed by the Courts for specific performance – appeal allowed and the suit of the plaintiff decreed for the specific performance of the agreement.(Para-13 to 19)

For the appellant: Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate.
For the respondents: Ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, appellant/plaintiff has challenged the judgment and decree passed by the Court of learned District Judge, Solan, Camp at Nalagarh, in Civil Appeal No. 6-NL/13 of 2007 dated 16.01.2008, vide which learned Appellate Court while partly setting aside the judgment and decree passed by learned Civil Judge (Senior Division), Nalagarh, in Civil Suit No. 162/1 of 2004 dated 30.04.2007, decreed the suit of the appellant/plaintiff partly, by holding the appellant/plaintiff to be entitled for decree for recovery of Rs.70,000/- from respondents/defendants with interest at the rate of 6% per annum from the date of payment till its realization with proportionate costs.

2. Brief facts necessary for adjudication of the case are that the appellant/plaintiff (hereinafter referred to as the plaintiff), filed a suit for specific performance of contract dated 15.11.2002 and in the alternative, suit for damages on the grounds that the defendants were

owners in possession of the suit land measuring 1 Bigha 8 Biswas being 1/3rd share of total land measuring 4 Bighas 4 Biswas comprised in Khata/Khatauni Nos. 62min/62min, bearing Khasra No. 560 (4-4), situated in village Nangal Nihla, Pargana Plassi, Tehsil Nalagarh, District Solan and the plaintiff was interested to purchase the suit land and as defendants agreed to sell the said land to the plaintiff for a total sale consideration of Rs.98,000/-, accordingly an agreement to sell was reduced into writing on 15.11.2002 which was duly signed by the parties in the presence of the attesting witnesses. As per the plaintiff, a sum of Rs.70,000/- was paid as earnest money to the defendants at the time of execution of said agreement to sell on 15.11.2002 and it was agreed between the parties that the remaining amount of Rs.28,000/- shall be paid on or before 15.01.2003 and that the defendants will execute the sale deed in favour of the plaintiff on or before 15.01.2003. As per the plaintiff, he undertook to bear the expenses of sale deed and the defendants undertook to keep the suit land free from all encumbrances till the execution of the sale deed. Further as per the plaintiff, the balance amount of sale consideration i.e. Rs.28,000/- was also paid to the defendants on 30.11.2002 as the defendants had approached the plaintiff to pay the same on the ground that they were constructing their houses and therefore, they required the money. As per the plaintiff, defendants assured that they would execute the sale deed as and when the plaintiff would ask them to execute the sale deed, however, later on, they started postponing the execution of the sale deed of the suit land on one pretext or the other. As per the plaintiff, he remained always ready and willing and was still ready and willing to perform his part of contract dated 15.11.2002 but the defendants were not ready and willing to perform their part of contract and were not executing the sale deed of the suit land as per terms and conditions of agreement dated 15.11.2002. It was further pleaded in the plaint that the plaintiff requested defendants lastly on 12.05.2004 to execute the sale deed as per the terms of agreement dated 15.11.2002 but defendants were not ready to fulfil their part of contract and threatened to alienate the same to some other person and to cause wrongful loss to the plaintiff and wrongful gains for themselves. As per the plaintiff, the cause of action arose in his favour on 15.01.2003 when the defendants did not turn in the office of Sub Registrar, Nalagarh, to execute the sale deed as per terms of agreement dated 15.11.2002 and lastly on 12.05.2004 when defendants irrevocably refused to execute the sale deed. On these basis, the plaintiff prayed for decree for possession by way of specific performance of contract dated 15.11.2002 qua the suit land and in the alternative, decree for recovery of Rs.1,50,000/- alongiwth interest as damages so suffered and sustained by the plaintiff on account of non-performance of part of contract by the defendants with costs.

3. Defendants contested the suit and in the written statement took the stand that the consideration amount of sale agreement was not paid to the defendants and in fact, no agreement to sell was executed or signed by the defendants. As per averments made in the written statement, defendants had not agreed to sell their share to plaintiff. It was denied by the defendants that in November, 2002 an amount of Rs.28,000/- was also received by them from the plaintiffs as was pleaded by the plaintiff. The execution of sale agreement between the parties was denied and it was further stated in the written statement that if the sale agreement had been executed by the plaintiff himself, in that event the same was not binding on the defendants.

4. By way of replication, the plaintiff reiterated the claim as was made in the plaint.

5. On the basis of the pleadings of the parties, learned trial Court framed the following issues:-

4. Whether the plaintiff is entitled for the decree qua possession by way of specific performance of agreement dated 15.11.2002 as prayed? ... OPP

5. Whether the plaintiff is also entitled for the decree to the tune of Rs.1,50,000/- alongwith interest and damages as prayed? ... OPP

6. Whether the suit of the plaintiff is not maintainable and competent in law and facts? ... OPD

7. Whether there is no cause of action, as alleged? .... OPD

8. Whether the plaintiff has properly valued the suit for the purpose of Court fee and jurisdiction? .... OPP

9. Whether the plaintiff has suppressed the material facts, as alleged? ... OPD

7. Relief.

6. On the basis of material placed on record by the respective parties, learned trial Court returned the following findings to the issues so framed:-

Issue No. 1:	No.
Issue No. 2:	No.
Issue No. 3:	No.
Issue No. 4:	No.
Issue No. 5:	Yes.
Issue No. 6:	Yes.
Relief. :	The suit of the plaintiff stands dismissed as per operative portion of the Judgment.

7. While dismissing the suit so filed by the plaintiff, learned trial Court held that the execution of agreement to sell Ext. P-1 was duly proved and as it was clearly mentioned in the agreement to sell that an amount of Rs.70,000/- was received by the defendants and remaining amount of Rs.28,000/- was to be paid on or before 15.01.2003 and failure to make said payment on or before 15.01.2003 would result in forfeiture of earnest money, therefore, it was to be examined whether the plaintiff had paid Rs.28,000/- to the defendants. Learned trial Court held that the plaintiff himself was not confident with regard to payment of Rs.28,000/- as it was mentioned in affidavit in examination-in-chief that if receipt of Rs.28,000/- was not proved then he was ready and willing to pay Rs.28,000/- again. Learned trial Court held that there was no need to mention this fact had he actually paid the same. It was further held by learned trial Court that the plaintiff had not deposed in his affidavit in examination-in-chief that he had gone to the office of Sub Registrar, Nalagarh, on 15.01.2003 for the purpose of execution of the sale deed. Learned trial Court also held that in the absence of any evidence having been led by the plaintiff in this regard it could be easily inferred that on 15.01.2003 plaintiff had not gone to the office of Sub Registrar. On these basis, it was concluded by learned trial Court that it stood proved that receipt of Rs.28,000/- and willingness to get the sale deed registered on 15.01.2003 by plaintiff was not proved. Learned trial Court further held that as the relief under Specific Relief Act was discretionary relief and person who was seeking specific performance should have come to the Court with clean hands and as plaintiff had failed to prove that he had paid Rs.28,000/- and was willing to execute the sale deed as per the terms and conditions of the agreement, the plaintiff was not entitled to specific performance of the contract in view of the terms and conditions of the agreement to sell in which it was mentioned that if the amount of Rs.28,000/- was not paid by the plaintiff on or before 15.01.2003, then Rs.70,000/- shall be forfeited. On these basis learned trial Court dismissed the suit of the plaintiff.

8. Feeling aggrieved by the judgment and decree so passed by learned trial Court, plaintiff filed an appeal.

9. Learned Appellate Court vide its judgment dated 16.01.2008 while partly setting aside the judgment and decree passed by learned trial Court, partly allowed the suit of the plaintiff by holding him entitled for recovery of Rs.70,000/- from the defendants with interest @ 6% per annum from the date of payment till its realization with proportionate costs. While arriving at the said conclusion, it was held by learned Appellate Court that dubious stand taken by the plaintiff in his affidavit about the payment of balance amount of Rs.28,000/- created a doubt as to the payment of this amount to the defendants on 30.11.2002 as there was

no documentary proof of such document and it did not stand to reason that the plaintiff would have paid this amount without securing any receipt and without any witness. Learned Appellate Court held that even if the parties were closely related and if the amount had actually been paid on said date then why plaintiff did not ensure the execution of the sale deed, was also not explained. On these basis, it was held by learned Appellate Court that learned trial Court had rightly rejected this part of the evidence produced by the plaintiff to prove that the balance amount of sale consideration stood paid and had correctly drawn the inference that the plaintiff was not ready and willing to perform his part of the contract. However, learned Appellate Court further held that learned trial Court wrongly rejected the claim of the plaintiff for return of advanced money, as though the balance amount was not paid by the plaintiff by the agreed date, the condition in the agreement to sell that if the same was not paid on or before the date mentioned in the agreement to sell, should not have been construed strictly as time was not generally the essence of the contract in case of sale of immoveable property. Learned Appellate Court further held that in the case in hand substantial amount was paid to the defendants as an advance by the plaintiff and he had stated in the deposition that he was willing and ready to pay the balance amount during the pendency of the suit. On these basis, it was held by learned Appellate Court that learned trial Court should have ordered the payment of the advance amount if no damages as claimed, especially when learned trial Court had specifically rejected the plea of the defendants of not executing the agreement to sell and not receiving the advance of Rs.70,000/- which fact was duly proved by the evidence of the plaintiff. On these basis, learned Appellate Court held the plaintiff to be entitled for decree for recovery of Rs.70,000/- from the defendants at the rate of 6% per annum from the date of payment till its realization with proportionate costs.

10. The judgment and decree so passed by learned Appellate Court stands assailed by the plaintiff on the ground that learned Appellate Court should have had passed a decree for specific performance of agreement dated 15.11.2002 in favour of the plaintiff rather than passing a decree for recovery of Rs.70,000/- alongwith interest and proportionate costs which was admitted on 19.05.2008 on the following substantial questions of law:-

> "1. Whether the learned lower appellate Court mis-directed itself in not granting a decree for specific performance once it come to the conclusion that the agreement to sell has proved on record and that the plaintiff is ready and willing to perform his part of the contract?"

11. The judgment and decree passed by learned Appellate Court has not been challenged by the defendants.

12. I have heard learned Senior counsel for the appellant and have also gone through the records of the case as well as judgments and decrees passed by both learned Courts below.

13. The factum of agreement to sell dated 15.11.2002 Ext. P-1 having been executed between the plaintiff and defendants has been held concurrently in favour of the plaintiff and against the defendants by both the learned Courts below. Similarly, the factum of defendants having received Rs.70,000/- out of total sale consideration of Rs.98,000/- has also been concurrently held by learned Courts below in favour of the plaintiff and against the defendants. Whereas, learned trial Court dismissed the suit of the plaintiff for specific performance of contract and for damages, learned Appellate Court while modifying the judgment and decree so passed by learned trial Court though dismissed the suit of the plaintiff for specific performance, however, it partly decreed the suit of the plaintiff held him entitled for recovery of Rs.70,000/- from the date of payment till its realization alongwith interest and proportionate costs. As per the appellant/plaintiff when both learned Courts blow had concurrently come to the conclusion that agreement to sell dated 15.11.2002 was duly executed between the plaintiff and defendants and the defendants had received an amount of Rs.70,000/- as advance out of total sale consideration of Rs.98,000/- from the plaintiff then the said Court should have had passed a decree for specific performance of agreement dated 15.11.2002 in favour of the plaintiff rather

than passing a decree for recovery of Rs.70,000/- as has been done by learned Appellate Court.

14. While denying the relief of specific performance of agreement dated 15.11.2002 in favour of the plaintiff, both learned Courts below have held that as the plaintiff had neither paid the balance sale consideration of Rs.28,000/- as per terms of agreement to sell dated 15.11.2002 nor he had proved on record his willingness to execute the sale deed, therefore, he was not entitled for the specific performance of agreement to sell dated 15.11.2002.

15. A perusal of the judgment passed by learned Appellate Court demonstrates that the said Court held that clause contained in the agreement to sell to the effect that in case balance amount of Rs.28,000/- was not paid by the plaintiff to the defendants on or before 15.01.2003 then the earnest amount would be forfeited was not required to be construed strictly as time was not generally essence of the contract in case of sale of immoveable property.

16. In my considered view, taking into consideration the said findings returned by learned Appellate Court and the factum of willingness expressed by the plaintiff to perform his part of the agreement to sell both in the plaint as well as in the witness box, learned Appellate Court erred in not granting the relief of specific performance of agreement to sell dated 15.11.2002 in favour of the plaintiff. No doubt, the relief of specific performance of contract is a discretionary relief but the said discretion has to be exercised by the Court taking into consideration the totality of the circumstances and not in a whimsical manner. In the present case, admittedly out of the total sale consideration of Rs.98,000/-, a substantial amount of Rs.70,000/- stood paid to the defendants by the plaintiff at the time of the execution of agreement to sell. Neither the execution of agreement to sell nor receipt of an amount of Rs.70,000/- as earnest money has been disbelieved by both learned Courts below. Not only this, both learned Courts below erred in not appreciating that defence of the defendants was not that though they were willing to perform their part of the agreement, however, it was the plaintiff who failed to pay the balance amount and did not turn up for the execution of the sale deed. The stand of the defendants was of total denial about the execution of the agreement to sell itself which stand was found to be incorrect by both learned Courts below.

17. In this view of the matter, in my considered view, interest of justice demanded that learned Appellate Court should have had decreed the suit of the plaintiff for specific performance of agreement to sell dated 15.11.2002 rather than decreeing the suit of the plaintiff for recovery of Rs.70,000/- from the defendants. Learned Appellate Court could have had directed the plaintiff to pay the balance amount of Rs.28,000/- to the defendants as both the learned Courts had held that the plaintiff could not prove that he had paid the balance amount to the defendants, however, denial of the relief of specific performance to the plaintiff on this count cannot be justified.

18. In view of the above discussion, this appeal is allowed and the judgment and decree passed by learned Appellate Court is set aside whereby learned Appellate Court has not granted the decree of specific performance of agreement dated 15.11.2002 in favour of the plaintiff and the suit of the plaintiff is decreed for specific performance of agreement dated 15.11.2002 qua suit land measuring 1 Bigha 8 Biswas being 1/3rd share of total land measuring 4 Bighas 4 Biswas comprised in Khata/Khatauni Nos. 62min/62min, bearing Khasra No. 560 (4-4), situated in village Nangal Nihla, Pargana Plassi, Tehsil Nalagarh, District Solan. Defendants are directed to execute the sale deed in favour of the plaintiff within a period of two months from today and the plaintiff is directed to pay the balance amount of Rs.28,000/- to the defendants at the time of execution of the sale deed. It is further directed that the expenses of the sale deed as well as other incidental expenses shall also be borne by the plaintiff. Substantial question of law is answered accordingly.

19. Appeal stands allowed in above terms. Miscellaneous applications pending, if any, also stand disposed of. Interim order, if any, also stands vacated.

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BEFORE HON'BLE MR. JUSTICE P.S.RANA, J.

Sh Oriental Insurance Company Ltd. ....Appellant.

Vs.

Sh. Sandeep Sharma son of Sh Kuram Chand and others. ....Respondents.

FAO(MVA) No. 146 of 2011.
Decision reserved on: 15.11.2016.
Date of decision: December 16, 2016.

Motor Vehicles Act, 1988- Section 173- Deceased was travelling in the vehicle, which rolled down in the rivulet – MACT awarded the compensation of Rs.6,51,000/- along with interest- aggrieved from the award, insurer preferred the present appeal- held, that insurer had not examined any person to prove that the driver did not have a valid driving licence or other documents – the insurer was bound to indemnify the insured and was rightly saddled with liability – compensation was awarded in accordance with law- appeal dismissed. (Para-12 to 19)

Cases referred:
Vidhyadhar Vs. Mankikrao and another, AIR 1999 SC 1441
Iswar Bhai C. Patel Vs. Harihar Behera and another, AIR 1999 SC 1341
Sarla Verma and others Vs. Delhi Transport Corporation and another, 2009 (6) SCC 121
Reshma Kumari and others Vs. Madan Mohan and others, AIR 2013 SCW 3120

For appellant.	Mrs.Seema Sood, Advocate.
For respondents No.3 to 8.	Mr. G.R.Palsra, Advocate.
For other respondents.	None.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Decision: Present appeal is filed under Section 173 of Motor Vehicles Act 1988 against award dated 24.2.2011 passed by Motor Accident Claims Tribunal-I Mandi to the tune of Rs. 651000/-(Six lacs fifty one thousand) along with interest @ 9% per annum from the date of petition till realization in MAC Petition No. 34 of 2009 title Smt.Geeta Devi and others Vs. Sh. Sandeep Sharma and others.

Brief facts of the case:

2. Smt. Geeta Devi and others filed claim petition under section 166 of Motor Vehicles Act 1988 pleaded therein that on dated 27.3.2008 near village and post office Kataula Tehsil Sadar District Mandi HP at about 11/11.30 PM Sohan Lal died when he was sitting in vehicle Tata Tipper No. HP 33B-1305 as mason-cum-labourer. It is pleaded that on dated 27.3.2008 deceased Sohan Lal boarded vehicle Tata Tipper No. HP 33B-1305 from village Batahan District Mandi and was going to village Kataula Tehsil Sadar District Mandi HP and when at about 11/11.30 PM vehicle reached near village Kataula vehicle was in excessive speed and driver of vehicle could not control vehicle due to excessive speed and vehicle was driven in rash and negligent manner. It is pleaded that driver of vehicle could not control vehicle as a result of which vehicle rolled down in rivulet. It is further pleaded that deceased along with driver and conductor also rolled down. It is further pleaded that deceased sustained multiple grievous injuries and head injuries which proved fatal and deceased died at the spot. It is further pleaded that post mortem of deceased was conducted by medical officer zonal hospital Mandi on 28.3.2008. The age of deceased is pleaded as 36 years at the time of accident. It is further pleaded that deceased was mason and agriculturist and monthly income of deceased pleaded as Rs.10000/- (Ten thousand) per month i.e. Rs.7500/- (Seven thousand five hundred) per month

from mason and Rs.2500/- (Two thousand five hundred) per month from agriculture work. It is further pleaded that FIR No. 138 of 2008 dated 28.3.2008 was registered in police station Sadar District Mandi under sections 279, 337 and 304-A IPC. It is further pleaded that co-petitioner No.1 is widow of deceased, co-petitioners No. 2 to 5 are daughters and son of deceased and co-petitioner No. 6 is mother of deceased. It is further pleaded that deceased was only bread earner in the family and all petitioners were dependant upon deceased. Compensation to the tune of Rs. 2000000/- (Twenty lac) sought.

3. Per contra response filed on behalf of co-respondents No. 1 and 2 owner and driver of vehicle No. HP 33B 1305 wherein factum of accident is admitted by co-respondents No. 1 and 2. It is pleaded that vehicle was not driven in rash and negligent manner. It is pleaded that deceased was stone cutting mason-cum- labourer in stone mines of co-respondents No. 1 and deceased used to load and unload stones in vehicle of co-respondent No.1. It is pleaded that petitioners have claimed excessive compensation amount. It is pleaded that vehicle was duly insured with Insurance Company at the time of accident. It is pleaded that co-respondent No.3 Insurance Company is under legal obligation to indemnify owner. It is pleaded that accident took place due to mechanical defect. It is admitted that deceased was employed as stone cutting mason-cum-labourer with co-respondent No.1 Sandeep Sharma owner of vehicle. It is admitted that on the day of accident deceased was travelling in vehicle to unload stones which were loaded at village Batahan and which were to be unloaded at village Kataula. Prayer for dismissal of petition sought. It is pleaded that if petitioners are entitled to any compensation amount the same would be paid by Insurance Company.

4. Per contra separate response filed on behalf of Insurance Company pleaded therein that there is breach of terms and conditions of Insurance Policy. It is pleaded that vehicle was driven without valid and effective R.C, route permit and fitness certificate. It is pleaded that the driver of vehicle involved in accident was not holding valid and effective driving licence at the time of accident. It is pleaded that deceased was travelling as gratuitous passenger in vehicle. It is pleaded that Insurance Company is not under legal obligation to indemnify the owner of vehicle. Prayer for dismissal of petition sought.

5. Motor Accident Claims Tribunal Mandi on dated 4.7.2009 framed following issues.

1.Whether on 27.3.2008 at about 11/11.30 PM near Kataula co-respondent No.2 was driving tipper No.HP 33B-1305 rashly and negligently and caused death of Sh Sohan Lal?. ...OPP

2. If issue No.1 is proved to what amount of compensation petitioners are entitled?. ..OPP.

3. Whether driver of Tipper No. HP 33B-1305 was not holding a valid and effective driving license to drive the tipper at the time of accident?....OPR.

4. Whether co-respondent No.2 was driving Tipper No. HP 33B-1305 without route permit and fitness certificate?. .... OPR.

5. Whether deceased was travelling as gratuitous passenger?.... OPR.

6. Relief.

6. Learned Motor Accident Claims Tribunal decided issues No. 1 and 2 in affirmative and learned Motor Accident Claims Tribunal decided issues No.3 to 5 in negative. Learned Motor Accident Claims Tribunal awarded compensation to the tune of Rs. 651000/- (Six lac fifty one thousand) along with interest @ 9% per annum from the date of petition till realization of amount.

7. Feeling aggrieved against award passed by learned Motor Accident Claims Tribunal Mandi Insurance Company filed present appeal under Motor Vehicle Act 1988.

8. Court heard learned Advocate appearing on behalf of Insurance Company and learned Advocate appearing on behalf of respondents and also perused entire record carefully.

9. Following points arises for determination in present appeal.

1. Whether appeal filed by Insurance Compnay is liable to be accepted as mentioned in memorandum of grounds of appeal.

2. Relief.

10.Findings upon point No.1 with reasons:

10.1 PW1 H.C Suresh Kumar has stated that copy of FIR Ext PW1/A is correct as per original record. He has stated that FIR No. 138 of 2008 dated 28.3.2008 was registered under sections 279, 337 and 304-A IPC. He has stated that FIR was not personally written by him.

10.2 PW2 Smt. Geeta Devi has filed affidavit Ext. PW2/A in examination-in-chief. There is recital in affidavit that on dated 27.3.2008 deceased was travelling in vehicle having registration No. HP 33B-1305 from Bathan to Kataula. There is recital in affidavit that at about 11/11.30 PM night when vehicle reached near Kataula then vehicle rolled down from road due to rash and negligent driving of vehicle. There is recital in affidavit that driver of vehicle could not control the speed of vehicle. There is recital in affidavit that deceased sustained serious injuries and died at the spot. There is recital in affidavit that on dated 28.3.2008 post mortem of deceased was conducted in zonal hospital Mandi. There is recital in affidavit that accident took place due to rash and negligent driving of vehicle. There is recital in affidavit that FIR was recorded in police station. There is recital in affidavit that the age of deceased at the time of his death was 36 years. There is recital in affidavit that deceased was mason-cum-labourer at the time of death and he was employed by co-respondent No.1 Sandeep Sharma owner of vehicle involved in the accident. There is recital in affidavit that salary of deceased was Rs.7500/- (Seven thousand five hundred) per month. There is recital in affidavit that deceased used to perform additional agriculture work and used to earn Rs.2000/- (Two thousand) per month. There is recital in affidavit that all petitioners were dependant upon deceased. There is recital in affidavit that co-respondents No.2 to 5 are minors. PW2 also tendered in evidence copy of family register Ext PW2/A, death certificate Ext PW2/B and post mortem report Ext PW2/C. She has stated that at the time of accident deceased was employed by owner of vehicle involved in accident for loading and unloading stones. She has denied suggestion that salary of her deceased husband was not Rs.7500/- (Seven thousand five hundred).

10.3 PW3 Sh Lal Singh has filed affidavit in examination-in-chief. There is recital in affidavit that deceased was known to him. There is recital in affidavit that deceased was mason. There is recital in affidavit that in the year 2007 deceased performed work of mason and Rs.200/- per day paid to deceased by deponent. PW3 has admitted that deceased used to load and unload stones from vehicle of Sandeep Sharma co-respondent No.1. PW3 has denied suggestion that deceased did not work as mason in his house. PW3 has denied suggestion that mason used to earn Rs.150/- (One hundred fifty) per day and labourer used to earn Rs.100/- (One hundred) per day.

10.4 RW1 Sandeep Kumar Sharma owner of vehicle has also tendered affidavit in examination-in-chief. There is recital in affidavit that deponent is the owner of vehicle No. HP 33B-1305. There is recital in affidavit that deceased was working as stone cutting mason-cum-labourer in stone mines of deponent. There is recital in affidavit that deceased also used to load and unload the vehicle owned by RW1 Sandeep Sharma. There is recital in affidavit that on dated 27.3.2008 deceased was travelling in vehicle of RW1 to unload the stones which were loaded at village Batahan and were to be unloaded at village Kataula. There is recital in affidavit that due to mechanical defect accident took place. There is recital in affidavit that vehicle was not driven in rash and negligent manner. There is recital in affidavit that deceased was travelling in vehicle as labourer of RW1 to unload the stones which were loaded in the vehicle. RW1 has denied suggestion that deceased was not working as labourer in vehicle. RW1 has stated that stones used to be loaded in vehicle manually. RW1 has denied suggestion that deceased was travelling as gratuitous passenger. RW1 has stated that he used to pay Rs.150/- per day to deceased for dressing hundred stones. RW1 has stated that deceased used to dress 80 to 100 stones in a day

and RW1 has stated that he used to pay extra charges to deceased for loading and unloading stones. RW1 has denied suggestion that accident did not take place due to mechanical defect.

10.5 RW2 Rup Singh has tendered affidavit in examination-in-chief. There is recital in affidavit that he was working as driver in vehicle No. HP 33B-1305 owned by Sh. Sandeep Sharma. There is recital in affidavit that on dated 27.3.2008 he was going to unload stones at village Kataula which were loaded by deceased Sohan Lal at village Batahan. There is recital in affidavit that deceased was working as stone cutting mason-cum-labourer in the mines of Sh Sandeep Sharma. There is recital in affidavit that deceased also used to perform work of loading and unloading of stones. There is recital in affidavit that on dated 27.3.2008 deceased was travelling in vehicle involved in the accident to unload the stones at village Kataula. There is recital in affidavit that due to mechanical defect the vehicle could not be controlled and rolled down. There is recital in affidavit that vehicle was not driven in a rash and negligent manner. RW2 has stated that at the time of accident three persons were travelling in vehicle i.e. RW2 Rup Singh, Soni Kumar conductor and deceased Sohan Singh labourer. RW2 has stated that RW1 is the owner of mines at village Batahan. RW2 has admitted that deceased Sohan Lal was working at the mines of Sh Sandeep Sharma for dressing of stones. He has admitted that there was lift system in the vehicle. Self stated that on the day of accident lift system was out of order. RW2 has stated that lift system was out of order since week. RW2 has denied suggestion that deceased was working as dresser of stones only. RW2 has denied suggestion that lift system was in order at the time of accident. RW2 has denied suggestion that deceased was not travelling as labourer in the vehicle at the time of accident. RW2 has denied suggestion that deceased was travelling as gratuitous passenger. RW2 has denied suggestion that vehicle did not develop mechanical defect at the time of accident.

11. None appeared in the witness box on behalf of Insurance Company for oral testimony despite opportunity granted by Motor Accident Claims Tribunal.

12. Following documentaries evidence filed by parties. (1) Ext. PW1/A FIR No. 138 of 2008. (2) Ext PW2/A extract of family register issued by panchayat. (3) Ext PW2/B death certificate of Sohan Lal. (4) Ext RA insurance policy. (5) Ext RB certificate of registration of vehicle No. HP 33B-1305. (6) Ext RC certificate issued by State Transport Authority Shimla. (7) Ext. RD driving licence. (8) Ext. RX package insurance policy issued by oriental insurance company. (9) Ext RY FIR No. 138 of 2008 dated 28.3.2008 under sections 279, 337 and 304-A IPC.

13. Submission of learned Advocate appearing on behalf of Insurance Company that driver of vehicle No. HP 33B-1305 was not holding valid and effective driving licence to drive tipper at the time of accident and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.3 was upon Insurance Company. No official on behalf of Insurance Company appeared in the witness box in order to prove issue No.3. Hence adverse inference under Section 114 (g) of Indian Evidence Act 1872 is drawn against Insurance company. See AIR 1999 SC 1441 title Vidhyadhar Vs. Mankikrao and another. Also see AIR 1999 SC 1341 title Iswar Bhai C. Patel Vs. Harihar Behera and another.

14. Submission of learned Advocate appearing on behalf of Insurance Company that driver was driving the vehicle without route permit and fitness certificate and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.4 was upon Insurance Company. No official on behalf of Insurance Company appeared in witness box in order to prove issue No.4. Hence adverse inference under section 114 (g) of Indian Evidence Act 1872 is drawn against Insurance Company in view of ruling cited supra.

15. Submission of learned Advocate appearing on behalf of Insurance Company that deceased was travelling as gratuitous passenger in vehicle at the time of accident and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.5 was upon Insurance Company. No official on behalf of Insurance Company appeared in the witness box in order to prove issue No.5. Hence adverse inference

under section 114 (g) of Indian Evidence Act 1872 is drawn against Insurance Company in view of ruling cited supra.

16. Submission of learned Advocate appearing on behalf of Insurance Company that there was lift system in the tipper for loading and unloading purpose and deceased used to dress stones only and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. The driver of vehicle namely RW2 Rup Singh who is eye witness of incident has specifically stated in positive manner that on the day of accident lift system of the vehicle involved in accident was out of order. RW2 Rup Singh has stated in positive manner that deceased was travelling in vehicle as labourer to unload the stones at village Kataula. Testimony of RW2 Rup Singh is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of RW2 Rup Singh. Insurance Company did not adduce in rebuttal oral evidence in order to rebut the testimony of driver of vehicle who is the eye witness of incident.

17. Submission of learned Advocate appearing on behalf of Insurance Company that terms and conditions of insurance policy violated by the owner and Insurance Company is not under legal obligation to indemnify the owner and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. No official on behalf of Insurance Company appeared in witness box in order to prove violation of terms and conditions of insurance policy. Insurance Company did not prove breach of terms and conditions of insurance policy as required under law. It is well settled law that breach of terms and conditions of Insurance Company should be proved by Insurance Company in positive, cogent and reliable manner. The plea of Insurance Company that terms and conditions of insurance policy flouted by owner is defeated on the concept of ipse dixit (Assertion made without proof).

18. Submission of learned Advocate appearing on behalf of Insurance Company that compensation awarded by learned Motor Accident Claims Tribunal is on higher side is rejected being devoid of any force for reasons hereinafter mentioned. Smt. Geeta Devi is the widow of deceased, Sita Devi, Leela Devi, Krishna Devi minors are daughters of deceased, Hoshiar Singh minor is son of deceased and Smt. Pati Devi is the mother of deceased. It is proved on record that all applicants who applied for compensation were dependant upon deceased at the time of his death. It is also proved on record that deceased was employed as mason-cum-labourer by co-respondent No.1 at the time of accident. RW1 Sandeep Sharma has specifically stated when he appeared in witness box that he used to pay Rs.150/- to deceased for dressing hundred stones. He has stated that deceased used to dress eighty to hundred stones in a day. He has stated that he used to pay extra charges for loading and unloading stones in vehicle. Testimony of RW1 Sandeep Sharma remained un-rebutted on record. Testimony of RW1 Sandeep Sharma relating to payment to deceased is reliable, trustworthy and inspires confidence of Court. In view of above stated facts it is held that learned Motor Accident claims Tribunal has rightly assessed monthly income of deceased to the tune of Rs. 4500/- (Four thousand five hundred) per month. It is held that learned Motor Accident Claims Tribunal has legally deducted 1/3rd of income of deceased as personal expenses. It is held that learned Motor accident Claims Tribunal has legally assessed the contribution of deceased towards applicants to the tune of Rs.3000/- per month. It is held that as the age of the deceased at the time of accident was 36 years learned Motor Accident Claims Tribunal has rightly applied multiplier of 16. It is held that learned Motor Accident Claims Tribunal has legally awarded additional compensation to the tune of Rs.10000/- (Ten thousand) for love and affection. It is held that learned Motor Accident Claims Tribunal has legally awarded compensation for funeral expenses to the tune of Rs.15000/-(Fifteen thousand) See 2009 (6) SCC 121 Sarla Verma and others Vs. Delhi Transport Corporation and another. See AIR 2013 SCW 3120 Reshma Kumari and others Vs. Madan Mohan and others. In view of above stated facts and case law cited supra point No.1 is decided in negative.

Point No.2 (Relief).

19. In view of findings on point No.1 appeal is dismissed. Parties are left to bear their own costs. File of learned Motor Accident Claims Tribunal be sent back forthwith along with

certified copy of decision. FAO(MVA) No. 146 of 2011 is disposed of. Pending applications if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Company Ltd. .....Appellant

Versus

Kirna & others .....Respondents

FAO No.486 of 2012 a/w CO
No.153 of 2013
Date of decision: 16.12.2016

Motor Vehicles Act, 1988- Section 149- It was contended that the driver was under the influence of liquor and insurer is not liable – held, that the insurer had not led any evidence to prove this plea- the insurance policy does not contain any such clause – insurer cannot escape from liability on this ground. (Para-6 and 7)

Motor Vehicles Act, 1988- Section 166- The salary of the deceased was Rs.8,700/- per month – 1/3rd amount was to be deducted towards personal expenses – thus, the claimants have lost source of dependency to the tune of Rs.6,000/- per month- the age of the deceased was 30 years at the time of accident and multiplier of 16 is applicable – thus, claimants are entitled to Rs.6,000 x 12 x 16= Rs.11,52,000/- under the head loss of dependency – the claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses- thus, total compensation of Rs.11,52,00 + 40,000/- =Rs.11,92,000/- awarded along with interest. (Para-8 to 14)

Cases referred:

Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant: Mr.B.M. Chauhan, Advocate.
For the respondents: Ms.Seema K. Guleria, Advocate, for respondents No.1 to 3.
Mr.Ashwani Sharma, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award dated 20th September, 2012, passed by the Motor Accident Claims Tribunal (I), Mandi, H.P. (for short, "the Tribunal") in Claim Petition No.128 of 2009, titled Smt. Kirana & others vs. Paras Ram & others, whereby compensation to the tune of Rs.16,60,120/- alongwith interest at the rate of 7.5% per annum came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

2. The claimants, the owner-insured and the driver have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant-insurer has raised the following three points.

1. That the accident was outcome of contributory negligence;

2. That the driver of the offending vehicle was driving the same under the influence of alcohol; and

3. That the Tribunal has wrongly assessed the compensation and awarded excessive compensation.

Point No.1

5. I have gone through the evidence. The claimants have specifically pleaded and proved that the driver of the offending vehicle had driven the same rashly and negligently and caused the accident. There is not an iota of evidence that it was case of contributory negligence. PW-3 HC Devinder Kumar has specifically given the events as to how the accident had taken place and the driver of the offending vehicle has not questioned the same. I wonder how the insurer can question the said findings, are against the driver. It was for the driver to question the same, has not questioned the same. It was also not the case of the insurer that there was collusion between the driver, owner and the claimants. Having said so the first point raised by the learned counsel for the appellant fails. The Tribunal has rightly determined issue No.1. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

Point No.2

6. It was for the insurer to plead and prove that the accident was caused due to the fact that driver of the offending vehicle was driving the vehicle under the influence of alcohol and caused the accident as such, has not led any evidence to prove the same. The insurance policy Ext. RX is not containing such terms and conditions. This Court in ***FAO (MVA) No.18 of 2009 titled Managing Director, HPMC Nigam Vihar Versus Naresh Kumar and others***, has laid down the same principles of law. It is apt to reproduce paras 15 to 18 of the said judgment herein.

"15.The learned counsel for the insurance company has relied upon the terms and conditions of the insurance policy but the Tribunal has fallen in an error in holding that the owner has committed willful breach. The condition No. 2 (c) of the terms and conditions of the insurance policy read as under:

"The Company shall not be liable to make any payment in respect of:

(a) ….. …..

(b) ….. …….

(c) any accidental loss or damage suffered whilst the insured or any person driving the vehicle with the knowledge and consent of the insured is under the influence of intoxicating liquor or drugs." [Emphasis added]

16. It was for the insurer to plead and prove that the driver was under the state of intoxication with the knowledge and consent of the insured. No such evidence has been led by the insurer that the owner was accompanying the driver and driver had taken the alcohol with the knowledge and consent of the insured. In the given circumstances, how the Tribunal has exonerated the insurer, is not forthcoming.

17. This Court in ***Khem Chand versus Smt. Uma Devi and others,*** *reported in* ***Latest HLJ 2010 (HP) 1,*** *has laid down the same principle. It is apt to reproduce para-4 of the judgmentherein:-*

"4. The law is very well settled that a claim which falls within the purview of an Act policy i.e. a liability falling within the ambit of Section 147 of the Motor Vehicles Act, 1988 (the Act) can only be contested by the Insurance Company on the grounds available to it under Section 149 of the Act. It is not permitted to contest the proceedings on any other grounds. Intoxication of the driver is not a ground available to the Insurance Company under Section 149 of the Act. Therefore, the liability, which is statutory under Section 147 of the Act, has to be satisfied by the insurer. It may be clarified that in case the insurer in addition to the liability which it is bound to cover under the Act covers other liability then in case of such

extended liability, it may raise the defences available to it as per terms of the policy, but as far as statutory liability is concerned, the insurer has no authority to incorporate any term in the policy which is not contemplated in terms of Section 149 of the Act. Therefore, the Insurance Company could not have been permitted to raise this defence and it could not be permitted to recover the awarded amount from the insured."

18. This ground is not available to the insurer in terms of the mandate of Sections 147 and 149 of the Act."

7. Applying the test, this point also fails

Point No.3.

8. Though the insurer has not sought permission to contest the claim petition under Section 170 of the Motor Vehicles Act, 1988 (for short, "the Act"), but while going through the impugned award, it appears that the amount is excessive for the following reasons.

9. Admittedly, the deceased was working as Sales Executive with Jagatjit Industries and his gross salary at the time of accident was Rs.8,700/- per month, which stands duly proved by salary certificate Ext.PW-4/B. 1/3 was to be deducted towards his personal expenses. Thus, it can be safely held that the claimants have lost source of dependency to the tune of Rs.6,000/- per month. The age of the deceased was 30 years at the time of the accident thus, the multiplier of '16' was rightly applied by the Tribunal, in view of Schedule II appended to the Act read with the ratio laid down by the Apex Court in case tilted as ***Sarla Verma (Smt.) and others*** versus ***Delhi Transport Corporation and another***, reported in ***AIR 2009 SC 3104*** and upheld by a larger Bench of the Apex Court in case titled as ***Reshma Kumari & others*** versus ***Madan Mohan and another, reported in 2013 AIR (SCW) 3120***.

10. Thus, the claimants are entitled to compensation to the tune of Rs.6,000x12x16= Rs.11,52,000/- under the head loss of dependency.

11. In addition a sum of Rs.10,000/- each is awarded in favour of the claimants under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate', and 'funeral expenses.

12. In view of the above discussion, the claimants are held entitled to Rs.11,52,000/- + Rs.40,000/- (Rs.11,92,000/-in all), alongwith interest, as awarded by the Tribunal.

13. Accordingly, the appeal is allowed and the impugned award is modified, as indicated above.

14. The Registry is directed to release the award amount in favour of the claimants, strictly in terms of the impugned award and the excess amount, if any deposited, be released in favour of the appellant-insurer through payee's account cheque, after proper identification.

Cross Objections No.153 of 2013.

15. In view of the disposal of the appeal, the cross objections also stand disposed of.

16. Send down the record after placing copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Umed Singh ...Appellant.

Versus

Shri Sohan Singh and others ...Respondents.

FAO No. 332 of 2012
Decided on: 16.12.2016

Motor Vehicles Act, 1988- Section 166- Injured remained admitted in the hospital at Bilaspurw.e.f. 13th April, 2002 till 17th April, 2002 and thereafter at IGMC w.e.f. 9th May, 2002 till 17th May, 2002- the compensation has to be awarded under pecuniary and non-pecuniary heads by making guess work in case of injuries - the claimant pleaded that he was earning Rs.6,000/- per month as cleaner of the vehicle- however, by guess work, it can safely be held that he would have been earning not less than Rs.3,000/- per month – injured had suffered 45% permanent disability and loss of income will be Rs.1,500/- per month – age of the claimant was 24 years at the time of accident and multiplier of 15 is applicable- claimant has lost source of income of Rs.2,70,000/- (1500 x 12 x 15) – claimant has placed on record cash payment/medical bills amounting to Rs.13,909.64/- and is entitled to Rs.13,910/- under the head medical expenses – the claimant has placed on record taxi bills/bus tickets to the tune of Rs.35,443/- and is entitled to Rs.35,500/- under the head transportation charges – compensation of Rs.50,000/- each awarded under the heads pain and suffering and loss of amenities of life- thus, total compensation of Rs.4,19,410/- awarded with interest @ 7.5% per annum from the date of the award. (Para-17 to 21)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
Jakir Hussein versus Sabir and others, (2015) 7 SCC 252

For the appellant:	Mr. G.R. Palsra, Advocate.
For the respondents:	Mr. H.S. Rangra, Advocate, for respondents No. 1 and 2.
	Mr. J.S. Bagga, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

By the medium of this appeal, the appellant-claimant-injured has called in question award, dated 17th March, 2012, made by the Motor Accident Claims Tribunal (II)-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 219/2005 (112S/2003), titled as Umed Singh versus Sh. Sohan Singh and others, whereby the claim petition came to be dismissed (for short "the impugned award").

2. The appellant-claimant-injured filed a claim petition before the Tribunal for grant of compensation to the tune of ₹ 5,00,000/-, as per the break-ups given in the claim petition, on the ground that he became the victim of the vehicular accident which was caused by the driver, namely Shri Tilak Raj, while driving truck bearing registration No. HP-32-0670, rashly and negligently, on 13th April, 2002, at about 4.00 P.M., at place Kulah, near Swarghat.

3. The respondents resisted the claim petition on the grounds taken in the respective memo of objections.

4. On the pleadings of the parties, following issues came to be framed by the Tribunal on 2nd August, 2005:

> *"1. Whether the petitioner sustained injuries due to rash and negligent driving of Truck No. HP-32-0670 on 13-4-2002 at place Kulah near Swarghat being driven by respondent No. 2 as alleged? OPP*

2. If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioner is entitled to and from whom? OPP

3. Whether respondent No. 2 was not holding valid and effective driving licence at the time of accident? OPR-3

4. Whether the petitioner was a gratuitous passenger at the time of the accident, if so its effect? OPR-3

5. Whether the offending vehicle was being driven in contravention of the terms and conditions of the insurance policy at the time of accident? OPR-3

6. Relief."

5. The appellant-claimant-injured has examined six witnesses in support of his claim and himself appeared in the witness box as PW-4. The insurer has examined two witness in support of its defence.

6. It is apt to record herein that the owner-insured and driver of the offending vehicle were proceeded against ex-parte by the Tribunal vide order, dated 13th July, 2009.

7. The Tribunal, after scanning the evidence, oral as well as documentary, dismissed the claim petition in terms of the impugned award. Hence, the appeal.

Issue No. 1:

8. The Tribunal, while making discussions in paras 11 to 18 of the impugned award, held that the claimant-injured has proved that the accident was caused by the driver, namely Shri Tilak Raj, while driving the offending vehicle rashly and negligently at the relevant point of time, in which claimant-injured sustained injuries. The owner-insured and the driver of the offending vehicle have not questioned the said findings. The appellant-claimant-injured has also not questioned the same. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

9. Before dealing with issue No. 2, I deem it proper to determine issue No. 4 at the first instance.

Issue No. 4:

10. The Tribunal has dismissed the claim petition on the ground that the appellant-claimant-injured was travelling in the offending vehicle as a gratuitous passenger at the time of the accident.

11. The appellant-claimant-injured has specifically pleaded in paras 10 and 24 of the claim petition that he was travelling in the offending vehicle as cleaner of the vehicle, which factum is admitted by the owner-insured and driver of the offending vehicle in their respective replies. Thus, there was no dispute about the factum of the appellant-claimant-injured being employed as cleaner with the offending vehicle. Therefore, there was no need to frame the issue relating to the said fact in terms of the mandate of Order XIV of the Code of Civil Procedure (for short "CPC").

12. However, the insurer has taken a specific plea in its reply that the appellant-claimant-injured was travelling in the offending vehicle as a gratuitous passenger at the time of the accident. Thus, it was for the insurer to discharge the onus.

13. The insurer has examined Shri Roshan Lal, Senior Assistant from the office of RLA, Gohar, as RW-1, who has specifically stated that the offending vehicle was registered as 'light goods vehicle' and conductor was permitted to travel with the driver in the offending vehicle.

14. Even otherwise, as per the registration certificate, Mark R-1, the seating capacity of the offending vehicle is '2+1', thus, the risk of the appellant-claimant-injured, being the cleaner, was covered, cannot be said to be gratuitous passenger. Viewed thus, the Tribunal has fallen in an error in deciding issue No. 4 by holding that the appellant-claimant-injured was a gratuitous passenger. Accordingly, the findings returned by the Tribunal on issue No. 4 are set

aside and it is held that the appellant-claimant-injured was travelling in the offending vehicle as cleaner and not as a gratuitous passenger.

Issue No. 3:

15. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same, though has examined Shri Chet Singh Thakur, Clerk from the office of RLA (Motors), Rural Shimla, as RW-2, but has failed to do so. Even otherwise, the driving licence is on the record as Mark R-2, the perusal of which does disclose that the driver was having a valid and effective driving licence to drive the offending vehicle. Accordingly, issue No. 4 is decided in favour of the owner-insured and driver of the offending vehicle and against the insurer.

Issue No. 5:

16. It was for the insurer to plead and prove that the offending vehicle was being driven in contravention of the terms and conditions of the insurance policy, thus, the owner-insured has committed a willful breach, has failed to do so, as discussed hereinabove. Accordingly, this issue is decided against the insurer.

Issue No. 2:

17. The Tribunal has not assessed the amount of compensation, to which the appellant-claimant-injured is entitled to. The perusal of the record does disclose that the claimant-injured remained admitted in Zonal Hospital, Bilaspur with effect from 13th April, 2002 to 17th April, 2002 and thereafter at IGMC, Shimla, with effect from 9th May, 2002 to 17th May, 2002.

18. It is beaten law of land that in an injury case, the compensation is to be awarded under pecuniary and non-pecuniary heads by making guess work.

19. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,**reported in **AIR 1995 SC 755,Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,**reported in **2010 AIR SCW 6085,Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,**reported in **2011 AIR SCW 4787,**and **Kavita versus Deepak and others,** reported in**2012 AIR SCW 4771**.

20. This Court has also laid down the same principle in a series of cases.

21. The claimant-injured has pleaded that he was earning ₹ 6,000/- per month as cleaner of the offending vehicle. However, by guess work, it can safely be held that he would have been earning not less than ₹ 3,000/- per month.

22. The disability certificate is on the record as Ext. PW-3/A, in terms of which the claimant-injured has suffered 45% permanent disability. Thus, it can be safely held that the claimant-injured has suffered loss of income to the tune of ₹ 1,500/- per month.

23. The age of the claimant-injured was 24 years at the time of the accident, which is not in dispute. Thus, the multiplier of '15' is to be applied in view of the second Schedule appended with the Motor Vehicles Act, 1988, (for short "MV Act") Act read with the law laid down by the Apex Court in the case titled as **Sarla Verma and others versus Delhi Transport Corporationand another** reported in **AIR 2009 SC 3104,** and upheld in **Reshma Kumari and others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.**

24. Having said so, the claimant-injured has lost source of income to the tune of ₹ 1,500/- x 12 x 15 = ₹ 2,70,000/-.

25. The claimant-injured has placed on record the cash memos/medical bills, Mark 1 to 36, amounting to ₹ 13,909.64/. Thus, he is held entitled to ₹ 13,910/- under the head 'medical expenses'.

26. The claimant-injured has also placed on record taxi bills/bus tickets, Ext. PW-1/A, Ext. PW-1/B, Mark 37 to 43 to the tune of ₹ 35,443/-, thus, is held entitled to compensation to the tune of ₹ 35,500/- under the head 'transportation charges'.

27. The Apex Court in its latest decision in the case titled as **Jakir Hussein versus Sabir and others,** reported in **(2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the judgment herein:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
>
> *.....*
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

28. In view of the ratio laid down by the apex Court in the judgment (supra), I am of the considered view that the claimant-injured is entitled to compensation to the tune of ₹ 50,000/- under the head 'pain and sufferings' and ₹ 50,000/- under the head 'loss of amenities of life'.

29. Having glance of the above discussions, the claimant-injured is held entitled to total compensation to the tune of ₹ 2,70,000/- + ₹ 13,910/- + ₹ 35,500/- + ₹ 50,000/- + ₹ 50,000/- = ₹ 4,19,410/- with interest @ 7.5% per annum from the date of the impugned award till its realization.

30. The factum of insurance is admitted. Thus, the insurer is saddled with liability.

31. In view of the above, the impugned award is modified, the appeal is allowed and the claim petition is granted, as indicated hereinabove.

32. The insurer is directed to deposit the awarded amount before the Registry within eight weeks. On deposition, the same be released in favour of the claimant-injured strictly as per

the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

33. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Vishal Puri and others. ...Appellants.

Versus

Yashpal Singh ...Respondent.

RFA No. 342 of 2003 a/w Cross Objection No. 9 of 2004.
Reserved on: 5.12.2016.
Decided on: 16.12.2016

Code of Civil Procedure, 1908- Section 96- Plaintiff pleaded that he was assaulted and humiliated by the defendant No.1 in the presence of many people – the defendants subsequently gave him beatings- the Trial Court awarded the compensation of Rs. 22,000/- along with interest @ 9% per annum – held in appeal that witnesses of the plaintiff proved the case of the plaintiff – an FIR was registered regarding the incident – one defendant was convicted by the Juvenile Justice Board – MLC proved the injuries suffered by the plaintiff – compensation of Rs.22,000/- is inadequate and is enhanced to Rs.1 lac – appeal partly allowed. (Para-3 to 11)

For the Appellants: Mr. Neeraj Gupta, Advocate.
For the Respondents: Mr. K.D Sood, Sr.Advocate with Mr. Ankit Aggarwal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal stands directed by the defendants against the impugned judgment recorded by the learned District Judge, Hamirpur whereby he returned affirmative findings qua the plaintiff's entitlement to claim damages from defendant No.1 also thereupon he assessed damages qua the plaintiff comprised in a sum of Rs.22000/- alongwith 9% interest from the date of decree till realization, liability whereof qua its defrayment stood fastened upon defendant No.1.

2. The plaintiff also stands aggrieved by the pronouncement recorded by the learned Court below whereupon it assessed damages vis-à-vis him in the sum aforesaid, quantum whereof stands contended herebefore to be grossly disproportionate to his apposite entitlement thereof besides the plaintiff stands aggrieved by the pronouncement recorded by the learned District Judge whereby it fastened liability qua the quantum of damages assessed thereunder vis-à-vis the plaintiff only upon defendant No.1 whereas it was jointly and severably fastenable upon all the defendants.

3. In an incident which occurred on 15.3.1997 in the Court of the Sr. Sub Judge, Hamirpur the plaintiff alleges qua his therein standing assaulted by the defendant No.1 besides his standing humiliated in the presence of people present thereat whereafter despite the plaintiff for averting perpetration of further assaults upon him by defendant No.1 proceeding to the litigant hall, yet the defendant No.1 chasing him thereupto whereat he meted threats to him. The plaintiff also avers qua on 15.3.1997 at about 4.45 p.m. when he was returning home on his scooter all the defendants forcibly stopping him at Gandhi Gate in sequel whereto he avers qua his falling on the ground whereafter the defendants stand averred to belabor him with kick and fist blows in consequence whereof he sustained injuries on his nose, forehead, teeth and eyebrows. Also he avers qua his thereat standing intimidated by the defendants for his

conducting case Onkar Walia versus Urmila in the Court of Sub Judge, Hamirpur against Urmila daughter of defendant No.1, sister of defendant No.2 and mother of defendant No.3. The plaintiff further avers qua on 17.3.1997 at about 9.30 a.m. when he was proceeding on his scooter to Court all the defendants forcibly stopped him near Satyanarayan Mandir whereat he stood manhandled by defendant No.1.

4. An FIR qua the incident bearing No. 59/07 stood lodged by the plaintiff against the defendants at Police Station, Hamirpur. The primadonna factum of the incidents aforesaid which occurred on 15.3.1997 and on 17.3.1997 respectively in the Court premises besides in the evening of the day aforesaid at Gandhi Gate and thereafter on 17.03.1997 at 9.30 A.M. near Satyanarayan Mandir warranted theirs standing unflinchingly proved by cogent reliable evidence standing adduced by the plaintiff whereupon the plaintiff would stand entitled to pecuniary damages for proven acts of tort of assault and battery standing perpetrated upon him.

5. In proof of the incident No.1 aforesaid, the plaintiff relied upon the testifications of PWs 5,6 and 7, all of whom rendered a credible account qua the incident which occurred on 15.3.1997in the Court premises. The oral testifications of the afore-stated ocular witnesses to the incident which occurred in the Court premises warrants imputation of credence thereto conspicuously when their respective testifications occurring in their respective examinations-in-chief remained unshred of their tenacity besides efficacy during the ordeal of a rigorous cross-examination whereto they respectively stood subjected to by the learned counsel for the defendants. In sequel thereto the ascription(s) made by the plaintiff in the suit qua defendant No.1 assaulting him in the Court premises stands invincibly proven.

6. The testification of the plaintiff in proof of the incident which occurred in the evening of 15.3.1997 at Gandhi Gate wherein he stood belabored by the defendants stands meted corroboration by the testification of an eye witness thereto who deposed as PW-6. The testification of PW-6 in corroboration to the testification of the plaintiff warrants imputation of credence thereto arising from the factum of his testification qua the relevant fact embodied in his examination-in-chief remaining uneroded during the ordeal of an exacting cross-examination to which he stood subjected to by the learned counsel for the defendants.

7. The incident of 17.3.1997 which occurred at 9.30 a.m at Satyanaryan Mandir, holding ascriptions therein qua the defendant No.1 manhandling the plaintiff, for obviation of his further manhandlings thereat by the defendant No.1 he stood evacuated by the people present thereat whereafter he fled therefrom and arrived in the premises of the Bar Association located in the Court campus whereupto also he stood chased by defendant No.1 also thereat the defendant No.1 unsuccessfully concerted to perpetrate an assault upon him stands proven by the un-eroded testification of the plaintiff, untainted corroboration whereto stands meted by PW-11 the then Pradhan of Bar Association, Hamirpur. In sequel thereto the incident aforesaid which occurred on 17.3.1997 near Satyanarayan Temple wherein the defendant No.1 manhandled the plaintiff also the incident subsequent thereto which occurred in the premises of the Bar Association located in the Court premises stands also emphatically proven.

8. Be that as it may the FIR borne on Ex.PW-2/A lodged with Police Station Sadar, Hamirpur by PW-11 sequelled the preferment before the Court concerned a report under Section 173 Cr.P.C by the Investigating Officer concerned. A charge in consonance therewith stood framed against the relevant accused yet the fate of the apposite charge is not evincible from the record which is available hereat. Conspicuously with the charge framed by the Court concerned against the accused named in the FIR Ex.PW-2/A remaining un-adjudicated by the trial Magistrate also does not purvey any vigour to the concert of the defendants to espouse qua thereupon the credible testimonies of PWs standing benumbed rather with co-accused/Juvenile at the relevant stage one Gaurav Walia against whom too penal ascriptions stand averred by the plaintiff when as unravled by a verdict recorded by the Juvenile Court embodied in Ex. PW-5/G stands convicted in respect thereto does give leverage to the espousal of the plaintiff qua his thereupon succeeding in establishing the averment(s) constituted in the complaint qua in

the evening of 15.3.1997 the defendants jointly at Gandhi Gate belaboring him with kick and fist blows.

9. The effect of the aforesaid discussion brings to the fore the inevitable sequel of the plaintiff succeeding in proving his averment(s) qua the defendant No.1 and other co-defendants respectively at the place(s) afore-stated jointly apart therefrom singularly perpetrating upon him tort of assault and battery also theirs meteing intimidations to him. However, the defendants had concerted to exculpate their liability qua pecuniary damages standing assessed vis-à-vis the plaintiff arising from his/theirs in the afore-stated manner his/theirs respectively jointly besides singularly at the place(s) aforesaid perpetrating tort of assault and battery upon him, by anvilling upon registration of FIR No. 61/97 against the plaintiff, yet with Ex.P-7 making an open pronouncement therein qua the Judicial Magistrate concerned accepting the proposal made in the apposite report furnished before the Court concerned by the Investigating Officer qua the FIR aforesaid warranting cancellation renders the aforesaid espousal by the defendants qua the relevant facet to stand benumbed. Also with a criminal complaint instituted by defendant No.1 against the plaintiff as apparent from an order borne on Ex.DA standing anvilled upon a statement of the complainant borne on Ex.DB whereupon it stood ordered to be withdrawn sequels an inference of defendant No.1 making an unsuccessful bid to exculpate his liability for assessment of pecuniary damages qua the plaintiff arising from his perpetrating assault and battery upon him, contrarily the afore-stated pronouncements occurring in Ex. P-7 and in Ex.DA make loud echoings qua the defendants contriving to falsely implicate the plaintiff also connotes their acquiescence qua the ascriptions made qua them by the plaintiff holding sinew besides vigor.

10. The MLC comprised in Ex.PW-9/A proven by PW-9 unravels qua multiple injuries occurring on the person of the plaintiff. The aforesaid pronouncements made in the afore-stated MLC give succor to the testification of the plaintiff besides his witnesses qua the defendants jointly at Gandhi Gate belaboring the plaintiff with fist and kick blows.

11. The learned Court below had aptly for lack of cogent evidence declined quantification of pecuniary damages to the plaintiff as stood claimed by him for loss of professional income besetting him arising from his clientele suffering erosion in sequel to the proven incidents of assault besides battery standing perpetrated on his person respectively singularly by defendant No.1 also by other co-defendants while joining defendant No. 1 at places aforesaid. However with the plaintiff adducing unflinching evidence unraveled by the MLC aforesaid in proof of the factum of his standing assaulted besides his suffering injuries in the relevant incidents of assault and battery preponderantly also with the evident factum of his standing subjected to repeated assaults by defendant No.1 did entail upon the learned trial Court to compute qua the plaintiff pecuniary damages in a figure higher than the one which stood computed vis-à-vis him. Even though there is no unbending rule of inflexible rigor for purveying guidance in measuring besides calibrating monetary damages assessable qua a victim of tort of assault and battery yet dehors the aforesaid lack of rigid guidelines for computing pecuniary damages to a victim of proven tort of assault and battery, the status of the victim also the places whereat it evidently occurred ultimately the repetitive perpetration of assault(s) upon his person singularly by defendant No.1 also with the latter standing joined by other co-defendants are relevant parameters which are always to be borne in mind. Cumulatively bearing in mind besides meteing deference to the aforesaid factors it is deemed fit and appropriate to conclude qua computation of Rs.22000/- as pecuniary damages vis-à-vis the plaintiff on account of his standing subjected to proven tort of assault and battery respectively by defendant No.1 at two places afore-stated besides by all the defendants jointly in the evening of 15.3.1997 at Gandhi Gate, being a meager besides a scanty amount whereupon this Court is constrained to modify the aforesaid figure of pecuniary damages in a sum of Rs.1,00,000/- (Rupees one lac). Also with the plaintiff proving ascriptions made by him vis-à-vis the defendant No.1 qua his perpetrating assault upon him singularly at two places besides with an evident display occurring of co-defendants joining defendant No.1in perpetrating an assault upon his person in the evening of 15.3.1997 at Gandhi Gage warranted the learned trial Court to hold decree qua all defendants

being jointly and severely liable to pay pecuniary damages to the plaintiff especially when they were proven tortfeasor whereas its fastening the relevant liability singularly upon defendant No.1 has committed an error. In view of the above, the present appeal is dismissed. The impugned judgment is modified accordingly. Cross-objections are allowed to the extent qua pecuniary damages vis-à-vis the plaintiff standing enhanced from Rs.22,000/- to Rs.1,00,000/- also all the defendants are held jointly liable to defray to the plaintiff the aforesaid amount of damages.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Ashok Kumar. ....Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No.1484 of 2016
Decided on: 19th December, 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 332, 353, 452, 342 and 504 read with Section 34 of I.P.C – the petitioner pleaded that he has been falsely implicated – informant had given beatings to the petitioner – held, that keeping in view the fact that simple injuries were sustained by the petitioner, the petitioner is permanent resident of the place and is not in a position to flee from justice or to temper with the prosecution evidence; bail application allowed subject to conditions. (Para-8)

For the petitioner: Mr. D.R. Verma and Mr. Arsh Rattan, Advocates.
For the respondent: Mr. Pushpinder Jaswal, Dy. AG, with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 116 of 2016, dated 12.11.2016, under Sections 332, 353, 452, 342, 504 read with Section 34 Indian Penal Code (hereinafter referred to as "the IPC"), registered at Police Station, Nadaun, District Hamirpur, H.P.

2. As per the learned counsel for the petitioner, the petitioner is innocent and has been falsely implicated in the present case due to extraneous circumstances. He is resident of the place and no purpose will be served by keeping him behind the bars.

3. Police report stands filed. As per the prosecution story, on 12.11.2016, complainant Rakesh Kumar, Constable No. 321, got his statement recorded under Section 154 Cr.P.C., wherein he has stated that he is working in Police Station, Nadaun, as General Duty Constable from 2016 and on 12.11.2016 he was on night duty in Police Help Room at Bus Stand, Nadaun. At about 7:45 p.m. he went to the shop of Ashok Kumar (petitioner herein) wherefrom noise was coming and he asked not to create noise. On this, Ashok Kumar started abusing him and thereafter the complainant came to Police Help Room, but the petitioner also came there alongwith his son and driver and dragged him to his shop and gave him beatings and also damaged his uniform. Police registered a case against the present petitioner.

4. I have heard the learned counsel for the petitioner, learned Deputy Advocate General for the State and gone through the record, including the police report, carefully.

5. As per the learned counsel for the petitioner, the petitioner has been implicated in the present case as the complainant was paying for the juice, which he has taken from the shop of the complainant, in old currency note of Rs. 500/- which the petitioner refused to accept. It is also submitted that in fact the complainant gave beatings to the petitioner.

6. On the other hand, the learned Deputy Advocate General has argued that the petitioner is making entirely a false case and as the petitioner is involved in a crime against the police, he may not be released on bail.

7. In rebuttal, the learned counsel for the petitioner has argued that for such a small offence, as registered by the police, the petitioner, who is a juice seller at Nadaun, is behind the bars since 12-13 November, 2016, and no fruitful purpose will be served by keeping him behind the bars, as the investigation in the present case is complete.

8. This Court has taken into consideration the nature of the injuries sustained by the complainant, which are, in fact, on his finger and other simple injuries and the fact that the petitioner is resident of the place and is not in a position to flee from justice, nor is he in a position to tamper with the prosecution evidence, therefore, no fruitful purpose will be served by keeping the petitioner behind the bars for unlimited period. This Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in favour of the petitioner, so it is ordered that the petitioner be released forthwith on bail on his furnishing personal bond to the tune of Rs. 20,000/- (rupees twenty thousand only) with one surety in the like amount to the satisfaction of learned ACJM/JMIC, Nadaun in case FIR No. 116 of 2016, dated 12.11.2016, under Sections 332, 353, 452, 342, 504 read with Section 34 IPC, registered at Police Station Nadaun. The bail is granted subject to the following conditions:

(i) That the petitioner will join investigation of the case and when called for by the Investigating Officer in accordance with law.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

9. In view of the above, the petition is disposed of. Copy *dasti*.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Babita .....Petitioners.

Versus

State of H.P. & others. .....Respondents.

CWP No. 2609 of 2015
Reserved on: 05.12.2016
Decided on: 19.12.2016

Constitution of India, 1950- Article 226- Petitioner was engaged as drawing master – she was subsequently asked not to come on the duty - respondent stated that the permission to fill up the post was withdrawn by respondent No.3 as no criteria was approved by the Government for distribution of marks- held, that the petitioner has scored maximum marks in the interview and her selection was not challenged – action of the respondent of not allowing the petitioner to work is arbitrary- writ petition allowed and respondent directed to permit the petitioner to work.

(Para- 7 to 11)

For the petitioner: Mr. P.P. Chauhan, Advocate.

For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy.AG and Mr. Rajat Chauhan, Law Officer, for respondents No. 1 to 4.
Mr. Deepak Kumar, Lecturer, GSSS Badahlag, Tehsil Kasauli, District Solan, H.P. in person.
Nemo for respondent No. 5.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner under Article 226 of the Constitution of India for issuing the writ of certiorari, mandamus or any other appropriate writ/order or direction to the respondents.

2. Succinctly, the facts giving rise to the present petition, as per the petitioner, are that pursuant to interview held on 13.11.2014 by the School Management Committee/respondent (SMC), she was engaged as Drawing Master on and w.e.f. 15.11.2014. Surprisingly, she was asked verbally not to come on duty w.e.f. 01.03.2015. The petitioner has further contended that she is Plus Two and having Diploma in Arts and Crafts, thus she is fully eligible for the post of Drawing Master. She was initially engaged as Drawing Master by the SMC w.e.f. August, 2014, and she was being paid from collection made from the students. Subsequently, on 13.11.2014, SMC conducted interview for the post of Drawing Master on period basis qua GSSS, Badhalag, Solan, H.P., in which 12 out of 18 candidates participated. Merit list was drawn and the petitioner held first position and consequently she was issued an order of assignment on 14.11.2014. The petitioner joined her duties in the said school on 15.11.2014 and continued there till 28.02.2015, but till date no remuneration has been paid to the petitioner by the respondents. As per the petitioner, on 03.12.2014 fresh selection was conducted by the respondents, wherein also the petitioner, being meritorious, scored first rank out of 12 appearing candidates. However, to the utter surprise of the petitioner w.e.f. 01.03.2014 the Principal of the School verbally conveyed the petitioner not to come on duty. The respondents now intend to fill up the said vacancy through similar arrangement, which is wholly impermissible in law. Lastly, the petitioner, by way of filing the present writ petition, sought the following substantive reliefs:

> *"(i) To issue a writ of certiorari or direction in nature thereof, quashing the impugned verbal order of respondent Principal whereby he has told the petitioner not to come on duty, as unconstitutional and illegal and contrary to the law;*
>
> *(ii) To issue a writ of mandamus, appropriate writ, order or direction in nature thereof, directing the respondent department/School Management Committee to continue the petitioner on the same post till fresh appointments are made by the respondent department on regular basis in accordance with Recruitment & Promotion Rules;*
>
> *(iii) To issue a further writ of mandamus or an appropriate writ, order or direction in nature thereof directing the respondents to reinstate the petitioner, in case the services of the petitioner are replaced by another incumbent appointed on the same basis and not on regular basis w.e.f. such illegal appointment with all consequential benefits and arrears of salary alongwith interest thereon @ 18% p.a.;*
>
> *(iv) To issue a further writ of mandamus or an appropriate writ, order or direction in nature thereof directing the respondents to pay the remuneration to the petitioner for the period from 15.11.2014 till 28.02.2015 alongwith interest thereon @ 18% p.a."*

3. Respondents No. 1 to 4, by filing reply to the petition, have resisted the claim of the petitioner. The replying respondents have contended that the petitioner was engaged as Drawing Master on period basis by the President of SMC on 14.1.2014 pursuant to interview conducted under the Chairmanship of S.D.M. Solan. The petitioner joined her duties on 15.11.2014, however permission so granted for filling up the said post was withdrawn by respondent No. 3 on 21.11.2014, as no criteria was approved by the Government for distribution of marks in the personal interview. The petitioner performed her duties from 15.11.2014 to 24.11.2014 and private respondent No. 5 has to pay qua that period. The replying respondents have denied that the petitioner worked w.e.f. 15.11.2014 to 28.02.2015. As per the replying respondents, the petitioner was not informed verbally not to come to School w.e.f. 01.03.2015, but on 24.11.2015 she noted the orders of respondent No. 4. Ultimately, the replying respondents prayed that the writ petition may be dismissed.

4. I have heard the learned counsel/Additional Advocate General for the appearing parties and gone through the record carefully.

5. The learned counsel for the petitioner has argued that the petitioner was duly selected in a selection process and subsequen procedure of selection, as approved by respondent No. 2, was not applicable to her, as the petitioner was selected/appointed before coming into force of that subsequent selection procedure.

6. Conversely, the learned Additional Advocate General has argued that the petitioner was asked not to work as she was selected in the earlier procedure of selection and same procedure stood withdrawn by respondent No. 3.

7. It is evident from the select list, which is annexed with the petition, that the petitioner was selected being most meritorious out of eighteen candidates. The selection committee was headed by S.D.M. Solan and they had awarded the marks after sub-dividing the marks for matric, Plus Two, Diploma, candidate belonging to the same Patwar Circle etc. etc. It is also manifest that the petitioner scored maximum marks in the said interview. The said selection process was not challenged by any other candidate, who appeared in it.

8. The petitioner was given appointment on 14.11.2014 and from the order it seems that the letter of the new procedure was received and issued after she was appointed. Though the petitioner has also enclosed with the petition a subsequent advertisement, inviting applications for the post in question, for which the petitioner was selected and appointed, but the respondents have stated that there was no such move ever.

9. In view of what has been discussed hereinabove, it is held that the petitioner was selected and appointed as Drawing Master in GSSS Badahlog, Tehsil Kasauli, District Solan, H.P., and she has a right to continue on the said post, as she was duly appointed after following the procedure prevalent at that time. The right of the petitioner has not diminished and the same cannot be abridged. Thus, this Court comes to the conclusion that the action of the respondents in not allowing the petitioner to work continuously is arbitrary. The action of the respondents also violates the principle of *audi alteram partem,* as the petitioner was not even provided an opportunity of being heard by the respondents.

10. The net result of the above discussion is that verbal order dated 01.03.2015, passed by respondent No. 4, asking the petitioner not come on duty, is illegal and appropriate writ is required to be issued to the respondents. Therefore, the respondents are directed to allow the petitioner to work on the post on which she was duly selected and appointed by them on 13.11.2014. However, the petitioner is not held entitled to any remuneration/wages for the period she could not work.

11. In view of the above, the petition stands disposed of. All pending application(s), if any, also stand(s) disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Oriental Insurance Company Ltd. .....Appellant.
Versus
Hima Vati & another .....Respondents.

FAO (WCA) No. 483 of 2007.
Decided on: 19th December, 2016

Employees Compensation Act, 1923- Section 4- Deceased was a driver in a truck – he died in the accident of the truck – compensation of Rs.4,42,740/- was awarded along with interest- held in appeal that the owner had not specifically denied that deceased was employed by him as a driver – it was asserted in the examination-in-chief by the applicant that deceased was working as driver and his wages were Rs.6,000/- per month – respondent No.1 also admitted that deceased was working as a driver and his wages were Rs.5,000/- per month – the fact that the driver was the brother of the owner will not make the case suspect – the provision of Code of Civil Procedure and Evidence Act are not applicable to the proceedings under Workmen Compensation Act – the deceased was having a valid driving licence to drive the vehicle – appeal dismissed.

(Para-16 to 25)

Cases referred:

T.S. Shylaja versus Oriental Insurance Company & Another, (2014) 2 SCC, 587

Gottumukkala Appala Narasimha Raju & Others versus National Insurance Company Ltd. & Another, 2007 ACJ, 1025

Brahmu Ram & Another versus United India Insurance Company & another, 2009(2) Shim. LC, 26

Santosh Devi versus Oriental Insurance Co. & Another, 2011 (Supp.) Him. L.R 1715,

Om Prakash Batish versus Ranjit @ Ranbir Kaur & Others, (2008) 12, SCC, 212

For the appellant	Mr. G.C. Gupta, Senior Advocate with Mrs. Meera Devi, Advocate.
For the Respondents	Mr. Chandranarayana Singh,Advocate for respondent No.1. Mr. G.S. Rathore, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Aggrieved by award dated 5.9.2005, passed by learned Commissioner under Workmen's Compensation Act, Sub-Division, Shimla (Rural), District Shimla in an application under Section 4 and 4(A) of the Workmen's Compensation Act registered as case No.02/2005 is in appeal before this Court.

2. Respondent No.1, hereinafter referred to as the applicant-claimant, is mother of deceased Narender Kumar. In the application she filed for the award of compensation against the owner of ill-fated vehicle i.e. truck No.HP51-1244, respondent No.2, hereinafter referred to as respondent No.1, and appellant, hereinafter referred to as respondent No.2-insurer. It is averred that her deceased son Narender Kumar died in the accident of truck No.HP51-1244 on 16.3.2005 at Jalog, Tehsil Suni, while driving the same. According to her, she was dependent upon the earning of deceased Narender Kumar, who was employed as driver by respondent No.1 with ill-fated truck on payment of Rs. 6,000/- per month as salary. The accident was reported to the Police of Police Station, Dhalli. The deceased at the time of his death was 22 years of age.

3. The first respondent, in reply to the application had submitted in preliminary that at the time of accident the vehicle was duly insured with insurer-respondent No.2, therefore,

the liability, if any, to pay compensation to the applicant-claimant was of the said respondent. It was further averred that the vehicle was being driven by an authorized person, holding a valid and effective driving licence at the time of accident. There being no breach of the contract of insurance, on this score also it is respondent No.2-Insurer, who is liable to pay the compensation.

4. The contents of paras 1 and 2 of the applications were denied for want of knowledge and the petitioner was called upon to produce the documentary proof regarding the averments made therein. No reply was intended to be given to the contents of paras 3 and 4 of the application being matter of record. It was, however, reiterated that the liability to pay the compensation, if any, was that of respondent No.2.

5. The insurer-respondent No.2, has also pleaded in preliminary that as per the FIR, deceased was traveling in the vehicle as gratuitous passenger having no express or implied authority to drive the same. Without admitting the liability to pay the compensation, it was submitted that since the deceased was not holding a valid and effective driving licence; the insurer-respondent No.2 was not liable to pay the compensation. The deceased was brother of respondent No.1 and as such the mother had filed the claim petition to obtain compensation on false grounds. The vehicle was being driven in contravention of the provisions contained in the Motor Vehicles Act and there being breach of the terms and conditions of the insurance policy, the insurer-respondent No.2 is not liable to pay the compensation. The application as constituted and instituted is stated to be neither competent nor maintainable nor was the applicant entitled to claim any damages. The application was also claimed to be bad for non-joinder of necessary parties.

6. On merits also, the insurer-respondent No.2 had denied that the deceased was employed as driver by respondent No.1 on payment of Rs. 6000/- per month as salary to him. He rather was travelling as gratuitous passenger in the ill-fated vehicle, hence the applicant is not entitled to award of any compensation.

7. On such pleadings of the parties, following issues were framed:

1. Whether the application is maintainable in the present form? OPP
2. Whether the vehicle is insured with the respondent No.2? OPR-1
3. Whether the deceased is covered under the definition of workman? OPP
4. Whether the deceased was traveling in the vehicle as a gratuitous passenger? OPR-2
5. Whether the deceased was not holding a valid driving licence at the time of accident? OPR-2
6. Whether the petition is being filed in collusion with the respondent No.1.? OPR-2
7. Whether the vehicle was being plied in contravention of Motor Vehicle Act? OPR-2
8. Whether the petition is bad for non-joinder of necessary parties? OPR-2
9. Relief.

8. Learned Commissioner, on appreciation of the evidence produced by the parties on both sides, has concluded that the deceased was a workman within the meaning of the Act and died during the course of his employment while driving the ill-fated truck. The application as such was held to be maintainable. Issues No.4 and 5 were answered against the insurer while arriving at a conclusion that the deceased was not travelling in the capacity of a gratuitous passenger in the ill-fated truck and rather was driving the same and holding a valid and effective driving licence to drive the same. The objections that the application was filed in collusion with respondent No.1 and that the truck was being plied in contravention of the provisions contained under Motor Vehicles Act and that the application was bad for non-joinder of necessary parties, were not acceded to while answering issues No.6 to 8 against insurer-respondent No.2.

Consequently, the application was allowed and a sum of Rs. 4,42,740/- was awarded as compensation by selecting 221.37 as the relevant factor whereas 50% of the wages of the deceased i.e. Rs. 2,000/- per month. Besides a sum of Rs. 1,26,180/- was also awarded as interest on the amount of compensation so worked out. Respondent No.2 was held liable to pay the entire amount to the applicant-claimant.

9. The insurer-respondent No.2 has assailed the legality and validity of the impugned award on the grounds *inter alia* that the findings recorded by learned Commissioner below on issues No.3 to 6 are erroneous and contrary to the facts proved on record. The owner of the vehicle, in reply to the application, had nowhere submitted that deceased was either employed by him as driver in the vehicle or the relationship of employer and employee was in existence between them. In reply to the application, he never averred that the salary of the deceased was Rs. 6000/- per month. The only case as set-up in the reply by the said respondent was that the vehicle was being driven by an authorized (wrongly mentioned as unauthorized) person holding a valid driving licence to drive the same. He has nowhere stated that the deceased was employed as driver with ill-fated truck.

10. The contents of paras 1 and 2 of the application for award of claim were denied for want of knowledge. Neither any record regarding payment of salary produced nor any such record qua appointment of the deceased as driver produced in evidence. Learned Commissioner, therefore, erroneously concluded that the salary of the deceased was Rs. 5,000/- per month. The findings so recorded are neither supported by the petition nor from the reply thereto filed on behalf of insured-respondent No.1. The deceased as per the evidence available on record was rather travelling in the ill-fated truck in the capacity of a gratuitous passenger. He was real brother of respondent No.1 and the claim petition was filed by the applicant in collusion with respondent No.1. The insurer-respondent No.2, therefore, could have not been saddled with the liability to pay the compensation.

11. The appeal has been admitted on the following substantial questions of law:-

(a) Whether the respondent No.1 has proved on the record that the deceased was employed as a driver by respondent No.2 in the absence of any evidence on the record and whether any evidence in the absence of any pleadings could be looked into by the Commissioner below?

(b) Whether the Commissioner below is right in holding the salary of the deceased to be Rs.5,000.00 per month without the production of the records regarding the same by respondent No.2 and in view of his specific denial in the reply filed on his behalf?

(c) Whether the Commissioner below has rightly decided issues No.3, 4 and 7 in favour of the claimants in view of the allegations made in the application as well as the reply filed on behalf of respondent No.2?

12. Mr. G.C. Gupta, learned Senior Advocate assisted by Mrs. Meera Devi, Advocate has strenuously contended that the relationship of employer and employee between the deceased and first respondent is not at all proved, therefore, neither the deceased could have been treated as a workman nor his salary taken as Rs. 5000/- per month. In reply to the claim petition the insured-respondent No.1 has not admitted that the deceased was employed by him as driver on payment of Rs. 6,000/- as salary per month and rather the averments to this effect in the application have been denied for want of knowledge. The testimony of the insured-respondent No.1 beyond the pleadings, according to Mr. Gupta, could have not been taken into consideration.

13. On the other hand, Shri G.S. Rathore, Advocate learned counsel representing the insured-respondent No.1 has urged that the insured while in the witness box has proved that the deceased was employed by him as driver with ill-fated truck and his salary was Rs. 5,000/- per month. According to Mr. Rathore, appointment of his own brother as driver is not legally barred. It has thus been urged that learned Commissioner below on appreciation of the evidence in its right perspective has rightly held the insurer-respondent No.2 liable to indemnify the insured.

14. Shri Chandranarayana Singh, Advocate learned counsel representing the applicant-claimant has submitted that the contents of reply to the application filed by first respondent manifestly reveals that he has not denied the engagement of the deceased as driver with ill-fated truck and rather while admitting the averments in paras 3 and 4 of the application being matter of record. It is implied that respondent No.1 has admitted that the deceased was employed as driver with the ill-fated truck. It has also been urged that the statement of insured respondent No.1 while in the witness-box, leaves no manner of doubt qua engagement of the deceased as driver with the ill-fated truck on payment of salary. Therefore, according to learned counsel, no other and further evidence was required to form an opinion that the deceased was a workman and died during the course of his employment. It has thus been urged by Mr. Singh, that learned Commissioner below has not committed any illegality and irregularity in allowing the claim petition and awarding a sum of Rs. 4,42,740/- as compensation to the applicant-claimant.

15. Although the appeal has been admitted on three substantial questions of law, yet Mr. Gupta, learned Senior Advocate has restricted his claim mainly on substantial question of law at (a) above.

16. True it is that in reply to the claim petition, respondent No.1 has not specifically admitted the averments in para 2 of the claim petition that the deceased was employed as driver with ill-fated truck on payment of Rs. 6000/- as salary per month. He, however, has even not denied also that the deceased was not employed by him as driver with ill-fated truck. The contentions in para 4 of the petition that the deceased was 22 years of age and the applicant was dependent upon him have, however, been admitted by the said respondent being matter of record. Meaning thereby that it is manifest and implied from the reply to the application filed on behalf of first respondent that he had engaged the deceased as driver with the ill-fated truck. Not only this, but while in the witness-box the applicant has categorically stated that the deceased was working as driver with the truck belonging to respondent No.1 and his wages was Rs. 6,000/- per month. She has tendered the postmortem report Ex.PW-11/B and the age certificate Ex.PW-11/C as well as death certificate Ex.PW-11/D in her statement. In her cross-examination, she even has proved the driving licence Ex.RX. She has been cross-examined on behalf of the insurer-respondent No.2, however, her testimony that the deceased was working as driver with ill-fated truck and died during the course of employment remained un-shattered because the suggestions to the contrary put to her were denied being wrong.

17. Now coming to the statement of respondent No.1, he has categorically stated that deceased Narender Kumar was driving the ill-fated truck at the time of accident. He was employed as driver on seeing his driving licence Ex.RX, which, according to him, was legal and valid. The wages of the deceased, according to respondent No.1, were Rs. 5,000/- per month. In his cross-examination conducted on behalf of the insurer, he tells us that the deceased was his real brother and at the time of accident the vehicle was deputed for bringing grass. The suggestions to the contrary that neither the deceased was employed by him as driver nor was he being paid Rs. 6000/- per month as wages have been denied being wrong.

18. True it is that Shri B.S. Dadwal, Administrative Officer of respondent No.2 has stated that the deceased was travelling unauthorizedly in the truck in question, however, when cross-examined, he has stated that the insurance policy nowhere prohibits the deployment of a real brother as driver of a vehicle by its owner and that the owner rather can employ any person as driver of the vehicle may be his real brother. He further tells us that in the FIR cancellation report was prepared and the same was registered against Narender Kumar, the deceased. Such evidence is, therefore, suggestive of that deceased Narender Kumar was employed by the owner of the vehicle as driver. The deceased was holding valid and effective driving licence to drive the vehicle involved in the accident. Mr. G.C. Gupta, learned Senior Advocate no doubt has emphasized that some record regarding engagement of the deceased as driver and payment of wages to him should have been produced by the insurer-respondent No.1, however, he failed to pin-point the particulars of such record. Otherwise also, in terms of the law laid down by the apex Court in ***T.S. Shylaja*** versus ***Oriental Insurance Company & Another, (2014) 2 SCC,***

587, in the absence of the particulars of such record/ document, the sole testimony of the insured qua engagement of a person as driver on payment of salary is sufficient to conclude that the deceased was a workman and died during the course of employment. Relevant portion of this judgment reads as follows:-

> "11. The only reason which the High Court has given to upset the above finding of the Commissioner is that the Commissioner could not blindly accept the oral evidence without analysing the documentary evidence on record. We fail to appreciate as to what was the documentary evidence which the High Court had failed to appreciate and what was the contradiction, if any, between such documents and the version given by the witnesses examined before the Commissioner. The High Court could not have, without adverting to the documents vaguely referred to by it have upset the finding of fact which the Commissioner was entitled to record. Suffice it to say that apart from appreciation of evidence adduced before the Commissioner the High Court has neither referred to nor determined any question of law much less a substantial question of law existence whereof was a condition precedent for the maintainability of any appeal under Section 30. Inasmuch as the High Court remained oblivious of the basic requirement of law for the maintainability of an appeal before it and inasmuch as it treated the appeal to be one on facts it committed an error which needs to be corrected."

19. It is seen that in the case supra also deceased driver was real brother of the owner of vehicle involved in the accident like in the present case before this Court.

20. No doubt, Mr. Gupta, has placed reliance on the judgment of the apex Court in ***Gottumukkala Appala Narasimha Raju & Others versus National Insurance Company Ltd. & Another, 2007 ACJ, 1025***, where driver of the ill-fated tractor was husband of the owner, in which it has been held that in order to establish the contract of employment documentary proof and independent witnesses were required to be examined, however, in view of the ratio of the latest judgment of the apex Court in ***T.S. Shylaja's*** case supra, and also in the given facts and circumstances of the case is of no help to the case of the appellant-respondent No.2.

21. Similarly the ratio of the judgment of a coordinate Bench of this Court in ***Brahmu Ram & Another*** versus ***United India Insurance Company & another, 2009(2) Shim. LC, 26***, in which the judgment of the apex Court in ***Gottumukkala Appala Narasimha Raju's*** case supra has been relied upon, is also of no help to the case of respondent No.2-appellant.

22. If coming to the judgment again that of a coordinate Bench of this Court in ***Santosh Devi*** versus ***Oriental Insurance Co. & Another, 2011 (Supp.) Him. L.R 1715***, the same is also distinguishable on facts.

23. On the other hand, the apex Court in ***Om Prakash Batish*** versus ***Ranjit @ Ranbir Kaur & Others,(2008) 12, SCC, 212*** has held that in the proceedings before Commissioner under the Workmen's Compensation Act, the provisions of Code of Civil Procedure or that of the Evidence Act are not strictly applicable. The Commissioner for the purpose of arriving at the truth can rely upon the evidence produced before it. Also that the manner in which the Commissioner appreciated the evidence adduced by the parties is out of the purview of an appellate Court. Relevant extract of this judgment reads as follows:-

> "16. A right of appeal under the Act is provided, both to the management as also the workman. It is difficult to hold that whereas for the workman the High Court shall exercise a wider jurisdiction but in the event the employer is the appellant, its jurisdiction would be limited. The High Court unfortunately proceeded on the basis that appreciation of evidence also would give rise to a substantial question of law.

17. In a proceeding initiated under the Act the provisions of the Code of Civil Procedure or of the Evidence Act are not applicable. The Commissioner could lay down his own procedures. He could, for the purpose of arriving at the truth, rely upon such documents which were produced before it."

24. The apex Court has held so keeping in view that the Workmen's Compensation Act is a piece of beneficial legislation and to be construed liberally to impart substantial justice to the dependants upon the victim of an accident and in a case of personal injury, to the injured-workman.

25. In view of what has been said hereinabove no question of law, what to speak of substantial questions of law as formulated, arises for adjudication in this appeal. The appeal as such is dismissed. Consequently, the impugned award is affirmed. Pending application(s) if any shall also stand disposed of. No order so as to costs.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Smt. Savitri Devi widow of late Shri Balwant Singh ....Appellant/Petitioner

Versus

Sh. Mohinder Pal son of Shri Ram Lal & others ....Respondents.

FAO (MVA) No. 121 of 2013
Judgement Reserved on 6th December 2016
Date of decision 19th December 2016

Motor Vehicles Act, 1988- Section 166- Deceased was hit by a car – he fell down upon the motorcycle – the driver and pillion rider also sustained injuries – a claim petition was filed for seeking compensation of Rs.6,12,000/- - the Tribunal dismissed the petition – held in appeal that PW-2 specifically stated that accident was caused due to the negligence of the driver – his testimony was corroborated by the report of post-mortem – thus, rashness and negligence were duly proved – monthly income of the deceased can be taken as Rs.3,000/-- 1/3rd amount is to be deducted towards personal expenses and loss of dependency will be Rs.2,000/- per month- the age of the deceased was 56 years and multiplier of 8 is applicable – compensation of Rs.1,92,000/- (2000 x 12 x 8) awarded towards loss of dependency- compensation of Rs.10,000/- each awarded under the heads funeral expenses, loss of love and affection and loss of consortium – thus, total compensation of Rs.2,22,000/- awarded with interest @ 9 % per annum.

(Para-13 to 22)

Cases referred:

Sarla Verma & others vs. Delhi Transport Corporation and others, 2009)6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, AIR 2013 SCW 3120

For the Appellant: Mr. J.L. Bhardwaj Advocate.

For Respondents Nos. 1 & 2: Mr. T.S. Chauhan Advocate.

For Respondent No.3: None.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Decision:- Present appeal is filed under Section 173 of Motor Vehicles Act 1988 against award passed by learned Motor Accident Claims Tribunal Fast Track Court Una (H.P.) announced in MAC petition No. 17 of 2008 title Savitri Devi vs. Mohinder Pal and others.

Brief facts of the case

2. Smt. Savitri Devi filed claim petition under Section 166 of Motor Vehicles Act 1988 pleaded therein that deceased namely Balwant Singh had gone to pay electricity bill at Bijlighat near Mittal Industries Gagret and when he came after depositing the bill at 10.45 AM then deceased was standing on a portion of road near tractor repair shop at about 11 AM. It is pleaded that a maruti car No. HP-19-5008 came from Gagret side which was driven by Mohinder Pal Suniara who was giving training of driving to his son namely Nitin @ Ladi. It is pleaded that as soon as Mohinder Pal handed over the car to his son Nitin who could not control the vehicle and hit the car with deceased Balwant Singh standing on road. It is pleaded that deceased fell upon motor cycle No. PB-08R-3285 which was driven by Vijay Kumar resident of village Panjawar and Manoj Kumar son of Deep Kumar was pillion rider over motor cycle and they also sustained injuries. It is pleaded that Vijay Kumar and Manoj Kumar were admitted in PHC Gagret and thereafter discharged. It is pleaded that Manoj Kumar son of Deep Kumar reported the matter at police station Gagret and FIR No. 25 of 2008 dated 18.2.2008 was registered under Sections 279, 304A and 201 IPC in P.S. Gagret. It is pleaded that police officials did not conduct the investigation fairly and impartially and they did not associate the actual culprits named above during pendency of investigation. It is pleaded that petitioner thereafter filed written complaint to Director General of Police on 30.5.2008. It is pleaded that petitioner is poor lady and she has no source of income and she was dependent upon income of deceased. Age of deceased pleaded as 56 years and occupation of deceased pleaded as private business. Monthly income of deceased pleaded as Rs.6000/- (Rupees six thousand) per month. It is pleaded that deceased sustained head injury and also sustained damage to his skull bones. It is pleaded that deceased died at the spot. Compensation to the tune of Rs.612000/- (Rupees six lac tweleve thousand) sought.

3. Per contra response filed on behalf of co-respondents Nos. 1 and 2 pleaded therein that petition is not maintainable and petitioner has no cause of action to file present petition. It is pleaded that co-respondents Nos. 1 and 2 were not driving the car No. HP-19-5008 at the relevant time. It is pleaded that co-respondent No.1 has sold car No. HP-19-5008 to third person. Prayer for dismissal of petition sought.

4. Per contra separate response filed on behalf of co-respondent No. 3 namely Vijay Kumar pleaded therein that claim petition is not maintainable. It is pleaded that claim petition is bad for misjoinder of parties. It is pleaded that co-respondent No. 3 was not driving vehicle No. HP-19-5008 at the time of accident. It is pleaded that co-respondent No. 3 was not owner of vehicle No. HP-19-5008 at the time of accident. Prayer for dismissal of petition sought.

5. Petitioner also filed rejoinder and re-asserted allegations mentioned in petition.

6. As per pleadings of parties learned MACT Una framed following issues on 23.2.2011:-

1. Whether deceased Balwant Singh died due to rash and negligent driving of car bearing registration No. HP-19-5008 on 18.2.2008 at 10.45 AM near electricity office Gagret by co-respondent No.1? OPP

2. If issue No. 1 is proved in affirmative whether the petitioner is entitled for compensation if so how much and from whom? ….OPP

3. Whether petition is not maintainable in present form? ..OPR

4. Whether petitioner has no cuase of action against the respondents? ….OPRs 1 & 2

5. Whether petition is bad for mis-joinder of party as alleged? ….OPR 3

6. Relief.

7. Learned MACT Una decided issues Nos. 1, 3 and 5 in negative and decided issue No. 4 in affirmative. Learned MACT Una decided issue No. 2 as redundant. Learned MACT dismissed petition filed under Section 166 of Motor Vehicles Act 1988.

8. Feeling aggrieved against award passed by learned MACT appellant namely Savitri Devi filed present appeal.

9. Court heard learned Advocate appearing on behalf of appellant and learned Advocate appearing on behalf of respondents and Court also perused entire record carefuly.

10. Following points arises for determination in appeal:-

1. Whether appeal filed by appellant is liable to be accepted as mentioned in memorandum of grounds of appeal?

2. Relief.

11. Findings upon point No.1 with reasons

11.1 PW1 Savitri Devi has filed her affidavit in examination in chief. There is recital in affidavit that on 18.2.2008 at about 10.45 AM deceased Balwant Singh went to electricity office at Gagret market and when he was standing near electricity office then car No. HP-19-5008 came from Gagret market which was driven by Nitin Kumar @ Ladi and Mohinder Pal was sitting by side of seat of car No. HP-19-5008. There is further recital in affidavit that Mohinder Pal was giving training of driving to his son Ladi. There is recital in affidavit that said car struck against deceased Balwant Singh who fell on motor cycle No. PB-08R-3285. There is recital in affidavit that motor cycle was driven by Vijay Kumar and Manoj Kumar was sitting as pillion rider on motor cycle. There is recital in affidavit that FIR was lodged in police station Gagret and deceased was brought to PHC Gagret. There is recital in affidavit that post mortem of deceased was conducted in District Hospital on 18.2.2008. There is recital in affidavit that age of deceased Balwant Singh was 56 years and he was earning Rs.6000/- (Rupees six thousand) per month. There is further recital in affidavit that accident took place due to rash or negligent driving of vehicle by Mohinder Pal and his son Ladi. There is further recital in affidavit that deponent spent Rs.60000/- (Rupees sixty thousand) on cremation and for performing last religious ceremony. PW1 has stated that accident did not take place in her presence. PW1 has stated that accident took place in presence of Vijay and Manoj. PW1 has stated that post mortem of deceased was conducted. PW1 has stated that FIR was filed in police station. PW1 has denied suggestion that no accident took place. PW1 has admitted that deceased did not die due to fault of motor cycle No.PB-08R-3285.

11.2. PW2 Bhajan Lal has filed affidavit in examination-in-chief. There is recital in affidavit that on 18.2.2008 deponent had gone to Gagret market and when he was standing near electricity Ghat at 10.45 AM he met Balwant Singh deceased who was standing there. There is recital in affidavit that Mohinder Pal and his son Nitin Kumar @ Ladi came in car No. HP-19-5008. There is further recital in affidavit that Ladi was driving the car and Mohinder Pal was giving him training. There is recital in affidavit that Ladi was driving the car in rash and negligent manner and struck car against deceased Balwant Singh who fell on motor cycle No. PB-08R-3285 and died. There is further recital in affidavit that motor cycle No. PB-08R-3285 was driven by Vijay Kumar and Manoj Kumar was sitting as pillion rider. There is further recital in affidavit that both of them took the deceased to PHC Gagret for his medical examination. There is recital in affidavit that Balwant Singh deceased was earning Rs.6000/- (Rupees six thousand) per month. There is further recital in affidavit that accident was informed by deponent to wife of deceased. PW2 has denied suggestion that accident did not take place in his presence. PW2 has stated that accident did not take place due to fault of driver of motor cycle No. PB-08R-3285.

11.3 PW3 Dr.Indu Bhardwaj medical officer Regional Hospital Una has stated that she is posted as medical officer in regional hospital Una since 1.3.2006. PW3 has stated that on 18.2.2008 she conducted post mortem of deceased Balwant Singh. PW3 has stated that cause of death was fracture of skull and brain haemorrhage. PW3 has stated that post mortem report is Ext.PW3/A which is in her hand and bears her signatures. PW3 has stated that injury could be caused if person would strike against car and fall on hard surface with big impact. PW3 has stated that deceased died within 2/3 minutes. PW3 has stated that if motor cycle would run and if struck then injury could be possible.

11.4 RW1 Mohinder Pal has filed affidavit in his examination in chief. There is recital in affidavit that no accident caused by deponent or his son namely Nitin. There is further recital in affidavit that deponent and Nitin were not driving car at the relevant time. There is further recital in affidavit that false petition filed against deponent and his son. RW1 has admitted that Nitin Kumar is his son. RW1 has admitted that he was owner of car having registration No. HP-19-5008. RW1 has admitted that Savitri has filed complaint against him before Director General of Police. RW1 has denied suggestion that his son Nitin was learning driving and he was helping him to drive car. RW1 has stated that he has sold vehicle No. HP-19-5008.

12. Following documentaries evidence adduced by parties. (1) Mark A is death certificate of deceased Balwant Singh. (2) Ext.PW3/A is post mortem report of deceased Balwant Singh. As per post mortem report deceased died due to head injury leading to severe damage. (3) Mark C is complaint filed by Savitri Devi to Director General of Police. (4) Mark D is FIR No. 25 of 2008 dated 18.2.2008 registered under Sections 279, 304-A and 201 IPC.

13. Submission of learned Advocate appearing on behalf of appellant that it is proved by way of testimony of PW2 Bhajan Lal who is eye witness of accident that deceased had died due to rash and negligent driving of maruti car No. HP-19-5008 is accepted for the reasons hereinafter mentioned. Court has carefully perused affidavit filed by PW2 Bhajan Lal placed on record. There is recital in affidavit that Mohinder Pal and his son Nitin Kumar @ Ladi came in car No. HP-19-5008. There is further recital in affidavit that Ladi was driving the car and Mohinder Pal was associating him in driving car. There is recital in affidavit that Ladi was driving the car in rash and negligent manner and struck car against deceased Balwant Singh who fell and died. Testimony of PW2 Bhajan Lal who is eye witness of accident is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve testimony of PW2 Bhajan Lal who was eye witness of accident. There is no evidence on record in order to prove that PW2 Bhajan Lal has hostile animus against Mohinder Pal or Nitin @ Ladi at any point of time. Testimony of PW2 Bhajan Lal is corroborated by post mortem report Ext.PW3/A wherein it is specifically mentioned that deceased had died due to head injury leading to severe damage.

14. Submission of learned Advocate appearing on behalf of appellant that appellant is widow of deceased and was dependent upon deceased at the time of his death and is entitled for compensation is accepted for reasons hereinafter mentioned. Age of deceased at the time of his death was 56 years. There is no positive direct evidence relating to income of deceased. No income certificate placed on record issued by competent authority of law. Hence Court assess the monthly income of deceased as Rs.3000/- (Rupees three thousand) per month at the time of death. 1/3rd income of deceased is deducted for his personal expenses and dependency of appellant is assessed at Rs.2000/- (Rupees two thousand). As age of deceased was 56 years multiplier of 8 is applied. Following compensation is awarded:-

(i) Compensation for loss of dependency awarded(2000X12X8)	=Rs.192000-00
(ii) Compensation for funeral expenses awarded	= Rs. 10000-00
(iii) Compensation for loss of love and affection awarded:	= Rs. 10000-00
(iv) Loss of consortium awarded	= Rs. 10000-00
(v) Compensation for medical expenses awarded	= NIL
(As no medical certificate placed on record)	
Total compensation awarded	= Rs.222000-00
(Two lacs twenty two thousand)	

15. ***See (2009)6 SCC 121 Sarla Verma & others vs. Delhi Transport Corporation and others. See AIR 2013 SCW 3120 Reshma Kumari and others vs. Madan Mohan and another.*** Compensation is awarded against co-respondents Nos. 1 and 2. Compensation amount will be paid by Mohinder Pal co-respondent No. 1 on the concept of vicarious liability. There is no evidence on record thatvehicle was insured with insurance company and no insurance certificate placed on record.

16. Submission of learned Advocate appearing on behalf of respondents that petition is not maintainable is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record by way of testimony of eye witness PW2 Bhajan Lal that deceased had died due to rash and negligent driving of maruti car No. HP-19-5008. Testimony of PW2 Bhajan Lal is corroborated by post mortem report placed on record. It is well settled law that widow of deceased can file application for compensation under Motor Vehicles Act 1988. Hence it is held that present petition is maintainable under Motor Vehicles Act 1988.

17. Submission of learned Advocate appearing on behalf of respondents that petitioner has no cause of action against respondents is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that cause of action is proved by way of oral as well as documentaries evidence placed on record. After careful perusal of oral and documentaries evidence placed on record it is held that petitioner has cause of action to file compensation petition under Motor Vehicles Act 1988 against co-respondents Nos. 1 and 2.

18. Submission of learned Advocate appearing on behalf of respondents that petition is bad for non-joinder of necessary parties is rejected being devoid of any force for reasons hereinafter mentioned. There is no evidence on record in order to prove that petitioner has not impleaded necessary party in present petition. It is held that petitioner has impleaded all necessary parties in petition as required in accordance with law. Plea of co-respondents Nos. 1 and 2 that petition is bad for non-joinder of necessary party is defeated on concept of *ipse dixit* (An assertion made without proof).

19. Submission of learned Advocate appearing on behalf of respondents that in FIR number of vehicle not mentioned in FIR and on this ground appeal be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that FIR is not substantive piece of evidence but FIR is only a corroborative piece of evidence. It is held that in view of positive testimony of PW2 Bhajan Lal who is eye witness of accident non-mentioning of vehicle number in FIR is not fatal in present petition.

20. Submission of learned Advocate appearing on behalf of co-respondent No. 1 that co-respondent No.1 has sold vehicle No. HP-19-5008 and is not legally liable to pay compensation is rejected being devoid of any force for the reasons hereinafter mentioned. Co-respondent No.1 did not adduce any evidence on record in order to prove that he has sold vehicle to some other person at the time of accident. No affidavit relating to sale of vehicle No. HP-19-5008 at the time of accident is placed on record as required under Sales of Goods Act. It is well settled law that person who is owner at the time of accident is liable to pay compensation amount relating to accident. Hence it is held that co-respondent No.1 is liable to pay compensation amount in accordance with law.

21. Submission of learned Advocate appearing on behalf of respondents that petitioner Smt. Savitri Devi is not eye witness of accident and on this ground appeal be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case Savitri Devi has examined eye witness namely PW2 Bhajan Lal. PW2 Bhajan Lal has specifically stated in positive manner that deceased had died due to rash and negligent driving of vehicle No. HP-19-5008. Respondents did not adduce any independent rebuttal evidence in order to rebut testimony of PW2 Bhajan Lal. In view of above stated facts point No.1 is answered in affirmative.

Point No. 2 (Relief)

22. In view of findings upon point No.1 appeal is allowed. Award passed by learned Motor Accident Claims Tribunal Fast Track Court Una in MAC petition No. 17 of 2008 is set aside

and compensation to the tune of Rs.222000/- (Rupees two lac twenty two thousand) is awarded in favour of appellant and against co-respondent No. 1 and 2. Co-respondent No. 1 will be liable to pay compensation amount on concept of vicarious liability. Petition against co-respondent No. 3 Vijay Kumar is dismissed. In addition interest at the rate of 9% per annum from the date of petition till realisation is also awarded upon compensation amount. Memo of costs be drawn accordingly. File of learned MACT Fast Track Court Una be sent back forthwith along with certified copy of decision. FAO No. 121 of 2013 is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Subhash Chand. .....Petitioner.

Versus

Rajinder Thakur & others. .....Respondents.

CMPMO No. 216 of 2016
Reserved on: 29.11.2016
Decided on: 19.12.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Petitioner was appointed as beldar – he was promoted and trained to operate the hydra crane – he was being transferred to the Mining Department without any training- a civil suit was filed along with an application for seeking ad-interim injunction- the injunction was granted by the Trial Court- an appeal was filed, which was allowed- held in revision that the petitioner was transferred to the Mining Department and was asked to undergo training in dumper operation, which the petitioner refused – the petitioner was transferred to crusher section and was advised to report to HOD crusher – the petitioner refused and was charge-sheeted – an employee can be posted anywhere to subserve the administration – the petitioner is not interested to undergo the training but wants to continue only on one machine – he cannot deny the order of superior – no prima facie case exists in favour of the petitioner – the injunction was rightly denied to the petitioner- revision dismissed. (Para-9 to 14)

For the petitioner: Mr. V.D. Khidta, Advocate.
For the respondents: Mr. Rajnish K. Lal, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner/plaintiff (hereinafter referred to as *'the petitioner'*) against the order of learned District Judge, Bilaspur, H.P. passed in Civil Miscellaneous Appeal No. 1/14 of 2016, dated 25.04.2016, whereby the order passed by the learned Civil Judge (Junior Division) Bilaspur, H.P. in CMA No. 67/6 of 2015, dated 02.01.2016, was set aside.

2. Briefly stating the facts giving rise to the present petition are that petitioner maintained a suit in the Court of first instance seeking permanent prohibitory injunction against the respondents/defendants (hereinafter referred to as *'the respondents'*). The petitioner also maintained an application under Order 39, Rules 1 and 2 read with Section 151 CPC and the learned Civil Judge (Junior Division) Bilaspur, H.P. vide order dated 02.01.2016, restrained the respondents from interfering, transferring and changing the nature of job of the petitioner from his primary job, i.e., Operator of Hydra Crane and Fork Life for which he was trained and appointed till disposal of the main suit. The said order was assailed by the respondents in the Court of learned District Judge, Bilaspur, H.P., successfully. As per the petitioner, on

14.02.1994, he was appointed as *Beldar* in ACC, Barmana. Subsequently, on 01.04.2009, he was promoted and trained to operate the Hydra Crane. Respondent No. 1, who is General Manager, ACC Barmana, belongs from the native place of the petitioner. Owing to some family feud, respondent No. 1 is harassing the petitioner. The petitioner has further contended that he has not been trained to work in the mining department to which he is to be transferred. Special medical fitness is necessary to work in the mining department and he is not medically fit, as he is suffering from disk/back problem. His transfer to the mining department is *mala fide* action of respondent No. 1. The petitioner is being compelled to work in the mining department, operate a dumper and climb ladder having more than five steps. In the mining department he has to climb on a running Starker, which is hazardous and risky. As per the petitioner, Starker is an electrical instrument and computerized machine and he has no knowledge of the same and likewise Dumper moves on treacherous roads resulting into bumpy drive. The petitioner sought interim orders restraining the respondents from interfering, transferring or changing the nature of his job/work from his primary job for which he was appointed and trained by the respondents.

3. The respondents, by way of filing reply to the application, raised preliminary objections qua maintainability, *locus standi*, estoppel, jurisdiction etc. On merits it was averred by the respondents that respondent No. 1 is not inimical towards the petitioner. As per the respondents, the petitioner started working as *Mazdoor* in Grade-E w.e.f. 14.02.1994 and Clause-7 of appointment letter provides *"it is understood and agreed that you are liable to be transferred to work in any of our works including quarries, departments or offices managed by this company or subsidiary company. If you are transferred permanently to and of the company's other units, your remuneration will be governed by the terms and conditions obtaining at that unit".* The respondents have further averred that the petitioner was promoted as Machinery Attendant w.e.f. 01.01.2008 and as an Operator w.e.f. 01.04.2009 and was shifted from kiln department to motor vehicle department and he was subsequently transferred therefrom to mining department on 21.03.2014. The petitioner himself declined to undergo training in dumper operation and was willing to operate Hydra Crane only. As per the respondents, the petitioner was then shifted to crusher section for operating stacker/crusher and was to undergo training, but he again refused. The petitioner did not perform his duties and remained idle; hence he was charge-sheeted on 18.02.2015. The petitioner is medically fit and as per the terms and conditions of appointment, any employee of the company can be transferred anywhere in the company.

4. The learned Civil Judge (Junior Division) Bilaspur, H.P. allowed the application under Section 39, Rules 1 and 2 read with Section 151 CPC. However, the learned Lower Appellate Court quashed and set aside the order passed by the learned Civil Judge (Junior Division) Bilaspur, H.P., hence the present petition.

5. The learned counsel for the petitioner has argued that the learned Lower Appellate Court has failed to take into consideration the fact that the petitioner has a *prima facie* case in his favour and balance of convenience also lies in his favour. He has further argued that by rejecting the application under Section 39, Rules 1 and 2 read with Section 151 CPC, the petitioner is suffering irreparable loss. In the interest of justice, the order passed by the learned Lower Appellate Court rejecting the application of the petitioner may be set aside.

6. Conversely, the learned counsel for respondents No. 1 to 4 has argued that the petitioner has no *prima facie* case in his favour. As an employee, the petitioner cannot choose where he wants to work. He has also referred to the appointment letter and other documents, which are on record.

7. In rebuttal, the learned counsel for the petitioner has argued that the petitioner is suffering from back ache and the work which he is being directed to perform is hazardous and he is not in a position to perform the same.

8. In order to appreciate the rival contention of the parties, I have gone through the record in detail and the pleadings of the parties, which are on record.

9. It is clear from the letter dated 21st March, 2014, that the petitioner was transferred to mining department and his services were urgently required in the said department. Vide another communication dated 25.03.2014, the petitioner was required to undergo training in dumper operation on and w.e.f. 26.03.2014 with some Senior HEMMO of mining department for a month. However, the petitioner refused to undergo the training and he wrote a letter dated 26.03.2014 to the authorities expressing that he has no interest to run heavy machinery, including dumper and he be allowed to operate Hydra Crane, which he was operating earlier. The petitioner nowhere highlighted his back problem to the authorities. Subsequently, vide letter dated 14.06.2014, the petitioner was transferred to crusher section. The said letter further revealed that the petitioner was required to operate the stacker/crusher and he was advised to report to HOD Crusher on 16.06.2014, but he did not do so. Thus, he was charge-sheeted on 18.02.2015 and the inquiry is still pending against him. Admittedly, the petitioner approached the Civil Court by filing suit for permanent prohibitory injunction coupled with injunction application on 20.03.2015. The petitioner approached the Civil Court much later to his last transfer. Earlier the petitioner did not highlight his ill-health to his employer. An employee can be posted anywhere by the employer in order to sub-serve the administration of work and the choice of the employee is always secondary. From the facts of the case it can be easily gathered that the petitioner is not interested to operate on a particular machine or undergo the training, he just wanted to continue on a specific machine only.

10. From the record it is not clear that the petitioner is having any major problem qua back ache. Although, he has produced the prescription slip on record, but the same nowhere justifies that the petitioner is not in a position to work. The appointment letter of the petitioner is amply clear that he can be posted anywhere. The petitioner cannot deny the orders of his superiors, as he is required to work and discharge duties as per the orders of his superiors.

11. In these circumstances, this Court finds that *prima facie* case does not exist in favour of the petitioner and balance of convenience is also not in his favour. In case interim order is granted in favour of the petitioner, other employees will also start disobeying the orders of their superiors and it will be difficult to run the administration for the respondents/defendants. The interests of justice demand that the petitioner should perform his duties as he is serving with the respondents.

12. In view of the above, I do not find any reason to interfere with the well reasoned order of the learned Lower Appellate Court. Accordingly, the petition, being devoid of merits deserves dismissal and is accordingly dismissed, however, with no orders as to costs.

13. The parties are directed to appear before the learned Trial Court on ***12th January, 2017.*** The learned Trial Court will try to dispose of the Civil Suit as early as possible.

14. The petition stands disposed of as also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Balwinder Singh ...Petitioner.
Versus
The State of Himachal Pradesh and others ...Respondent.

CWP No. 2186 of 2016
Reserved on: 12.12.2016
Date of order: 20.12.2016

Constitution of India, 1950- Article 226- Petitioner had applied for sanitation tender at Mahatma Gandhi Medical Services Complex, Khaneri Rampur but ineligible firms were declared qualified in the technical bid- the tender was allotted to respondent no.4 despite the fact that it

was not fulfilling terms and conditions of the tender documents- respondent no. 1 stated that the tender was allotted to respondent no.4 as it was found to be the lowest bidder - a writ petition was filed earlier, which was dismissed as not maintainable- respondent no.4 raised an objection that petitioner had not participated in the tender and cannot questionthe process – held, that petitioner had not participated in the tender process and has no locus standi to question the same – ESIC no. was wrongly blocked/cancelled by ESIC, which mistake was rectified by ESIC – no case for judicial review was made out—petition dismissed.

For the petitioner:	Mr. Javed Khan, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. Kush Sharma, Deputy Advocate General, for respondents No. 1 to 3. Mr. Ashok Sood, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of the instant writ petition, the petitioner has called in question awarding of the sanitation tender process drawn by respondents No. 1 to 3 at Regional Hospital, Kullu, on the ground that the said tender has been allotted in favour of respondent No. 4 without following due process of law.

2. The petitioner has pleaded in paras 2 and 4 of the writ petition that the petitioner had applied for sanitation tender at Mahatma Gandhi Medical Services Complex (MGMSC) Khaneri, Rampur, for the financial year 2016-17, but the firms, which were not eligible, were declared qualified in the technical bid. Further averred that respondents No. 1 to 3 have wrongly and illegally awarded the sanitation tender at Regional Hospital, Kullu, in favour of respondent No. 4 despite the fact that it was not fulfilling the terms and conditions contained in the tender document.

3. The respondents have filed the replies. Respondents No. 1 to 3, in their reply, have stated that as per the check list of the documents to be attached with the technical bid, respondent No. 4 was found to be eligible and the tender of sanitation in respect of the Regional Hospital, Kullu, was allotted in its favour being the lowest bidder. But, when the fact of cancellation/rejection of the ESIC number of respondent No. 4 came into the notice of respondent No. 3, the matter was got verified from the Employees State Insurance Corporation, Baddi (for short "ESIC") and, thereafter, respondent No. 4 was asked to explain, which furnished new ESIC number allotted to it alongwith copies of various challans paid with effect from 15th February, 2015. Respondents No. 1 to 3 have specifically taken these pleas in the preliminary submissions and in paras 2 and 5 of the reply on merits.

4. Respondents No. 1 to 3 have also specifically stated that the petitioner had challenged the tender process for sanitation in respect of MGMSC Khaneri, Rampur, by the medium of CWP No. 882 of 2016, which was dismissed by this Court, being not maintainable vide judgment and order, dated 27th June, 2016, thus, cannot maintain this writ petition on similar grounds.

5. Respondent No. 4, in para 2 of the preliminary submissions and reply on merits, has specifically averred that it was registered with ESIC since February, 2015, under Employer's Code No. 1532240001001, was blocked/cancelled by ESIC without any enquiry/verification on the wrong assumption that the business premises of the said respondent is situated outside the municipal limits of Municipal Corporation, Shimla, which is non-implemented area under the Employees' State Insurance Act, 1948 (for short "the Act"). Further averred that when it came to know about the blocking/cancellation of the Employer's Code, it immediately approached ESIC alongwith revenue record and certificate from the concerned Patwari to the effect that its business

premises is situated within the limits of Municipal Corporation, Shimla. Thereafter, ESIC revoked the rejection and issued fresh Employer's Code enforceable with effect from February, 2015, because a number/code, once blocked, cannot be re-allotted. Thus, it has been pleaded that respondent No. 4 was eligible in all respects.

6. Respondent No. 4 has also specifically stated that the petitioner has not participated in the tender process, thus, has no right to question the same. It has also been stated that the petitioner, being involved in the business of providing contract services in hospitals and other public institutions throughout the State of Himachal Pradesh, has obtained several service contracts by producing forged documents resulting in registration of various FIRs against the petitioner's firm and is facing trial. It is also stated that the petitioner is in the habit of approaching the Courts whenever his tender is rejected.

7. We have examined the pleadings read with the record and are of the considered view that respondents No. 1 to 3 have not committed any illegality or irregularity in awarding the tender in favour of respondent No. 4 being the lowest bidder for the following reasons:

8. Mr. Romesh Verma, learned Additional Advocate General, was asked to seek instructions as to whether the petitioner has participated in the tender process in question or not, has furnished list of the firms which have participated in the sanitation tender process at Regional Hospital, Kullu, for the year 2016-17, made part of the file. The perusal of the said list does disclose that the petitioner or his firm has not participated in the said tender process, has no locus to question the same. Thus, the writ petition is not maintainable only on this score.

9. It has duly been established by respondent No. 4 that the ESIC number was wrongly blocked/cancelled by ESIC, which mistake was rectified by ESIC, when pointed out by respondent No. 4 supported by relevant documents, by issuing fresh ESIC number with effect from February, 2015. The same ESIC number could not be issued to respondent No. 4 for the reason that once a number/code is blocked by the computer, the same cannot be re-allotted. Respondent No. 4 has used the said ESIC number and filed various challans for depositing the share of employer's contribution towards the contributory insurance premium of its employees. Thus, no case for judicial review is made out.

10. Having glance of the above discussions, the writ petition is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Bhuri Singh .....Appellant.

Versus

State of Himachal Pradesh and others .....Respondents.

LPA No.28 of 2013.
Judgment reserved on : 13.12.2016.
Date of decision: December 20, 2016.

Constitution of India, 1950- Article 226- Petitioner joined the services of the department as daily waged beldar – he was engaged as a pipe fitter – his case was considered for regularization and he was appointed as a work charge beldar – he joined under protest and filed original application before the Tribunal – a direction was issued to appoint the petitioner to the post of work charge pipe fitter – a corrigendum was issued and the designation of the petitioner was shown as fitter – the petitioner filed an original application claiming the time scale on seniority basis – the application was transferred to the High Court and was dismissed – held in appeal that the petitioner was directed to be appointed as pipe fitter in the lowest grade with the scale of work charge beldarby the Tribunal – the corrigendum was issued in terms of the direction- the

petitioner should have filed a review petition or an appeal, if he was not satisfied with the direction issued by the Tribunal- he cannot claim that he should have been appointed as a daily waged pipe fitter with the time scale – appeal dismissed.(Para-8 to 13)

For the Appellant	Mr.Sanjeev Bhushan, Senior Advocate with Ms.Abhilasha Kaundal, Advocate.
For the Respondents	Mr.Shrawan Dogra, Advocate General with Mr.P.M.Negi, Mr.Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General, for respondents No.1 to 3. Mr.Sat Parkash, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This Letters Patent Appeal is directed against the judgment passed by the learned writ Court on 15.07.2011 whereby his claim for appointment as Pipe Fitter with retrospective effect came to be dismissed.

2. As per the pleaded case of the appellant, he joined services of the respondent-Department in the year 1984 as daily waged 'Beldar' and subsequently in July, 1986, was engaged as a Pipe Fitter. His case for regularization was considered in the year 1993 and he was appointed as a work charged 'Beldar' instead of a Pipe Fitter. He thereafter on 09.03.1995 joined under protest and at the same time filed OA (M) No.424/95 before the learned Tribunal wherein he claimed regularization as Pipe Fitter. The Original Application was decided on 25.06.1996 by directing that the appellant would be entitled for appointment to the post of work charged Pipe Fitter in the lowest grade i.e. the scale of Rs. 770-1350/- and his services would be regularized in the said category as and when vacancy is available with the respondent-Department.

3. In compliance to the judgment, the respondents on 07.03.1998 issued a corrigendum and the designation of the appellant instead of 'Beldar' was shown as Fitter in the scale of Rs. 770-1350/-.

4. Aggrieved by the corrigendum, the appellant filed O.A.No.78/2002 wherein he claimed that the respondent-Department should have appointed the appellant to the post of Pipe Fitter and granted him time scale on seniority basis. It was further averred that the respondents in violation of the judgment earlier passed by the learned Tribunal had appointed junior persons to the post of Pipe Fitter thereby violating the provisions of Articles 14 and 16 of the Constitution of India.

5. The respondents filed reply wherein it was averred that the judgment passed by the learned Tribunal in favour of the appellant had been implemented in its letter and spirit and the appellant had been appointed in the pay scale of Rs. 770-1350/-, even though no post of Pipe Fitter was available.

6. It was upon closure of the learned Tribunal at that time that the record of the Original Application No.78/2002 was transferred to this Court and was registered as CWP(T) No.8192/2008. The same came up for consideration before the learned writ Court on 15.07.2011 and the only argument put-forth by the appellant was that the judgment passed by the learned Tribunal on 25.06.1996 has not been implemented in its letter and spirit. However, the said contention was negated by the learned writ Court.

7. It is this judgment which has been assailed by the appellant on the ground that the learned writ Court had fallen in error in concluding that the petition had been filed for seeking compliance of the judgment of the erstwhile Tribunal in OA (M) No.424/95, whereas, the appellant had infact set up a claim that he should be considered as daily waged Fitter with effect

from July, 1996, so as to be eligible and entitled for the grant of work charged status of Pipe Fitter after 10 years.

We have heard the learned counsel for the parties and gone through the records of the case.

8. At the outset, we may notice that the directions passed by the learned Tribunal in OA (M) No. 424/95 are very specific whereby the appellant was directed to be appointed as Pipe Fitter in the lowest grade with the scale of work charged 'Beldar' in the scale of Rs. 770-1350/- and the same read as under:-

> "*The lowest grade of the post held by the applicant i.e. Beldar and Pipe Fitter to complete 10 years continuous service is that of Beldar, that is to say the scale of the Beldar is that of 770-1350, as such the applicant is to be made a work charged employee as Pipe Fitter in the lowest grade i.e. the scale of work charged Beldar in the scale of Rs.770-1350. The applicant would thus entitled to be appointed to the said post and his services to be regularised in the said category as and when vacancy is available with the respondent-department and the regularisation is to be done on the basis of seniority of the applicant in the seniority list maintained by the Department under the scheme."*

9. We further find that the respondents in compliance of the aforesaid directions had infact issued a corrigendum on 07.03.1998 and the same reads as under:-

> *"As the status of Pipe fitter in the lowest grade of Rs.770-1350 has been given by the Administrative Tribunal H.P. Shimla in OA No. (M)-424/95 as per judgment dated 25.06.1996 in favour of Shri Bhuri Singh S/o Sh.Tashi Ram Village Kuthed, P.O.Deola, Tehsil Churah, Distt. Chamba, the name of post as written as Beldar in the appointment order of Shri Bhuri Singh may be read as Fitter in the scale of Rs.770-1350. This is w.r.to the clarification as sought for vide IPH-A-5-E(3)28/97 dated 5.12.97 from the Financial Commissioner-cum-Secretary (IPH) to the Govt. of Himachal Pradesh Shimla."*

10. From what has been extracted above, we have no doubt in our mind that the order passed by the learned Tribunal directing the appellant to be designated as Pipe Fitter in the lowest grade of Rs. 770-1350/- was duly complied with by the respondents by issuing corrigendum dated 07.03.1998. If that be so, then there is no occasion for the appellant to have any further grievance. What infact the appellant is striving for is questioning the orders passed by the learned Tribunal on 25.06.1996 in OA (M) No.424/95 which obviously is not permissible? If at all the appellant was aggrieved by the directions passed by the learned Tribunal whereby he was ordered to be placed in the lowest grade, he ought to have either filed a review petition or assailed the said order before the higher Forum/Court.

11. Having failed to do so, the findings as recorded by the learned Tribunal would obviously stare at his face having attained finality. That apart, even at the time of filing of CWP (T) No.8192/2008 out of which the present appeal arises was taken up for consideration, the only contention put-forth by the appellant was that the judgment passed by the learned Tribunal on 25.06.1996 had not been implemented in its letter and spirit, as would be evident from the perusal of the judgment, the relevant portion whereof reads thus:-

> *"3. Mr. Rajesh Raghuvanshi, learned counsel for the petitioner has argued that the judgment dated 25th June, 1996 rendered by the learned Tribunal has not been implemented in letter and spirit.*
>
> *4. However, it is evident from the material placed on record and the contents of Annexure-R dated 9.3.1998 filed with supplementary affidavit that the petitioner's designation was changed from Beldar to pipe fitter in the pay-scale of Rs. 770-1350.*

5. The grievance of the petitioner stands redressed and the judgment rendered in OA (M) No. 424 of 1995 has already been implemented. Consequently, there is no merit in this petition and the same is dismissed, so also the pending application(s), if any. No costs."

12. Having obtained judgment in his favour, the appellant cannot turn around and now claim that he should have been appointed as a daily waged Pipe Fitter with effect from July, 1986 alongwith pay-scale which in teeth of the findings recorded by the learned Tribunal in its judgment dated 25.06.1996 is not clearly available to him. That apart, even while filing OA No.78/2002 (CWP(T) No. 8192/2008), the only claim agitated at the time of arguments pertained only to the non-implementation of the aforesaid judgment and that being the position, the appellant is otherwise precluded and estopped from raising the contention as now sought to be raised in this appeal.

13. Consequently, we find no merit in this appeal and accordingly the same is dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Kulvinder Singh .....Petitioner

Versus

The Managing Partner, M/S Cousins Gun Manufactures Mandi .....Respondent

CWP No. 6565 of 2011
Decided on : December 20, 2016

Industrial Disputes Act, 1947- Section 25- The workman was appointed as a driver – his services were terminated orally without issuance of notice – a reference was made, which was allowed by the Labour Court- held, that the management had not challenged the award – the Industrial Tribunal had wrongly denied the benefit of backwages especially when continuity in service and seniority were granted – Writ Court does not have jurisdiction to re-appreciate the facts- however, Tribunal had failed to exercise the jurisdiction by denying the back wages – writ petition allowed and workman held entitled to 50% of back wages from the date of retrenchment till passing of award. (Para-9 to 16)

Cases referred:

Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157
T.N. Terminated Full Time Temporary LIC Employees Assn. V. LIC, (2016) 9 SCC 366
Raghubir Singh vs. General Manager, Haryana Roadways, Hissar, 2014(6) SLR 6 (S.C.)

For the petitioner : Mr. V.B. Verma, Advocate.
For the respondent : Mr. B.S. Chauhan, Senior Advocate with Mr. Munish Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant petition under Article 226 of the Constitution of India, the petitioner-workman (herein after, 'workman') has laid challenge to Award dated 4.12.2010 passed by the Industrial Tribunal-cum-Labour Court, Dharamshala in Ref. No. 74/2006, whereby the learned Tribunal below though has granted benefit of continuity in service and seniority from the date of illegal termination of the workman but has denied the back-wages.

2. Briefly stated facts, as emerge from the record are that appropriate Government made following terms of reference under Section 10(1) of the Industrial Disputes Act to the learned Industrial Tribunal-cum-Labour Court:

> "Whether the termination of services of Shri Kulvinder Singh S/o Shri Preetpal Singh workman by the M/s Cousins Gun Manufacturers Mandi, H.P. w.e.f. 20.5.2004 without complying the provisions of the Industrial Disputes Act, 1947 as alleged by the workman is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"

3. Workman, in his statement of claim before the learned Tribunal below stated that he was appointed as a Driver by the respondent-management (herein after, 'management') in the year 1998 and as such he continued to work till 20.5.2004, whereafter his services were terminated by the management orally, without issuance of any notice. Since workman had completed more than 240 days in each calendar year, his services could not be terminated without resorting to the provisions of Industrial Disputes Act. Record further reveals that when the workman raised industrial dispute before the Labour-cum-Conciliation Officer, Management issued a notice alongwith cheque amounting to Rs.2815/- in favour of the workman virtually in compliance of Section 25 (F) of the Act, however, the fact remains that the same was not accepted by the workman. In the aforesaid background, workman claimed before the Tribunal that he be ordered to be re-engaged forthwith in the same capacity as he was working earlier alongwith consequential benefits including back-wages.

4. It also emerges from the record that despite various opportunities to the Management, it failed to file any reply to the statement of claim filed by the workman, as such, claim was decided on the basis of material adduced on record by workman. Workman while examining himself as PW-1 specifically stated that he was appointed as a Driver by the Management in the year 1998 and thereafter, he worked uninterruptedly till 20.5.2004, when his services were all of a sudden terminated without resorting to the provisions of Industrial Disputes Act. It is also stated that he has completed more than 240 days in each calendar year during his service with the Management. In support of his aforesaid claim, he also examined one Shri Manohar Lal as PW-2, who also corroborated version having been put forth by the workman that workman was working as Driver with the management from 1998 till 2004, when his services were terminated by the Management. As has been observed above that the Management despite sufficient opportunities, failed to file reply, as a result of which averments made in the statement of claim and statement having been made by the workman during the proceedings before the learned Tribunal below, remained unrebutted and learned Tribunal below rightly presumed and inferred that the workman had worked continuously and uninterruptedly with the Management since 1998 and his services were illegally terminated by the Management without following provisions of Section 25(F) of the Industrial Disputes Act and as such his termination was rightly quashed and set aside. At this stage, it may be taken note of as also clearly emerges from the Award passed by learned Tribunal below that when workman raised industrial dispute before the Labour-cum-Conciliation Officer, Management, in semblance of compliance of Section 25(F) of the Act, issued a notice alongwith cheque of Rs.2815/- to the workman, which was not accepted/ withdrawn by the workman, meaning thereby that there was admission on the part of the Management as far as non-compliance of Section 25(F) of the Act at the time of termination of services of workman is concerned. By way of impugned Award, learned Tribunal below while accepting the claim having been put forth by the workman, directed the Management to reengage the workman at same place and in the same post, against which workman was working with the Management at the time of his illegal termination. Award further suggests that workman was also held entitled to benefit of continuity in service and seniority from the date of his illegal termination, but he was not granted any back wages. In the aforesaid background, being aggrieved with the denial of back wages by the learned Tribunal below, workman approached this Court seeking following main relief:

" ii) Allow the present Civil Writ Petition and the petitioner may also be held entitled to full back wages while reinstating his services with seniority and other consequential service benefits from the date of his illegal termination i.e. 20-05-2010 with cost through out."

5. Since the management has not laid any challenge to the impugned award passed by the learned Tribunal below whereby direction has been issued for reinstatement of workman with benefit of continuity in service and seniority, Award has attained finality to that extent qua the Management.

6. Mr. V.B. Verma, learned counsel representing the workman vehemently argued that the impugned award passed by learned Tribunal below denying back wages to the workman is illegal and against the law laid down by the Apex Court in a catena of cases, wherein it has been categorically held that once workman is entitled to the benefit of continuity in service and seniority, he is also entitled to back wages and as such Award deserves to be modified. Mr. Verma, further contended that the learned Tribunal below has failed to appreciate that the onus to prove that workman was not gainfully employed during the period of termination was not upon the workman but the same was upon the Management, which claimed that during the period of retrenchment, workman remained gainfully employed. With a view to substantiate his aforesaid plea, he made this Court to travel through the records of the case to demonstrate that at no point of time, Management was able to prove on record by leading cogent and convincing evidence that the workman was gainfully employed during the period of retrenchment and as such impugned award having been passed by learned Tribunal below deserves to be modified. While concluding his arguments, Mr. Verma, further contended that despite there being order of reinstatement passed by learned Tribunal below, Management has not reengaged the workman, as such impugned award is harsh, inequitable and unfair to the workman especially for the reasons that after passing Award, substantial justice has eluded the workman since neither the workman has been reinstated nor he has been paid for the period.

7. Mr. B.S. Chauhan, learned Senior Advocate duly assisted by Mr. Munish Dhatwalia, Advocate, supported the award passed by Industrial Tribunal-cum-Labour Court. Mr. Chauhan, vehemently argued that there is no illegality and infirmity in the impugned award passed by learned Tribunal below as the same is based upon correct appreciation of evidence adduced on record by the parties and as such there is no scope of interference by this Court, especially in view of the findings of fact recorded by the learned Tribunal below. In this regard he placed reliance upon judgment passed in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.*** While refuting the contentions having been put forth on behalf of the learned counsel representing the petitioner, that onus was upon the Management to prove that workman was not gainfully employed during the period of retrenchment, Mr. Chauhan, strenuously argued that as per settled law, onus is always upon the person, who claims wages for the period of retrenchment, to prove that during the period of termination, he was not gainfully employed at some other place and as such there is no illegality or infirmity in the impugned award passed by learned Tribunal below as far as denial of back wages is concerned. Mr. Chauhan, further contended that since the respondent Unit is closed for the reasons beyond the control of the Management, services of workman could not be reengaged and as such there is no disobedience on the part of the Management, as alleged by the workman. While concluding his arguments, Mr. Chauhan also invited attention of this Court to the judgment having been passed by the Apex Court in **T.N. Terminated Full Time Temporary LIC Employees Assn. V. LIC**, reported in (2016) 9 SCC 366, to suggest that considering the hardships of the respondent-Management, workman may not be held entitled to back wages.

8. I have heard the learned counsel representing the parties and also gone through the Award and records.

9. At the risk of repetition, it may be reiterated that there is no challenge to the impugned award passed by learned Tribunal below by the respondent-Management, whereby workman has been held entitled to reinstatement with benefit of continuity in service and

seniority, as such to that extent, award has attained finality qua the Management. Since no challenge has been laid to the impugned award by the Management, it can be safely inferred that for all intents and purposes, Management has accepted the workman to be in continuous service, who was admittedly appointed as Driver in the year 1998 and continued to work as such till 20.5.2004, when his services were illegally terminated by the Management, without resorting to the provisions contained in Industrial Disputes Act.

10. After perusing the pleadings as well as Award, this Court sees substantial force in the claim of the workman that he could not be denied back wages, especially when on the basis of the evidence adduced on record learned Tribunal came to the conclusion that the termination is bad being in violation of various provision of the Act, learned Tribunal could not deny the benefit of back wages, especially when the petitioner was granted the benefits of continuity in service and seniority. The benefit of continuity in service and seniority could only be granted by the Court if it was satisfied that workman/petitioner was not allowed to work during the retrenchment period despite there being sufficient work available with the management. In the present case, learned Tribunal while holding the termination of the petitioner bad came to the conclusion that the termination was in violation of Section 25-F of the Act, meaning thereby, learned Tribunal was convinced that after retrenchment of the petitioner, work was available but for some extraneous reasons services of the petitioner were terminated without resorting to provisions contained in Section 25-F of the Act. Otherwise, also this Court after perusing the evidence as has been discussed above is fully convinced that the respondent-company was unable to prove that at the time of retrenchment of the petitioner, no work was available and no persons junior to him were retained. Once, the petitioner was able to prove on record that at the time of his termination, no procedure as prescribed under Industrial Disputes Act, was followed, learned Tribunal below ought to have granted back wages also. Apart from above, when learned Tribunal on the basis of the evidence held the petitioner entitled to benefit of continuity in service and seniority, there was no occasion whatsoever, to deny the benefit of back wages because benefit of continuity of service could only be granted, if tribunal was satisfied that during retrenchment period petitioner was purposely stopped from discharging his duty despite there being availability of sufficient work.

11. In this regard reliance is placed on the judgment of the Hon'ble Apex Court in ***Raghubir Singh vs. General Manager, Haryana Roadways, Hissar, 2014(6) SLR 6 (S.C.),*** wherein the Court held:

> **"39.** Now, it is necessary for this Court to examine another aspect of the case on hand, whether the appellant is entitled for reinstatement, back wages and the other consequential benefits. In the case of **Deepali Gundu Surwase V. Kranti Junior Adhyapak Mahavidyalaya (D. Ed) and Ors.,(2013)10 SCC 324: [2013(6) SLR 642 (SC),** this Court opined as under:-
>
> > **"22. The very idea of restoring an employee to** the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the

employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

23. A somewhat similar issue was considered by a three Judge Bench in Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd. (supra).....The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages..... In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular.....

24. Another three Judge Bench considered the same issue in **Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi (supra)** and observed: Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too.....In such and other

> exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted." **(Emphasis supplied by this Court)" (pp.23-25)**

12. Hence, this Court after carefully going through the aforesaid judgment having been passed by the Hon'ble Apex Court, has no hesitation to conclude that learned Tribunal below erred in not granting back wages to the workman, while extending him benefit of reinstatement alongwith benefit of continuity in service and seniority, as such, impugned award deserves to be modified accordingly. Aforesaid view has been reiterated by the Hon'ble Apex Court in (2016) 3 SCC 340 and (2016) 6 SCC 541.

13. As far as judgment passed by the Hon'ble Apex Court in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** is concerned, there can not be any quarrel with the settled proposition of law that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment having been relied upon by the learned counsel representing the Management, clearly suggests that error of law which is apparent on the face of record can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law which can be corrected by a writ of certiorari. Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ of certiorari can be issued if it is shown that in recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

> "16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in

proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

14. Perusal of aforesaid findings returned by the Hon'ble Apex Court nowhere completely bars jurisdiction of writ Court to examine the correctness and genuineness of the Award having been passed by the Tribunal especially when there is an error of law apparent on the face of record. In the instant case, as has been discussed in detail, learned Tribunal below could not have denied benefit of back wages to the workman, especially when Tribunal, on the basis of material, came to the conclusion that the workman is entitled to reinstatement alongwith benefit of continuity in service and seniority. Once, the learned Tribunal below had come to the conclusion that the workman is entitled to the benefit of continuity in service and seniority, it ought to have granted benefit of back wages as has been laid down by the Hon'ble Apex Court in case ***Raghubir Singh vs. General Manager, Haryana Roadways, Hissar.***

15. Hence, this Court is of the view that learned Tribunal below failed to exercise jurisdiction vested in it and erroneously refused to admit admissible claim of the workman and as such this Court has the jurisdiction to correct the same while exercising writ jurisdiction as laid down in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.(supra)***.

16. Consequently, in view of above, the Award dated 4.12.2010 passed by the Industrial Tribunal-cum-Labour Court, Dharamshala in Ref. No. 74/2006, is modified to the extent of denying back wages to the workman. Workman is held entitled to the 50% of the back wages from the date of illegal retrenchment till the date of passing of the Award by the Industrial Tribunal-cum-Labour Court below.

17. Pending applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Lalit Narain Mishra. ....Petitioner.

Versus

The State of Himachal Pradesh & others ....Respondents.

CMP No. 10020 of 2016 in
CWP No. 1449/2015
Reserved on 12.12.2016
Decided on: 20.12. 2016

Constitution of India, 1950- Article 226- A writ petition was filed by the petitioner seeking direction to the University to show the answer sheets/books of the petitioner and the copy of notification of dates of examination – the petition was dismissed – SLP was filed before the Supreme Court, which was also dismissed – a CMP was filed to provide the record kept in the sealed cover –the petitioner was directed to approach the authorities for obtaining the copy of the requisite documents – the petitioner filed the present application pleading that he is not satisfied with the order passed by the authority – held, that the language used by the petitioner is intemperate and contemptuous – the petitioner has attempted to interfere with the due course of judicial proceedings – no licence can be given to the petitioner to commit contempt of Court – however, no action was taken considering the fact that petitioner is a student — further, the writ

petition has been disposed of and the Court has become functus officio - no direction can be issued – petition dismissed. (Para-6 to 24)

Cases referred:
Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248
Chetak Construction Ltd. v. Om Prakash (1998) 4 SCC 577:
Radha Mohan Lal v. Rajasthan High Court (2003) 3 SCC 427
Jaswant Singh Vs. Virender Singh (1995 (supp.1) SCC 384)

For the Petitioner:	In person.
For the Respondents:	Mr. Shrawan Dogra, Adocate General with Mr. Anup Rattan & Mr. Romesh Verma, Addl. A.Gs. and Mr. Kush Sahrma, Dy. A.G. for respondent No.1. Nemo for respondent Nos. 2 to 6.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

By medium of this application, the petitioner has prayed for the following reliefs:

(a) "Recall the copy of answer book handed over to the respondent university vide order dated 15th November, 2016 in CMP No. 9077/2016 in Writ Petition No. 1449 of 2015 to the petitioner in the interest of justice and provide a copy of that with the seal of the court so that truth of the University can be verified in the open court in the interest of justice.

OR

(b) Verify the said answer book in the open court with an expert whether it bears handwriting of the petitioner or not in the interest of justice.

(c) Pass any other order deems fit to this Hon'ble Court in favour of petitioner in the interest of justice."

2. The writ petition is no longer on the dockets of this Court. The petitioner filed writ petition claiming therein four reliefs, however, at the time of hearing, only two reliefs were prayed for and the same read as under:

> "(i). That the respondent-University may be directed to show the answer sheets/books of the petitioner of the examination of 2nd Semester of 2nd Year M.Sc.(Horticulture), in First hourly, Mid term, Second hourly and Practical Examination for course No. FSC-516/Course title Systematics of Fruit Crops, Academic Year 2013-2014 and the copy of notification of dates of examination for the said examination, for which grading has been reported at Annexure P-1.
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> (ii). That the respondent–University may be directed to show or place on records the answer sheets/books of the petitioner in examination of Practical examination and final examination of M.Sc (Horticulture), academic year 2013-14, Course No. FSC-506, 2nd semester, Course Title: Breeding of Fruit Crops, Cr. Hrs: 2+1 for which grading has been shown at Annexure P-2."

3. This Court vide judgment dated 2.9.2015 dismissed the petition after having arrived at conclusion that the same sans merit. The petitioner thereafter assailed the judgment passed by this Court by approaching the Hon'ble Supreme Court by filing SLP (C) No.6203/2016. However, the same was dismissed by the Hon'ble Supreme Court vide order dated 19.9.2016, which reads thus:

"Upon hearing the counsel the Court made the following

O R D E R

The special leave petition is dismissed. Pending application is disposed of."

4. After the dismissal of the Special Leave to Appeal, the petitioner filed CMP No. 9077 of 2016 wherein the prayer was made for providing the record kept in sealed cover as per the orders earlier passed by this Court on 2.9.2015.

5. Even though we had doubts regarding the maintainability of this application, however, vide order dated 15.11.2016, we asked the petitioner to approach the concerned authorities for obtaining the copy of requisite documents and at the same time, the Registry was directed to handover the sealed cover documents to the learned Senior Counsel of the respondent-University. This would be evident from the order passed on 15.11.2016, which reads thus:

> "Petitioner/applicant has moved this application in a decided CWP No. 1449 of 2015. It is moot question-whether this application is maintainable? We leave this question open. It is for the petitioner to approach the concerned authorities for obtaining the copy of the requisite documents. Registry is directed to hand over the sealed covered documents filed on 27.5.2015 to Ms. Ranjana Parmar, learned Senior Advocate. Accordingly, the application is disposed of."

6. It is thereafter that the petitioner has filed the instant application and would contend that he is not satisfied with the orders passed by the authorities concerned and prayed that the application may be decided on merit.

7. At the outset, we may point out that we are really pained and rather taken aback by some of averments made in the application, more particularly, those contained in para No.3, which reads thus:

> "That this Hon'ble Court had dismissed the writ petition No.1449 of Year 2015 without hearing it on merits and the Hon'ble High Court had told in the judgment of the said writ petition that the respondent University had filed the answer-book of the petitioner in the Hon'ble High Court and the Hon'ble High Court without verifying the answer book of the petitioner by means of expert test considered blindly that the answer book filed by the University is written by the petitioner in the sealed envelop."

8. We have already exercised great amount of restrain while adjudicating the writ petition on merit and even at that time we refrained ourselves from imposing exemplary costs only because the petitioner is a student, as would be clearly evident from para 9 of the judgment, which reads thus:

> "9. As the petitioner has based his claim on falsehood and has not come with clean hands, we would have normally awarded exemplary costs, but we refrain from doing so since the petitioner is only a student."

9. However, it appears that the sympathy and consideration shown to the petitioner was totally misplaced or else he would have taken extreme care and caution, more particularly, in the use of words and language while drafting the instant petition.

10. It is evidently clear from the language used by the petitioner that the same is intemperate and contemptuous and we have no hesitation to conclude that the petitioner by deliberately using the words in the para extracted above has attempted to interfere with the due course of judicial proceedings and such action could be construed to be obstructive or attending to obstruct the administration of justice.

11. No affront to the majesty of law can be permitted. The fountain of justice cannot be allowed to be polluted by disgruntled litigants. The protection is necessary for the courts to

enable them to discharge their judicial functions without fear. (***Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248).***

12. It is well settled that litigant cannot be permitted to browbeat the court or terrorize or intimidate the Judges as held by the Hon'ble Supreme Court in ***Chetak Construction Ltd. v. Om Prakash (1998) 4 SCC 577:***

> "16. Indeed, no lawyer or litigant can be permitted to browbeat the court or malign the presiding officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities were permitted and in the result administration of justice would become a casualty and the rule of law would receive a setback. The Judges are obliged to decide cases impartially and without any fear or favour. Lawyers and litigants cannot be permitted to 'terrorise' or 'intimidate' Judges with a view to 'secure' orders which they want. This is basic and fundamental and no civilized system of administration of justice can permit it."

13. These observations were subsequently, reiterated in ***Radha Mohan Lal v. Rajasthan High Court (2003) 3 SCC 427.***

14. Only because a party has appeared in person does not give him a licence thereby to commit contempt of the Court by using intemperate language or innuendos against the Judges while discharging the judicial function. The safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the courts. No doubt, fair comments, even if, outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith, in proper language, do not attract any punishment for contempt of court. However, when from the criticism deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute, the courts must bestir themselves to uphold their dignity and the majesty of law. No system of justice can tolerate such unbridled licence on the part of a person to permit himself the liberty or scandalizing a court by casting unwarranted, uncalled for an unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice. (***Jaswant Singh*** Vs***. Virender Singh (1995 (supp.1) SCC 384)***.

15. In ordinary circumstances, we would not have hesitated to initiate proceedings against the petitioner under the Contempt of Courts Act, however, again taking into consideration that the petitioner is still a student, whose career may otherwise be spoiled by any adverse order that may be passed by this Court, we leave the matter to rest here. However, with a stern warning to the petitioner to disassociate from such kind of misadventures in future.

We now proceed to consider the application on merit.

16. Indubitably, the main writ petition is not on the dockets of the Court and as observed earlier has been decided on 2.9.2015 and even the Special Leave to Appeal against the decision stands dismissed on 19.9.2015 and, therefore, it is settled law that once the writ petition has finally been decided and proceedings stand terminated the Court becomes *functus officio*. It is only by filing an application for review of the order passed earlier that the Court may be called upon to examine the issue raised therein. That apart, the Court would by invoking its inherent powers correct some kinds of error, which normally would be arithmetical, grammatical etc. However, such powers would be invoked only in exceptional circumstances to avoid miscarriage of justice. Fraud is genuine, albeit limited, exception to the important principle of finality of litigation upon which the doctrine of *functus officio* is founded.

17. *"Functus officio"* is a Latin term meaning having performed his or her office. With regard to an officer or official body, it means without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

18. *"Functus"* means having performed and "*officio"* means office. Thus, the phrase *functus officio* means having performed his or her office, which in turn means that the public officer is without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

19. *Trayner's Latin* Maxims, 4th Edn. Gives the expression *functus officio* the following meaning:

> *"Having discharged his official duty. This is said of any one holding a certain appointment, when the duties of his office have been discharged. Thus a Judge, who has decided a question brought before him, is functus officio and cannot review his own decision."*

20. In *Wharton's Law Lexicon*, 14th Edn., the expression *functus officio* is given the meaning, *"a person who has discharged his duties, or whose office or authority is at an end."*

21. *P. Ramanatha Aiyar's Law Lexicon* gives the expression the meaning, "*A term applied to something which once has had a life and power, but which has become of no virtue whatsoever. Thus when an agent has completed the business which he was entrusted his agency is functus officio*."

22. In *Black's Law Dictionary Tenth Edition*, meaning of *functus officio* is : "*having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished*."

23. In other words, the authority, which had a life and power, has lost everything on account of completion of purpose/activities/act.

24. Notably, what the petitioner is seeking is virtually a writ of mandamus in a decided case, which is legally impressible.

24. Accordingly, we found no merit in this application and the same is dismissed with the clear warning to the petitioner, as aforesaid.

The Registry is directed to send a copy of this order to the petitioner.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Maharishi Markandeshwar Medical College and Hospital and others. ...Petitioners.

Versus

State of Himachal Pradesh and others. ...Respondents.

CWP No. 4773/2015
Reserved on: 2.11.2016
Decided on: 20.12. 2016

Constitution of India, 1950- Article 226- Petitioner No.1 is an unaided private college established by petitioner No.3 and is a constituent of petitioner No.2- essentiality certificate was issued in favour of the petitioner No.3 by the State Government after which the college was established- Medical Council of India granted letter of intent to petitioner No.3 to open the medical college with certain conditions – State Government notified the procedure for admission and fee structure – State Government issued a notification amending Himachal Pradesh Private Medical Educational Institution (Regulation of Admissions and Fixation of Fee) Act, 2006 – amendment was challenged by the petitioner on the ground of competence of the State Government to carry out the amendments – held, that the Medical College has to apply for permission and to submit consent of affiliation from a recognized University – once recognition is

granted, College is required to take affiliation from University – recognition and affiliation are distinct and their purposes are different – role of MCI is confined to recognition whereas affiliation is left to the State Government or the examining University- Himachal Pradesh University Act, 1970 is the parent statute under which all the Universities in the State have to be constituted – the petitioners can have no right to claim that it will be affiliated to the University of its choice – writ petition dismissed.(Para-22 to 54)

Cases referred:

Modern Dental College and Research Centre and others Vs. State of Madhya Pradesh and others, 2016 (7) SCC 353

Rajasthan Prdesh Vaidya Samiti, Sardarshahar and another vs Union of India and others, (2010) 12 SCC 609

Bhartia Education Society vs. State of H.P., 2011 (4) SCC 527

State of Madhya Pradesh and another vs. Kumari Nivedita Jain and others, (1981) 4 SCC 296

For the Petitioners:	Mr. K.D. Shreedhar, Sr. Advocate with Mr. Yudhbir Singh Thakur, Advocate.
For the Respondents:	Mr. Shrawan Dogra, A.G. with Mr. Anup Rattan, Mr. Romesh Verma, Addl. A.Gs. and Mr. J.K. Verma, Dy. A.G. for respondent No.s 1 and 2. Mr. Ashok Sharma, Asstt. Solicitor General of India with Mr. Ajay Chauhan, Advocate for respondent Nos. 3 and 4. Mr. B.C. Negi, Sr. Advocate with Mr. Raj Negi, Negi, Advocate for respondent No.5.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

This instant writ petition has been filed with the following substantive prayers:

i) To issue a writ in the nature of mandamus or any other appropriate writ, direction or order striking down sections 3 (6), 3 (6) (a) and 3 (6) (b) of the Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 as amended vide Amendment Act No. 24 of 2015 as null and void being wholly arbitrary, grossly malafide, in contravention of the law settled by the Hon'ble Supreme Court and in naked breach of the fundamental rights of the petitioners under Article 19 (1) (g) of the Constitution of India.

ii) To issue the orders of appropriate nature that the petitioner No.1 MM Medical College and Hospital or any other intuitions of Medical Streams which may be started by petitioners be governed by the MMU (E&R) Act."

2. It is vide notification dated 30.9.2015 that the State Government amended the Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 (Act No. 24 of 2015). The amendment carried in section 3 reads thus:

3. Amendment of section 3.- In section 3 of the principal Act, for sub-section (6), the following sub-section shall be substituted, namely:-

"(6) If the State Government is satisfied that the institution affiliated to the Himachal Pradesh University or any other University has contravened any of the provisions of this Act, it may recommend to that University for withdrawal of recognition or affiliation of such institution.

(6-a) In order to insure common standards for maintaining the excellence of Medical Education in the State, the Himachal Pradesh University shall have the exclusive power to affiliate Private Medical Education Institutions set up in the State; and

(6-b) Notwithstanding anything contained in this Act, the Private Medical Educational Institutions shall be bound to comply with all the rules, directions and notifications issued by the State Government, from time to time, and provide all such facilities and assistance as are required to implement such rules, directions and notifications."

3. However, at the time of arguments, the petitioners have confined their arguments only to the amendment carried in sub-section (6-a) of section 3.

4. One of the moot questions that therefore arises for consideration in the instant petition is as to which authority has the power to decide regarding the affiliation of Medical College. Is it the Central Government through MCI or the State Government or is the petitioner-college, which is alleged to be constituent of Maharishi Markandeshwar University established under the Maharishi Markandeshwar University (Establishment and Regulation) Act, 2010, that can decide this question?

However, before answering the question certain facts, as pleaded may be recapitulated:

5. The petitioner No.1 is an unaided private college established by the petitioner No.3-Maharishi Markandeshwar University Trust (for short 'University Trust') and is a constituent of petitioner No.2 Maharishi Markandeshwar University (for short University).

6. The University was set up pursuant to letter of intent issued by the State Government on 20.8.2008 under section 5 (1) of the Himachal Pradesh Private Universities (Establishment and Regulations) Act, 2006 (for short 'Private University Act').

7. The petitioner-trust was issued an essentiality certificate by the State for establishment of a Medical College, subject to its observing all codal formalities as per law/prevailing Act/Rules/ Instructions and it was further made clear that the Trust would abide by the 'Private University Act'.

8. The petitioner-University after obtaining the essentiality certificate purchased 125.02 bighas of land at Khalogra in Kumarhatti-Solan contiguous to the land purchased by it for setting up the petitioner-University. On 16.6.2010, the Maharishi Markandeshwar University (Establishment and Regulation) Act, 2010 (for short 'MMU Act') was brought into force.

9. The University-Trust vide its letter dated 27.7.2012, requested the State Government for the grant of Essentiality Certificate to establish a new medical college at Kumarhatti, Solan under petitioner No. 2-University, which though was granted by the State Government on 29.8.2012, however, the same was subject to the following conditions:

i) The institution concerned will have to abide by the regulations/terms issued by the Medical Council of India and State; and

ii) The admission, fee structure and related issues shall be governed as per the Himachal Pradesh Private Medical Education Institutions (Regulation of Admission and Fixation of Fee) Act, 2006.

10. Petitioner No.3-Trust upon the receipt of essentiality certificate/NOC applied to the Central Government alongwith required scheme under section 10-A of the Indian Medical Council Act, 1956 (for short 'IMC Act, 1956) for grant of permission for establishment of a new Medical College at Kumarhatti under petitioner No.2-University. The application was processed by the MCI and after carrying out the physical inspection of the Medical College, granted letter of intent to the petitioner-trust for establishment of a new Medical College from the academic session 2013-2014 with certain conditions.

11. Thereafter, vide letter of permission dated 14.7.2013, approval of the Board of Governors of MCI was granted for the establishment of a new Medical College in the name and style of Maharishi Markandeshwar Medical College and Hospital, Kumarhatti,Solan Himachal Pradesh by the Maharishi Markandeshwar University. The State Government vide notification dated 14.8.2013 issued under section 3(3) of the Private University Act notified the procedure for admission and fee structure for the University. It is here that the dispute with regard to affiliation of the petitioner-University began to arise.

12. There was protracted correspondence between the MCI and the State with regard to the affiliation of the petitioner-University and finally the MCI vide its letter dated 2.9.2015 informed the State Government and reiterated its earlier view that the petitioner-University was statutorily empowered by way of section 5 (1) (xxvi) "to setup colleges" and further that the State Legislature had itself granted the right to the petitioner-University to have its own college, therefore, in such case insisting on affiliation of its medical college to another University, i.e. H.P. University appeared to be contrary to the Act of Himachal Legislature.

13. It is thereafter that the State Government issued a notification thereby carrying out an amendment in the Himachal Pradesh Private Medical Educational Institutions (Regulations of Admission and Fixation of Fee) Act, 2006, as aforesaid.

14. It is this amendment, which has been assailed in this writ petition mainly on the ground that the co-ordination and determination of standards in higher education falls in Entry 66, List-I of the Seventh Schedule of the Constitution of India and therefore, the State Government cannot by controlling education in the State encroach upon the standards in the institutions for higher education, as these powers lie only within the purview of the University Grant Commission and the power vested in the MCI under Section 3 of the MCI Act, which are not merely advisory in nature, but are mandatory and the Universities are bound by the standards prescribed.

15. The respondent-State has contested the petition by taking various preliminary objections. It is averred that it is the State Government who alone is competent to regulate the standards of education to be imparted in Medical Colleges and this has so been recognized by the Hon'ble Supreme Court in various pronouncements.

15. In addition to that, it is averred that in view of Entry 25 of List-III of the Seventh Schedule of the Constitution, Union as well as State have the power to legislate subject to the provisions of Entry 66 of List-I of the Seventh Schedule, which deals with determination of standards in institutions for higher education. Therefore, the State has a right to control education, including medical education.

17. It is further averred that the letter of intent was actually issued in favour of petitioner No-1-Medical College and not to petitioners No.2 or 3. Moreover, the essentiality/ feasibility certificate was issued to the petitioners subject to the following conditions:

i) The institution concerned will have to abide by the regulations/terms issued by the Medical Council of India and State; and

ii) The admission, fee structure and related issues shall be governed as per the Himachal Pradesh Private Medical Education Institutions (Regulation of Admission and Fixation of Fee) Act, 2006.

18. It has thereafter been specifically denied that the State Government had approved to establish College under the MMU Act. It has been reiterated that it is the State Government, which alone has power to regulate any profession with regard to causing standards of quality, public welfare, equality of opportunity etc. and merely because the petitioners Institution is in the business of imparting education, cannot have unregulated right of admitting students in a non-transparent manner.

19. The MCI has filed a separate reply wherein it is averred that it is a statutory body constituted under the provisions of the MCI Act, 1956 and has been given the responsibility of

discharging the duties of maintenance of highest standards of Medical Education throughout the country and in this regard by virtue of provisions of Section 33 of the MCI Act, 1956 has been empowered with the prior approval of the Central Government to frame regulations for laying down minimum standards of infrastructure, teaching and other requirements of conduct of medicine courses.

20. It is further averred that the regulations so issued are binding and mandatory and State enactments, rules and regulations framed by the Universities in relation to the conduct of medicine courses, to the extent they are inconsistent with the Act and the regulations made thereunder by the MCI, are repugnant by virtue of Article 254 of the Constitution of India.

21. We have heard the learned counsel for the parties and have gone through the material placed on record.

22. Incidentally, both the parties have referred to and have heavily relied upon the recent judgment of the Hon'ble Supreme Court in ***Modern Dental College and Research Centre and others*** Vs. ***State of Madhya Pradesh and others,*** 2016 (7) SCC 353, in support of their respective claims. Learned counsel for the petitioner would contend that the Hon'ble Supreme Court in para 101 of the judgment (supra) has though held that Entry 66 of List-I is a specific Entry having a very specific and limited scope and the same deals with coordination and determination of standards in institution of higher education or research as well as scientific and technical institutions, however, it has further clarified the words "coordination and determination of standards" and has recognized the exclusive domain of the Union in prescribing such standards.

23. On the other hand, learned Advocate General would rely upon the observations made in paras 101, 103 and 107 of the judgment in ***Modern Dental College's*** case (supra) to contend that the Hon'ble Supreme Court has specifically held that regulating "education" includes even Medical Education, i.e. prescribed in List-II Entry 25, thereby giving concurrent powers to both Union as well as State and it has been clarified that when two Entries relating to Education, one to the Union List and other in the Concurrent List, co-exist, they have to be read harmoniously and then it becomes manifest that when it comes to coordination and laying down of standards in the higher education or research and scientific and technical institutions, power rests with the Union/Parliament to the exclusion of the State Legislatures. However, the other facets of education, including technical and medical education as well as governance of universities is concerned; even State Legislatures are given power by virtue of Entry 25, which is wide enough and is only circumscribed to the limited extent of it being subject to List-1 Entries 63 to 66.

24. In order to better appreciate the contentions raised by the parties, it would be necessary to advert to the observations as are necessary for the adjudication of this case and the same are contained in paras 98 to 103, which read thus:

> "[98] The next issue to be considered is whether the subject matter of admissions was covered exclusively by Entry 66 of List I, thereby the States having no legislative competence whatsoever to deal with the subject of admissions or determination of fee to be charged by professional educational institutions.
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> [99] Main reliance placed on behalf of the appellants is on Bharti Vidyapeeth (Deemed University) & Ors. v. State of Maharashtra & Anr., 2004 11 SCC 755 Heavy reliance was also placed by the appellants on Gujarat University & Anr. v. Shri Krishna Ranganath Mudholkar & Ors.,1964 Supp1 SCR 112 and the judgment of the Constitution Bench in the case of Dr. Preeti Srivastava & Anr. v. State of M.P. & Ors., 1999 7 SCC 120
>
> [100] The competing Entries are: List I, Entry 66 and List III, Entry 25. In the process, List II, Entry 32 also needs a glance. Thus, for proper analysis, we reproduce these Entries below:

"List I

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

List II

32. Incorporation, regulation and winding up of corporation, other than those specified in List I, and universities; unincorporated trading, literacy, scientific, religious and other societies and associations; co-operative societies.

List III

25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

[101] To our mind, Entry 66 in List I is a specific Entry having a very specific and limited scope. It deals with co-ordination and determination of standards in institution of higher education or research as well as scientific and technical institutions. The words 'co-ordination and determination of standards' would mean laying down the said standards. Thus, when it comes to prescribing the standards for such institutions of higher learning, exclusive domain is given to the Union. However, that would not include conducting of examination, etc. and admission of students to such institutions or prescribing the fee in these institutions of higher education, etc. In fact, such co-ordination and determination of standards, insofar as medical education is concerned, is achieved by Parliamentary legislation in the form of Medical Council of India Act, 1956 and by creating the statutory body like Medical Council of India (for short, 'MCI') therein. The functions that are assigned to MCI include within its sweep determination of standards in a medical institution as well as co-ordination of standards and that of educational institutions. When it comes to regulating 'education' as such, which includes even medical education as well as universities (which are imparting higher education), that is prescribed in Entry 25 of List III, thereby giving concurrent powers to both Union as well as States. It is significant to note that earlier education, including universities, was the subject matter of Entry 11 in List II 5 . Thus, power to this extent was given to the State Legislatures. However, this Entry was omitted by the Constitution (Forty-Second Amendment) Act, 1976 with effect from July 03, 1977 and at the same time Entry 25 in List II was amended 6 . Education, including university education, was thus transferred to Concurrent List and in the process technical and medical education was also added. Thus, if the argument of the appellants is accepted, it may render Entry 25 completely otiose. When two Entries relating to education, one in the Union List and the other in the Concurrent List, co-exist, they have to be read harmoniously. Reading in this manner, it would become manifest that when it comes to co-ordination and laying down of standards in the higher education or research and scientific and technical institutions, power rests with the Union/Parliament to the exclusion of the State Legislatures. However, other facets of education, including technical and medical education, as well as governance of universities is concerned, even State Legislatures are given power by virtue of Entry 25. The field covered by Entry 25 of List III is wide enough and as circumscribed to the limited extent of it being subject to Entries 63, 64, 65 and 66 of List I.

[102] Most educational activities, including admissions, have two aspects: The first deals with the adoption and setting up the minimum standards of education. The objective in prescribing minimum standards is to provide a benchmark of the caliber and quality of education being imparted by various

educational institutions in the entire country. Additionally, the coordination of the standards of education determined nationwide is ancillary to the very determination of standards. Realising the vast diversity of the nation wherein levels of education fluctuated from lack of even basic primary education, to institutions of high excellence, it was though desirable to determine and prescribe basic minimum standards of education at various levels, particularly at the level of research institutions, higher education and technical education institutions. As such, while balancing the needs of States to impart education as per the needs and requirements of local and regional levels, it was essential to lay down a uniform minimum standard for the nation. Consequently, the Constitution makers provided for Entry 66 in List I with the objective of maintaining uniform standards of education in fields of research, higher education and technical education.

[103] The second/other aspect of Education is with regard to the implementation of the standards of education determined by the Parliament, and the regulation of the complete activity of Education. This activity necessarily entails the application of the standards determined by the Parliament in all educational institutions in accordance with the local and regional needs. Thus, while Entry 66 List I dealt with determination and coordination of standards, on the other hand, the original Entry 11 of List II granted the States the exclusive power to legislate with respect to all other aspects of education, except the determination of minimum standards and coordination which was in national interest. Subsequently, vide the Constitution (Forty-second Amendment) Act, 1976, the exclusive legislative field of the State Legislature with regard to Education was removed and deleted, and the same was replaced by amending Entry 25, List III, granting concurrent powers to both Parliament and State Legislature the power to legislate with respect to all other aspects of Education, except that which was specifically covered by Entry 63 to 66 of the List I."

25. Having gone through the judgment in ***Modern Dental College's*** case (supra), the relevant portion whereof has been extracted above, we find that the issue of affiliation has in fact not really been considered or dealt with in the aforesaid judgment. However, nonetheless the observations in para 101 (supra) have a definite bearing to the controversy in dispute. It has been clearly held that Entry 66 in List I deals with coordination and determination of standards which essentially means laying down the standards. It has been held that such standards insofar as medical education is concerned are achieved by the Parliamentary Legislation in the form of Indian Medical Council Act, 1956 by creating the statutory body like MCI. It has further been held that the functions that have been assigned to MCI include within its sweep determination of standards in a medical institution as well as coordination of standards and that of educational institutions. However, when it comes to regulating education, as such, which includes even medical education, the same is prescribed under List III Entry 25 thereby giving concurrent powers to both Union as well as States.

26. Judged in the light of aforesaid exposition of law, it would be necessary to advert to the provisions of the Indian Medical Council Act, 1956. Section 10-A provides for permission for establishment of new medical college, new course of study, etc. and reads thus:

"10A. Permission for establishment of new medical college, new course of study.

(1) Notwithstanding anything contained in this Act or any other law for the time being in force,—

(a) no person shall establish a medical college; or

(b) no medical college shall—

(i) open a new or higher course of study or training (including a post-graduate course of study or training) which would enable a

student of such course or training to qualify himself for the award of any recognised medical qualification; or

(ii) increase its admission capacity in any course of study- or training (including a post-graduate course of study or training), except with the previous permission of the Central Government obtained in accordance with the provisions of this section.

Explanation 1.—For the purposes of this section, "person" includes any University or a trust but does not include the Central Government.

Explanation 1.—For the purposes of this section, "admission capacity", in relation to any course of study or training (including post-graduate course of study or training) in a medical college, means the maximum number of students that may be fixed by the Council from time to time for being admitted to such course or training.

(2) (a) Every person or medical college shall, for the purpose of obtaining permission under sub-section (1), submit to the Central Government a scheme in accordance with the provisions of clause (b) and the Central Government shall refer the scheme to the Council for its recommendations.

(b) The scheme referred to in clause (a) shall be in such form and contain such particulars and be preferred in such manner and be accompanied with such fee as may be prescribed.

(3) On receipt of a scheme by the Council under sub-section (2), the Council may obtain such other particulars as may be considered necessary by it from the person or the medical college concerned, and thereafter, it may,—

(a) if the scheme is defective and does not contain any necessary particulars, give a reasonable opportunity to the person or college concerned for making a written representation and it shall be open to such person or medical college to rectify the defects, if any, specified by the Council;

(b) consider the scheme, having regard to the factors referred to in sub-section (7), and submit the scheme together with its recommendations thereon to the Central Government.

(4) The Central Government may, after considering the scheme and the recommendations of the Council under sub-section (3) and after obtaining, where necessary, such other particulars as may be considered necessary by it from the person or college concerned, and having regard to the factors referred to in sub-section (7), either approve (with such conditions, if any, as it may consider necessary) or disapprove the scheme and any such approval shall be a permission under sub-section (1):

Provided that no scheme shall be disapproved by the Central Government except after giving the person or college concerned a reasonable opportunity of being heard:

Provided further that nothing in this sub-section shall prevent any person or medical college whose scheme has not been approved by the Central Government to submit a fresh scheme and the provisions of this section shall apply to such scheme, as if such scheme has been submitted for the first time under sub-section (2).

(5) Where, within a period of one year from the date of submission of the scheme to the Central Government under sub-section (2), no order passed by the Central Government has been communicated to the person or college submitting the scheme, such scheme shall be deemed to have been approved by the Central Government in the form in which it had been submitted, and, accordingly, the

permission of the Central Government required under sub-section (1) shall also be deemed to have been granted.

(6) In computing the time-limit specified in sub-section (5) the time taken by the person or college concerned submitting the scheme, in furnishing any particulars called for by the Council, or by the Central Government shall be excluded.

(7) The Council, while making its recommendations under clause (b) of sub-section (3) and the Central Government, while passing an order, either approving or disapproving the scheme under sub-section (4), shall have due regard to the following factors, namely:—

(a) whether the proposed medical college or the existing medical college seeking to open a new or higher course of study or training, would be in a position to offer the minimum standards of medical education as prescribed by the Council under section 19A or, as the case may be, under section 20 in the case of postgraduate medical education;

(b) whether the person seeking to establish a medical college or the existing medical college seeking to open a new or higher course of study or training or to increase its admission capacity has adequate financial resources;

(c) whether necessary facilities in respect of staff, equipment, accommodation, training and other facilities to ensure proper functioning of the medical college or conducting the new course of study or training or accommodating the increased admission capacity have been provided or would be provided within the time-limit specified in the scheme;

(d) whether adequate hospital facilities, having regard to the number of students likely to attend such medical college or course of study or training or as a result of the increased admission capacity, have been provided or would be provided within the time-limit specified in the scheme;

(e) whether any arrangement has been made or programme drawn to impart proper training to students likely to attend such medical college or course of study or training by persons having the recognised medical qualifications;

(f) the requirement of manpower in the field of practice of medicine; and

(g) any other factors as may be prescribed.

(8) Where the Central Government passes an order either approving or disapproving a scheme under this section, a copy of the order shall be communicated to the person or college concerned."

27. Section 19 provides for withdrawal of recognition and reads thus:

"19. WITHDRAWAL OF RECOGNITION

1. When upon report by the Committee or the visitor it appear to the Council:-

1. that the courses of study and examination to be undergone in, or the proficiency required from candidates at any examination held by any University or medical institution,

2. that the staff, equipment accommodation, training and other facilities for instruction and training provided in such University or medical institution or in any college or other institution affiliated to that University, do not conform to the standards prescribed by the Council, the Council shall make a representation to that effect to the Central Government.

2. After considering such representation, the Central Govt. may send it to the State Government of the State in which the University or medical Institution is situated and the State Government shall forward it along with such remarks as it may choose to make to the University or Medical Institution, with an intimation of the period within which the University or medical institution may submit its explanation to the State Government.

3. On the receipt of the explanation or, where no explanation is submitted within the period fixed, then on the expiry of that period, the State Government shall make its recommendations to the Central Government

4. The Central Government, after making such further inquiry, if any, as it may think fit, may by notification in the official Gazette, direct that an entry shall be made in the appropriate Schedule against the said medical qualification declaring that it shall be a recognised medical qualification, only when granted before a specified date or that the said medical qualification if granted to students of a specified college or institution affiliated to any university shall be a recognised medical qualification only when granted before a specified date or, as the case may be, that the said medical qualification shall be a recognised medical qualification in relation to a specified college or institution affiliated to any University only when granted after a specified date.

28. Section 19-A provides for minimum standards of medical education and reads thus:

"19A. MINIMUM STANDARDS OF MEDICAL EDUCATION

1. The Council may prescribe the minimum standards of medical education required for granting recognised medical qualifications (other than postgraduate medical qualifications) by universities or medical institutions in India.

2. Copies of the draft regulations and of all subsequent amendments thereof shall be furnished by the Council to all State Governments and the Council shall before submitting the regulations or any amendment thereof, as the case may be, to the Central Government for sanction, take into consideration the comments of any State Government received within three months from the furnishing of the copies as aforesaid.

3. The Committee shall from time to time report to the Council on the efficacy of the regulations and may recommend to the Council such amendments thereof as it may think fit. "

29. Under section 33, the Council has been conferred with powers to make Regulations with the previous sanction of the Central Government and in terms thereof it has framed the Establishment of New Medical Colleges, Opening of Higher Courses of Study and Increase of Admission Capacity in Medical Colleges Regulation, 1993 (hereinafter referred to as "Regulations").

30. It would be noticed that at the time of submitting an application for permission of the Central Government to establish Medical College, the desirous Medical College has to apply for permission to set up new Medical College, who in addition to other documents, is required to submit consent of affiliation for the proposed medical college from a recognized university. This would be evident from qualifying criteria No.4, which reads thus:

> "4. That Consent of Affiliation for the proposed medical college has been obtained by the applicant from a recognised university."

31. In addition thereto, in terms of Part-III of the application, the same is required to contain the name of the university alongwith certified copy of consent of affiliation and State Government's permission.

32. Appendix I to the Regulations provides for instruction to the applicant for permission of the Central Government for starting new or higher courses (including P.G. Degree/Diploma and higher specialties) in a Medical College/institution, which reads thus:

> For starting higher courses in medical subjects (Annexure I) in the medical colleges/ institutions, the applicant should be a recognised medical college or institution. The applicant should conform to the guidelines laid down in the recommendations on Graduate/Postgraduate Medical Education adopted by the Medical Council of India and modified from time to time and approved by the Central Government. They should apply to the Central Government for this permission along with the State Government's permission. University's affiliation and in conformity with the Medical Council of India regulations along with the documentary evidence to show additional financial allocation, provision for additional space, provision for additional equipment and other infrastructural facilities and provisions of recruitment of additional staff as per Medical Council of India norms.

33. Appendix I also provides for Qualifying Criteria, which reads thus:

> 1-2.....
>
> 3. Letter of University's permission for starting these courses at the existing medical college/institution has been obtained by the applicant from the University to which it is affiliated.
>
> 4.....6

34. It also provides for List of Enclosures, which reads thus:

> 1.....
>
> 2. Certified copy of the consent of affiliation issued by a recognized University.
>
> 3-4.....

35. Now, what we can gather from the provisions of the MCI Act is that the committee constituted by the MCI is required to entertain the application for recognition, consider State opinion, cause inspection to be conducted by an expert team then grant or refuse recognition in terms of the Act. Once recognition is granted and public institution is permitted to commence the course, it is required to take an affiliation from the affiliating body, which is the University. Thus, grant of recognition and affiliation to an institute is condition precedent to running of the courses of the institute. If either of them is not granted to the institute, it would not be in a position to commence the relevant academic courses.

36. Grant of recognition is the basic requirement for the grant of affiliation. Therefore, it cannot be said that affiliation is insignificant or a mere formality on the part of the examining body. It is the requirement of law that the affiliation should be granted by the affiliating body in accordance with the prescribed procedure and upon proper application of mind.

37. 'Recognition' and 'affiliation' are expressions of distinct meaning and consequences. The affiliating body/examining body does not have any discretion to refuse the affiliation with reference to any of the factors which had been considered by the MCI while granting recognition. However, the examining body can always impose condition in relation to its own requirements. Some of which can be:

a) eligibility of students for admission;
b) conduct of examinations;
c) the manner in which the prescribed courses should be completed; and
d) to see that the conditions imposed by the MCI are complied with.

38. Despite the fact that 'recognition' itself covers the larger precept of 'affiliation' still the affiliating body is not to grant affiliation automatically but must exercise its discretion fairly and transparently while ensuring that conditions of the law of the university and the functions of the affiliating body should be complementary to the recognition of MCI and ought not to be in derogation thereto.

39. However, the purpose of 'recognition' and 'affiliation' is different. The difference was meticulously and succinctly delineated by the Hon'ble Supreme Court in ***Rajasthan Prdesh Vaidya Samiti, Sardarshahar and another*** vs ***Union of India and others***, (2010) 12 SCC 609, wherein it was held that the purpose of 'affiliation' is only to prepare and present the students for public examinations, whereas 'recognition' of the institute is for other purpose mentioned under the statute and unless the institute is recognized by the appropriate authority, the institute cannot be amenable to any other provision of the statute applicable in this regard. 'Recognition' is a governmental function, which signifies an admission or an acknowledgement of something existing before. The State or the State Authority can lay down the condition for recognition of an educational institution that the same must have particular amount of funds or number of students or standard of education and so on and so forth subject to provisions of the Constitution. It would be apt to reproduce the relevant observations, which read thus:

> [20] In The Principal and Ors. v. The Presiding Officer and Ors., 1978 AIR(SC) 344, this Court held that 'recognition' means that the school has been recognized or acknowledged by the appropriate authority under the Statute and 'affiliation' means that the students of that school are eligible to appear in the examination. Therefore, purpose of affiliation is only to prepare and present the students for public examination, recognition of a private school is for the other purposes mentioned under the Statute and unless the school is recognized by the appropriate authority, the school cannot be amenable to any other provision of the Statute applicable in this regard.
>
> [21] In Re: The Kerala Education Bill, 1957 AIR 1958 SC 956; and T.M.A Pai Foundation and Ors. v. State of Karnataka and Ors., 2002 8 SCC 481, this Court held that it is always open to the State or the Statutory Authority to lay down conditions for recognition of an educational institution namely, that the institution must have particular amount of funds or properties or number of students or standard of education and so on and so forth and it is also permissible for the Legislature to make a law prescribing conditions for such recognition, however, such a law should be constitutional and should not infringe any Fundamental Right of the minorities etc. Recognition is a Governmental function.
>
> [22] This Court has persistently deprecated the practice of an educational institution admitting the students and to allow them to appear in the examinations without having requisite recognition and affiliation. This kind of infraction of law has been treated as of very high magnitude and of serious nature. Students of a un-recognised institution cannot legally be entitled to appear in any examination conducted by any government, university or board. (Vide Minor Sunil Oraon Thr. Guardian and Ors. v. C.B.S.E. and Ors., 2007 AIR(SC) 458).
>
> [23] Similarly, recognition must be there with the school to make it subject to the provisions of the Act. Recognition signifies an admission or an acknowledgement of something existing before. To recognize is to take cognizance of a fact. It implies an overt act on the part of the person taking such cognizance. (Vide T.V.V. Narasimham and Ors. v. State of Orissa, 1963 AIR(SC) 1227).
>
> [24] In State of Tamil Nadu and Ors. v. St. Joseph Teachers Training Institute and Anr., 1991 3 SCC 87, this Court held that students of un-recognised institutions are not entitled to appear in any public examination held

> by the Government and it is not permissible for the Court to grant relief on humanitarian grounds contrary to law to the person who claim to have passed any examination from such institutions.
>
> 25. In view of the above, it is evident that any institution which is not recognised cannot impart an education and students thereof cannot appear in the examination held by the government, university or Board."

40. Closer to the point in issue is a subsequent judgment of the Hon'ble Supreme Court in ***Bhartia Education Society*** vs. ***State of H.P.***, 2011 (4) SCC 527, wherein again the term 'recognition' and 'affiliation' came up for consideration and it was held that the purpose of 'recognition' and 'affiliation' is a different and it is apt to extract the relevant observations, which read thus:

> [19] The purpose of 'recognition' and 'affiliation' are different. In the context of NCTE Act, 'affiliation' enables and permits an institution to send its students to participate in the public examinations conducted by the Examining Body and secure the qualification in the nature of degrees, diplomas, certificates. On the other hand, 'recognition' is the licence to the institution to offer a course or training in teacher education.

41. It would be evidently clear from the aforesaid observations that 'affiliation' enables and permits an institution to send students to participate in the public examinations conducted by the Examining Body and secure the qualification in the nature of degrees, diplomas, certificates. Whereas, on the other hand, 'recognition' is the licence to the institution to offer a course or training in teacher education.

42. The Hon'ble Supreme Court in the aforesaid case was dealing with a case relating to National Council for Teacher Education Act, 1993 (for short NCTE Act) and it was observed that prior to the NCTE Act, in absence of apex body to plan and coordinate development of teachers education system, respective regulation and proper maintenance of the norms and standards in the teacher education system, including grant of 'recognition' was largely exercised by the State Government and Universities/Boards. It is only after the enactment of NCTE Act, the functions of NCTE as 'recognizing authority' and the Examining Bodies as 'affiliating authorities' became crystallized, though their functions overlap on several issues. NCTE Act recognizes the role of examining bodies in their sphere of activity.

43. On the same analogy, it can conveniently be held that prior to the MCI Act, in the absence of apex body to plan and coordinate, the development of education system, respective regulation and proper maintenance of the norms and standards in the teacher education system, including grant of 'recognition' was largely exercised by the State Government and Universities/Boards. However, after the enactment of MCI Act, the functions of the MCI as recognizing authority and the examining body as affiliating authority became crystallized. Meaning thereby that the role of the MCI is mainly confined to recognition, whereas the affiliation is best left to the State Government or the examining university.

44. Here, it would be advantageous to refer to earlier judgment of the Hon'ble Supreme Court in ***State of Madhya Pradesh and another*** vs. ***Kumari Nivedita Jain and others***, (1981) 4 SCC 296 wherein the powers conferred upon the MCI under MCI Act to make regulations to carry out the purpose of the Act have been clearly delineated and it was observed as under:

> "18. An analysis of the various sections of the Act indicate that the main purpose of the Act is to establish Medical Council of India, to provide for its constitution, composition and its functions; and the main function of the Council is to maintain the medical register of India and to maintain a proper standard of medical education and medical ethics and professional conduct for medical practitioners. The scheme of the Act appears to be that the Medical Council of India is to be set up in the manner provided in the Act and the Medical Council

> will maintain a proper medical register, will prescribe minimum standards of medical education required for granting recognised medical qualifications, will also prescribe standards of post-graduate medical education and will further regulate the standards of professional conduct and etiquette and code of ethics for medical practitioners. The Act further envisages that if it appears to the Council that the courses of study and examination to be undergone in, or the proficiency required from candidates at any examination held by any University or Medical Institution do not conform to the standard prescribed by the Council or that the staff, equipment, accommodation, training and other facilities for instructions and training provided in such University or medical institution or in any college or other institution affiliated to that University do not conform to the standards prescribed by the Council, the Council will make a representation to that effect to the Central Government and on consideration of the representation made by the Council, the Central Government may take action in term of the provisions contained in Sec. 19 of the Act. The Act also empowers the Council to take various measures to enable the Council to judge whether proper medical standard is being maintained in any particular institution or not."

45. It would be clear from the extracted portion that the Medical Council of India has been set up to maintain a proper medical register, prescribe minimum standards of medical education required for granting recognised medical qualifications and also prescribe standards of post-graduate medical education and to regulate the standards of professional conduct and etiquette and code of ethics for medical practitioners. Whenever it appears to the Council that the courses of study and examination to be undergone in, or the proficiency required from candidates at any examination held by any University or Medical Institution do not conform to the standard prescribed by the Council or that the staff, equipment, accommodation, training and other facilities for instructions and training provided in such University or medical institution or in any college or other institution affiliated to that University do not conform to the standards prescribed by the Council, the Council will make a representation to that effect to the Central Government and on consideration of the representation made by the Council, the Central Government may take action in terms of the provisions contained in section 19 of the Act.

46. However, nowhere does the Act confer authority upon the Medical Council to itself affiliate a college with any particular University and that is best left to the State Government which is competent to affiliate the college to a State or other University provided the certificate for affiliation is otherwise in conformity with the norms and guidelines prescribed by the Central Government, i.e. Medical Council of India.

47. The affiliation primarily is the subject of the University of the State/Affiliating University/examining Body. The MCI, the State Government, the Affiliating Body or the University, as the case may, have been assigned a definite role under the provisions of the MCI Act. The provisions of the MCI Actidentify the scope and extent of power which each of the stakeholders is expected to exercise. While the MCI has been assigned the paramount role of according recognition, whereas the affiliation is best left to the State Government/University/examining body.

48. Notably, the Himachal Pradesh University Act, 1970 is the parent statute under which all the Universities in the State have to be constituted and this is so provided in section 7 of the Himachal Pradesh University Act, 1970, which reads thus:

> **7. Jurisdiction of the University.**
>
> (1) Save as other wise provided by or under this Act, the powers conferred on the University shall be exercisable in the area constituting Himachal Pradesh.
>
> (2) Notwithstanding anything contained in any other law for the time being in force, no educational institution situated within the territorial limits of the University shall be admitted to any privilege of any other University, incorporated

> by law in India, and any such privilege granted by any such other University to any such educational institution prior to the commencement of this Act, shall unless otherwise directed by the State Government be deemed to be withdrawn on the commencement of this Act, and any such institution shall be deemed to be admitted to the privileges of the Himachal Pradesh University.
>
> (3) Where any institution or body established outside Himachal Pradesh seeks recognition from the University, then the powers and jurisdiction of the University shall extend to such institution or body subject to the laws in force in the State within which, and the rules and regulations of the University within whose jurisdiction, the said institution or body is situated.

49. Indubitably, the petitioners have not assailed the constitutionality of the aforesaid provision. Sub-section (2) of section 7 starts with the non-obstante clause and, therefore, would have predominance and would prevail inspite of anything contrary contained in any other law for the time being in force. Once that is so, the petitioners can have no right to claim that it should be affiliated to a University of its choice despite the fact as contained in section 7 (supra).

50. Even otherwise the State Government in its quest and endeavour to ensure common standards of maintaining the excellence of medical education within the State can always exercise its power to affiliate a private educational medical institute set up in a State to a particular University set up within the State, as this power vests within the exclusive domain of the State. The State can always act as a regulatory authority to ensure good quality education and see that the excellence of education standard does not fall below than what has been prescribed by the State Government. Rather, it is crucial for the State to act as a regulator even if this may have some effect on the autonomy of the private institution as that would not mean that the freedom of the Institute under Article 19 (1) (g) of the Constitution of India has been violated.

51. Similar issue came before this Court in CWP No. 7668 of 2013, ***titled as H-Private Universities Management Association (H-PUMA)*** Vs ***State of Himachal Pradesh and others***, decided on 23.7.2014 and this Court observed as under:

> ***20.*** In view of the various pronouncements of the Hon'ble Supreme Court, it can safely be concluded that in a right to establish an institution, inherent is the right to administer the same which is protected as part of the freedom of occupation under Article 19 (1) (g). Equally, at the same time, it has to be remembered that this right is not a business or a trade, given solely for the profit making since the establishment of educational institutions bears a clear charitable purpose. The establishment of these institutions has a direct relation with the public interest in creating such institutions because this relationship between the public interest and private freedom determines the nature of public controls which can be permitted to be "permissible". Even the petitioners concede that they have established the institutions to ensure good quality education and would not permit the standard of excellence to fall below the standard as may be prescribed by the State Government. The petitioners also conceded that the State makes it mandatory for them to maintain the standard of excellence in professional institutions. Thus, ensuring that admissions policies are based on merit, it is crucial for the State to act as a regulator. No doubt, this may have some effect on the autonomy of the private unaided institution but that would not mean that their freedom under Article 19 (1) (g) has in any manner been violated. The freedom contemplated under Article 19 (1) (g) does not imply or even suggest that the State cannot regulate educational institutions in the larger public interest nor it be suggested that under Article 19 (1) (g), only insignificant and trivial matters can be regulated by the State. Therefore, what clearly emerges is that the autonomy granted to private unaided institutions cannot restrict the State's authority and duty to regulate academic standards. On

the other hand, it must be taken to be equally settled that the State's authority cannot obliterate or unduly compromise these institutions' autonomy. In fact it is in matters of ensuring academic standards that the balance necessarily tilts in favour of the State taking into consideration the public interest and the responsibility of the State to ensure the maintenance of higher standards of education.

23. The State has power to regulate academic excellence particularly in matters of admissions to the institutions and, therefore, is competent to prescribe merit based admission processes for creating uniform admission process through CET. Any prayer for seeking dilution or even questioning the authority of the State to act an regulator is totally ill-founded in view of the various judicial pronouncements, particularly in ***Visveswaraiah Technological University*** (supra)and reiterated in ***Mahatma Gandhi University*** (supra).

52. Importantly, not only the aforesaid judgment was assailed by filing Special Leave Petition, but the same was dismissed by the Hon'ble Supreme Court on 21.11.2014.

53. From the aforesaid detailed discussion, we are of the considered view that the provisions of the MCI Act identify the scope and extent of power which each of the State stakeholders, i.e. MCI, State Government, Affiliating Body or the University is expected to exercise. While the MCI has been assigned the paramount role of according recognition, the affiliation is best left to the State Government/University/examining body and, therefore, it is beyond the competence of the MCI or the Central Government to dictate terms to the State insofar as the question of grant of 'affiliation' is concerned or direct the State to affiliate a Medical College to a particular University. This is clearly beyond the powers conferred by the Constitution upon the Central Government or for that matter even the MCI. Even the College seeking affiliation is bound by the provisions of the Himachal Pradesh University Act, 1970, more particularly, the provisions contained in Section 7 thereof and cannot of its own claim any right or privilege to get affiliated to any University of its choice including petitioner No.2.

54. Having said so, we find no merit in this petition and the same is accordingly dismissed alongwith all applications leaving the parties to bear their own costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sandeep Chauhan .....Petitioner.

Versus

Union of India and others .....Respondents.

CWP No.300 of 2016.
Judgment reserved on: 22.11.2016.
Date of decision: December 20, 2016

Constitution of India, 1950- Article 226- Construction work on selected reaches on NH-70 was advertised – two bids were submitted – one was rejected by Tender Evaluation Committee – the Committee decided to cancel the tender process being single tender - the work was re-advertised – six bids were received out of which four were rejected – a complaint was filed regarding concealment of facts by respondent No.5, which was found to be correct on inquiry – another complaint was filed against the petitioner- the tender was again cancelled – the petitioner filed a writ petition challenging the cancellation process- held, that the officer of respondent No.2 was associated at the time of inquiry into complaint made against respondent No.5- he had written a letter subsequently that in case of opening of financial bid, no cognizance will be taken by respondent No.2- this shows lack of coordination between the respondents - the objection of

respondent No.5 regarding the fact that technical personnel will not be ready to work with the petitioner is an assumption belied by the documents showing that they had consented to work with the petitioner – petition allowed - letter quashed and set aside - respondents directed to award the work to the petitioner.(Para-17 to 29)

For the Petitioner	:	Mr.B.C.Negi, Senior Advocate with Mr.Yashwardhan Chauhan, Advocate.
For the Respondents:		Mr.Ashok Sharma, Assistant Solicitor General of India, with Ms.Sukarma, Advocate, for respondents No.1 and 2. Mr.Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No.3 and 4. Mr.Bhuvnesh Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

If only the respondents would have taken extra care and not un-necessarily have blown up the issue only on account of lack of coordination amongst themselves and rectified the error without much ado, the filing of the instant petition could have conveniently been avoided and the precious public time of the Court could have been better utilized for the disposal of other cases.

2. The petitioner aggrieved by the cancellation of tender, has filed the instant petition claiming therein the following substantive reliefs:-

> *"i) Issue a writ of certiorari to quash **Annexure P-7 and Annexure P-8** i.e. letter dated 25.01.2016 and corrigendum dated 01.02.2016.*
>
> *ii) Issue a writ of mandamus directing the Respondent authorities not to implement **Annexure P-7 and Annexure P-8** i.e. letter dated 25.01.2016 and corrigendum dated 01.02.2016.*
>
> *iii) Issue a writ of mandamus directing the respondent authorities to award the work in question to the petitioner."*
>
> Certain undisputed facts may be noticed.

3. The work of construction of retaining wall, breast wall, crash barrier, parapet etc. in selected reaches on NH-70 (New NH-03) Jallandhar- Hoshiarpur-Gagret-Mubarikpur-Amb-Kotli-Mandi road from Km. 152/0 to 196/495 in the State of Himachal Pradesh was sanctioned by the Ministry of Road Transport and Highways (for short MORTH) for Rs. 1084.40 lacs vide letter dated 19.02.2015.

4. Tender for the said work was called for by the State PWD for the first time on 21.05.2015 and only two bids qua the same were received. One of the bid was by the petitioner, whereas, other bid was by one SAB Industries Limited. These bids were evaluated on 16.07.2015 by the Tender Evaluation Committee. However, the work experience submitted by the SAB Industries Limited did not fulfill the relevant clause of the 'Detailed Notice Inviting Tender' (for short 'DNIT'). Since there was only a single bidder, the same was declared as non-responsive and the Committee decided to cancel the tender process being single tender in the first call in accordance with the Central Vigilance Commissioner (CVC) guidelines.

5. Tender for the aforesaid work was called for the second time by the State PWD on 23.08.2015 and this time six bids were received. The bids so received were evaluated by the Committee on 26.10.2015 and this time four bids were found to be non-responsive and ultimately only the bids of the petitioner and respondent No.5 were left in the fray. During the aforesaid meeting, the Executive Engineer, NH Division, informed the Committee that a complaint had been

received from the petitioner regarding concealment of facts with respect to the existing works in hand and commitments of the bids submitted by respondent No.5. He further informed that the veracity of this complaint was examined and was found to be genuine, as such, the Committee decided to declare the bid of respondent No.5 to be non-responsive under Clause 4.8 of DNIT which reads as under:-

> *"Even though the bidders meet the above qaualifying criteria, they are subject to be disqualified if they have:*
>
> *-Made misleading or false representations in the forms, statements and attachments submitted in proof of the qualification requirements..."*

6. However, in the meanwhile, the Regional Office of MORTH, Chandigarh i.e. respondent No.2 received various grievances from the bidders found to be non-responsive representing their cases and a complaint against the petitioner was received from respondent No.5. The representations/grievances/ complaints were referred to Chief Engineer (NH). As per the complaint submitted by respondent No.5, the petitioner had also concealed the fact regarding existing commitments of ongoing work and list of key personnel. Respondent No.2 in turn requested respondent No.4 to examine the veracity of this complaint before opening the financial bids. Respondent No.4 vide letter dated 21.01.2016 informed respondent No.2 that in order to deliberate upon the complaints of respondent No.5 and petitioner against each other, an internal Committee had been constituted, who in its meeting held on 14.12.2015 had decided that the objection against the petitioner was found to be false in respect of the concealed work details, however, regarding deployment of key personnel and requisite staff, it was decided by the Committee that an undertaking from the Contractor i.e. petitioner be taken before award of the work. It was further informed that the date for opening of financial bid had been fixed on 22.01.2016.

7. Respondent No.2 vide letter dated 25.01.2016 (Annexure P-7) requested respondent No.4 to scrupulously examine the veracity of various complaints and open the financial bids only after ascertaining that the charges levelled against the petitioner are found to be false and unfounded, lest tender process be annulled and short notice rebidding may be done. It also asked respondent No.4 not to proceed further with the opening of the financial bid as it was in disagreement with the procedure adopted and conveyed by respondent No.4 and it was observed that if the State PWD still goes ahead with the opening of the financial bid for the lone bidder i.e. petitioner, no cognizance will be taken by it and the same may be considered as null and void.

8. Respondent No.4 ultimately cancelled the tender process vide corrigendum dated 01.02.2016 (Annexure P-8) and the reason cited therein was "*cancelled due to administrative reasons*".

9. The petitioner has assailed the aforesaid action and would contend that the reasons cited in the letters dated 25.01.2016 and 01.02.2016 suffer from irrationality, unreasonableness besides being cryptic, vague and baseless and deserve to be quashed as respondents have failed to comply with the basic rules of natural justice and fair play.

10. The Union of India and the Regional Office of MORTH (respondents No.1 and 2) have filed their joint reply wherein the factual matrix of the case have not been disputed. However, it is claimed that the letter dated 21.01.2016 issued by the respondents was based upon the following:-

> *"(i) Submission of the undertaking by Sh.Sandeep Chauhan petitioner before award of the work that the requisite staff shall be deployed, does not absolve him from the charge of concealment of facts which was the basis for the declaration of Sh.Om Prakash Sharma and Sons as non-responsive by the Committee in its meeting held on 26.10.2015.*
>
> *(ii) There were some contradictions with regard to the way the complaint against Sh.Om Prakash Sharma & sons was dealt by CE(NH). If during the meeting*

of evaluation committee held on 26.10.2015, CE (NH) confirmed that the veracity of the complaint against Om Prakash Sharma & Sons was examined and found to be genuine, then why the same complaint was again got verified in writing on 13.01.2016."

11. It is further claimed that vide letter dated 25.01.2016, respondent No.2 had only expressed its disagreement with the procedure adopted and conveyed by respondent No.4. However, this letter was not meant to convey any sort of decision, judgment or did not even amount to issuing directions to respondent No.4 and was basically meant to ensure fairness in the bidding process and to avoid any procedural lapse. It is further contended that after opening of the financial bids on 23.01.2016, respondent No.4 of its own had cancelled the tender process citing administrative reasons and had not made the letter of respondent No.2 dated 25.01.2016 (Annexure P-7) the basis for cancellation of tender in the tender cancellation order. Therefore, it is not understood as to why letter dated 25.01.2016 (Annexure P-7) has been made the basis of this writ petition.

12. Respondents No.3 and 4 have filed their joint reply wherein they too have not disputed the factual matrix of the case and have specifically claimed that it was the letter issued by respondent No.2 dated 25.01.2016 (Annexure P-7) that eventually led to the cancellation of the tender process.

13. In addition to the aforesaid, it is averred that as per Clause 32 of Section 1 (instructions to bidders) in SBD, the Employer is having power to cancel the bidding process before award of contract and in view of this Clause, the action of the respondents is claimed to be legal and justified. It is also claimed that even if the respondent-department opts to proceed with the tender process, the Government of India i.e. respondents No.1 and 2 will not revalidate the sanction and for want of funds this project/work cannot be executed and, therefore, even on this ground the action of the respondents is claimed to be legal and valid.

14. Respondent No.5 has filed a separate reply and contested the petition mainly on the ground that his bid has wrongly been declared as non-responsive. Whereas, it was the petitioner, who had misrepresented by showing Engineers Sunit Thakur and Ambitabh Thakur as his key personnel knowing fully well that Engineer Sunit Thakur had gone abroad and staying there since long, whereas, Engineer Amitabh Thakur was himself an independent Contractor and would never agree to work with the petitioner and therefore, could not be key technical personnel of the petitioner. Therefore, in such circumstances, even the bid offered by the petitioner ought to have been declared as non-responsive.

15. For completion of records, we may notice that the petitioner on 02.07.2016 filed an application bearing CMP No.6691 of 2016 whereby he sought to place on record certain additional documents. In terms of para-3 of the application, it has been submitted that the petitioner had mentioned Shri Amitabh Thakur and Shri Narender Singh Chauhan as the key personnel against whom an objection was taken that these persons would not be ready and willing to work with the petitioner. However, when these persons were contacted, they have shown their readiness and willingness to work with the petitioner as per the certificates appended with the application as Annexures P-9 and P-10, respectively. Besides that one Shri Gaurav Chauhan is also stated to be ready and willing to work as site Engineer in the event of the bid in question being allotted to the petitioner and in support of such contention a certificate issued by Shri Gaurav Chauhan has been appended as Annexure P-11.

16. Notably, this application came up for consideration before this Court initially on 04.10.2016 and on the said date learned counsel for respondent No.5 stated at the Bar that he is under instructions not to file any response to the application. His statement was taken on record and his right to file response was ordered to be closed. Whereas, other respondents were granted three weeks' time to file response. Thereafter, when the matter came up for consideration on 25.10.2016, the respondents were granted further two weeks' time to file response to the

application, however, till date no response to the said application has been filed by the respondents.

We have heard the learned counsel for the parties and gone through the material placed on record.

17. Indubitably, it was the letter issued by respondent No.2 on 25.01.2016 (Annexure P-7) that triggered the entire action and compelled respondents No.3 and 4 to cancel the tender process.

18. Now, as regards respondents No.3 and 4, the only reason given by them for cancelling the tender is the letter dated 25.01.2016 (Annexure P-7) issued by respondent No.2, as would be evident from para-6 of the preliminary submissions which reads thus:-

> *"That the Govt. of India vide its letter No.RW/CH/HP/Misc/2760-62 dated 25-1-2016 communicated that the undertaking sought from petitioner will not absolve the petitioner as to whether he has wrongly mentioned the names of key personnel and concealed facts in his bid. The above communication also stated that if state PWD goes ahead with the opening of financial bid for the aforesaid work no cognizance will be taken by them and the same may be considered null and void. Hence, based upon this direction of respondent No.1 & 2 as well as public interest of road safety and lapse of sanction replying respondent decided to pass the order/corrigendum dated 1-2-2016 whereby the tender dated 23-08-2015 for the said work has been cancelled due to administrative reasons."*

19. Admittedly, the project in question is of respondents No.1 and 2 for which an amount of Rs. 1084.40 lacs already stands sanctioned and respondents No.3 and 4 are only the executing agencies. Therefore, once respondent No.2 itself had made the threatening observations in its letter dated 25.01.2016 (Annexure P-7), there was no option available with respondents No.3 and 4 but to cancel the tender process.

20. It is only now that respondents No.1and 2 in their reply have clarified that the letter dated 25.01.2016 had only expressed disagreement with the procedure adopted by respondent No.4 and had not asked him to cancel the tender process. The letter was basically to ensure fairness in the bidding process and to avoid any procedural lapse. Relevant portion of the reply reads thus:-

> *"10.That in the absence of proper response from the Chief Engineer, HP PWD, the Regional Officer, M/oRTH, vide letter No.RW/CH/HP/Misc/2760-62 dated 25.01.2016, expressing disagreement with the procedure adopted, conveyed to the Chief Engineer, HP PWD that if the State PWD goes ahead with the opening of the financial bid for the lone bidder i.e. "the petitioner", no cognizance will be taken by his office and the same may be considered as null and void. This letter of the Regional Officer, M/oRTH was not meant for any sort of decisive, judgmental or issuing direction to the Chief Engineer, HP PWD. This letter of the Regional Officer, M/oRTH, was basically meant to ensure fairness in the bidding process and to avoid any procedural lapse. A copy of letter No.RW/CH/HP/Misc./2760-62 dated 25.01.2016 of the Regional Officer, MORT&H, Chandigarh is being appended alongwith as Annexure R-2."*

21. It is evidently clear from the replies filed on behalf of the official respondents that there has been a complete lack of coordination and cooperation amongst them, though they were required to function harmoniously and work in unison as a team to achieve the desired target.

22. What is more surprising is that the meeting dated 26.10.2015, amongst others, was attended by Engineer Aditya Prakash, Regional Officer, on behalf of respondent No.2, in which the complaint made by the petitioner against respondent No.5 was found to be genuine and it was then that the bid of respondent No.5 was also declared to be non-responsive on account of concealment of fact and despite the petitioner being lone bidder, it was decided to

open the financial bid submitted by him. However, this very Officer i.e. Aditya Prakash vide letter dated 25.01.2016 retracted from what had been decided in the meeting dated 26.10.2015.

23. Apart from the above, it would be noticed that vide letter dated 25.01.2016, Aditya Prakash, the Regional Officer, in para-6 of the letter had clearly and unequivocally threatened that in case respondents No.3 and 4 still choose to go ahead with the opening of the financial bid for the work, no cognizance will be taken by his Office (respondent No.2) and the same be considered as null and void, as would be evident from paras 5 and 6 of the letter which reads thus:-

> "*5. The above mentioned content of letter of CE(NH) has been examined and found to be contradictory as far as dealing with the complaint of Sandeep Chauhan Contractor is concerned as mentioned in the minutes of the Technical Evaluation Committee meeting held on 26.10.2015 that*
>
> > *"Executive Engineer NH Division, HP PWD, Hamirpur informed that a complaint was received from Sandeep Chauhan, Govt. Contractor regarding concealment of the facts regarding existing work, in hand/commitments in the bid submitted by Om Prakash Sharma and sons. In this regard, CE (NH), chairman of the committee confirmed that the veracity of the complaint against Om Prakash Sharma & Sons was examined and found to be genuine."*
>
> *While, now it is stated in aforesaid letter of CE (NH) dated 21.01.2016 that in the meeting of PWD officers taken by CE (NH) on 14.12.2015 it was decided that complaint made by Shri Sandeep Chauhan Contractor was to be verified in writing to confirm the facts so that the financial bid is opened accordingly if found suitable. Thus, apparently during the meeting of Technical Evaluation Committee on 26.10.2015 the genuineness of the complaint of Sandeep Chauhan Contractor was not confirmed in writing. Further, the statement that "regarding key personnel it was decided to take undertaking from the contractor before award of work that the requisite staff shall be deployed as per Clause 4.5.4 of the Standard Bid Document" also not absolve Sandeep Chauhan Contractor as to whether he has wrongly mentioned the names of key personnel or not and concealed facts in his bid. The matter has accordingly been taken up with CE(NH) vide this office letter the same day dated 21.01.2016, again requesting thereby that the financial bid may be opened only after ascertaining that the charges levelled against the lone bidder left i.e. Sandeep Chauhan is false and unfounded, lest the tender process be annulled and short notice rebidding may be done.*
>
> *6. <u>As may be seen from the above, the issues being raised by this office/ELO Shimla are still to be properly responded by the State PWD w.r.t. various grievances/complaints involved. Under such circumstances, if the State PWD goes ahead with the opening of the financial bid for the work, no cognizance will be taken by this office and the same may be considered as null and void."</u>*

24. However, when reply to the writ petition was filed on behalf of respondents No.1 and 2, an affidavit sworn-in by one Abhilash Kumar, Engineer Liaison Officer, and a complete somersault has taken and it is averred that the letter dated 25.01.2016(Annexure P-7) was basically to ensure fairness in the bidding process and to avoid any procedural lapse and did not amount to a decision or a judgment or even a direction and, therefore, should not have been made the basis of the writ petition. If that was so, then why at the first place the letter dated 25.01.2016?

25. We have no doubt in our mind that the entire fiasco has been created by the official respondents themselves, in particular the respondent No.2 and the same has only resulted in precious time of the Court being wasted. It would have been better if the respondents No. 1

and 2 alongwith respondents No. 3 and 4 would have worked in tandem with a better coordination and thereby avoided such unsavoury mess.

26. Now, adverting to the objection of the respondents including respondent No.5 regarding the technical personnel mentioned by the petitioner in the bid document, according to them, would not be ready and willing to work with the petitioner. We find that this assumption has been clearly belied by the documents placed by the petitioner alongwith CMP No.6691 of 2016 annexed as Annexures P-9 and P-10, respectively. A perusal of these documents, reveal that the named technical personnels have consented to work with the petitioner.

27. As observed earlier, respondent No.5 has not contested this application by giving a statement before this Court on 04.10.2016, whereas, other respondents too have not contested this application despite having been given sufficient time and opportunity. Even otherwise, the question of engaging technical manpower would only arise if the contract is to be awarded in favour of the petitioner and for this purpose an undertaking from him for deployment of key personnel and staff has already been taken.

28. As there is virtually no opposition to the petition, we have no other option but to allow the same. Ordered accordingly. The letter dated 25.01.2016 (Annexure P-7) and corrigendum dated 01.02.2016 (Annexure P-8) are quashed and set aside and the respondents are directed to award the work in question to the petitioner within two weeks from today.

29. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Som Dutt Sharma .....Petitioner

Versus

The Presiding Judge, Industrial Tribunal-cum-Labour Court and another .....Respondents

CWP No. 8420 of 2010
Decided on : December 20, 2016

Industrial Disputes Act, 1947- Section 25- The petitioner was appointed as Librarian – his services were terminated after an inquiry, which was not proper – the Labour Court rejected the claim of the petitioner – held, that no objection was raised to the appointment of the Inquiry Officer – petitioner was unable to prove that he was deprived of an opportunity to examine the witnesses- serious allegations were made against the petitioner and the inquiry was rightly held to verify those allegations – the Writ Court will not act as a Court of appeal to disturb the findings of fact- writ petition dismissed.(Para-9 to 15)

Cases referred:

Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.
Deputy Inspector General of Police v. S. Samuthiram, (2013) 1 SCC 598
Commissioner of Police v. Mehar Singh, (2013) 7 SCC 685
State of West Bengal v. Sankar Ghosh, (2014) 3 SCC 610
Baljinder Pal Kaur v. State of Punjab, (2016) 1 SCC 671

For the petitioner : Mr. J.R. Poswal, Advocate.
For the respondents : None for respondent No.1.
Mr. Rahul Mahajan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By medium of this petition, petitioner-workman (herein after, 'workman'), has laid challenge to Award dated 15.9.2010 passed by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla in Ref. No. 69 of 2006, whereby claim of the petitioner has been dismissed.

2. Briefly stated the facts as emerge from the record are that the appropriate Government, in terms of Section 10 of the Industrial Disputes Act, 1947 (herein after, 'Act'), made following terms of reference to the learned Industrial Tribunal-cum-Labour Court, for adjudication:

> "Whether the dismissal from service w.e.f. 2.12.2003 of Shri Som Dutt Sharma S/o Late Shri Ganga Ram workman by the Management of M/s Sidhrtha Super Spinning Mills Ltd., Nilala Khera, Nalagarh, District Solan, HP w.e.f. 1.12.2003 after conducting domestic enquiry by the management is legal and justified? If not, what relief of service benefits and amount of compensation, the above aggrieved workman is entitled to"?

3. Petitioner by way of statement of claim stated before the Tribunal that he was appointed as Librarian by the respondent No.2-Company (hereinafter, 'respondent-company') on 15.6.1984 and worked as such till 2.12.2003, when his services were illegally and wrongly terminated without notice and against the mandatory provisions of the Act. Workman further claimed that on 22.9.2003, he was issued a charge sheet under the Certified Standing Orders, whereby he was called upon to explain his position vis-à-vis alleged charge sheet. Vide reply dated 25.9.2003 (sic 25.9.2007), workman denied all the charges but the respondent-Company dissatisfied with the explanation having been rendered by the workman, appointed one Shri Sanjeev Sharma, Advocate who at the relevant time was junior of Shri Rajeev Sharma, Advocate, presently working as Consultant with the respondent-Company, as an Enquiry Officer in order to enquire into the facts of the case. As such, the enquiry was a mere eye-wash. Workman further claimed that the Enquiry Officer refused to record the statements of four witnesses, as a result of which, grave prejudice was caused to him. Workman further claimed that since he had raised voice against agreement dated 31.2.2003, , respondent-Company was hell bent to make him scapegoat. Workman further averred that there was a case registered under Section 406 IPC against one Devinder Jain, MD of the respondent-Company and for this reason also the Management of respondent-Company was maltreating the workman, on one pretext or the other as workman was one of the prosecution witnesses in that case. Workman further averred that a false case under Section 354 IPC was also got registered against him and in this regard, he had made a representation, but his services were terminated without notice and in an illegal manner without resorting to the mandatory provisions of the Act, as such, workman deserves to be reinstated in service with all consequential benefits including back wages.

4. Respondent-Company by way of reply to the statement of claim, refuted the claim of the workman, by raising preliminary objections regarding maintainability. On merits also, respondent-Company refuted the claim of the workman by stating that the workman continued to remain in employment with the respondent-Company with effect from 15.6.1984 till 2.12.2003, when his services were dismissed. It was denied that his services had been dismissed in an illegal and improper manner against the provisions of the Act. Respondent-Company claimed that disciplinary proceedings were initiated against the workman on the basis of a written complaint having been filed by one Shri Vashisht Pandey, wherein it had been alleged that he had tried to outrage the modesty of his wife while residing in the bachelor quarters of the labour colony. Said Vashisht Pandey had also lodged a complaint with the police regarding same incident. Respondent-Company further claimed that on the basis of allegations having been made by the complainant Vashisht Pandey, Management decided to conduct an independent inquiry against the workman in order to ascertain truth of allegations leveled against him. Accordingly, a person

namely Shri Sanjeev Sharma was appointed as Enquiry Officer, who conducted enquiry strictly in terms of Certified Standing Orders and principles of natural justice. Respondent-Company further claimed that due and admissible opportunity of being heard was afforded to the workman by the Enquiry Officer before submitting final report. In nutshell, respondent-Company claimed that the Enquiry Officer having considered all the facts and circumstances of the case, submitted his report, on the basis of which, respondent-Company issued show cause notice-cum-proposed penalty, calling upon the workman to file reply. Pursuant to reply having been filed by the workman to the show cause notice, respondent-Company being dissatisfied with the explanation rendered by the workman, dismissed him from service. Respondent-Company further claimed that the management of the respondent-Company having regard to the misconduct of the workman, particularly his involvement in an immoral act, imposed penalty of dismissal, that too, after resorting to the provisions of the Act as well as principles of natural justice.

5. Learned Tribunal below, on the basis of pleadings as well as evidence led on record by the respective-parties, answered the reference in negative and rejected the claim of the workman. Being aggrieved and dissatisfied with the impugned award, workman approached this Court, by way of present petition, seeking following main relief(s):

> "i) That a writ in the nature of certiorari may kindly be issued, quashing the impugned award dated 15.9.2010 (Annexure P-10).
>
> ii) That a writ in the nature of mandamus may kindly be issued directing the respondent No.2 to reinstate the petitioner with all consequential benefits.
>
> iii) That the respondents may kindly be directed to pay the salary for the period for which petitioner remained out of job and other benefits which have not been paid to the petitioner since 2003. The entire arrears may kindly be directed to be paid to the petitioner alongwith 12% interest from the date of its due."

6. Mr. J.R. Poswal, learned counsel representing the workman, vehemently argued that impugned award passed by learned Tribunal below is not sustainable in the eyes of law as the same is not based upon correct appreciation of evidence adduced on record by the respective parties, as such, same deserves to be set aside. Mr. Poswal, while referring to the impugned award as well as record, vehemently argued that learned Tribunal below failed to take into consideration that the workman was working with the respondent-Company from the year 1984, without any interruption and as such his services could not be terminated in a casual manner without resorting to the provisions of the Act. While referring to the impugned award, Mr. Poswal, strenuously argued that learned Tribunal below before returning findings on the controversy at hand, failed to frame proper issues and as such faulted in returning findings on issues No. 1,2 and 4, because, admittedly, these are without any reasons. Mr. Poswal, further contended that the learned Tribunal below failed to appreciate that there was nothing on record suggestive of the fact that respondent-Company before terminating the services of the workman, issued any notice as envisaged under the Act, to the workman, calling upon him to explain his conduct and as such impugned award can not be allowed to sustain. Mr. Poswal further contended that since Smt. Sarita Pandey, was not a worker in the respondent-Company, no action, if any, could be taken by the respondent-Company on her complaint, especially when in no manner, she could be termed as 'workman' as defined under the Act and as such no domestic inquiry could be initiated against the workman and thus the impugned action of dismissing the workman by the respondent-Company, ought to have been quashed and set aside by the learned Tribunal below while adjudicating the reference made to it by the appropriate Government. Mr. Poswal, further contended that the respondent-Company could not terminate the services of the workman on the basis of domestic enquiry, more particularly, in terms of provisions of Section 11-A of the Act, wherein enquiry can only be conducted on the basis of complaint of a workman. But in the instant case, complaint has been lodged by Sarita Pandey, who was not a worker at any point of time and as such action of the respondent-Company in dismissing the services of the workman

on the basis of domestic enquiry deserves to be set aside. While concluding his arguments, Mr. Poswal, forcefully contended that a bare perusal of impugned award clearly suggests that learned Tribunal below failed to appreciate the evidence in its right perspective, as a result of which, grave prejudice has been caused to the workman, who admittedly, was not allowed to examine his witnesses by the Enquiry Officer, during the disciplinary proceedings. He further contended that the learned Tribunal below miserably failed to take note of the judgment Ext. PA, placed on record by the workman, to demonstrate that he was acquitted in criminal case having been filed by aforesaid Sarita Pandey. Since workman was acquitted in criminal proceedings, he was entitled to the benefit of same in the domestic enquiry proceedings. In the aforesaid background, Mr. Poswal, prayed that impugned order of dismissal having been issued by the respondent-Company, may be set aside after setting aside the impugned award passed by the learned Tribunal below and workman be held entitled to reinstatement with back wages.

7. Mr. Rahul Mahajan, learned counsel representing the respondent-Company, supported the impugned award passed by the learned Tribunal below. Mr. Mahajan, while referring to the impugned award passed by learned Tribunal below vehemently argued that there is no illegality or infirmity in the impugned award passed by learned Tribunal below and same is based upon correct appreciation of evidence adduced on record by the respective parties and as such there is no occasion for this Court to interfere with the same. While refuting the contentions having been raised by the learned counsel representing the workman, Mr. Mahajan strenuously argued that perusal of award as well as record clearly suggests that the workman was unsuccessful in proving that domestic enquiry against him was not conducted in accordance with law by not resorting to the principles of natural justice. Mr.Mahajan, specifically invited attention of this Court to the reasoning having been given by learned Tribunal below, to demonstrate that each and every aspect of the matter has been dealt with meticulously by the learned Tribunal below and as such there is no scope of interference by this Court, especially in view of findings of fact recorded by the learned Tribunal below. In this regard he placed reliance upon judgment passed in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.*** While concluding his arguments, Mr. Mahajan, further contended that acquittal in criminal proceedings can not be ground for automatic reinstatement, especially when individual is held guilty in domestic enquiry. In the aforesaid background, Mr. Mahajan, prayed for dismissal of the writ petition.

8. I have heard the learned counsel for the parties and also gone through the impugned award as well as record.

9. During proceedings of the case, this Court had an occasion to peruse the impugned award as well as other documentary evidence available on record, perusal whereof nowhere suggests that the learned Tribunal below misread and misconstrued evidence adduced on record by the respective parties, rather close scrutiny of impugned award clearly suggests that learned Tribunal below has dealt with each and every aspect of the matter meticulously and there is no scope of interference by this Court. However, with a view to ascertain the genuineness and correctness of the submissions having been made by the learned counsel representing the workman, this Court carefully examined evidence led on record by the respective parties. Learned counsel representing the petitioner vehemently argued that Shri Sanjeev Sharma, Advocate, who happened to be junior of Mr. Rajeev Sahrma, Advocate was appointed as Enquiry Officer by the management of respondent-Company solely with a view to defeat the claim of the workman but perusal of impugned award as well as record clearly suggests that no objection, if any, was ever raised by the workman at the time of appointment of Sanjeev Sharma, Advocate, as Enquiry Officer, who at the time of appointment, called upon the parties and explained the procedure to be followed in the enquiry proceedings. If workman was at all aggrieved with the appointment of Shri Sanjeev Sharma, Advocate as an Enquiry Officer, he could always raise objection, if any, before the respondent-Company or the Enquiry Officer stating therein reasons, if any, against appointment of Sanjeev Sharma, as Enquiry Officer. There is nothing on record suggestive of the fact that at the relevant time, workman raised any objection with regard to appointment of Sanjeev Sharma, as an Enquiry Officer. Similarly, this Court sees no force in the contentions

having been raised by the workman that no opportunity of examining witnesses was afforded by the aforesaid Enquiry Officer because learned Tribunal below has specifically recorded while returning its findings that there is nothing on record to show that which were the four witnesses, he wanted to examine and Enquiry Officer did not allow him to examine. Though the workman has stated that during enquiry proceedings, he was given opportunity to cross-examine witnesses of management but he was not allowed to examine his witnesses. But as has been notice above, workman was unable to prove before learned Tribunal below that which were those witnesses, whom he wanted to examine and as such there is no illegality and infirmity in the findings returned by the Court below that workman was unable to prove allegations against Enquiry Officer, Sanjeev Sharma. Similarly, nothing was placed on record by the workman to suggest that Sanjeev Sharma, being junior of one Shri Rajeev Sharma, Advocate, who happened to Consultant of the respondent-Company, was biased against him in any manner and he did not conduct enquiry in a fair and proper manner by resorting to the principles of natural justice. In the facts and circumstances of the case, it has been recorded by the learned Tribunal below that record clearly suggests that the workman was afforded due opportunity to be represented by Defence Assistant of his choice by the Enquiry Officer and to avail opportunity to cross-examine the witnesses of the respondent-Company. Hence, this Court sees no force in the contentions having been raised by the learned counsel representing the workman that learned Tribunal below has failed to appreciate the evidence its right perspective. Similarly, record clearly reveals that domestic enquiry was conducted by the Enquiry Officer in a most fair manner and due and admissible documents were made available to the workman during enquiry proceedings and pursuant to notice Exts. RC and RD, workman himself joined enquiry and examined witnesses. Learned Tribunal below after perusing zimni orders having been passed by Enquiry Officer, concluded that it clearly suggests that after completion of enquiry, report was given to the workman and he had also received notice from the respondent-Company regarding proposed penalty Ext. RD. Sanjeev Sharma, Advocate, Enquiry Officer, while deposing before the learned Tribunal below as RW-1 specifically proved that he was appointed as Enquiry Officer by the respondent-Company and he conducted enquiry against workman, after sending notice to both the parties specifically disclosing procedure to be followed by him while conducting enquiry. This Court, after carefully examining deposition of Sanjeev Sharma, sees no reason to disagree with the findings of the learned Tribunal below that domestic enquiry was conducted strictly in accordance with Certified Standing Orders.

10. Now, the Court would be adverting to the another contention raised by the learned counsel representing the workman, that no domestic enquiry could be initiated against him on the complaint of Smt. Sarita Pandey, who was not a workman. This Court, sees no force in the aforesaid contention of the learned counsel representing the workman because admittedly, complaint in the present case was lodged by the husband of Sarita Pandey i.e. Vashisht Pandey, who was admittedly workman as defined under Industrial Disputes Act. Since serious allegations were leveled against workman, by the husband of Sarita Pandey, respondent-Company in its wisdom thought it proper to get the matter investigated and as such it can not be said that no enquiry, could be initiated against the workman, on the basis of complaint having been made by the wife of fellow workman. Since a workman of the Company had specifically complained against the workman, respondent-Company rightly conducted enquiry against workman and after offering due opportunity of hearing, awarded appropriate punishment, more over, record nowhere suggests that the workman was able to prove on record, motive, if any, of husband of Sarita Pandey, to falsely implicate him in the case and as such aforesaid argument having been made by the workman deserves outright rejection.

11. As far as judgment of acquittal of workman, who has been held guilty in enquiry proceedings, vide Ext. PA in criminal proceedings having been initiated at the behest of wife of fellow workman, Vashisht Pandey is concerned, same was rightly not taken into consideration by the learned Tribunal below because it is well settled by now that once an employee is acquitted by a criminal court, as a matter of right he /she can not be reinstated in service. In this regard,

reliance is placed on judgment rendered by Hon'ble Apex Court in **Deputy Inspector General of Police v. S. Samuthiram,** reported in (2013) 1 SCC 598, wherein Apex Court has held as under:

> "26. As we have already indicated, in the absence of any provision in the service rule for reinstatement, if an employee is honourably acquitted by a Criminal Court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal court and the enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent. It is settled law that the strict burden of proof required to establish guilt in a criminal court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witnesses since few of the other witnesses turned hostile etc. In the case on hand the prosecution did not take steps to examine many of the crucial witnesses on eth ground that the complainant and his wife turned hostile. The court, therefore, acquitted the accused giving the benefit of doubt. We are not prepared to say in the instant case, the respondent was honourably acquitted by the criminal court and even if it is so, he is not entitled to claim reinstatement since the Tamil Nadu Service Rules, do not provide so.
>
> 27. We have also come across cases where the service rules provide that on registration of a criminal case, an employee can be kept under suspension and on acquittal by the criminal court, he be reinstated. In such cases, the re-instatement is automatic. There may be cases where the service rules provide in spite of domestic enquiry, if the criminal court acquits an employee honourably, he could be reinstated. In other words, the issue whether an employee has to be reinstated in service or not depends upon the question whether the service rules contain any such provision for reinstatement and not as a matter of right. Such provisions are absent in the Tamil Nadu Service Rules.
>
> 28. In view of the above mentioned circumstances, we are of the view that the High Court was not justified in setting aside the punishment imposed in the departmental proceedings as against the respondent, in its limited jurisdiction under Article 226 of the Constitution of India."

12. Reliance is further placed on judgment rendered by the Hon'ble Apex Court in **Commissioner of Police v. Mehar Singh**, reported in (2013) 7 SCC 685 and **State of West Bengal v. Sankar Ghosh**, reported in (2014) 3 SCC 610, wherein above judgment has been followed. This judgment has further been followed in **Baljinder Pal Kaur v. State of Punjab**, reported in (2016) 1 SCC 671.

13. As far as judgment passed by the Hon'ble Apex Court in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** is concerned, there can not be any quarrel with the settled proposition of law that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment having been relied upon by the learned counsel representing the Management, clearly suggests that error of law which is apparent on the face of record can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law which can be corrected by a writ of certiorari.

Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ of certiorari can be issued if it is shown that in recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

> "16. .....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

14. In the instant case, as has been discussed in detail, learned Tribunal below has dealt with each and every aspect of the matter meticulously and there is no error of law or fact apparent on record, which can be corrected by this Court while exercising writ jurisdiction.

15. Consequently, in view of the aforesaid law having been laid down by the Apex Court, this Court sees no force in the contentions having been raised by the workman that learned Tribunal below ought to have allowed his claim in view of judgment rendered by criminal Court in criminal proceedings initiated at the behest of wife of Vashisht Pandey,.

16. Accordingly, the writ petition is dismissed being without merits. Award dated 15.9.2010 passed by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla in Ref. No. 69 of 2006 is upheld. Pending applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

The Tiara Co-operative Agriculture Service Society Ltd. ...Petitioner.

Versus

State of Himachal Pradesh and others. ...Respondents.

CWP No. 3148/2016
Reserved on: 19.12.2016
Decided on: 20.12. 2016

Constitution of India, 1950- Article 226- Petitioner, a cooperative society filed a writ petition seeking quashing of inspection note and the office order issued on the basis of the inspection note – held, that revisional power has been given to the State Government under Section 94 of H.P. Cooperative Societies Act, 1968, where there is no provision of appeal – the petitioner can approach the competent authority for the redressal of his grievances – the alternative and efficacious remedy is available to the petitioner – petitioner is required to pursue that remedy and not to invoke the writ jurisdiction of the High Court- petition dismissed as not maintainable.

(Para-5 to 19)

Case referred:

State of Bihar and others vs. Jain Plastics and Chemicals Ltd; (2002 1 SCC 216

For the Petitioner: Mr. Ajay Sharma, Advocate.

For the Respondents: Mr. Shrawan Dogra, A.G. with Mr. V.S. Chauhan, Mr. Romesh Verma, Addl. A.Gs. and Mr. Kush Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

The petitioner is a Cooperative Society and has filed the instant petition primarily seeking quashing of the inspection note (Annexure P-4) submitted by respondent No.4 and has further sought quashing of office order dated 16.8.2016 (Annexure P-6) whereby the Assistant Registrar, Co-operative Societies, Dharamshala has, on the basis of the inspection note, ordered an inquiry (surcharge proceedings) against the petitioner under Section 69 (1) of the Himachal Pradesh Co-operative Societies Act, 1968 (for short "the Act") by appointing the Block Inspector as an Inquiry Officer, who has further been directed to submit his report within one month.

2. In addition to the aforesaid reliefs, the petitioner has also prayed for quashing of the notice (Annexure P-12) issued to it seeking therein its justification and comments regarding appointment of two employees being in violation of the applicable laws.

3. The petitioner was asked to justify the maintainability of the petition on the ground of availability of an alternative and efficacious remedy under the Act.

4. However, learned counsel for the petitioner would vehemently argue that no such statutory remedy is available to the petitioner and, therefore, it has filed the instant petition.

5. We have gone through the provisions of the Act and Rules and are of the considered view that the petitioner has not only an alternative but efficacious statutory remedy available to it under the Act.

6. Chapter-VIII of the Act specifically deals with the audit, inquiry, inspection and surcharge. Section 65 therein deals with inspection of co-operative societies. Section 67 deals with inquiry by the Registrar. Whereas, Section 69 relates to surcharge proceedings, which are to be initiated in case during the course of an audit, inquiry, inspection or the winding up of a co-operative society, it is found that any person who is or was entrusted with the organization or

management of such society, or who is or has at any time been an officer or an employee of the society, has made any payment contrary to the provisions of the Act, the rules or the bye-law or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has misappropriated or fraudulently retained any money or other property belonging to the society, the Registrar may, of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorized by him, by an order in writing in this behalf, to inquire into the conduct of such person.

7. Chapter-XII relates to the jurisdiction, appeal and review and the relevant provisions for the adjudication of this petition is contained in Section 94, which reads thus:

> "4. Review and Revision:— (1) The State Government except in a case in which an appeal is preferred under section 93 may call for an examine the record of any inquiry or inspection held or made under this Act or any proceedings of the Registrar or of any person subordinate to him or acting on his authority, and may pass thereon such orders as it thinks fit.
>
> (2) The Registrar may at any time,—
>
> (a) review any order passed by himself; or
>
> (b) call for and examine the record of any inquiry or inspection held or made under this Act or the proceedings of any person subordinate to him or acting on his authority and if it appears to him that any decision, order or award or any proceedings so called or should for any reason be modified, annulled or reversed, may pass such order thereon as he thinks fit;
>
> Provided that, before any order is made under sub-section (1) and (2), the State Government or the Registrar as the case may be shall afford to any person likely to be affected adversely by such orders an opportunity or being heard.
>
> "Provided further that every application under sub-section (1) and (2), to the State Government or the Registrar, as the case may be shall be made within ninety days from the date of the communication of the order sought to be reviewed or revised."

8. A bare perusal of the aforesaid provisions clearly shows that this Section gives revisional powers to the State Government in a case where no appeal under section 93 of the Act has been preferred and similar powers have been conferred upon the Registrar to be exercised either *suo motu* or on an application of a party, provided the same is preferred within 90 days from the date of communication of the order sought to be reviewed or revised and further that the person(s) likely to be effected adversely by such order is afforded an opportunity of being heard. It is immaterial whether the revisional power is exercised, on action initiated at the instance of the interested party or *suo motu*, the order passed would be within jurisdiction.

9. This Section specifically deals with the power of the State Government/Registrar to call for and to examine the record of any inquiry or inspection held or made under this Act or any proceedings. The State Government can examine any proceedings of the Registrar or any person subordinate to him or acting on his authority, whereas the Registrar is empowered to call for and examine the proceedings of any person subordinate to him or acting on his authority and if it appears to him that any decision, order or award or any proceedings so called or should for any reason be modified, annulled or reversed, may pass such order thereon as he thinks fit.

10. However, it needs to be clarified that if revisional application is not maintainable, fortiori *suo motu* powers cannot also be exercised.

11. The power exercised by the State Government/Registrar under Section 94 of the Act is in the nature of supervisory jurisdiction conferred upon them.

12. In terms of the first proviso, the State Government or the Registrar, as the case may be, is obliged to afford to any person likely to be effected adversely by such order an opportunity of being heard. In terms of the section proviso, every application under sub-section (1) and (2), to the State Government or the Registrar, as the case may be, has to be made within 90 days from the date of the communication of the order sought to be reviewed or revised.

13. In view of what has been observed above, we can safely come to the following conclusions:

i) The State Government or the Registrar under Section 94 of the Act can exercise its *suo motu* revisonal jurisdiction or on an application made by an aggrieved party;

ii) the remedy of revision before the State Government is barred only in the cases where an appeal has already been preferred under section 93 of the Act;

iii) the remedy of revision either *suo motu* or otherwise can be exercised only against the decision or order passed by the authority under the Act or proceedings arising out of the Act or the Rules framed thereunder. However, this remedy cannot be invoked against an order passed by the society;

iv) the *suo motu* power of revision cannot be exercised by the State Government or the Registrar, as the case may be, if at the instance of an aggrieved party, the revision is not maintainable, fortiori *suo motu* power cannot also be exercised.

14. On the basis of the aforesaid application, we have no hesitation to conclude that the petitioner if aggrieved by the inspection note (Annexure P-4) on the basis of which, surcharge proceedings (Annexure P-6) have been ordered can conveniently approach the competent authority for the redressal of its grievance under section 94 of the Act.

15. As regards the communication (Annexure P-12) dated 21.9.2016, it is for the petitioner to file reply to the said communication. No exception can be taken to the same as it only calls upon the petitioner to justify the appointments of its employees and this communication *per se* does not adversely effect the rights of the petitioner.

16. In view of the aforesaid discussion, we are of the firm view that writ petition under Article 226 of the Constitutional of India is not the proper proceedings for adjudicating the disputes as raised in the instant petition, more especially, when not only an alternative but equally efficacious and proper remedy is available to the petitioner under the Act.

17. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226. [See: ***State of Bihar and others*** vs. ***Jain Plastics and Chemicals Ltd***; (2002 1 SCC 216.

18. In view of the aforesaid discussion, we are of the considered view that the instant petition is not maintainable as the proper remedy for the petitioner is to approach the statutory authorities in terms of the Act.

19. Before parting, we may observe that anything observed hereinabove shall not be construed to be opinion on the merits of the case.

20. With these observations, the petition is dismissed, so also the pending application(s). The petitioner is at liberty to pursue his remedy under the Act. Costs easy.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Dr. Y.S. Parmar University of Horticulture and Forestry, Nauni ...Appellant
Versus
Mr. Satish Chand ...Respondent

LPA No. 203 of 2015 with
LPA's No. 163, 164, 165 and 166 of 2016
Reserved on: December 8, 2016
Decided on: December 21 , 2016

Constitution of India, 1950- Article 226- Writ petitioners were regularized as hostel attendants vide different office orders- they claimed that they were discharging the duties of higher post of Hostel Assistants and are entitled to the pay of the same– University had proposed the upgradation of the post but the proposal was returned by the Comptroller - the writ petition was allowed by the Writ Court holding that the University had proposed the upgradation of the post which strengthens the claim of the writ petitioners- held in appeal that University had 11 hostels and only four persons are occupying posts of regular Hostel Assistants – writ Court had rightly held that the writ petitioners are looking after the work of Hostel Assistants – the judgment was based upon correct appreciation of fact and law- however, the petitioners are entitled to the arrears for the period of three years prior to filing of writ petition.(Para-11 to 19)

Cases referred:
Jai Dev Gupta versus State of Himachal Pradesh and another, AIR 1998 SC 2819
Union of India and others versus Tarsem Singh, (2008) 8 SCC 648
Asger Ibrahim Amin versus Life Insurance Corporation of India, JT 2015 (9) SC 329

For the appellant — Mr. Balwant Singh Thakur, Advocate
For the respondent(s): — Mr. B.S. Chauhan, Senior Advocate with Mr. Munish Thakur, Advocate.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

Since common questions of law and facts are involved in all these appeals, same were taken up together for hearing and are being disposed of vide this common judgment.

2. These Letters Patent Appeals are directed against judgment dated 17.4.2015 rendered by the learned Single Judge of this Court in a batch of petitions i.e. lead case being CWP No. 4615 of 2012 titled **Satish Chand vs. Dr. Y.S. Parmar University**, whereby the petitions have been partly allowed and appellant University has been directed to pay to the respondents pay scale of Hostel Assistants from the time they were designated as Hostel Attendants. Appellant has also been directed to pay interest at the rate of 9% per annum till the date of payment.

3. Facts in brief emerging from the record are that the respondents after joining the services of the appellant-University were regularized as Hostel Attendants vide different office orders. The respondents claimed in the petition that though their services were regularized as Hostel Attendants but ever since they were performing duties of higher post of Hostel Assistants. It is the case of the respondents in the writ petition that there are only four posts of regular Hostel Assistants against eleven hostels and therefore, in the absence of regular Hostel Assistants, it is the respondents, who are discharging the duties of Hostel Assistants.

Respondents thus claimed equal pay for equal work. The writ petition was filed mainly with the following main relief(s):-

> "a) The writ of mandamus be issued against respondent, directing them to remove the anomaly in the pay scale of petitioner and respondent may further be directed to release the pay scale of Rs.3120-5160 w.e.f. 1996 and subsequently revised to Rs. 5910-20200 w.e.f. January, 2006 to the petitioner being Hostel Attendant as his counter part in the departments of State Govt. and H.P. University are being paid the pay scale of Rs.5910-20200 w.e.f. January, 2006 onwards alongwith consequential benefits.
>
> b) The respondents deserves to be directed to upgrade the post of Hostel Attendant to Hostel Assistant from class 1V to 111 as has been upgraded by the State Govt., CSKHPKV Palampur and H.P. University.
>
> b-a) The respondent may be directed to follow the principles of equal pay for equal work, further direct them to pay the scales of Hostel Assistant to the applicant because the applicant is performing the duties of Hostel Assistant.
>
> c) The respondents may be directed to release the arrears of pay to the petitioner w.e.f. Oct. 1999 till date along with 18% interest P.A."

4. During the course of hearing before the learned Single Judge, the respondents restricted their claim to relief (b-a) only.

5. Appellant University filed its reply and claimed that the Hostel Attendant is feeder category for promotion to the post of Hostel Assistant and case of upgradation of Hostel Attendants to that of Hostel Assistants in the revised pay scale of Rs. 5910-20200+1900 GP was sent to the Comptroller for being placed before the Finance Committee. However, the Comptroller returned the case with the observation that the case may be re-examined in light of approved core cadre strength and existing working strength. University further stated that the management vide item No. 8 of the proceedings of the meeting held on 30.3.2011 had approved the core strength of different categories of posts vide notification dated 8.4.2011 and the surplus post of different categories were abolished vide office order dated 25.4.2011 but the core strength was not approved by the State Government and as such fresh core cadre strength proposal was sent to the State Government vide letter dated 30.1.2014 and approval of same was stated to be awaited.

6. The learned Single Judge after hearing the learned counsel for the parties, came to the conclusion that as the respondents were discharging duties of the post of Hostel Assistant and it was the University itself, which proposed upgradation of posts of Hostel Attendants to that of Hostel Assistants, therefore, it strengthens the claim put forth by the respondents that in fact they are discharging and performing duties of Hostel Assistants in the absence of regular Hostel Assistants. The learned Single Judge thus partly allowed the petitions as noticed above.

7. The University being aggrieved, challenged the judgment passed by learned Single Judge by filing the present appeal.

8. Mr. Balwant Singh Thakur, learned counsel appearing for the appellant-University vehemently argued that that the judgment passed by the learned Single Judge is not based on correct appreciation of facts available on record as well as Rules governing the field, as such, same is not sustainable, in the eyes of law. He further contended that the findings returned by the learned Single Judge that the respondents though designated as Hostel Attendants are in fact working as Hostel Assistants, are solely based upon certificate (Annexure PA) issued by the Warden of the Hostel, who was not competent to issue such certificate and as such same could not be taken into consideration while recording aforesaid findings. Mr. Thakur further argued that the learned Single Judge failed to appreciate that the post of Hostel Assistant is promotional post for feeder post of Hostel Attendants and same can not be equated as claimed by the respondents. While concluding his arguments, Mr. Thakur strenuously argued that the direction issued by the learned Single Judge to pay to the respondents pay scale of the post of Hostel Assistants from the time they were designated as Hostel Attendants, is also against law laid down

by the Apex Court as well this Court, whereby financial benefits, if any, have been restricted only to three years prior to the date of approaching the Court for redressal of their grievances.

9. Mr. B.S. Chauhan, learned Senior Advocate duly assisted by Mr. Munish Thakur, Advocate, appearing for the respondents-petitioners supported the judgment passed by the learned Single Judge. Mr. Chauhan, vehemently argued that there is no illegality or infirmity in the judgment passed by learned Single Judge and same is based upon proper appreciation of facts as well as Rules occupying the field and as such there is no scope of interference, whatsoever, for this Court, especially in view of the fact that learned Single Judge has dealt with each and every aspect of the matter meticulously. Mr. Chauhan, forcefully contended that a bare perusal of impugned judgment as well as pleadings available on record clearly suggests that the respondents though were appointed as Hostel Attendants but since their appointment, they have been regularly performing the duties of Hostel Assistants and as such impugned judgment having been passed by learned Single Judge being correct in law, deserves to be upheld.

10. We have heard the learned counsel for the parties and also gone through the record of the case.

11. Perusal of the pleadings as well as impugned judgment clearly suggests that the respondents though were regularized as Hostel Attendants vide different orders but ever since their regularization, they have been discharging and performing duties of higher post of Hostel Assistants. It is also undisputed that there are eleven hostels in the appellant-University and only four persons are occupying posts of regular Hostel Assistants, meaning thereby that learned Single Judge has rightly concluded that in the absence of adequate staff of regular Hostel Assistants, respondents are discharging and performing duties of Hostel Assistants. Perusal of Annexure PA placed on record i.e. certificate issued by Warden of the Hostel clearly suggests that respondents though appointed as Hostel Attendants in the Hostels, are looking after works like maintaining stock/store items, giving complaints of the hostel regarding electricity, maintenance etc. If aforesaid certificate having been issued by the Warden is perused juxtaposing Annexure R-3, wherein duties of Hostel Assistants have been defined, clearly suggests that for all intents and purposes, respondents have been discharging duties of Hostel Assistants. Annexure R-3 suggests that Hostel Assistants are supposed to distribute mess bills for collection of money, collection of telephone charges from students, to make reports to the concerned warden regarding complaints of water/electricity etc., to maintain register of incoming and outgoing calls of hostel.

12. Hence, this Court, after careful perusal of Annexure PA vis-à-vis Annexure R-3, sees no illegality or infirmity in the findings returned by the learned Single Judge that the respondents are performing duties of Hostel Assistants. Similarly, pleadings available on record nowhere suggest that the appellant-University placed on record material, if any, to demonstrate that respondents are actually not performing duties of Hostel Assistants. Moreover, University specifically pleaded before the writ Court that it had proposed upgradation of Hostel Attendants to the post of Hostel Assistants in the revised pay scale, which did not find favour at the level of the Government. Aforesaid admission having been made on behalf of the appellant-University clearly strengthens the claim of the respondents that for all intents and purposes, they are discharging duties of Hostel Assistants, rather, attempt on the part of the appellant to send the proposal to appropriate authority for upgradation of seven posts of Hostel Attendants to that of Hostel Assistants clearly suggests that the University had acknowledged the claim of the respondents that they have actually been discharging duties of Hostel Assistants. It also emerges from the record that there is no dispute qua the duties and responsibilities as well as work being performed by them as the same is being performed by the Hostel Assistants and as such, learned Single Judge rightly concluded that the appellant can not deny the legitimate claim of the respondents and their action in denying the pays scale of Hostel Assistants to the respondents is ex facie arbitrary, irrational and unjust.

13. Careful perusal of impugned judgment passed by learned Single Judge suggests that the same is based upon correct appreciation of law having been laid down by the Hon'ble Apex Court in a catena of judgments. Hon'ble Apex Court has repeatedly observed that the

principle of "equal pay for equal work" is not a mere slogan but a fundamental right which can be enforced through constitutional remedies prescribed therein. Hence, learned Single Judge rightly concluded that determining of grant of pay scale is not the sole prerogative of the executive, rather an aggrieved employee has every right to knock the doors of justice for the redressal of his grievances.

14. Hence this Court sees no reason to interfere with the well reasoned judgment passed by the learned Single Judge, in as much as, respondents have been held entitled to the pay scale of Hostel Assistants. However, we see substantial force in the contentions having been raised by the learned counsel representing the appellant-University that the arrears, if any, in terms of judgment passed by learned Single Judge, were required to be restricted only for the period of three years prior to the filing of writ petition.

15. The Limitation Act, 1963, for short "the Act" provides for some mechanism or period within which an aggrieved person can seek the redressal of his grievances.

16. The question arose for the first time before the apex Court in case **Jai Dev Gupta** versus **State of Himachal Pradesh and another** reported in AIR 1998 SC 2819, whether the arrears can be restricted only for three years prior to the filing of the writ petition, in terms of the mandate of Limitation Act. The question was answered in affirmative by the apex Court. It is apposite to reproduce paras 2 and 3 of the said judgment herein.

> "2. Learned Counsel appearing for the appellant submitted that before approaching the Tribunal the appellant was making number of representations to the appropriate authorities claiming the relief and that was the reason for not approaching the Tribunal earlier than May, 1989. We do not think that such an excuse can be advanced to claim the difference in backwages from the year 1971. In Administrator of Union Territory of Daman and Diu v. R. D. Valand, 1995 Supp (4) SCC 593, this Court while setting aside an order of Central Administrative Tribunal has observed that the Tribunal was not justified in putting the clock back by more than 15 years and the Tribunal fell into patent error in brushing aside the question of limitation by observing that the respondent has been making representations from time to time and as such the limitation would not come in his way. In the light of the above decision, we cannot entertain the arguments of the learned Counsel for the appellant that the difference in backwages should be paid right from the year 1971. <u>At the same time we do not think that the Tribunal was right in invoking Section 21 of the Administrative Tribunals Act for restricting the difference in backwages by one year</u>.
>
> 3. In the facts and circumstances of the case, we hold that the appellant is entitled to get the difference in backwages from May, 1986. The appeal is disposed of accordingly with no order as to costs."[emphasis supplied]

17. The Hon'ble Apex Court in another judgment delivered in case **Union of India and others** versus **Tarsem Singh** reported in (2008) 8 SCC 648, has laid down the same propositions of law and held that arrears should be restricted to three years prior to filing of writ petition. It is apt to reproduce paras 4 to 8 of the said judgment herein.

> "4. The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. A continuing wrong refers to a single wrongful act which causes a continuing injury. Recurring/successive wrongs are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court in Balakrishna S.P. Waghmare v. Shree Dhyaneshwar Maharaj Sansthan,, explained the concept of continuing wrong (in the context of Section 23 of Limitation Act, 1908 corresponding to section 22 of Limitation Act, 1963) :
>
> > It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from

the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.

5. In M.R. Gupta v. Union of India,, the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. This Court applied the principles of continuing wrong and recurring wrongs and reversed the decision. This Court held :

> "5……The appellant s grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant s claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant s claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred....
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> 6. In Shiv Dass v. Union of India, 2007 9 SCC 274, this Court held:
>
> > "8…..The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.
> >
> > 10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition.... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years.
>
> 7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong

creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

8. In this case, the delay of 16 years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to 16 years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances."

18. The apex Court in a latest judgment delivered in case **Asger Ibrahim Amin** versus **Life Insurance Corporation of India** reported in JT 2015 (9) SC 329 has also laid down the same principles of law. It is profitable to reproduce paras 4, 4.1 and 16 of the said judgment herein.

"4. As regards the issue of delay in matters pertaining to claims of pension, it has already been opined by this Court in Union of India v. Tarsem Singh, 2008 8 SCC 648 that in cases of continuing or successive wrongs, delay and laches or limitation will not thwart the claim so long as the claim, if allowed, does not have any adverse repercussions on the settled third-party rights. This Court held:

> 7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition. [emphasis is ours]

4.1. We respectfully concur with these observations which if extrapolated or applied to the factual matrix of the present case would have the effect of restricting the claim for pension, if otherwise sustainable in law, to three years

previous to when it was raised in a judicial forum. Such claims recur month to month and would not stand extinguished on the application of the laws of prescription, merely because the legal remedy pertaining to the time barred part of it has become unavailable. This is too well entrenched in our jurisprudence, foreclosing any fresh consideration.

5 to 15..... ....

16. We thus hold that the termination of services of the Appellant, in essence, was voluntary retirement within the ambit of Rule 31 of the Pension Rules of 1995. The Appellant is entitled for pension, provided he fulfils the condition of refunding of the entire amount of the Corporation's contribution to the Provident Fund along with interest accrued thereon as provided in the Pension Rules of 1995. Considering the huge delay, not explained by proper reasons, on part of the Appellant in approaching the Court, we limit the benefits of arrears of pension payable to the Appellant to three years preceding the date of the petition filed before the High Court. These arrears of pension should be paid to the Appellant in one instalment within four weeks from the date of refund of the entire amount payable by the Appellant in accordance of the Pension Rules of 1995. In the alternative, the Appellant may opt to

get the amount of refund adjusted against the arrears of pension. In the latter case, if the amount of arrear is more than the amount of refund required, then the remaining amount shall be paid within two weeks from the date of such request made by the Appellant. However, if the amount of arrears is less than the amount of refund required, then the pension shall be payable on monthly basis after the date on which the amount of refund is entirely adjusted."

[emphasis supplied]

19. Having said so, it is held that the writ petitioners are entitled to the arrears for the period of three years prior to the filing of writ petitions. The impugned judgment is modified accordingly and the appeals are disposed of, alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Smt. Raksha Devi .....Petitioner.

Versus

Smt. Uma and others .....Respondents.

CMPMO No.126 of 2013.
Judgment reserved on: 15.12.2016.
Date of decision: December 21st , 2016.

Code of Civil Procedure, 1908- Order 21 Rule 32- Section 47- A petition was filed for the execution of the decree of specific performance – the petitioner filed objections pleading that the decree is unexecutable as she is not in possession of the flat – the bank had taken possession of the flat and had auctioned it to N- objections were dismissed by the Trial Court- held, that any right created during the pendency of the suit will not affect the decree holder in view of the doctrine of lis pendens – this doctrine is also applicable to the Court sales – the petitioner had prolonged the proceedings for 3½ years after obtaining ex-parte stay order – petition dismissed with the cost of Rs.30,000/-. (Para-6 to 20)

Cases referred:

Jayaram Mudaliar versus Ayyaswami and others AIR 1973 SC 569

Guruswamy Nadar versus P.Lakshmi Ammal (D) by L.R.s and others AIR 2008 SC 2560,

For the Petitioner : Mr.P.S.Goverdhan, Advocate vice Mr.V.S.Chauhan, Advocate.
For the Respondents: Mr.Anupinder Rohal, Advocate vice Mr.Tek Chand Sharma, Advocate, for respondents No.1 and 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Article 227 of the Constitution of India is directed against the order dated 07.01.2013 passed by the learned Civil Judge (Senior Division), Court No.1, Shimla, whereby the objections filed by the petitioner under Section 47 of the Code of Civil Procedure came to be dismissed.

2. It is not in dispute that the suit filed by the decree holders was dismissed by the learned trial Court, however, the said judgment and decree was reversed by the learned first appellate Court and the operative portion of the judgment reads thus:-

> *"34. ……The defendant No.1 is directed to execute and register a sale deed of the disputed premises i.e. one room, one kitchen, another room between kitchen and bath/WC towards Eastern side Ashok Sharma building in the ground floor of a house built on 4/59 shares, measuring 0-4 biswa, out of the land comprised in Khata Khatauni No.14/14, 15, Khasra No.214/202 and 201/52, kitas 2, measuring 2 bighas 19 biswas, situated at Village Shakral, Pargana Chabrogti, Tehsil and District Shimla, H.P. in favour of the legal representatives of original plaintiff Badri Singh (present appellants) within a period of three months from today itself. The stamp duty and other expenses of execution and registration of sale deed shall be borne by the appellants (legal representatives of the original plaintiff). The parties are left to bear their own costs."*

3. The respondents on the basis of the judgment and decree passed by the learned first appellate Court filed execution petition under Order 21 Rule 32 of the Civil Procedure Code for execution of decree of specific performance. On receiving notice from the learned executing Court, the petitioner filed objections under Section 47 of the Code of Civil Procedure on the ground that the decree in question is unexecutable against the petitioner as she is not in possession of the flat in question. It was also averred that husband of the petitioner had procured loan to run his company known as 'M/s N.R. and Company' and mortgaged the entire building with Banker i.e. UCO Bank. The husband of the petitioner could not liquidate the loan amount, therefore, the Banker took possession of the building under SARFESI ACT and auctioned the same to one Shri Naresh Chauhan for an amount of Rs. 24.50 lacs. The petitioner was intimated by the Banker through letter dated 14.02.2008 informing that the premises in question had been auctioned in a private bid to Shri Naresh Chauhan for total amount of Rs. 24.50 lacs. The petitioner tried to liquidate the loan amount, but she could not do so and as per her information, the same has been confirmed in favour of the auction purchaser. The husband of the petitioner faced great losses in the business and went in depression due to which he left the petitioner and minor daughter and his whereabouts are not known.

4. The objections preferred by the petitioner were dismissed by the learned Executing Court vide its order dated 07.01.2013 (for short 'impugned order'). It is against this order that the petitioner has approached this Court by invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution.

5. It is contended by the learned counsel for the petitioner that the findings recorded by the learned executing Court are totally perverse as it has failed to take into consideration that the petitioner is neither in possession nor owner of the premises in question and, therefore, not in a position to execute the sale deed in compliance to the judgment and decree dated 30.06.2009. It is further stated that once the premises in dispute have been sold in an open auction to one Shri Naresh Chauhan, who has become the registered owner thereof, the

petitioner cannot be asked to perform, that what is impossible and deliver the premises which is not in his possession.

I have heard the learned counsel appearing for the parties and gone through the records of the case.

6. As regards the possession of the disputed premises, I find that in para-1 of the objections, the petitioner has categorically stated that the possession of the premises is already with the respondents and the said averments read thus:-

> *"1. That the judgment and decree under execution is unexcitable decree as the same can not be executed as the JD/Objector is not in possession of the flat/set regarding which decree has been passed. It is submitted that the husband of JD/objector had procured loan to run his company namely N.R. & Company and the JD/objector stood as surety in favour of the company of her husband and mortgaged the building in dispute which had been purchased from the predecessor of DH/plaintiffs long back and due to losses in the company, the husband of the JD/objector could not liquidate the said loan in time and the banker under SARFESI Act took the possession of the entire building and auction the same to one Sh. Naresh Chauhan for an amount of Rs.24.50 lacs as is clear from the perusal of letter issued by banker i.e. Uco Bank, annexed herewith. The JD/objector is not in physical possession of the same and the DH/plaintiffs are in illegal occupation of the flat and their status can not be held more than that of tenant. It is further submitted that the objector/JD is trying her level best to liquidate the loan amount and take back the possession of the building from the bank or any other person to whom the same has been handed over. As per information of the objector/JD, the auction sale has not been confirmed in the name of auctioneer so far as no intimation in that regard has not been given to her. It is worthwhile to mention here that the JD/objector is not in possession of any documents presently as all the documents with respect to building in dispute had been handed over to Bank. At the cost of repetition, JD/objector is trying her level best to deposit the loan amount and take back the possession of the building. It is further submitted that the where about of husband of the JD/objector is not known for the last more than four years. It is further submitted that the husband of JD/objector faced big losses in the business and was under great depression due to which he left the JD/objector and one daughter in the year 2007. Since then the where about of husband of JD/objector are not known. It was only for this reason that the JD/objector could not liquidate the loan amount."*

7. Once this is the admitted position, it is not understood as to how the petitioner claims that the physical possession of the premises has been taken over by the UCO Bank and how the said premises were further sold to any other person. In addition to what has been observed aforesaid, it would be noticed that the respondents in reply to the objections have categorically claimed themselves in physical possession of the premises even prior to the execution of the agreement and, therefore, any right created during the pendency of the suit would obviously not hamper their rights in view of the doctrine of lis pendens which applies to a transfer pendente lite and would prevent the rights of any third party from being fructified or getting matured.

8. It is more than settled that the doctrine of lis pendens was intended to strike at the attempts by parties to a litigation to circumvent the jurisdiction of a Court, in which a dispute of rights or interests of a immovable property was pending by a private dealings which might remove the subject matter of the litigation from the ambit of Court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are bound, by the application of the aforesaid doctrine, by the decree passed in the suit even though they may not have been impleaded in it.

9. In ***Jayaram Mudaliar*** *versus* ***Ayyaswami and others AIR 1973 SC 569***in the Corpus Juris Secundum (Vol. LIV. 570) defines the lis pendens in the following terms:-

> "*Lis pendens literally means a pending suit; and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit, pending the continuance of the action, and until final judgment therein".*"

10. The doctrine of lis pendens is available to the purchaser at the execution of sale and the doctrine further applies to the Court sales also.

11. Here, it shall be apt to reproduce the following observations made by the Hon'ble Supreme Court in ***Guruswamy Nadar****versus* ***P.Lakshmi Ammal (D) by L.R.s and others AIR 2008 SC 2560,*** which read thus:-

> "*3.....The main argument which was advanced before learned Single Judge was that Section 19 of the Specific Relief Act, 1963 provides that a decree for specific performance against a subsequent purchaser for bona fide who has paid the money in good faith without notice of the original contract can be enforced as the same is binding on the vendor as well as against the whole world. As against this, it was contended by the respondents that Section 52 of the Transfer of Property Act which lays down the principle of lis pendens that when a suit is pending during the pendency of such suit if a sale is made in favour of other person, then the principle of lis pendens would be attracted. In support of this proposition a Full Bench decision of the Allahabad High Court in Smt. Ram Peary and others v. Gauri and others [AIR 1978 All. 318] as well as a Division Bench judgment of the Madras High Court was pressed into service. Therefore, the question before us in this case is what is the effect of the lis pendens on the subsequent sale of the same property by the owner to the second purchaser. Section 19 of the Specific Relief Act clearly says subsequent sale can be enforced for good and sufficient reason but in the present case, there is no difficulty because the suit was filed on 3.5.1975 for specific performance of the agreement and the second sale took place on 5.5.1975. Therefore, it is the admitted position that the second sale was definitely after the filing of the suit in question. Had that not been the position then we would have evaluated the effect of Section 19 of the Specific Relief Act read with Section 52 of the Transfer of Property Act. But in the present case it is more than apparent that the suit was filed before the second sale of the property. Therefore, the principle of lis pendens will govern the present case and the second sale cannot have the overriding effect on the first sale. The principle of lis pendens is still settled principle of law. In this connection, the Full Bench of the Allahabad High Court in Smt. Ram Peary (supra) has considered the scope of Section 52 of the Transfer of Property Act. The Full Bench has referred to a decision in Bellamy v. Sabine[(1857) 44 ER 842 at p.843)wherein it was observed as under:*
>
> > *" It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.*
> >
> > *Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind required that the decision of the Court in the suit shall be finding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end."*

Similarly the Privy Council in Faiyaz Husain Khan v. Munshi Prag Narain [(1907) 34 Ind App 102] where the Court lay stress on the necessity for final adjudication and observation that otherwise there would be no end to litigation and justice would be defeated. The Full Bench of Allahabad High Court further referred to the work of Story on Equity IIIrd Edition,(para 406) which expounded the doctrine of lis pendens in the terms as follows:

> *" Ordinarily, it is true that the judgment of a court binds only the parties and their privies in representations or estate. But he who purchases during the pendency of an action, is held bound by the judgment that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the action. Where there is a real and fair purchase without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise, alienations made during an action might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim pendent elite, nihil innovetur; the effect of which is not to annul the conveyance but only to refer it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them."*

Normally, as a public policy once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, the principle of lis pendens has been evolved so that the litigation may finally terminate without intervention of a third party. This is because of public policy otherwise no litigation will come to an end. Therefore, in order to discourage that same subject matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked. Otherwise, litigation will never come to an end."

12. Another factor which is very intriguing is that there is no material placed on record by the petitioner wherefrom it can be gathered as to when exactly the husband of the petitioner took loan from the UCO Bank. The letter issued by the UCO Bank has been placed on record. The contents of the letter (Annexure P-6) do reveal that on account of loan taken by the husband of the petitioner, the account was declared as non performing account on 01.07.2006 and it also finds mention therein that the premises has been sold through a private sale to one Shri Naresh Chauhan for a sum of Rs. 24.50 lacs. However, that in itself is inconsequential as the suit out of which it gives rise to the decree sought to be executed was presented on 10.06.2003 and, therefore, any transaction entered into by the petitioner after the said date would be hit by the doctrine of lis pendens.

13. As regards other objections regarding there being no agreement between the parties etc., the same are not open to challenge as these objections have been conclusively decided by the first appellate Court which judgment and decree admittedly has attained finality.

14. However, before parting, I would now like to advert to another aspect of the case which relates to the all out endeavours made by the petitioner to prolong these proceedings.

15. A perusal of the order sheet indicates that further proceedings in the execution petition have been ordered to be stayed vide an ex parte order passed by this Court on 06.05.2013. Thereafter, the petitioner took no steps for getting the respondents served and eventually on 04.09.2014, this Court passed the following orders:

> *"Steps for service of respondents, complete in all respects be positively taken within a period of four weeks. If steps are not taken within the aforesaid period, petition shall automatically stand dismissed for non prosecution without any further reference to this Court. In the event of steps being taken, notices be issued to the respondents returnable for 22nd October, 2014."*

16. Lateron, vide order dated 19.12.2014, the order passed earlier on 04.09.2014 was though recalled, however, even thereafter no serious endeavour was made by the petitioner to get the respondents served, as would be evident from the order sheet dated 03.06.2015 which reads thus:-

> *"As per Registry report steps for service of co-respondents No.1 to 3 not taken. Steps be taken within two weeks. Thereafter, notices be issued to co-respondents No.1 to 3 returnable within four weeks. Be listed thereafter."*

17. Thereafter, on 03.09.2015, learned counsel representing the petitioner made out a grievance with regard to incorrect proceedings recorded by the official of this Registry and accordingly Registrar (Judicial) was directed to examine and submit his report and the matter was directed to be listed on 09.09.2015. On 09.09.2015, it was the learned counsel for the petitioner, who candidly conceded that the process fee so filed by him was lying under objection and the same escaped his attention.

18. It is eventually on 29.10.2015 that respondents No.1 and 2 came to be served, yet no steps for service of respondent No.3 were effected uptill 03.06.2016. On 21.07.2016, notices issued to respondent No.3 were stated to be awaited, however, since these were actual date notices, they could not be awaited any further and, therefore, the petitioner was directed to take fresh steps for the service of respondent No.3 within two days. Despite this order, the petitioner took no steps to serve respondent No.3 uptill 23.08.2016. Even on 23.08.2016, the process fee was filed only because the case was listed before this Court on 24.08.2016. Even thereafter, the petitioner took no steps and eventually on 30.11.2016, this Court after taking into consideration that the notices to respondent No.3 had been issued on 25.10.2016 and the statutory period of service had come to an end, concluded that respondent No.3 would be deemed to be served and was thereafter proceeded ex parte.

19. The aforesaid narration of facts makes it evidently clear that the petitioner after having obtained ex parte order from this Court has abused the process of law and managed to keep the proceedings in a state of limbo for more than 3 ½ years. Obviously, this was done with an intent to tire out the decree holders so as to make them to succumb to the illegal and unjustified demand of the petitioner and the same is not legally permissible.

20. Having said so, there is no merit in this petition and the same is otherwise nothing but an abuse of the process of the Court. Accordingly, the petition is dismissed with costs of Rs. 30,000/- to be paid to the respondents within four weeks from today and in default thereof, the respondents shall be at liberty to have the same recovered by resorting to the process of execution. Pending application, if any, also stands disposed of. Interim order dated 06.05.2013 is vacated.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh. ...Appellant

Versus

Ajay Kumar & Another. ...Respondents

Criminal Appeal No. 508 of 2011
Judgment Reserved on: 19.10.2016
Date of decision: 21.12.2016

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused No.1- accused No.2 was mother-in-law of the deceased – the accused started maltreating the deceased for bringing insufficient dowry – they used to beat the deceased – the deceased committed suicide by consuming poison – the accused were tried and acquitted by the

Trial Court- held in appeal that PW-1 admitted in cross-examination that accused had not demanded dowry at the time of marriage or till the death of deceased- statement of PW-4 is general in nature and no specific instance was given by her- material witness was not examined- the complaint stated to have been written by the deceased was suspicious – the FIR was lodged after three years and no explanation for the same was provided – the prosecution version was not proved beyond reasonable doubt and the accused were rightly acquitted by the Trial Court- appeal dismissed. (Para-5 to 18)

For the Appellant: Mr.V.S. Chauhan, Additional Advocate General with Mr.Vikram Thakur and Mr.Puneet Rajta, Deputy Advocate Generals.

For the Respondents: Mr.Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur J.

State has filed the instant appeal against the acquittal of respondents vide judgment dated 17.9.2011 passed by learned Additional Sessions Judge (II), Kangra at Dharamshala in case RBT S.C. No. 71-J/VII/2010/2007 in FIR No. 72 of 2006, registered under Sections 306, 498-A read with Section 34 of the Indian Penal Code at Police Station Jawali, District Kangra, H.P.

2. We have heard learned counsel for the parties and also have gone through the records of the case.

3. Prosecution case is that deceased Nisha Devi alias Monika was married to respondent No. 1 Ajay Kumar in the year 2004. Respondent No. 2, Shakuntla Devi was mother-in-law of deceased. After one year of marriage, respondents started maltreating deceased Nisha Devi for want of sufficient dowry in her marriage and respondents used to beat deceased Nisha Devi and did not allow her to sleep on the cot for no cot was brought by her from her parental house. On 22nd March, 2006 at about 7:00 P.M., PW-1, Surestha Devi, mother of deceased heard about death of her daughter and inquired from one Shambhu Nath. After knowing about death of her daughter, PW-1, Surestha Devi along with her relatives and villagers went to the house of accused/respondents. On information, police also reached there. After preparation of inquest report, dead body of deceased was sent for post mortem. Initially possibility of death due to asphyxia was not ruled out by doctor who conducted post mortem on 23.3.2006. However, as per chemical analysis report, deceased was found to have consumed Phosphate. In these circumstances, on 25.3.2006 FIR under Sections 306, 498-A read with Section 34 IPC was registered in pursuance to statement of PW-1, Surestha Devi. On conclusion of the trial, respondents were acquitted by the trial Court.

4. To prove allegations of dowry demand and maltreatment to deceased Nisha Devi by respondents, prosecution has relied upon statements of PW-1 Surestha Devi, PW-2 Darshan Singh, PW-3 Shambu Singh and PW-4 Tripta Devi and also complaint Ex. PW-1/B alleged to be written at the instance of deceased, Nisha Devi against the respondents.

5. Scrutiny of statements of prosecution witnesses PW-1, PW-2, PW-3 and PW-4 reflects that allegations of demand of dowry is not proved on record, rather it has been contradicted by PW-1, Surestha Devi herself by admitting in cross-examination that it was correct that accused persons did not demand dowry at the time of solemnization of marriage and also did not demand dowry from her after the marriage till the death of Nisha Devi. She admitted that they had not given any article in dowry till death of deceased Nisha Devi and respondent Ajay Kumar used to visit her house till death of her daughter. She admitted that on account of poverty, deceased was married to Ajay and she had also stated that accused Ajay Kumar had agreed for marriage by saying that he will not demand any dowry because of their poverty.

6. PW-2 Darshan Singh, uncle of deceased Nisha Devi stated that PW-1 and deceased Nisha Devi used to tell him that accused beat her for demand of dowry. However in cross-examination he stated that he did not know that deceased Nisha Devi did not like accused Ajay, but had married on account of poverty. He admitted that respondent Ajay Kumar used to visit house of in laws till death of his wife Nisha Devi.

7. PW-3 Shambu Singh is silent about the maltreatment and demand of dowry by respondents to deceased Nisha Devi or her mother.

8. Statement of PW-4 Tripta Devi is general in nature and she is not specific about time, place and date of dowry demand and torture as she has not stated any specific instance disclosed by deceased Nisha Devi to her in this regard. Her allegations are vague which cannot be basis for conviction for want of corroboration by substantial evidence on record.

9. In view of admission of PW-1 in her cross-examination, allegations of demand of dowry and maltreatment to deceased Nisha Devi by respondents stand shattered. There is no convincing and confidence inspiring evidence on record proving allegations of maltreatment by respondents for dowry.

10. Document Ex. PW-1/B relied upon by prosecution is alleged to be written at the instance of deceased Nisha Devi. PW-1, Surestha Devi in her examination-in-chief has stated that deceased Nisha Devi was taken to the house of her sister Nimo Devi and along with Nimo Devi, they went to the house of somebody, where this complaint was written. The name of that somebody was never disclosed nor Nimo Devi was examined by the prosecution, rather she was given up to avoid repetition. There was no evidence on record to show that in whose house, PW-1and Nimo Devi along with deceased Nisha Devi had visited and who scribed the document Ex. PW-1/B. Therefore, there was no question of repetition of the fact, rather Nimo Devi was a necessary witness to be examined to prove the fact, which was not stated by any other witnesses examined by the prosecution. PW-1 in her cross-examination has also admitted that this complaint (Ex. PW-1/B) was not disclosed to the police at the time of lodging of FIR.

11. Perusal of Ex. PW-1/B indicates that alleged signatures of Nisha Devi are not at a place where the same should have been in normal course after scribing application/complaint Ex. PW-1/B but the application appears to be manipulated or fabricated on blank paper already available with signature of Nisha Devi. There is suspicion about the genuineness of this document. Even PW-1, Surestha Devi, mother of deceased has not stated that this complaint was scribed at the instance of deceased Nisha Devi in her presence and even she did not disclose that who scribed this complaint. At the bottom of the document, copy of this document has been stated to be forwarded to Pradhan Gram Panchayat, Sunet, Police Post Fatehpur and also to Police Station, Jawali, but no corresponding evidence has been led to corroborate or to prove the genuineness of this document by calling record from Gram Panchayat Sunet or Police Station, Jawali, therefore, this document cannot be considered to be reliable to infer that document/complaint Ex. PW-1/B was written at the instance of deceased Nisha Devi for respondents were maltreating or beating deceased for want of dowry or otherwise.

12. There is another fact which renders document Ex. PW-1/B doubtful. The inquest report Ex. PW-7/A was prepared immediately after death of deceased Nisha Devi in presence of PW-1, her relatives and villagers accompanying her. PW-2 Darshan Singh has been cited as a witness in inquest report as relative of deceased, who identified the deceased before sending her dead body for post mortem. It was the case of the prosecution that respondents did not disclose cause of death as poisoning immediately after death and had stated that deceased died because of stomach pain. However in inquest report, it has been clearly mentioned that deceased Nisha Devi had informed one Sarla that she had consumed some poison and had asked to save her and to call her husband. At that time no complaint was lodged regarding beating or maltreatment to deceased Nisha Devi for want of dowry, despite the fact that PW-1, PW-2 and other villagers were present on the spot. Sarla was an important witness, who was neither cited as a witness nor

examined by the prosecution and her non-examination definitely invites adverse inference against the prosecution.

13. The prosecution has failed to explain the reasons for registration of FIR after three days of the death, particularly when there is no reference of any maltreatment and demand of dowry in inquest report Ex. PW-7/A, which was prepared immediately after death of deceased Nisha Devi before sending her dead body for post mortem. It indicates that registration of FIR against the respondents was an afterthought for extraneous reasons, best known to the prosecution. It is a case of no specific and conclusive evidence against the respondents with regard to maltreatment or demand of dowry from deceased, her parents or relatives.

14. Learned Deputy Advocate General contended that in present case, death has taken place within seven years of the marriage and that too for demand of dowry and he further argued that even if the demand of dowry is not proved, then provisions of Sections 113-A and 113-B of the Indian Evidence Act, 1972 (for short the 'Act') for drawing presumption for abetment of suicide to deceased Nisha Devi by subjecting her to cruelty are attracted.

15. In our opinion Section 113-B is not attracted in the present case because for drawing presumption under Section 113-B of the Act, initial burden lies upon the prosecution to prove demand of dowry and only thereafter Court shall presume that respondents had caused dowry death. In present case, there is no confidence inspiring evidence on record to prove that respondents had ever made any demand of dowry or had maltreated deceased for such demand or otherwise. Therefore, Section 113-B of the Act is not applicable in the present case.

16. In so far as Section 113-A is concerned, under this Section the Court may presume having regard to all the other circumstances of the case that respondents had abetted deceased Nisha Devi for committing suicide. Scrutiny of statements of PW-1, PW-2, PW-3 and PW-4 do not disclose any cruelty on the part of respondents for want of dowry or otherwise and the evidence led by prosecution is not sufficient to hold that deceased Nisha Devi was ever subjected to any cruelty by respondents for want of dowry or otherwise. Therefore, the provision of Section 113-A of the Act is also not attracted in the present case.

17. Respondents have been acquitted by learned trial Court and presumption of innocence of respondents has been fortified. In such case burden of proving guilt of respondents heavily lies upon prosecution.

18. In view of above discussion, prosecution has failed to prove the case against the respondents by leading cogent, reliable, trustworthy and confidence inspiring evidence. Learned trial Court has correctly and completely appreciated the evidence on record and has rightly acquitted the respondents. No case for interference is made out in the present appeal, therefore, the same being devoid of any merit, is dismissed. Personal bail and surety bonds of respondents are discharged. Record be sent back to the trial Court.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J.

National Insurance Company Ltd. through its Divisional Manager ....Appellant

Versus

Rajveer Kaur d/o Sh. Major Singh and others ....Non-appellants

FAO No. 441/2011-D
Order Reserved on 22.09.2016
Date of Decision : 22.12.2016

Motor Vehicles Act, 1988- Section 166- Deceased was travelling with N on motorcycle – a truck being driven by respondent No.1 in a rash and negligent manner came from the opposite side and hit the motorcycle – the deceased and pillion rider fell down and sustained multiple injuries –

deceased was taken to hospital but succumbed to the injuries – compensation of Rs.6,01,000/- was awarded by the Tribunal jointly and severally along with interest @ 7% per annum- held in appeal that monthly income was assessed as Rs.3,600/- per month- 1/3rd amount was to be deducted towards personal expenses – the loss of dependency would come out as Rs.2,400/- per month- the age of the deceased was 24 years and Tribunal had applied multiplier of 17 – the burden to prove the breach of the terms and conditions of the policy was upon the insurance company- no evidence was led by the insurer to discharge the burden- the Insurance Company was rightly held liable to indemnify the insured- appeal dismissed. (Para-12 to 21)

Cases referred:

Vidyadhar Vs. Mankikrao & Another, AIR 1999 Apex Court 1441

Ishwarbhai C. Patel alias Bachu Bhai Patel Vs. Harihar Behera and another, AIR 1994 Apex Court 1341

Sarla Verma & Others Vs. Delhi Transport Corporation and another, 2009(6) SCC 121

Reshma Kumari and others Vs. Madan Mohan and another, AIR 2013 SCW 3120

United India Insurance Co. Ltd. Vs. Lehru, AIR 2003 Apex Court 1292

Pepsu Road Transport Corporation Vs. National Insurance Company, AIR 2014 Apex Court 305

For appellant : Mr. Lalit K. Sharma, Advocate

For non-appellants No.1 to 4 : Mr. N.K. Thakur, Sr.Advocate with Ms. Sneh Lata, Advocate.

For non-appellants No.5 to 7 : None

The following order of the Court was delivered:

P. S. Rana, J.

Decision:

Present appeal is filed against award dated 31.08.2011 passed by learned Motor Accident Claims Tribunal Fast Track Court Una (H.P.) announced in M.A.C. Petition No.14/09 title Rajveer Kaur and others Vs. Naresh Kumar & Others.

Brief facts of case:

2. Rajveer Kaur and others filed petition under section 166 of Motor Vehicles Act 1988 pleaded therein that on dated 10.03.2009 deceased Major Singh s/o Sh. Balkar Singh alongwith pillion rider Mandeep Singh s/o Sh. Hardeep Singh were travelling on motor cycle No.A/F. It is pleaded that at about 5.30 PM when motor cycle No.A/F reached near petrol pump at village Baruhi Tehsil Amb Distt. Una (H.P.) a truck having registration No.HP-12A-9281 came from opposite side which was driven in rash and negligent manner by co-respondent No.1 without observing traffic rules. It is further pleaded that truck struck with the motorcycle and deceased as well as pillion rider of the motorcycle fell down on the road and sustained multiple grievous injuries on their body and deceased became unconscious. It is further pleaded that accident took place due to rash and negligent driving of truck No.HP-12A-9281 driven by Naresh Kumar s/o Sh. Dharam Pal. It is further pleaded that after accident deceased was shifted to Regional Hospital Una by local people in unconscious condition where deceased was medically examined by Medical Officer. It is further pleaded that after first aid deceased was referred to PGI Chandigarh for better treatment. It is further pleaded that deceased was admitted in PGI where he remained admitted w.e.f. 11.03.2009 to 12.03.2009 and died on 12.03.2009 at about 9.00 PM in PGI. It is further pleaded that petitioners have spent about Rs.50,000/- on the treatment of deceased and postmortem of deceased was conducted at PGI on 13.03.2009 vide postmortem report No.12979. It is further pleaded that accident occurred due to rash and negligent driving by co-respondent No.1. Age of the deceased pleaded as 25 years. Occupation of deceased pleaded as agriculture and monthly income of the deceased pleaded as Rs.15,000/- per month from agriculture and Rs.5,000/- per month by way of selling milk. It is further pleaded that FIR

No.35/2009 dated 10.03.2009 under sections 279/337/304A IPC was registered. It is further pleaded that deceased sustained multiple grievous injuries on various parts of the body including head injury. It is further pleaded that petitioners No.1 & 2 are children and petitioner No.3 is widow and petitioners No.4 & 5 are mother and father of deceased respectively. Compensation to the tune of Rs.15 lacs alongwith interest @9% per annum from the date of filing petition till its realization sought.

3. Per contra response filed on behalf of co-respondents No.1 & 2 pleaded therein that present claim petition is not maintainable and petition is bad for non-joinder of necessary parties. It is pleaded that false case under sections 279/337/304A IPC registered against co-respondent No.1. It is further pleaded that motorcycle which was driven by deceased was coming from Amb side in rash and negligent manner and struck with backside of truck. Death of deceased is admitted. It is further pleaded that death was caused due to own negligence of deceased. Prayer for dismissal of appeal sought.

4. Per contra response filed on behalf of co-respondent No.3 pleaded therein that petitioners have no cause of action. It is pleaded that deceased himself was driving motorcycle. It is pleaded that accident occurred due to rash and negligent driving by deceased. It is further pleaded that petition is bad for non-joinder of necessary parties. It is pleaded that driver of alleged vehicle No.HP-12A-9281 was not having valid and effective driving licence at the time of accident. It is further pleaded that vehicle was used in violation of terms and conditions of insurance policy. Prayer for dismissal of appeal sought.

5. As per pleadings of parties learned Motor Accident Claims Tribunal framed following issues on dated 23.02.2010:

(1) Whether deceased Major Singh died because of rash and negligent driving of truck having registration No.HP-12A-9281 driven by Naresh Kumar co-respondent No.1 on dated 10.03.2009 at about 5.30 PM at village Baruhi? .....OPP.

(2) Whether petitioners are entitled to compensation if so how much and from whom? .....OPP

(3) Whether petition is not maintainable? .....OPR.

(4) Whether petition is bad for non-joinder of necessary parties? .....OPR.

(5) Whether driver of truck No.HP-12A-9281 was not having valid and effective driving licence at the time of accident. If so its effect?.....OPR.

(6) Whether vehicle in question was used in violation of terms and conditions of insurance policy?.....OPR.

(7) Relief.

6. Learned Motor Accident Claims Tribunal decided issues No.1 & 2 in affirmative and decided issues No.3, 4, 5 & 6 in negative. Learned Motor Accident Claims Tribunal allowed the petition and granted compensation to the tune of Rs.6,01,000/- jointly and severally. Learned Motor Accident Claims Tribunal also awarded interest @7% per annum from the date of filing petition till realization. Learned Motor Accident Claims Tribunal further held that insurance company being insurer of the truck is under legal obligation to indemnify the owner of the vehicle with regard to compensation. Learned Motor Accident Claims Tribunal further directed that compensation will be shared by the petitioners equally. Learned Motor Accident Claims Tribunal further directed that share of minor petitioners would be deposited in Nationalized Bank till they attain the age of majority. Feeling aggrieved against the award passed by Learned Motor Accident Claims Tribunal insurance company filed present petition under section 173 of Motor Vehicle Act 1988.

7. Court heard learned Advocates appearing on behalf of parties and also perused the entire record carefully.

8. Following points arises for determination:

1) Whether appeal filed by insurance company is liable to be accepted as mentioned in memorandum of grounds of appeal?

2) Relief.

Findings upon Point No.1 with reasons:

9. PW-1 HC Puran Bhagat has stated that he has brought the summoned record and copy of FIR is Ext.PW1/1 which is correct as per original record. He has stated that challan was filed in the Court on 27.06.2009. He has denied suggestion that false FIR registered.

10. PW-2 Smt. Gurpreet Kaur has tendered into evidence affidavit Ext.PW2/A in examination-in-chief. There is recital in the affidavit that on dated 10.03.2009 her deceased husband namely Major Singh was travelling upon motorcycle. There is further recital in the affidavit that at about 5.30 evening when deceased reached near Petrol Pump Baruhi then truck having registration No.HP-12A-9281 came from opposite side in fast speed and in negligent manner. There is further recital in the affidavit that Naresh Kumar was driving truck No.HP-12A-9281 in opposite direction in rash and negligent manner and struck with motorcycle. There is further recital in the affidavit that husband of deceased fell down upon road and sustained grievous injuries. There is further recital in the affidavit that deceased became unconscious. There is further recital in the affidavit that accident took place due to rash and negligent driving of truck No.HP-12A-9281. There is further recital in the affidavit that injured was brought to Una hospital for medical treatment and thereafter deceased was referred to PGI Chandigarh for medical treatment. There is further recital in the affidavit that husband of deponent remained admitted in hospital w.e.f. 11.03.2009 to 12.03.2009. There is further recital in the affidavit that on dated 12.03.2009 at 9.00 PM husband of deceased died. There is further recital in the affidavit that petitioners have spent Rs.50,000/- upon medical treatment of deceased. There is further recital in the affidavit that postmortem of deceased was conducted. There is further recital in the affidavit that deponent has two minor daughters. There is further recital in the affidavit that Gurdeep Kaur and Balkar Singh are mother-in-law and father-in-law of deponent. There is further recital in the affidavit that deponent is owner of 80 kanals of land and is also owner of truck. There is further recital in the affidavit that profession of deceased was agriculture. There is further recital in the affidavit that all the petitioners were dependent upon deceased. In cross-examination PW-2 has stated that accident did not take place in her presence. She has stated that she has no documentary evidence relating to income of deceased. She has stated that she is not in possession of any pass book issued by the bank. She has stated that her deceased husband was truck driver. She has stated that land is in ownership of her father-in-law. She has stated that she has two brothers-in-law also. She has denied suggestion that she has claimed excessive compensation.

11. PW-3 Sh. Mandeep Singh has tendered into evidence affidavit Ext.PW3/A in examination-in-chief. There is recital in the affidavit that on dated 10.03.2009 he was travelling with deceased upon motorcycle. There is further recital in the affidavit that at about 5.30 evening when motorcycle reached near Petrol Pump Baruhi then truck having registration No.HP-12A-9281 came from opposite side in fast speed and in negligent manner and struck with motorcycle. There is further recital in the affidavit that due to accident deceased sustained injuries upon his head and other parts of body. There is further recital in the affidavit that deponent also sustained injuries. There is further recital in the affidavit that accident took place due to rash and negligent driving of truck. There is further recital in the affidavit that deceased was not at fault. There is further recital in the affidavit that deceased Major Singh died due to accident. In cross-examination he has denied suggestion that motorcycle was driven in fast speed. He has also denied suggestion that deceased could not control motorcycle. He has denied suggestion that deceased died due to his own negligence.

12. RW-1 Sh. Naresh Kumar has tendered into evidence affidavit Ext.RW1/A in examination-in-chief. There is recital in the affidavit that on dated 10.03.2009 he was driving

truck having registration No.HP-12A-9281. There is further recital in the affidavit that deceased struck his motorcycle from the back portion of truck. There is further recital in the affidavit that accident took place due to fault of motorcycle driver. There is further recital in the affidavit that driver was holding valid licence. He has admitted that investigating agency visited the spot. He has admitted that case under sections 279/304A IPC is pending against him before criminal Court. He has admitted that his truck was taken into possession by investigating agency. He has denied suggestion that he was not in possession of valid driving licence. He has denied suggestion that he has obtained false licence from Mathura. He has denied suggestion that he has got renewed driving licence in illegal manner.

13. RW-2 Sh. Shiv Dayal has tendered into evidence affidavit Ext.RW2/A. He has stated that copy of route permit is Ext.RW2/B. He has stated that he is owner of truck having registration No.HP-12A-9281. He has stated that driver told him that accident took place due to fault of driver of motorcycle. He has stated that truck was duly insured with insurance company w.e.f. 19.10.2008 to 18.10.2009.

14. Following documents filed by parties: (1) Ext.PW-1/A is first information report. (2) Ext.PW-2/A is post mortem report of deceased. (3) Ext.RW-1/A is driving licence. (4) Ext.P-1 is identity card issued by Election Commission of India. (5) Ext.P-2 is copy of revenue record. (6) Ext.P-3 is copy of certificate of registration. (7) Ext.RW-2/A is copy of certificate of registration. (8) Ext.RW-2/B is copy of route permit. (9) Ext.RW-2/C is copy of insurance policy. (10) Ext.RX is copy of insurance policy.

15. Submission of learned Advocate appearing on behalf of insurance company that driver of truck No.HP-12A-9281 was not holding valid and effective driving licence at the time of accident and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.5 was upon insurance company. No official on behalf of insurance company appeared in witness box in order to prove issue No.5. Hence adverse inference under section 114(g) of Indian Evidence Act 1872 is drawn against insurance company. See AIR 1999 Apex Court 1441 ***Vidyadhar*** Vs. ***Mankikrao & Another.*** Also see AIR 1994 Apex Court 1341 **Ishwarbhai C. Patel alias Bachu Bhai Patel** Vs. **Harihar Behera and another.** Hence plea of insurance company that driver was not holding valid and effective driving licence at the time of accident is defeated on the concept of ipse dixit (An assertion made without proof).

16. Submission of learned Advocate appearing on behalf of insurance company that vehicle was driven in violation of terms and conditions of insurance policy is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.6 was upon insurance company. No official on behalf of insurance company appeared in witness box for the purpose of cross examination. Hence adverse inference under section 114(g) of Indian Evidence Act 1872 is drawn against insurance company. Plea of insurance company that vehicle involved in accident was driven in violation of terms and conditions of insurance policy is defeated on the concept of ipse dixit (An assertion made without proof).

17. Submission of learned Advocate appearing on behalf of insurance company that petition is bad for non-joinder of necessary parties is also rejected being devoid of any force for reasons hereinafter mentioned. Petitioners have impleaded driver of truck No.HP-12A-9281 and owner of truck as co-party in present petition. Petitioners have also impleaded insurance company as co-party in present petition. It is held that petition is not bad for non-joinder of necessary parties.

18. Submission of learned Advocate appearing on behalf of insurance company that accident took place due to fault of driving of motorcycle by deceased is also rejected being devoid of any force for reasons hereinafter mentioned. PW-3 Sh. Mandeep Singh eye witness of the accident has specifically stated that deceased had died due to rash and negligent driving of truck No.HP-12A-9281. Testimony of PW-3 Sh. Mandeep Singh is trustworthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW-3 Sh. Mandeep

Singh. There is no evidence on record in order to prove that PW-3 Sh. Mandeep Singh has hostile animus against the owner and driver of truck No.HP-12A-9281.

19. Submission of learned Advocate appearing on behalf of insurance company that excessive compensation is awarded to petitioners and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Learned Motor Accident Claims Tribunal has assessed monthly income of deceased as Rs.3600/- per month. Learned Motor Accident Claims Tribunal has detected 1/3rd personal expenses of deceased. Learned Motor Accident Claims Tribunal has assessed dependency of petitioners to the tune of Rs.2400/- per month. Age of deceased at the time of death was 25 years. Learned Motor Accident Claims Tribunal has rightly applied multiplier of 17 in accordance with law. **See 2009(6) SCC 121 Sarla Verma & Others Vs. Delhi Transport Corporation and another, See AIR 2013 SCW 3120 Reshma Kumari and others Vs. Madan Mohan and another.**

20. Submission of learned Advocate appearing on behalf of insurance company that learned Motor Accident Claims Tribunal has committed grave illegality by way of not summoning licencing clerk from Mathura is also rejected being devoid of any force for reasons hereinafter mentioned. On dated 10.02.2011 dealing clerk of RLA Una was present but learned Advocate V.K. Dharmani appearing on behalf of insurance company has given statement that he does not want to examine dealing clerk RLA Una as per separate statement placed on record. Licence was renewed from Licencing Authority Una. It is held that insurance company did not examine official of Licencing Authority Una who has renewed licence. Learned Motor Accident Claims Tribunal has rightly closed evidence of insurance company. No satisfactorily explanation given by insurance company that why insurance company did not examine licencing clerk Una when he was present in the Court on 10.02.2011. It is well settled law that when licence is renewed by the competent authority in accordance with law then insurance company is under legal obligation to indemnify the owner of the vehicle relating to third party claim. In the present case it is proved on record that truck No.HP-12A-9281 was duly insured with insurance company as per insurance policy Ext.RX placed on record w.e.f. 19.10.2008 to 18.10.2009 and premium to the tune of Rs.14,038/- was also received by insurance company relating to vehicle No.HP-12A-9281. It is held that insurance company is under legal obligation to indemnify the owner of the vehicle against third party claim. **See AIR 2003 Apex Court 1292 United India Insurance Co. Ltd. Vs. Lehru, See AIR 2014 Apex Court 305 Pepsu Road Transport Corporation Vs. National Insurance Company.** In view of above stated facts point No.1 is answered in negative. .

Point No.2 (Relief).

21. In view of findings upon point No.1 present appeal filed by insurance company is dismissed. Parties are left to bear their own costs. File of learned Motor Accident Claims Tribunal be sent back forthwith alongwith certified copy of the decision. FAO No.441/2011-D is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ... Appellant
Versus
Darshan Lal ... Respondent

Criminal Appeal No. 436 of 2011
Reserved on : 17.11.2016
Date of judgment : 22.12.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.540 kg. charas – he was tried and acquitted by the Trial Court- held in appeal that the prosecution version that accused was apprised of his right to be searched before a Magistrate or a Gazetted Officer was not proved

– no independent witness was associated – there are contradictions in the statements of other prosecution witnesses – the Trial Court had rightly acquitted the accused- appeal dismissed.

(Para-8 to 26)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258

T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the Appellant: Mr. Virender Verma, Additional Advocate General.

For the respondent: Mr. Vivek Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present appeal is preferred by the appellant/State under Section 378 of the Code of Criminal Procedure assailing the judgment of acquittal, dated 31.5.2011, passed by the learned Special Judge, Fast Track Court, Chamba, District Chamba,H.P., in Sessions Trial No.11 of 2011, whereby the accused was acquitted of the charges framed against him under Section 20 of the Narcotic Drugs & Psychotropic Substances Act,1985 (hereinafter referred to as 'the Act").

2. Briefly stating, as per prosecution story, facts giving rise to the present appeal are that on 26.2.2011, at about 1.00 p.m., a secret information was received by ASI, Jeet Singh that the accused deals in smuggling of Charas and has gone towards Chamba side for bringing Charas and if nakka is laid at Bonkhari mor (curve), the accused can be nabbed with Charas. To this effect, a daily diary report Ex.PW-6/A, was entered and sent to the Superintendent of Police, Chamba, through Constable, Subhash Chand No.572. After sending information, Investigating Officer/ASI, Jeet Singh took out I.O. kit and proceeded to the spot alongwith Constable, Anuj Kumar and Home Guard, Palwinder. The witnesses Vijay Kumar and Surinder were found standing at Toll Tax Barrier, where they were waiting for bus. He apprised Vijay and Surinder about the secret information of possession of Charas by the accused and whether or not they were ready to accompany him to Bonkhari mor. Thereafter, they both agreed to accompany him to Bonkhari mor and, as such, they were made to sit in the vehicle (Alto Car) No.HP-20D-0997, belonging to the Investigating Officer. The Investigating Officer, alongwith these witnesses and Constable, Anuj Kumar and Home Guard, Palwinder reached at Bonkhri mor at about 1.45 p.m. and laid a nakka there and started waiting for the accused by concealing their presence below the road. It has been averred that at about 3.00 pm, as per the description given by the secret source, the accused having same description, was seen coming on Chakra road, who was stopped by the Investigating Officer, who disclosed his name, as Darshan Lal son of Prithi, resident of near Kali Mata Mandir, Pathankot. The accused was intimated that he was being suspected of carrying Charas and his personal search was required to be taken. He was also apprised of his legal right to be searched before some Gazetted Officer or Magistrate, in writing, but the accused agreed to be searched by the police at spot, per memo Ex.PW-2/A. Thereafter, all the police officials and witnesses Vijay and Surinder gave their search to the accused, per memo. Ex.PW-1/A. Thereafter, personal search, of the accused was taken and during search, a polythene packet was recovered from him, which had been concealed by the accused below the belt of his trouser on the front side. The word 'Sahajada garments' was printed on the said polythene packet and on opening it, one more packet of Khakhi colour was recovered, containing black coloured hard substance in the shape of candles and balls, which, on smell and experience, was found to be Charas. Thereafter, the Charas was weighed, which was found 1kg.540 grams, with polythene packet. The Charas, so recovered, was put in the Khakhi colour packet, which in turn, was put in the packet of *'Sahajada garments'* and then the same was parceled and sealed in a piece of cloth by affixing three seals of impression **'K'.** Sample seal Ex.PW-1/B, was taken separately. NCB forms Ex.PW-10/F were completed in triplicate and seal was embossed thereon and the seal was handed over to witness Surinder and thereafter the case property was taken into

possession vide memo Ex.PW-1/C. Thereafter, rukka Ex.PW-13/A (mark B) was written and sent to the Police Station, through Constable, Anuj Kumar for registration of the case on the basis of which F.I.R. Ex.PW-10/A was registered. On the spot inspection, map Ex.PW-13/B was prepared. The accused was arrested and communicated about the grounds of his arrest, vide memo Ex.PW-1/D and his personal search was taken per memo Ex.PW-1/E. Thereafter, statements of the witnesses were recorded, as per their versions. Thereafter, the accused, case file and the case property brought to the Police Station for resealing the same and produced to the S.I. Vishwas Kumar, Additional S.H.O., who also resealed the parcel in the presence of Constable Hem Raj by affixing two seals of seal impression **'T'** and also took sample seal of 'T' on Ex.PW-1/B and embossed two seals of 'T' in NCB forms and filled relevant columns of NCB forms Ex.PW-10/F and prepared reseal memo Ex.PW-7/A and, thereafter, handed over the case file to the Investigating Officer and deposited the case property i.e. parcel NCB forms, sample seals with MHC and the accused was taken into custody. MHC entered the case property in the Malkhana register, vide Ex.PW-10/B. Special report of the case, Ex.PW-3/B, was prepared and sent to the Superintendent of Police, through Constable, Anil Kumar, who deposited the same with Head Constable Subhash Chand, Reader to the Superintendent of Police at about 3.45 p.m., which was produced before the Superintendent of Police, Chamba at 3.50 p.m. On 27.2.2011, at about 1.00 p.m., MHC, Indu Balla entrusted the aforesaid parcel, sample seals, NCB forms and copy of seizure memo and copy of FIR along with document to Constable, Suresh Kumar No.338, vide R.C. No.22/11, Ex.PW-10/C for being deposited in F.S.L., which he deposited in F.S.L. on 28.2.2011 and handed over the receipt to her. Daily diary report No.26-A, Ex.PW-10/D and daily diary report No.27-A, dated 26.2.2011, Ex. PW-10/E, were procured. Statements of witnesses were also recorded. The report of Chemical Analyst, F.S.L., Junga Ex.PX was received that the quantity of resin found in the Charas was 28.88% w/w and the same were extract of cannabis and sample of Charas.

3. A copy of the challan and other documents were supplied to the accused. On consideration, the accused was charged for the commission of offence under Section 20 of the NDPS Act, to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined, as many as, thirteen witnesses, in order to substantiate the charge against the accused.

4. After completion of the prosecution evidence, the accused was separately examined under Section 313 Cr.PC. The accused denied the prosecution case in its entirety and had not led any evidence in defence. After the completion of the trial, the learned trial Court acquitted the accused of the charges framed against him.

5. Heard. Mr. Virender Verma, Additional Advocate General has vehemently argued that the Court below has committed illegality in acquitting the accused and has not appreciated the evidence correctly and to its true perspective. The learned Court below has failed to appreciate that the prosecution has proved the guilt of the accused conclusively and beyond reasonable doubt and so the judgment of acquittal may be set-aside and the accused be convicted.

6. On the other hand, Mr. Vivek Singh Thakur, learned counsel for the respondent, has argued that the accused is innocent and the only conclusion, after appreciating the evidence on record, leads towards the innocence of the accused and there is no merit in the appeal and the same be dismissed and the accused be acquitted.

7. To appreciate the arguments of the learned counsel for the parties, we have gone through the record of the case in detail.

8. PW-1, Surinder Singh has stated that he was posted as Chowkidar in Gram Panchayat, Belly. He has further stated that he, along with police officials and one Home Guard and Vijay Kumar went with them to Bonkhari Mod. He has also stated that they were sitting below the road and at about 3.00 p.m., a person appeared from Chakra road side. The accused disclosed his name, as Darshan Lal, resident of Pathankot. The accused was told that a secret

information was gathered regarding possession of Charas by him and his search was required to be taken. During search, a polythene packet was recovered from him, which had been concealed by the accused below the belt of his trouser on the front side, which was found containing Charas. He has further deposed that before recovering Charas, no document was prepared and the documents were prepared simultaneously at the time of recovery of Charas. He has also identified his signatures and admitted that his statement was recorded by the police. He has denied that the accused had been apprised that he has a legal right to give his search before a Magistrate or Gazetted Officer. He admitted that before taking search of the accused, the police officials had given search to the accused, and he and Vijay also gave their search to the accused and memo. Ex.PW-1/A to this effect was prepared. He did not remember whether '*Sehjada Garments'* was written on the polythene packet, which was recovered from the accused. In his cross-examination, he admitted that Vijay Kumar, who was resident of village Bathari, was known to him since his childhood. He has also deposed that he was not aware about the profession of Vijay Kumar and that Village Belli is on the Banikhet-Pathankot Road towards Pathankot, whereas Bathari is on Banikhet- Chamba road towards Chamba. He has further deposed that ASI, Jeet Singh had come down on foot from Police Post, but a car was waiting for him where he was waiting for the bus. The car was of red colour, but he was not aware of the number. He also deposed that Pradhan of the Panchayat and many respectable persons reside at Banikhet and there were many houses and shops there. Benkunth is also adjacent to Banikhet on Banikhet-Chamba road and 10-12 houses and shops were situated at Benkunth Nagar. Sukdain Bain was the next destination from Benkunth Nagar towards Chamba. He has also deposed that there were 10-12 shops and houses at Bonkhari mod besides a Bus Stop. He remained at spot till 8.00 pm. Further that so long he remained present, none of the police officials left the place of occurrence. He has deposed that the parcel was prepared at the spot from cloth and the same was not stitched in his presence. He further deposed that he kept on signing the documents in the manner he was asked by the police to sign. He deposed that he was not aware of the metal of the seal and he could not depose whether the same was of rubber or wood. He also deposed that he lost the seal after 5-7 days of the incident and he did not report the authority regarding the loss of the seal. He admitted that the police officials were in uniform. He also did not disclose to the police in his statement that secret information regarding possession of the Charas by the accused had been gathered. He denied the suggestion that he had not accompanied the police to the spot and that Charas was not recovered in his presence and in the presence of Vijay. He also denied the suggestion that no documents were prepared in his presence.

9. PW-2, Constable, Anuj Kumar stated that he, alongwith other police officials, were sitting for nakka at Chakara Road and at about 3.00 p.m. one person came on foot on the Chakara road, who was stopped by ASI, Jeet Singh. On asking him, the accused disclosed his name as Darshan Lal. The accused was told that he being suspected of carrying contraband and his search was required to be taken, the accused was apprised of his legal right to be searched before a Magistrate, Gazetted Officer or the police present at the spot. However, the accused gave his consent to be searched before the police present on the spot, qua which memo. Ex.PW-2/A, was prepared, which was signed by the accused at circle 'B'. He admitted his signatures at circle 'A' on it. He has further stated that before taking search of the accused, he, along with other police officials, Vijay and Surinder gave their search to the accused person per memo. Ex.PW-1A. Thereafter, personal search of the accused was taken and a polythene packet was recovered from him, which had been concealed by him below the trouser beneath the belt. He further stated that the said polythene packet was containing words 'Shahaza garments' which was containing black coloured hard substance in the shape of balls and candles, which on experience and smell, was found Charas. The Charas, so recovered, was weighed with scales and weight, which was found 1kg.540 grams and thereafter, the same was put in the same Khakhi colour packet, which in turn, was put in the packet of *Shazada garments* and thereafter, the same was parceled and sealed in a piece of cloth with three seals of impression 'K'. Sample seal, Ex.PW-1/B was separately taken on a piece of cloth and seal was handed over to witness Surinder. NCB forms were filled in at the spot and seal was embossed thereon and thereafter, the case property was

taken into possession, vide memo, Ex.PW-1/C, which bears his signatures. He has further stated that the accused also signed the same. Thereafter, the Investigating Officer prepared rukka mark 'B' at 4.50 pm for being taken to the Police Station for registration of case, which he handed over to MHC, Police Station, Dalhousie, at 6.15 pm. He has further stated that at about 6.45 p.m. the case file was given to him by the MHC, which he delivered to the Investigating Officer at the spot at 8.30 p.m. He also identified the parcel Ex.P-1, polythene packets, Ex.P-2 and P-3 and Charas P-4 to be the same. In his cross-examination, he has stated that Vijay was known to him for the last about 1½ years, but he was not aware about his profession. He also deposed that witness Surinder Kumar was also known to him, as he used to come to the Police Post in connection with summons. He further deposed that the accused had stated that he was illiterate but knows how to sign. The accused had been explained the meaning of Magistrate and Gazetted Officer. He further stated that he has disclosed to the police in his statement that meaning of Magistrate or Gazetted Officer had been explained by him to the accused, but confronted with mark 'D' wherein it was not so recorded. He admitted that the Court of J.M.I.C. and his residence was situated at a distance of 10 kms from Chakra road. He had not read the rukka. Rukka had been sent in the presence of Surinder Singh. He has further admitted that he was having I-Card, mobile, purse pen and handkerchief and that the parcel was stitched by him on the spot in the presence of Surinder and Vijay. He further deposed that three sides of the parcel were already stitched by them and fourth side was stitched by him at the spot. He further deposed that the cloth was in the kit of the Investigating Officer and that the search of the I.O. kit was also given to the accused. He denied the suggestion that the accused was not apprehended in his presence.

10. PW-3, HC, Subhash Chand has stated that he was posted as Reader to the Superintendent of Police at the relevant time. He entered the information vide Sr. No.2935/VD on 26.2.2011. He has also admitted that Special Report Ex.PW-3/A, was given to him by Constable Anil Kumar in the office of Superintendent of Police. He produced the same before the Superintendent of Police and the concerned Superintendent of Police, after perusing the same, returned to him after appending his signatures. Said report is Ex.PW-3/B.

11. PW-4, Constable Anil Kumar stated that the Special report was given to him by ASI, Jeet Singh.

12. PW-5, Constable Subhash stated that a copy of daily diary report No.7, dated 26.2.2011, was given to him by ASI, Jeet Singh for being delivered to S.P. Chamba.

13. PW-6, HHC, Chaman Singh stated that daily diary report No.7 was entered in PP by ASI, Jeet Singh, which is Ex.PW-6/A.

14. PW-7, Constable Hem Raj stated that on 26.2.1011, ASI, Jeet Singh produced one parcel sealed with three seals of impression 'K', NCB forms, in triplicate and sample seal for resealing to SI/Addl. SHO, Vishwas Balli, who resealed the parcel by affixing two seals of impression 'T' in his presence and embossed seal 'T' in NCB forms and sample seal of seal 'T' was also taken on record Ex.PW-1/B. Reseal memo Ex.PW-7/A, was prepared and seal was handed over to him. Thereafter, the case property was handed over by Addl. SHO to MHC. He has also admitted his signatures on Memo Ex.PW7/A.

15. PW-8, Constable, Suresh Kumar stated that on 27.2.2011, MHC, Police Station, Dalhousie had handed over to him a sealed parcel sealed with three seals of impression 'K' and two seals of impression 'T' alongwith copy of FIR, sample seal, docket, NCB forms vide road certificate No.22/11, for being deposited in F.S.L., which he deposited in FSL on 28.2.2011, in safe condition and also handed over the receipt thereof to LHC Indu Balla. He admitted that so long case property remained in his custody, no tampering was done by him.

16. PW-9, ASI Surjeet Singh has stated that he prepared special report, Ex.PW-3/B and sent the same to the Superintendent of Police, Chamba, through Constable, Anil Kumar.

17. PW-10, MHC Indu Balla has stated that she was officiating as MHC, Police Station, Dalhousie. She further stated that on receipt of rukka, she entered FIREx.PW-10/A, which contained the signatures of Addl.SHO, Vishwas Balli. She also handed over the case file to Constable Anuj Kumar for delivering the same to the Investigating Officer. She also entered in the malkana register, at Sr. No.77, the parcel duly sealed with three seals of seal impression 'K' and two seals of 'T' alongwith NCB forms in triplicate, articles of *jamatalashi,* copy of seizure memo and sample seal at about 9.40 P.M. She also received the receipt issued by F.S.L. She further admitted that till the time the case property remained in her custody, no one tampered with it. She also admitted that she entered report No.26 (A), Ex.PW-10/D and daily diary report No.27 (A), Ex.PW-10/E, which are correct as per record.

18. PW-11, S.I., Vishwas Kumar stated that on the basis of a rukka, received by him through Constable, Anuj Kumar, FIR Ex.PW-10/A, was registered, which bears his signatures and, thereafter, case file was handed over to Constable, Anuj Kumar and endorsement on the rukka was also made by him, vide Ex.PW-11/A. He has further stated that on the same day, at about 9.30 PM, ASI, Jeet Singh deposited with him the case file along with accused and a parcel duly sealed with three seals of impression '**K',** containing 1kg.540 grams Charas, alongwith sample seals and NCB forms for resealing the same. He resealed the parcel in the presence of Constable, Hem Raj by affixing two seals of seal impression 'T' and NCB forms and completed relevant columns of NCB forms Ex.PW-10/F and prepared reseal memo Ex.PW-7/A. He also deposited the relevant case property with MHC and articles of *jamatalashi* to him and the case file was returned to the Investigating Officer and accused was sent in the custody. In his cross-examination, he has deposed that the vehicular distance of Police Station and place of the recovery of Charas was approximately one hour. He has further deposed that it took about ten minutes to complete the resealing process and he also instructed the witness to preserve the seal. He denied the suggestion that no resealing was done by him.

19. PW-12, Vijay Kumar stated that he has a Karyana shop at Bathari and while he was waiting for some lift to Bathari from Banikhet at a place where Surinder was also standing, at about 1.30/2.00 p.m., some police official appeared there and they called him and asked him to associate them so, he along with Surinder, were made to board the vehicle of the police officials, which was of red colour, but he does not know its number. The police officials stopped the vehicle at Bonkhari mor. When he started to proceed towards Bathari, after alighting from the vehicle, he was asked to stop by the police officials. In the meantime, the police officials told him that a person was caught with Charas and he was made to sign certain papers, but neither said person was nabbed in his presence nor Charas was recovered. He has further stated that he was not in a position to identify the said person/accused. He also could not depose that the accused was the same person. He has also deposed that his statement was recorded by the police. Witness was declared hostile and in his cross-examination, he has deposed that the police officials had laid a nakka at Chakra road. He denied the suggestion that at about 3.00 pm, the accused appeared in Chakra road and was nabbed by the police. However, some person was nabbed by the police at 3.00 p.m. He also denied the suggestion that the said person had disclosed his name, as Darshan Lal, resident of Pathankot. He denied the suggestion that the police had apprised the accused that he was being suspected of carrying Charas and his search was required to be taken. He also denied that the accused was also apprised by the police about his legal right to be searched before a Magistrate or Gazetted Officer. He has also denied that accused consented to be searched by the police party or consent memo Ex.PW-2/A, was prepared at the spot. He also admitted his signatures on Ex.PW-2/A, but admitted that he had signed six papers. He has denied the suggestion that during search of the accused in his presence, a polythene packet was recovered from the accused, which had been concealed beneath the belt. He admitted that polythene packets Ex.P-2 and P-3 and Charas Ex.P-4 had been recovered from the said person and that the parcel Ex.P-1, also bears his signatures. He has denied that Charas was weighed in his presence, but he was told that Charas recovered, was 1 Kg.540 grams. He also denied that the Charas was parceled and sealed in his presence, but three seals of impression **'K'** had been affixed in the parcel. He denied that the accused nabbed in his presence

and in the presence of Surinder. He deposed that he had not seen accused Darshan Lal at the spot, as such, he could not say about the colour of his dress. He further deposed that the police officials Jeet Ram and two other constables had asked him to board their vehicle. He has also admitted that he had also been kept, as a witness, in one another case of Charas, by the police official, namely Jeet Ram.

20. PW-13, ASI, Jeet Singh stated that he had received a secret information from some source that one Darshan Lal (accused) deals in smuggling of Charas and had gone towards Chamba side for bringing the Charas. He entered a daily diary report Ex.PW-6/A, on the basis of secret information and sent a copy to the Superintendent of Police, Chamba through Constable Subhash Chand. Thereafter, he took out I.O. Kit and proceeded to the spot alongwith Constable Anuj Kumar, Home Guard Palwinder and at Toll Tax Barrier, witnesses Vijay and Surinder were found standing, who were waiting for a bus. He apprised them about the secret information of possession of Charas by the accused and whether or not they are ready to accompany him to Bonkhari mor and they both agreed to accompany him to Bonkhari mor and, as such, they were made to sit in the vehicle (Alto) Car No.HP-20D-0997. They reached at Bonkhri mor at about 1.45 p.m. and laid a nakka there. They also started waiting for the accused by concealing their presence below the road. It has been averred that at about 3.00 pm, as per the description given by the secret source, the accused having same description, was seen coming on Chakra road, who was stopped by him, who disclosed his name, as Darshan Lal son of Prithi resident of near Kali Mata Mandir, Pathankot. The accused was intimated by him that he was being suspected of carrying Charas and that his personal searched was required to be taken. He was also apprised of his legal right to be searched before some Gazetted Officer or Magistrate, in writing, but the accused agreed to be searched by the police at spot, per memo, Ex.PW-2/A. Thereafter, all the police officials and witnesses Vijay and Surinder gave their search to the accused per memo Ex.PW-1/A. Thereafter, personal search of the accused was taken and during search, a polythene packet was recovered from him, which had been concealed by the accused below the belt of his trouser on the front side. The word *'Sahajada garments'* was printed on the said polythene packet and on opening it, one more packet of Khakhi colour was recovered, which was containing black coloured hard substance in the shape of candles and balls, which on smell and experience, was found to be Charas. Thereafter, the charas was weighed, which was found 1kg. 540 grams, with polythene packet. The Charas, so recovered, was put in the Khakhi colour packet, which was put in the packet of 'Sahajada garments' and then the same was parceled and sealed in a piece of cloth by affixing three seals of impression 'K'. Sample seal Ex.PW-1/B was taken separately. NCB forms Ex.PW-10/F were completed in triplicate and seal was embossed thereon and the seal was handed over to witness Surinder and thereafter the case property was taken into possession, vide memo, Ex.PW-1/C. Thereafter, he scribed rukka Ex.PW-13/A (mark B) and thereafter, sent the same to the Police Station for registration of the case through Constable, Anuj Kumar. Accused was arrested. The personal search of the accused was also taken after arrest memo Ex.PW-1/E. He has also recorded the statements of the witnesses, namely Vijay and Surinder. Case file was also handed over to him by Constable Anuj Kumar at the spot at about 8.30 p.m. He has further stated that after resealing the case property at the Police Station, the same was deposited by the Station House Officer to the M.H.C. Thereafter, he became busy in another case and handed over the case file to ASI, Surjeet Singh. He returned the file after investigation to him. He presented the file to SHO for preparation of challan. He further stated that the daily diary report Ex.PW-10/D was entered when the case property was presented by him for resealing purpose. In his cross-examination, he has deposed that witness Vijay Kumar was not known to him prior to 26.2.2011. He has also denied the suggestion that it becomes dark at 5.00 pm during the month of February at Bonkhari mor. Self stated that it becomes dark at about 6.30 pm during February. He has also admitted that the statements of the witnesses, was recorded by him on the road with the reflection of light from the shop of Sadhu Ram and other lights, which were on the road. He also denied the suggestion that he had not written in the statements of the witnesses that Vijay and Surinder met him at Toll Tax Barrier and that he had received secret information about possession of Charas by the accused and they should not accompany him. He has also admitted that the secret source had not been disclosed about the

colour of clothes of the accused. He also denied the suggestion that Bonkhari Mod was a busy highway. He has also deposed that the accused was wearing shirt and trouser, but was not aware about the colour thereof. He had not entered number of the vehicle in the departure report. He has deposed that after complying with Section 50 of the Act, he gave personal search of the police officials and witnesses to the accused and effected the recovery. He further denied the suggestion that consent memo was prepared after sending the rukka. He had written in the rukka that accused was apprised about his legal rights to be searched before a Magistrate or Gazetted Officer. He denied the suggestion that accused did not appear at Chakra road. He has also denied that witnesses were not present with him at the spot. He denied the suggestion that no Charas was recovered from the accused and the accused was not apprised of his legal right of search before Magistrate or Gazetted Officer. He has also denied the suggestion that no proceedings were conducted at the spot and that parcel and other case property were not produced for resealing by him before the Station House Officer.

21. There were two independent witnesses, namely Surinder Singh (PW1) and Vijay Kumar (PW12). The prosecution story is that in the presence of the independent witnesses, accused was informed that the Police has suspicion that he was carrying narcotics and the accused has legal right to be searched before a Magistrate or Gazetted Officer, but the accused gave his consent to be searched before the Police at the spot. Now, Surinder Singh, the independent witness (PW1) has stated that on 26.2.2011, he was waiting for the bus alongwith Vijay Kumar near Police Post, Banikhet, at about 1-30/1-45 PM, when ASI, Jeet Singh and Constable, Anuj and one Home Guard came to him and requested him and Vijay Kumar to accompany them to Bonkhari curve (Mor) and accordingly, they reached at Bonkhri Mod at 1-45 PM and were sitting below the road and at about 3-00 PM, accused appeared from Chakra road-side whose identity and whereabouts were ascertained and accused disclosed his name as Darshan Lal. According to him, accused was told about the secret information received qua him regarding possession of Charas and that his search is to be taken and on search, a polythene packet was recovered which had been concealed by the accused below his trouser near stomach which was found containing Charas. However, he has not stated anything that the accused had been apprised of his legal right to be searched before a Magistrate or Gazetted Officer before carrying out his search. Rather, he stated that before recovery of Charas, no documents whatsoever were prepared and the documents were prepared simultaneously at the time of recovery of Charas. Though, this witness was declared hostile by the prosecution but nothing favourable to the prosecution has come. He has specifically denied that accused had been apprised of his legal right to be searched before a Magistrate or Gazetted Officer. Though, he admitted that the accused had stated that he was ready to be searched by the police at the spot, but once the accused was not apprised of his indefeasible legal right to be searched before a Magistrate or Gazetted Officer, the whole search and recovery becomes doubtful. So, as the witness has not stated anything with regard to the fact that the accused had been apprised about his legal right to be searched before a Magistrate or Gazetted Officer, the prosecution story becomes suspicious with regard to the recovery and the benefit of it is always required to be given to the accused. At the same point of time when this witness was cross-examined by the defence counsel, he stated that he know the Investigating Officer, as he used to go to the Police Post in connection with the service of summons, as he was the Chowkidar of the Panchayat. He has further stated that the distance of his village and the Police Post was 10 Kms from his village and many other persons were there and there were 10-12 shops. It has also come in the prosecution story that the alleged recovery was effected at 3.00 PM. It is surprising why any resident of Bonkhari Mor was not associated by the police. This witness has also not supported the sealing of the samples at the spot. In his statement, he stated that no police official departed from the spot till 8.00 PM, the same is in contradiction to the contents of the F.I.R.

22. The another independent witness namely Vijay Kumar, who appeared as PW12, has also not supported the prosecution story and stated that he alongwith Surinder was taken to Bonkhari Mod from where he was about to go to his house, but was stopped by the police and in the meanwhile, he was apprised by the police that accused has been found in possession of the

Charas and was made to sign certain papers. In these circumstances, he too was declared hostile, but without any assistance to the prosecution. No doubt, he stated that the person nabbed by the police had disclosed his name as Darshan Lal and witness has identified his signatures on memo Ex.PW-2/A encircled **A** and that the parcel was also sealed in his presence, but he has denied rest of the prosecution story. He also categorically denied that the accused had been apprised of his legal right to be searched before a Magistrate or Gazetted Officer or that the accused had consented to be searched by the police party at the spot or consent memo Ex.PW-2/A was prepared at the spot. He also denied that search of the accused was carried out in his presence and a polythene packet had been recovered which had been concealed below the belt or that Charas was weighed in his presence or sample seal was taken or NCB forms were completed on the spot or rukka was sent from the spot or accused was arrested. During his cross-examination, he has stated that witness Surinder was known to him for the last about 4-5 years, but witness Surinder has stated that this witness was known to him from childhood and that he was also associated as witness in one another case after 26.2.2011. He further stated that he was not resident of Bonkhari Mor, as such, he was not required to be associated. So, he was a stock witness and, as such, his signatures were obtained somewhere else and it was projected that the accused had been nabbed in his presence. Once he has categorically stated that neither Charas was recovered in his presence nor accused had been apprised of his legal right to be searched before a Magistrate or Gazetted Officer nor the accused consented to be searched by the police, the entire prosecution case falls to ground and it is not substantiated that mandatory provisions of Section 50 of the NDPS Act have been complied.

23. Constable, Anuj (PW2) was present with the Investigating Officer and corroborated the prosecution story. As per him, rukka was written by the Investigating Officer and handed over to him at 4-50 PM, which he took to the Police Station for registration of the case and handed over to MHC at 6-15 PM and at 6-45 PM, case file was given to him by the MHC, which he further delivered to the Investigating Officer at the spot at 8.30 PM. So far as his version regarding depositing the rukka is concerned, PW1 has categorically stated that he remained at the spot till 8.00 PM and so long he remained there, no police official departed from the spot. PW-12 Vijay Kumar has also stated that no rukka was sent in his presence. PW-1 and PW-12, are also not the residents of Bonkhari Mor and belong to far off places and appear to be stock witnesses. If so, it is also doubtful that the rukka had been dispatched in the manner projected and possibility of completing all the papers lateron cannot be ruled out. According to him, accused had been explained the meaning of Magistrate or Gazetted Officer, but when confronted with his statement under Section 161 Cr.P.C. Ex.PW-13/A, said statement was silent that the accused had been explained such meaning as such an inference arises that the accused was not apprised of his legal right as projected by the independent witnesses. He has further stated that the Court of Judicial Magistrate and residence was at a distance of 10 Kms. from the spot. He also stated that the parcel was stitched in the presence of Vijay and Surinder but PW-1 has denied the same. Apparently, he was under the influence of Investigating Officer. Since the independent witnesses have not rendered assistance to the prosecution story and his version regarding explaining the meaning of the Magistrate or Gazetted Officer is silent in his statement under Section 161 Cr.P.C., possibly of deposing falsely to cover up the lacuna left by PW-1 cannot be ruled out. Therefore, his version without corroboration of independent witnesses cannot be believed.

24. Further, though the independent witness PW-1, has stated that that the accused was not informed that he has a right to be searched before a Magistrate or Gazetted Officer, meaning thereby that the provision was not complied with. At the same point of time, even PW-2, Constable Anuj Kumar has stated that the accused was apprised of his legal right to be searched before a Magistrate, Gazetted Officer or the police officials present on the spot and even this is also not a proper compliance of the mandatory provisions under the law. In these circumstances also, the findings of the Court below cannot be said to be against the law while convicting the accused.

25. It has been held in **K. Prakashan** vs. **P.K. Surenderan (2008) 1 SCC 258**, that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/mis-appreciation of evidence on record, reversal thereof by High Court was not justified.

26. The Hon'ble Supreme Court in **T. Subramanian** vs. **State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

27. In these circumstances, as the prosecution has failed to prove the guilt of the accused conclusively and beyond shadow of doubt. This Court finds that the learned trial Court has rightly dealt with the evidence and found the same to be not worthy of credence. We, thus, find no merit and substance to interfere with the well reasoned judgment, passed by learned Appellate Court and the appeal filed by the appellant is accordingly dismissed.

28. In view of the aforesaid decision of the Hon'ble Supreme Court and discussion made hereinabove, we find no merit in this appeal and the same is accordingly dismissed.

29. All the pending application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ... Appellant
Versus
Pawan Kumar and others. ... Respondents

Criminal Appeal No. 480 of 2009
Reserved on : 17.11.2016
Date of judgment : 22.12.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 505 grams charas- he was tried and acquitted by the Trial Court- held in appeal that the independent witness has not supported the prosecution version – other independent witness was given up by the prosecution – there are contradictions in the statements of official witnesses – the trial Court had rightly refused to rely upon the testimonies of the official witnesses – appeal dismissed.(Para-7 to 24)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the Appellant: Mr. Virender Verma, Additional Advocate General.
For the respondents: Mr. V.S. Rathore,Advocate, for respondent No.1.
Mr. Rajesh Mandhotra, Advocate for respondent No.2.
Mr. Chaman Negi, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present appeal is preferred by the appellant/State under Section 378 of the Code of Criminal Procedure assailing the judgment of acquittal, dated 15.5.2009, passed by the learned Special Judge(3), Kangra at Dharamshala, District Kangra, H.P., in Sessions Trial No.29-

D/VII/2006, of 2010, whereby the accused persons have been acquitted of the charges framed against them under Section 20 of the Narcotic Drugs & Psychotropic Substances Act,1985 (hereinafter referred to as 'the Act").

2. Briefly stating, as per prosecution story, facts giving rise to the present appeal are that on 13.4.2005, a Police Party consisting of ASI, Kamal Chand, HC, Bhag Chand No.69, HC, Uttam Chand No.142, HHC, Janam Singh No.377, HHC, Tungal Singh No.733, Constable, Santosh Kumar No.279 and one Ramesh Kumar son of Harbans Lal r/o countryside House, Bhagsunag, laid a naka near Jogibara on Kharadanda Road and at about 7.30 AM a Maruti Van bearing No.HP-01-0654, came which was checked by them. The vehicle was driven by Tek Chand resident of Bhagyara, P.O. Jari, District Kullu, HP and other occupants disclosed their names, as Pawan Kumar resident of Mamleeg, District Solan, who was residing at Dharamkot, District Kangra and Ganga Ram resident of Malana, Tehsil and District Kullu. It has been alleged that Pawan Kumar had a bag in his lap and on suspicion, the bag was opened, which was containing Charas in polythene packets in the shape of tablets and balls and on weighing, it was found 505 grams. In another packet of the bag, an agreement, dated 19.10.2004,containing two sheets, which was between Kala Ram and Pawan Kumar, a copy of Jamabandi of Mohal Chohla qua Khatauni No.165 to 169, dated 6.10.2004, Jamabandi for the year 1997-98, Khatauni No.261, Mohal Chohla, dated 14.10.2004 were found. Two samples of Charas, each containing 25 grams, were drawn and put in two empty cigarette packets, which were sealed with seal impression **'M'** (with 6 seals each) and the remaining 455 grams Charas was put in polythene packet and placed in the same very bag, which was put in a cloth parcel and sealed with seal impression '**M'.** It has been averred that ASI, Kamal Chand filled in NCB-I, in triplicate, and specimen impression of seal was also obtained separately and seal was handed over to Ramesh Kumar. The contraband material and other documents besides the vehicles were seized vide separate memorandum in the presence of the witnesses and a copy thereof was handed over to the accused persons. All the accused admitted the contraband, as Charas and ASI, Kamal Chand prepared rukka and sent the same to the Police Station through Constable Santosh Kumar where FIR No.78/05, dated 13.4.2005, was registered. Site plan was prepared and the statements of the witnesses were recorded by ASI, Kamal Chand, who handed-over the case property to the Station House Officer, Onkar Nath, who, in turn, resealed the same and sample seal impression **"A"** was taken and handed-over the same along with documents to MHC, Sushil. The sample was sent to the Laboratory for analysis and report was obtained. After completion of the investigations, the challan against the accused persons was put in the Court under Section 20 of the NDPS Act.

3. The accused persons in their statements, under Section 313 Cr.PC denied the prosecution case in its entirety and had not led any evidence in defence. After the completion of the trial, the learned trial Court acquitted the accused of the charges framed against them.

4. Heard. Mr. Virender Verma, Additional Advocate General has vehemently argued that the Court below has committed illegality in acquitting the accused persons and has not appreciated the evidence correctly and to its true perspective. The learned Court below has failed to appreciate that the prosecution has proved the guilt of the accused persons conclusively and beyond reasonable doubt and so the judgment of acquittal may be set aside and the accused persons be convicted.

5. On the other hand, learned counsel for the respondents/accused (hereinafter called the 'accused') have argued that the accused persons are innocent and the only conclusion, after appreciating the evidence on record, leads towards the innocence of the accused persons and there is no merit in the appeal and the same be dismissed and the accused persons be acquitted.

6. To appreciate the arguments of the learned counsel for the parties, we have gone through the record of the case in detail.

7. PW-1, ASI Bhag Chand stated that he remained posted as HC in Police Post, Forystgang. He further deposed that on 13.4.2005 at about 2.20 a.m., he alongwith ASI Kamal

Chand, HC Uttam Chand and HHC Tungal Singh and HHC Dharam Singh and Constable, Santosh Kumar were at Khara Danda Road Jogibara and performing the nakka bandi by checking the vehicles. At about 7.30 a.m., a taxi (Van) bearing No.HP-01K-0654 came from Dharamshala side and on checking the same, it was found that two persons were sitting in the rear seat and the occupants of the Car became perplexed during checking. On asking, they disclosed their names, as Pawan Kumar and Ganga Ram, resident of Solan and Kullu, respectively. The vehicle was being driven by Tek Chand. On checking the bag, it was found containing polythene packet, which was containing Charas and on weighing, it was found 505 grams and two samples were drawn, 25 grams each. The Charas was in the shape of tablets and balls. He has further stated that each sample was put in a packet and sealed with seal impression **'M'** and the remaining Charas was also put in a packet and sealed with seal impression 'M' and was taken into possession vide memo Ex.PW1/A, which was signed by accused persons and Chander Bahadur, Uttam Chand and Ramesh Chand respectively. PW1 also identified Charas as P1, sample P2 and bag P3. He also admitted that nearby the nakka/place of occurrence, there were various houses and establishments and no person from the locality was associated.

8. PW-2, Constable Santosh Kumar stated that he was posted in the Police Post, Forsythgang and accompanied ASI, Kamal Chand and was one of the members of the police party and saw Taxi HP-01K-0654, which was stopped at the time of naka at Jogibara and saw the accused persons in that vehicle. He further stated that Pawan Kumar had a bag in which was a polythene bag, which on opening found containing Charas, which was 505 grams and samples were drawn in his presence and sealed on the spot. He further stated that samples were taken in his presence and he was deputed by said Kamal Chand with the rukka, which he handed-over to the Incharge, Police Station, Dharamshala. He also identified the accused persons and bag (P3) and Charas (P1). He further stated that various vehicles were checked and they remained at nakka for about 4-5 hours. He has also admitted that nearby the place of nakka, there were many houses and establishments. He also stated that Ramesh Kumar had come on the spot and he had brought weighing scale from the shop of a goldsmith.

9. PW-3, Chander Bahadur, who was running a shop of Goldsmith at Cantt. Road, Dharamshala Cantt. since his birth, has stated that he identified his signatures at place Ex.PW3/A on seizure memo Ex.PW1/A, but denied to have seen the occurrence and seizure of the contraband material. He also did not support the prosecution case.

10. PW-4, Ramesh Kumar stated that he was running a Guest House at Bhagsunag and he did not join the proceedings on 13.4.2005 at Jogibara. He also did not support the prosecution case even when he was cross-examined by the learned P.P. after being declared hostile.

11. PW-5, ASI Subhash Chand stated that he received Special report through HHC Gungal Singh on 14.4.2005, while he was working as a Reader to Superintendent of Police and he handed over the same to Kapil Sharma, the then Superintendent of Police and that the report has been exhibited as Ex.PW5/A and extract of register as Ex.PW5/B.

12. PW-6, HC Tungal Singh has stated that he was posted in Police Station, Dharamshala since the year 2006. He had handed-over the special report Ex.PW5/A to the office of Superintendent of Police, on 14.4.2005.

13. PW-7, SHO Prem Dass was posted at Police Station, Banjar and has prepared the challan.

14. PW-8, ASI Onkar Nath has stated that he was working as Investigating Officer at Police Station, Dharamshala. He has further stated that ASI, Kamal had handed-over three packets sealed with seal impression **'M'** along NCB form along with same seal. After that, he had handed-over the material to PW10, Sushil Kumar, MHC. In his cross-examination, he stated that his seal was made of lead. He, at his own, prepared it and the seal was not allotted by the Government to him and he had lost the seal.

15. PW-9, Kamal Chand was the Investigating Officer, who headed the police party on 13.4.2005 and had laid a naka at Jogi Bara on Khara danda Road. He also proved copy of report Ex.PW9/A. He further stated that at about 7.30 a.m., a taxi Maruti Van bearing No. HP-01K-0654, which was driven by Tek Chand and two other persons, one Ganga Ram were sitting in rear seat. Pawan Kumar had on bag in his lap, which contained a polythene packet. On opening the same, Charas was found in the shape of tablets and balls. He further stated that he asked Chander Bahadur to bring weighing scale and weights. Charas was weighed, it was found 505 grams. He had deposed that Ramesh Kumar was already with the police party. Two samples, 25 grams each, were drawn. Each sample part was put in empty cigarette packet and each packet was put in a cloth packet and sealed with seal impression **'M'**. The remaining Charas was put in the polythene bag and thereafter put in a cloth parcel and was sealed with seal impression 'M'. The material was taken into possession vide memo Ex.PW1/A, and the same was signed by the accused persons, Ramesh Kumar, Chander Bahadur, Bhag Chand and Uttam Chand. Specimen impression of seal 'M', Ex.PW9/B, was obtained by him and he also filled NCB forms Ex.PW9/C. He handed over the seal to Ramesh Kumar. The report of the Chemical Examiner is Ex.PW9/D. He also prepared ruka, Ex.PW9/F and site Plan Ex.PW9/E. He also sent Special report Ex.PW5/A, through Tungal Singh, HHC. He also proved statement of Chander Bahadur Ex.PW9/G. He handed over the case property along with other documents to PW8 Onkar Nath, SHO. He also identified the Charas P1, sample P2 and Bag P3. The other documents found in the bag were Ex.A1 to A3. He has deposed that F.I.R. **(A4)** was written by Sushil Kumar and also identified his signatures on the same. He also admitted that nearby the place of nakka, there were many houses and establishments. He has also admitted that he had not associated any witness from the locality nor tried to associate any Executive Magistrate. The Chemical Report is Ex.PW9/D. He denied that he had any prior information that the accused were bringing Charas in a vehicle.

16. PW-10, Sushil Kumar, has stated that he was posted as MHC at Police Station, Dharamshala. He has further stated that PW9, Karam Chand had deposited three packets sealed with seal impression 'M' with him and further resealed it with seal impression 'A' alongwith NCB forms. He has also admitted that he made entry in the Malkhana Register and sent the sample alongwith documents to the F.S.L. He further admitted that there was no entry in the Malkhana Register about the deposit of the NCB forms.

17. It has come on record that near the alleged place of recovery, there are many houses and shops and further at a distance of 1- 2 Kms., there is Officer's Colony at Chilgarhi, Dharamshala, where Executive Magistrates and high police officers are residing. No one amongst them was associated. PW-4, Chander Bahadur has specifically stated that he did not join the proceedings and no Charas was recovered by the police in his presence, though he was cross-examined at length by the learned Public Prosecutor after being declared hostile, but he denied all the suggestions put to him by the learned Public Prosecutor. PW-4, Uttam Chand was given-up by the prosecution. PW-3, Chander Bahadur has also stated that he is running a shop of Goldsmith at Cantt. Road, Dharamshala, since his birth. He also did not support the prosecution case and he has specifically stated that neither he was called by the police nor he knows what was recovered by the police. He was cross-examined at length by the learned Public Prosecutor after being declared hostile, but nothing favourable to the prosecution has come. He has also specifically stated that he has put his signatures due to the reason that he was having affinity with the police, as his shop was situated near the Police Station. He has also not identified any accused person and he has specifically denied that the seal was handed over to Ramesh Kumar by the police when he was cross-examined. Meaning thereby that he has not supported the recovery, sealing and taking of the samples by the police on the spot.

18. In these circumstances, when the independent persons, who were associated by the police have not supported the case of the prosecution at all, we have to consider whether the learned Court below has committed illegality in not convicting the accused persons on the basis of statements of the police witnesses to this effect. It is found that A.S.I., Bhag Chand has stated that the police party consisted ASI, Kamal Chand, HC, Uttam Chand, HHC Tungal Singh, HHC

Dharam Singh and Constable Santosh Kumar, but he did not state that PW-3 and PW-4 were also with them. PW-2, Santosh Kumar, stated that he has gone to call Goldsmith and thereafter, he went to the Police Station. Even PW-4, Ramesh Kumar has denied his signature on Ex.PW-1/A. From the statement of the Police witnesses, the presence of PW3 and PW4 also becomes doubtful, resulting that the prosecution story with respect to search and seizure becomes suspicious. Further, it is in evidence of PW-8, ASI, Onkar Nath that he had resealed the samples and the remaining Charas with his own seal 'A', but he had not stated that he had also taken the specimen seal impression separately and handed over the same to the MHC. PW-10, ASI, Sushil Kumar has stated that the case property and samples were given to him by PW-9, ASI, Kamal Chand. Further, PW-10, Sushil Kumar has admitted that there is no mention in the Malkhana register that NCB forms were also deposited with him.

19. In these circumstances, the learned Court below has committed no illegality in not basing the conviction on the statement of police witnesses alone as their statements were contradictory and not inspiring confidence.

20. The result of the above discussion is that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt.

21. It has been held in **K. Prakashan** vs. **P.K. Surenderan (2008) 1 SCC 258**, that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/mis-appreciation of evidence on record, reversal thereof by High Court was not justified.

22. The Hon'ble Supreme Court in **T. Subramanian** vs. **State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

23. In these circumstances, as the prosecution has failed to prove the guilt of the accused conclusively and beyond shadow of reasonable doubt, this Court finds that the learned trial Court has rightly dealt with the evidence and found the same to be not worthy of credence. We, thus, find no merit and substance to interfere with the well reasoned judgment, passed by learned Appellate Court and the appeal filed by the appellant is accordingly dismissed.

24. In view of the aforesaid decision of the Hon'ble Supreme Court and discussion made hereinabove, we find no merit in this appeal and the same is accordingly dismissed.

25. All the pending application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Vinod Kumar and others. …Petitioners.

Versus

State of H.P. and others. …Respondents.

CMPMO No. 487/2016
Decided on: 22.12.2016

Land Acquisition Act, 1894- Section 18- Reference petition was ordered to be dismissed in default- held, that the reference petition cannot be dismissed in default and the reference Court had wrongly ordered the dismissal – direction issued to restore the reference petition to its original number and to decide the same in accordance with law. (Para-2 to 5)

Cases referred:

Khazan Singh (dead) by L.Rs. v. Union of India, AIR 2002 SC 726

Thakur Dass vs. Land Acquisition Collector and others, Latest HLJ 2003 (HP) 13
Yogesh Verma and others vs. State of H.P. and others, 2004 (1) Shim. L.C. 16

For the Petitioners: Mr. B.S. Chauhan, Sr. Advocate with Mr. Manish Datwalia, Advocate.
For the Respondents: Mr. Meenakshi Sharma, Addl. A.G. with Mr. J.S. Guleria, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (oral):

It is rather unfortunate that even after the legal position of law having been settled more than one and a half decade back, this Court is once again called upon to answer the question as to whether Reference Petition under section 18 of the Land Acquisition Act (for short the 'Act'), can be ordered to be dismissed in "***default***".

2. The impugned order reads thus:

"19.11.2015: Present : None for the petitioners.

Sh. Sudhir Sharma, Ld. Dy.D.A. for the state/respondents.

Petition called time and again, neither petitioners, nor any counsel appeared on their behalf. It is 3.55 P.M. Hence, the petition is hereby dismissed in default. File after its due completion be consigned to the records."

3. As far back as in the year 2002 (precisely 24.1.2002), the Hon'ble Supreme Court in ***Khazan Singh (dead) by L.Rs.*** v. ***Union of India***, AIR 2002 SC 726, had made it absolutely clear that reference made under section 18 of the Act cannot be dismissed in default. It would be apt to reproduce the relevant observations, which read thus:

"[7] The provisions above subsumed would thus make it clear that the Civil Court has to pass an award in answer to the reference made by the Collector under S. 18 of the Act. If any party to whom notice has been served by the Civil Court did not participate in the inquiry it would only be at his risk because an award would be passed perhaps to the detriment of the concerned party. But non-participation of any party would not confer jurisdiction on the Civil Court to dismiss the reference for default."

4. This settled proposition of law was thereafter repeatedly followed and reiterated by this Court. Reference in this regard can conveniently be made to:

i) ***Thakur Dass*** vs. ***Land Acquisition Collector and others***, Latest HLJ 2003 (HP) 13; and

ii) ***Yogesh Verma and others*** vs. ***State of H.P. and others***, 2004 (1) Shim. L.C. 16

5. In view of the above said well settled position of law, impugned order dated 19.11.2015 cannot be sustained and is accordingly set aside. Learned Additional District Judge (CBI), Circuit Court at Theog, Shimla, shall restore the Reference Petition to its original number and decide the same in accordance with law. The parties/their counsel are directed to cause appearance before the learned Additional District Judge (CBI), Circuit Court at Theog on **6.1.2017**.

6. The petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Meemo Devi .....Petitioner/Defendant.
Versus
Saroj Kumari .....Respondent/plaintiff.

CMPMO No.207 of 2016.
Date of decision: 23.12.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff/applicant filed an application seeking an ad interim injunction, which was partly allowed by the Trial Court and the defendant/respondent was restrained from mortgaging or creating charge over the suit land – however, relief of injunction for restraining the defendant/respondent from interfering with the suit land was declined on the ground that defendant/respondent was in possession of the suit land - an appeal was filed, which was allowed and the defendant/respondent was restrained from interfering with the suit land – held, that the Appellate Court had not upset the findings recorded by the Trial Court that defendant/respondent was in possession and therefore, could not have granted injunction for restraining the defendant/respondent from interfering with the suit land – petition allowed and order of Appellate Court set aside. (Para-4 to 7)

For the Petitioner : Mr.Ajay Sharma, Advocate.
For the Respondent: Mr.Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner/defendant (hereinafter referred to as the petitioner) has filed this petition under Article 227 of the Constitution of India against the judgment dated 21.03.2016 passed by the learned Additional District Judge-II, Kangra at Dharamshala, Camp at Jawali.

2. It is not in dispute that the plaintiff/respondent (hereinafter referred to as the respondent) alongwith suit for declaration and injunction had filed an application under Order 39 Rules 1 and 2 CPC which was partly allowed by the learned trial Court and the petitioner was restrained from mortgaging or creating charge over the land comprised in Khata No.137, Khatauni No.179, Khasra No.103, land measuring 0-40-23 HMs. to the extent of 3449/4023 shares i.e. 0-34-49 HMs., situated in Mohal Bhanyari, Mauza Bhali, Tehsil Jawali, District Kangra, H.P. during the pendency of the suit. However, as regards the relief of injunction restraining the petitioner from dispossessing the respondent or from transferring it by way of sale, gift or exchange the same was declined.

3. This constrained the respondent to file an appeal before the learned first appellate Court, who vide impugned judgment dated 21.03.2016 has allowed in entirety the application filed by the respondent and thereby has restrained the petitioner from dispossessing the respondent from suit land and also from alienating the suit land or creating charge over it in any manner whatsoever. It is this judgment which has been assailed by way of instant petition mainly on the ground that once the learned trial Court had found the petitioner to be in possession of the suit land, then no injunction could have been granted in favour of the respondent without first upsetting these findings.

I have heard the learned counsel for the parties and gone through the material placed on record.

4. At the outset, I may observe that the manner, in which the order passed by the learned trial Court has been set aside, is not at all satisfactory as the first appellate Court has virtually gone astray without appreciating the real controversy in issue. It was on the basis of the

material placed on record that the learned trial Court had arrived at a finding that it was the petitioner, who was in possession of the suit land and had, therefore, granted injunction to that extent, as would be clear from para-7 of the order which reads thus:-

> *"7. In regard to relief of injunction restraining the respondent from dispossessing the applicant, perusal of record shows that the applicant is herself residing at Pragpur which is clear from Marriage Certificate and copy of Parivar Register of Ramesh Chand due to which at this stage it appears that the applicant is herself out of possession due to which she cannot be dispossessed from the suit land. Further, when applicant is appearing out of possession of the suit land then in said case relief in regard to injunction restraining respondent from dispossessing the applicant cannot be granted in her favour at this stage."*

5. Evidently, the learned first appellate Court without discussing the aforesaid findings and further without even arriving at an independent conclusion that the respondent is in possession of the suit land restrained the petitioner from dispossessing the respondent, who was not even in possession of the suit land. To say the least, the findings recorded by the learned first appellate Court are perverse and, therefore, cannot be sustained in the eyes of law.

6. Consequently, this petition is partly allowed and the impugned judgment is set aside to the extent it restrains the petitioner from interfering with the possession of the respondent, who otherwise is not in possession of the suit land.

7. It is clarified that though the respondent is directed not to interfere in the peaceful possession of the petitioner over the suit land, however, at the same time, the petitioner is restrained from mortgaging, transferring the suit property by way of sale, gift or exchange or creating charge over it during the pendency of the suit.

8. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Gian Chand & ors. ...Appellants.

Versus

M/s Mohan Transport Company and others ...Respondents.

FAO No.405 of 2011.
Reserved on : 30.11.2016.
Decided on: 26.12.2016.

Motor Vehicles Act, 1988- Section 166- The vehicle fell down on the house of the claimant and caused damage to the same – MACT awarded compensation – it was pleaded that liability of the insurance company is restricted to Rs. 6,000/- and no extra premium was paid – compensation is excessive- held, that damages sustained by the petitioner were not specified in the valuation report- photographs do not show damage to the residential house – the report Ex.RW-1/A shows the damage to the extent of Rs. 17,200/- - this report was prepared by an independent person/expert – compensation was rightly assessed by the MACT- appeal dismissed.

(Para-10 to 12)

For the appellants Mr. J.R. Poswal, Advocate.

For the respondents Mr. Dinesh Thakur, Advocate, for respondent No.1.
Respondent No.2 already ex-parte.
Mr. Deepak Bhasin, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1988, is maintained by the appellants/claimants/petitioners (hereinafter referred to as the 'petitioners') for enhancing the amount awarded by learned Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P, in MAC Petition No.10 of 2007, vide impugned award dated 20.7.2011.

2. Brief facts giving rise to the present appeal are that on 8.10.2006 at about 11:00 PM, the offending vehicle Bulkar bearing No.HP-24-5740 came from Swarghat side in a very high speed and straightway struck against the STD booth and house of the petitioners and fell down on two latrines at village Chehari on National Highway-21, as a result of which, residential house, STD booth and two latrines of the petitioners were damaged. The wall of the house consisting of three storey residential building sustained cracks. It is further averred in the petition that at the time of accident, the bulkar vehicle was being driven by its driver, respondent No.2, in a very high speed and in a rash and negligent manner. There was a P.C.O machine, three telephones and the apparatus installed in the S.T.D booth, which stood completely damaged due to which the daily income earned by the petitioners from this booth has been completely stopped. The petitioners are poor persons and cannot afford expenditure to repair and rebuild the damaged portion of their house.

3. The respondents contested the claim petition. In reply on behalf of respondent No.1 preliminary objections has been raised that the petition is not maintainable and the petitioners have no locus standi to file the claim petition. On merits, it has been denied that the amount as claimed is highly excessive and exorbitant. In reply on behalf of respondent No.2, it has been submitted that no damage has been caused to the house, STD booth and other structure of the petitioners nor any accident took place due to rash and negligent driving of respondent No.2. It has been further submitted that the amount of compensation as claimed is highly excessive and exorbitant. Respondent No.2 further submitted that at the relevant time, suddenly a cow came in front of the bulker of the replying respondent and then respondent No.2 applied immediate brakes, due to which the vehicle slightly struck with the STD booth and no damage has been caused to the structure, as alleged. In reply on behalf of respondent No.3, preliminary objections have been taken that the petition is not maintainable, the petition does not disclose any cause of action against the replying respondent, the replying respondent had not issued any policy of the insurance insuring or contracting to indemnify respondent No.1 for any loss, the vehicle was being driven without relevant documents i.e. Registration Certificate, Route permit, fitness certificate, the liability of the Insurance Company is limited to the extent of Rs. 6000/-. On merits, the replying respondent submitted that no particulars of the policy of insurance have been supplied by the concerned parties.

4. The learned Tribunal below framed the following issues on 27.11.2007 :

"1. Whether on 8.10.2006 at about 11:00 PM at village Chehri, the property of the petitioner i.e. residential house etc. was damaged due to the rash and negligent driving of bulker/truck No.HP-24-5740 being driven by respondent No.2, as alleged ? OPP.

2. If Issue No.1 is proved in affirmative, to what amount of compensation, the petitioner is entitled to and from whom ? OPP.

3. Whether respondent No.2 was not possessed of a valid and effective driving licence, at the relevant time ? OPR-3.

4. Whether the offending truck/bulker was being plied without valid documents at the relevant time in contravention of provisions of Motor Vehicles Act ? OPR-3.

5. Whether the liability of respondent No.3 is limited to the extent of Rs. 6000/-only ? OPR-3.

6. Relief."

5. After deciding Issue Nos.1 and 2 in favour of the petitioners, Issue Nos.3 to 5 against the respondents No.3. Learned tribunal below allowed the claim petition, as per operative portion of the award.

6. Learned counsel appearing on behalf of the petitioners has argued that the learned Tribunal below has not taken into consideration the report given by an independent person and has given the findings which are perverse. On the other hand, learned counsel appearing on behalf of respondent No.1 has argued that it is the insurance company, who is liable to pay the compensation, as the vehicle of respondent No.1 insured with respondent No.3.

7. Learned counsel appearing on behalf of respondent No.3 has argued that the third party liability of Insurance Company under the Act, is to the tune of Rs. 6000/- and respondent No.1 has not paid extra premium for making the liability to the extent of rupees seven lacs. He has further argued that the learned Tribunal below has awarded an amount of Rs. 17,200/-, the Insurance Company has not chosen to file an appeal, as the amount was meager.

8. In rebuttal, learned counsel appearing on behalf of the petitioners has argued that the Insurance Company/respondent No.3 is liable to make the payment to the extent of full damages to the tune of Rs. 1,75,000/-.

9. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record of the case carefully.

10. The only question involved in the present case is with respect to the damages. In his statement PW-2, petitioner has deposed that as a result of the accident his S.T.D booth, latrines, bathroom and septic tank were damaged, his house sustained cracks and he had sustained loss. However, no cogent and satisfactory evidence has been led by the petitioners to prove the amount of loss sustained by them. In the valuation report Mark-A, the damages sustained by the petitioner has not been specified. The petitioners have failed to explain as to on what basis, the amount of damages have been assessed in the valuation report. In photographs Ex.PW3/A to Ex.PW3/D, it is not clear as to whether the latrines, bathrooms and septic tank have also been damaged. The damage allegedly sustained to the residential house has not been also shown in the photographs. PW-5 Mangal Nath, an eye witness had only stated that the S.T.D booth of the petitioners has been damaged and thereafter the bulkar fell down on the latrines and septic tank, however, he had not stated that the latrines and septic tank have been completely damaged. It was incumbent upon the petitioners to have led cogent and satisfactory evidence on record with respect to the damages sustained by him. On the other hand, RW-1 Sita Ram, the surveyor of the Insurance company has categorically admitted in his cross-examination that in the alleged accident one P.C.O, one bathroom at the road level and one bathroom below the road level had sustained damages and no damage was caused to the latrines and septic tank. He has further deposed that he had assessed the damages in the presence of petitioner Gian Chand. In his report, Ex.RW1/A, he has stated that the P.C.O, one bathroom at the road level and one bathroom below the road level sustained damages, but no damage has been caused to the joint bathroom and septic tank. The report of Surveyor is an important document and it cannot be brushed aside unless satisfactory evidence to the contrary is brought on record. The petitioners have failed to lead any satisfactory evidence on record contrary to the report of Surveyor and also regarding the fact that he had sustained damages with respect to latrines and septic tank, the valuation report Mark-A cannot be accepted. Hence, in the facts and circumstances of the case, report Ex.RW1/A, it can be safely held that the petitioner has sustained damages in the sum of Rs. 17,200/- only. The petitioner also claimed damages in respect of the consequential loss of business, as it has been pleaded in the petition that the daily income of the petitioner from the S.T.D booth has completely stopped.

11. The only evidence which has come on record is the report of surveyor, who was an independent person and an expert, whose report is on record, who was assessed the damages to the tune of Rs. 17,200/-. So, I find no illegality or irregularity with the impugned award

passed by the learned Tribunal below, hence the same needs no interference. As far as the liability of respondent No.3/Insurance Company is concerned, no findings are required to be given on this point, as no appeal/cross objections are maintained by the Insurance Company. No other points argued so, needs no consideration.

12. The net result of the above discussion is that the appeal is devoid of any merit deserves dismissal and the same is accordingly dismissed. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

CWP No. 3077 of 2016 alongwith
CWP No. 3079 of 2016
Reserved on: 21.12.2016
Date of Decision: December 26, 2016

1 CWP No. 3077 of 2016
Smt. Pratibha Singh ...Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & another. ...Respondents.

2. CWP No. 3079 of 2016
Sh. Virbhadra Singh ...Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & another. ..Respondents.

Income Tax Act, 1961- Section 147 and 148- Petitioner filed a return showing the income from rent, salary and interest from deposits- a notice was issued by the Income Tax Authorities – the petitioner tried to explain the source of investment as being agricultural income from Hindu undivided family- proceedings were initiated against the petitioner under Section 147 of the Act- held in the writ petition that the assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year and if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax – the original return was not subjected to assessment – however, the Assessing Officer is not precluded to re-open assessment on the basis of his finding of fact so made on the basis of fresh material so discovered in the course of assessment of next assessment year –the order rejecting objections was not cryptic – the objections were considered and rejected – the action is not ex-facie illegal – it is not a case of lack of jurisdiction – the Writ Court is not a fact finding authority- writ petition dismissed. (Para-14 to 89)

Cases referred:
Thansingh Nathmal v. The Superintendent of Taxes, Dhubri and others, AIR 1964 SC 1419
The Commissioner of Income-tax, Gujarat v. M/s A. Raman and Co., AIR 1968 SC 49
Bellary Steels & Alloys Ltd. V. CCT, (2009) 17 SCC 547
Indo Asahi Glass Co. Ltd. v. ITO, (2002) 10 SCC 444
K.S. Rashid and Son v. Income Tax Investigation Commission, AIR 1954 SC 207
Union of India Versus Guwahati Carbon Ltd., (2012) 11 SCC 651
Munshi Ram Versus Municipal Committee, Chheharta, (1979) 3 SCC 83
Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calcutta and another, AIR 1961 SC 372
S. Narayanappa and others v. Commissioner of Income-Tax, Bangalore, (1967) 63 ITR 219 : [AIR 1967 SC 523]

Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calutta and another, AIR 1961 SC 372
M/s S. Ganga Saran and sons (Pvt.) Ltd., Calcutta v. Income Tax Officer & ors, (1981) 3 SCC 143
Income Tax Officer, Cuttack and others v. Biju Patnaik, 1991 Supp. (1) SCC 161
M/s Niranjan & Co. Pvt. Ltd. v. Commissioner of Income Tax, West Bengal-I and others, 1986 (Supp) SCC 272
Sreelekha Banerjee V. Commissioner of Income Tax, (1963) 49 ITR (SC) 112
CIT v. United Commercial and Industrial Co. P. Ltd., (1991) 187 ITR 596)
Income Tax Officer, A-Ward, Lucknow v. Bachu Lal Kapoor, AIR 1966 SC 1148

For the Petitioner:	M/s Vishal Mohan, Pranay Pratap Singh, Sushant Keprate and Aditiya Sood, Advocates, for the petitioner.
For the Respondents	Mr. Vinay Kuthiala, Sr.Advocate with Ms Vandana Kuthiala, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Invoking Extra Ordinary Writ jurisdiction of this Court, petitioner lays challenge to the impugned notice dated 22.3.2016 (Annexure P-2) and order dated 24.11.2016 (Annexure P-6), whereby proceedings for assessment stands initiated by the Revenue under the provisions of Income Tax Act, 1961 (hereinafter referred to as the Act).

2. Petitioner Sh. Virbhadhra Singh (CWP No. 3079 of 2016) by way of separate petition also lays challenge to similar notice/order. As prayed for, by the learned counsel, these petitions were heard together and in principle, only facts of CWP No. 3077 of 2016, were argued before us, for difference pertains only to the amount of income declared and the dates of filing of returns under Section 139 of the Act. Hence we proceed to discuss the facts of CWP No. 3077 of 2016.

3. The issues, which this Court is called upon to consider, are: (a) whether an order passed by an authority under the Act, in view of availability of equally efficacious remedy, is amenable to interference by way of writ jurisdiction, (b) whether exercise of power by the jurisdictional authority, in initiating action for assessment of escaped income, is justiciable by a Writ Court, (c) whether the jurisdictional authority had sufficient material to form reasons of belief, (d) whether such reasons do exist and if so, can this Court go into sufficiency thereof, (e) whether sanction accorded by the appropriate authority is in accordance with law, (f) whether the order passed by the authority is in conformity with the settled procedure of law, and (g) whether action of the authorities below can be said to be arbitrary, whimsical or capricious.

4. Petitioner, a permanent resident of Himachal Pradesh is regularly assessed to income tax. On 28.07.2009, she filed a return, declaring her net taxable income for the assessment year 2009-10 (hereinafter referred to as the relevant year), to be Rs. 4,81,340/- (Annexure P-1, page 13), and the source mainly being rent, salary and interest from deposits. Prima facie, finding certain income to have escaped assessment, on 22.03.2016 she received a notice, under Section 148 of the Act, issued by the Deputy Commissioner of Income Tax, Shimla (Annexure P-2, page 16).

5. Pursuant thereto vide communication dated 25.04.2016 (Annexure P-3, page 17), petitioner chose the return already filed to be considered as the one having filed under Section 148 of the Act. Her request for supply of "reasons" for re-opening the case was acceded to vide communication dated 09.05.2016 (Annexure P-4, page 19). Her further request for supply of "approval" (sanction) of the superior officer, so made vide communication dated 02.06.2016 (page 18) was promptly met by the Department, which led to her filing detailed objections vide

communication dated 16.06.2016 (Annexure P-5, page 25) and 21.06.2016 (page-32) which now stands rejected by the Assessing Officer in terms of order dated 24.11.2016 (Annexure P-6, page 40).

6. Perusal of aforesaid communications reveals that on 22.03.2016, the Assessing Officer, forwarded his reasons of belief to the superior officer i.e. Principal Commissioner of Income Tax, Shimla and the very same day, the said officer, after expressing his satisfaction thereupon, on finding the case fit for issuance of notice under Section 148 of the Act, returned the file and same day, notice issued by the Assessing Officer, was served upon the petitioner.

7. For better appreciation, reasons so recorded by the Assessing Officer, prompting him to initiate action under Section 147 of the Act, with respect to the present petitioner are extracted as under:-

" Reasons for issue of Notice u/s. 148 of the Income Tax Act, 1961 for Assessment Year, 2009-10 in the case of Smt. Pratibha Singh.

1. Smt. Pratibha Singh is filing her income tax return in the capacity of an individual. The assessee filed her return for the Assessment Year 2009-10 on 28.07.2009 showing net income of Rs.4,81,340/-. Such income consisted of salary of Rs. 1,20,952/- and income from other source of Rs. 3,60,388/-. The return has not been scrutinized u/s 143(3) of the Income Tax Act, 1961.

2. As per the information available with the department obtained from Life Insurance Corporation (LIC), Smt Pratibha Singh invested in Life Insurance Policy in Assessment Year 2009-10 as per the details given below:-

Name of the beneficiary of the Life Insurance Policy	Date on which investment made	Amount invested (Rs.)	Policy particulars
Smt. Pratibha Singh	15.11.2008	50,00,000/-	LIC policy no. 153158575 (Growth fund)

3. Information obtained from LIC in relation to investment by Smt. Pratibha Singh is placed as Annexure –A to this note.

4. Summary of findings

4.1 I have carefully perused the return of income of Smt. Pratibha Singh (Assessment Year 2009-10) and documents obtained from LIC.

4.2 Smt. Pratibha Singh has shown her return of income of Rs. 4,81,340/- only in her return of income.

4.3 Smt. Pratibha Singh has invested Rs. 50,00,000/- in insurance policy during Financial Year 2008-09.

4.4 The gross total income of Rs. 4,81,340/- disclosed in her return was not sufficient to invest Rs. 50,00,000/- in LIC policy made by her in Financial Year 2008-09.

5. From the information obtained and analysis of return of income, it is clear that Smt. Pratibha Singh had made investments amounting to Rs. 50,00,000/- in insurance policy during Financial Year 2008-09. Smt. Pratibha Singh was the beneficiary of the investment made in the insurance policy. The meager income shown in the return for the

Financial Year 2008-09 or such income shown in previous 5 years was not sufficient to justify availability of fund for investment of Rs. 50,00,000/- in LIC policy as discussed above. Therefore, the unexplained investments made into the insurance policy needs to be assessed in the hands of Smt. Pratibha Singh, the beneficiary of the investment made.

6. Reasons forming belief

In view of the above, I have reasons to believe that an amount of at least Rs. 50,00,000/- has escaped assessment in the case of Smt. Pratibha Singh for Assessment Year 2009-10 within the meaning of section 147/148 of the Income Tax Act, 1961." (Emphasis supplied)

8. Significantly, while admitting, petitioner tried to explain the source of such investment, being an agricultural income, from a Hindu Undivided Family (HUF), a separate legal entity, inter alia comprising of herself and her husband Shri Virbhadra Singh, owner of the agricultural land in the State of Himachal Pradesh.

9. Prima facie finding her explanation not to be satisfactory, objections filed by the petitioner came to be rejected by the Assessing Officer, relevant portion whereof is extracted as under:-

"(iii) The assessee is a member of M/s Virbhadra Singh, HUF is a matter of record and needs further verification. Moreover, it has not been proved that the HUF has earned agriculture income of this large extent during the financial year 1999-2000 to 2008-09, which is more clearly established from the fact that the HUF had declared income of Rs. 16,38,940/- plus agriculture income of Rs.7,35,000/- in the assessment year 2009-10, which has been assessed as such in the original assessment order passed u/s 143(3) on 29.07.2011 by the Addl. CIT, Shimla Range, Shimla. Agricultural income of the HUF was declared as per the details given below:

Sr.No.	A.Y.'s	Agriculture Income Declared
1.	2000-01	4,50,000
2.	2001-02	5,00,000
3.	2002-03	4,50,000
4.	2003-04	6,00,000
5.	2004-05	8,00,000
6.	2005-06	9,00,000
7.	2006-07	12,05,000
8.	2007-08	16,00,000
9.	2009-10	7,35,000

So far, no other assessment/appellate order has been passed in the case of HUF for Asstt. Year 2009-10 or any previous assessment years, in which agriculture income, more than the above amounts, have been worked out by any of the Assessing Officer or Appellate authorities. Therefore, the submissions that the investment for purchase of LIC worth Rs. 50.00 lac. made during the financial year 2008-09 relevant to the assessment year 2009-10, is made out of agriculture income of the HUF is not proved and thus, can't be accepted.

(iv) From the above details, it is noticed that the HUF has earned net agriculture income of Rs. 72.40 lacs only during the period of above nine assessment years.

Thus, it can't be said that investment for purchase of LIC Policy for Rs. 50.00 Lacs in your case was made out of agriculture income of the HUF."

(Emphasis supplied)

10. It is the pleaded case of the petitioner that (a) reopening of the case is bad in law and facts, (b) there is no escapement of any income, for investment came to be made by the HUF, which fact, was known to the Assessing Officer, as very same action also stood initiated against the said entity, (c) there was no material before the Assessing Officer enabling him to form reasons of belief of escapement of any income, (d) sanction accorded is in a mechanical manner, much less without any application of mind, (e) order rejecting the objections is non speaking, (f) by exceeding jurisdiction, the Assessing Officer committed grave illegality in initiating the impugned action.

11. On the other hand, it is the pleaded case of the Revenue that (i) though in the original return, petitioner declared her income to be Rs. 4,81,340/-, but none was from agricultural source. (ii) Factum of purchase of Insurance Policy, never came to be reflected in the return filed for the relevant year. (iii) Only on receipt of information from the Office of Life Insurance Corporation of India, Shimla, such fact came to be discovered. (iv) Even in response to the notice under Section 148 of the Act, source of such investment never came to be disclosed. (v) As such on 23.05.2006, in compliance of Section 142(1) of the Act, a detailed questionnaire was issued to her. (vi) Proceedings initiated with respect to the HUF could not be completed, for on her asking, further proceedings are stayed by this Court. (vii) The income still remains un-assessed.

12. During the course of hearing, learned counsel cited following decisions which we have considered. The need to clarify such fact arises only for the reason that in the pleadings and/or proceedings conducted so far by the Assessing Officer, parties have referred to several decisions.

Mr. Vishal Mohan, learned counsel cited:

(i) GKN Driveshafts (India) Ltd. V. Income-Tax Officer and others, (2003) 259 ITR 19 : (2003) 1 SCC 72; (ii) Ajanta Pharma Ltd. v. Assistant Commissioner of Income-Tax and others, (2004) 267 ITR 200 (Bombay);(iii) Income-Tax Officer, I Ward, Distt. VI, Calcutta, and others v. Lakhmani Mewal Das, (1976) 103 ITR 437 : (1976) 3 SCC 757; (iv) Sagar Enterprises v. Assistant Commissioner, (2002) 257 ITR 335 (Guj); (v) M/s Chhugamal Rajpal v. S.P. Chaliha and others, (1971) 1 SCC 453; (vi) S.P. Agarwalla alias Sukhdeo Prasad Agarwalla v. Income-Tax Oficer, E-Ward, Dist. III(2), Calcutta and others, (1983) 140 ITR 1010 (Calcutta); (vii) Arjun Singh, Ajay Singh v. Assistant Director of Income-Tax (Investigation), (2000) 246 ITR 363 (Madhya Pradesh); (viii) Central India Electric Supply Co. Ltd. v. Income-Tax Officer, (2011) 333 ITR 237 (Delhi); and (ix) ITA No.45 of 2007, decided on 14.3.2012, titled as Commissioner of Income Tax, Shimla v. M/s Sahil Knit Fab.

Mr. Vinay Kuthiala, learned Senior Counsel cited:

(i) CWP No.347 of 2014, decided on 4.7.2014, titled as Joint Commissioner of Income Tax v. Kalanithi Maran; (ii) Commissioner of Income Tax, Gujarat v. Vijaybhai N. Chandrani, (2013) 14 SCC 661; (iii) Commissioner of Income Tax and others v. Chhabil Dass Agarwal, (2014) 1 SCC 603; (iv) Lalji Haridas v. Income-Tax Officer and another, (1961) 43 ITR 387; (v) Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers Private Limited, (2008) 14 SCC 208 = (2007) 291 ITR 500; (vi) Raymond Woolen Mills Ltd. vs. ITO (1999) 236 ITR 34 (SC) : 2008 (14) SCC 218; (vii) Phool Chand Bajrang Lal and another v. Income-Tax Officer and antoher, (1993) 203 ITR 456 : (1993) 4 SCC 77; (viii) Ess Ess Kay Engineering Co. P. Ltd. v. Commissioner of Income Tax, 247 ITR 818; (ix) Decision dated 04.03.2016, rendered by the Calcutta High Court in ITA No.297 of

2006, titled as Prem Chand Shaw (Jaiswal) V. Assistant Commissioner, Circle-38, Kolkata & Anr; (x) Sunil Kumar Jain v. CIT, 284 ITR 626 (Allahabad); (xi) Mangilal Jain V/S Income Tax Officer, (2009) 315 ITR 105 (Mad); (xii) Shankar Industries v. Commissioner of Income Tax, Central, 114 ITR 689 (Cal); (xiii) Civil Misc. Writ Petition No. 181 (Tax) of 2004, decided on 16.09.2006, by Allahabad High Court, titled as M/s Ema India Ltd. Versus Asstt. Commissioner of Income Tax Central Circle-I; (xiv) Sasi Enterprises v. Assistant Commissioner of Income Tax, (2014) 5 SCC 139; and (xv) Commissioner of Income tax v. Sophia Finance Ltd., (1994) 205 ITR 98.

13. The relevant provisions, to which our attention is invited are Sections 68, 147 to 153 of the Act.

14. Section 147 is evidently clear. Insofar as its application to the instant facts are concerned, what is required is, fulfillment of essential ingredient(s) that: (i) The Assessing Officer (ii) must have reason(s) to believe, (iii) that any income chargeable to tax has escaped assessment (iv) for any assessment year, (v) which he is empowered to (vi) may assess, and (vii) if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax having escaped assessment.

15. However, for initiating such action, in compliance of Section 148, the Assessing Officer has to (i) record his reasons (ii) forward the same to an authorized officer, as the case may be, so mentioned in Section 151, (iii) who, shall record his satisfaction, on the reasons recorded by the Assessing Officer that it is a fit case for issuance of such notice, and only thereafter, (iv) the Assessing Officer shall issue notice to the assessee requiring him/her to furnish within a specified period, return of his/her income, in a prescribed form.

16. In view of the statutory mandate, so contained in Section 153, in the given facts and circumstances, assessment proceedings are necessarily required to be completed before 31.12.2016.

17. Section 68, which deals with the concept of deemed income, provides that where any sum is found credited in the books of an assessee maintained for any previous year, and he offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee.

18. As a matter of abandoned caution, in a tabulated form we reproduce facts relevant to each one of the petitioners:

Assessment Year 2009-10	CWP 3077 of 2016, Smt. Pratibha Singh (Wife)	CWP 3079 of 2016, Shri Virbhadra Singh. (Husband) (Karta of HUF)
Date of filing of Return	Rs. 4,81,340/- on 28.7.2009 (P-1)	Rs. 5,03,330/- on 24.7.2009 (P-1)
Date of notice u/s 148 of the Act	22.3.2016 (P-2)	22.3.2016 (P-2)
Date when request for supply of reasons was made	25.4.2016	27.4.2016
Reasons supplied on	9.5.2016 (P-4)	9.5.2016 (P-4)
Objections filed on	16.6.2016 (P-5)	29.6.2016 (page 21)
Investment in LIC Policy	Rs. 50,00,000/-	Rs. 75,00,000/-

Date of rejection of objections on same ground in both the cases.	24.11.2016	24.11.2016

19. It is a common case of parties that original return filed by the petitioner, in compliance of Section 139, was not subjected to assessment under sub-section (3) of Section 143. Return dated 28.07.2009, came to be processed only under sub-section (1) of Section 143, in which there is no reference of such investment. Thereafter, the first communication inter se the parties, is the notice dated 22.03.2016, so issued by the Assessing Officer under Section 148 of the Act.

Scope of jurisdiction

20. Scope of interference with an order passed by an authority under a Statute, providing an equally alternate and efficacious remedy is now well settled. The issue is no longer res integra, hence we restrict the discussion only to the decisions pertaining to the Statute in issue.

21. A Constitution Bench of the apex Court in Thansingh Nathmal v. The Superintendent of Taxes, Dhubri and others, AIR 1964 SC 1419, observed that:

> "7.....The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Art. 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Art. 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."
>
> (Emphasis supplied)

22. A three-Judge Bench of the apex Court in The Commissioner of Income-tax, Gujarat v. M/s A. Raman and Co., AIR 1968 SC 49, held that:

> "6. The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income-tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the Income-tax Officer had in his possession any information: the Court may also determine whether from that information the Income-tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on the information in his possession he should commence a proceeding for assessment or reassessment, must be decided

> by the Income-tax Officer and not by the High Court. The Income-tax Officer alone is entrusted with the power to administer the Act; if he has information from which it may be said prima facie, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under Article 226 of the Constitution, to set aside or vacate the notice for reassessment on a re-appraisal of the evidence."
>
> (Emphasis supplied)

23. In Raymond Woolen Mills (supra), their Lordships of the Supreme Court rejected challenge to the issuance of notice for reassessment by observing that at the stage of notice, court can only consider whether there is a prima facie case for reassessment. Reopening of proceedings cannot be quashed by going into the "sufficiency" or "correctness" of the material relied upon by the assessing authority.

24. In Vijaybhai N. Chandrani (supra), the Apex Court while reversing the view taken by the High Court in quashing a notice of reassessment issued under Section 153-C of the Act, by relying upon its earlier decisions, in Bellary Steels & Alloys Ltd. V. CCT, (2009) 17 SCC 547; and Indo Asahi Glass Co. Ltd. v. ITO, (2002) 10 SCC 444, directed the assessee to first exhaust alternate remedies provided under the Act, by filing reply to the notice and take consequential action, if any, before the jurisdictional forum.

25. In Chhabil Dass Aggarwal (supra), in somewhat similar circumstances, where notice issued under Section 148 of the Act and the ex-parte assessment proceedings came to be quashed by a writ Court, the Apex Court, by referring to its several judicial pronouncements, including that of the Constitution Bench (Five Judges) in K.S. Rashid and Son v. Income Tax Investigation Commission, AIR 1954 SC 207, observed that restriction of not entertaining a writ petition, when an efficacious and alternate remedy is available, is self imposed. It is essentially a rule of policy, convenience and discretion, rather than the rule of law. Only where an exceptional case warranting interference; existence of sufficient grounds; for invoking extra ordinary jurisdiction, is made out, power, which is discretionary in nature, must be exercised. Where hierarchy of appeal is provided by a statute, party must exhaust the statutory remedies before invoking the writ jurisdiction. The right or liability created by a statute giving a special remedy for enforcing it must be availed of. The Court reiterated the principle laid down in Union of India Versus Guwahati Carbon Ltd., (2012) 11 SCC 651 and in Munshi Ram Versus Municipal Committee, Chheharta, (1979) 3 SCC 83, that when a statute provides for a person aggrieved, a particular remedy to be sought in a particular Forum and in a particular way, it must be sought in that manner, to the exclusion of all other modes and Forums. But it did recognize certain exceptions to this rule and that, inter alia being, where the action of the statutory authority is not in accordance with the statutory provisions; in defiance of fundamental principles of judicial procedure; and in total violation of principle of natural justice.

26. Justifying the action of the petitioner in bypassing the statutory remedy and directly assailing the notice for reassessment, Mr. Vishal Mohan, learned counsel, seeks reliance on the decision rendered by the Bombay High Court, in Ajanta Pharma Ltd. (supra). The decision came to be rendered in the given facts and circumstances, where reason for reassessment being non-discloser of invoice/details of the purchase of the trading goods exported and failure to co-relate the trading exports with the trading goods exported was found to have been non-existent, in fact contradicted from the record rendering the reasons of the Assessing Officer to be totally "flimsy" and not "sufficient to draw conclusion about the escapement of income" and there being "no material" before the Assessing Officer, entitling him to reopen the case of assessment, the Court found the notice so issued to be ex-facie, bad in law. Hence it exercised its discretionary power in quashing such action. Significantly, the Court observed that a writ would lie only if the impugned action is ex-facie without jurisdiction or again in excess of the jurisdiction vested in the authority or the action being totally arbitrary. It cautioned that extra ordinary jurisdiction cannot be allowed to be availed as a matter of course and while deciding the issue of jurisdiction,

finding of the authority on the factual aspect may be necessary, in which case, necessarily the assessee would be required to approach the Assessing Officer.

27. Mr. Vinay Kuthiala, learned Senior Counsel, also invites our attention to a decision dated 16.09.2006, rendered in Ema India Ltd. (supra), which we need not discuss in view of the settled position of law.

28. Thus it cannot be said that jurisdiction of this Court, in entertaining a petition even when an equally efficacious remedy is available to a party, is totally ousted. Notwithstanding the statutory remedies available to the aggrieved party, restriction imposed by a writ Court is more in the nature of restraint. With the ever increasing and growing scope of judicial review, exercise of extraordinary writ jurisdiction cannot be circumscribed.

29. But however, in the given facts and circumstances, for reasons to follow, we do not find the petitioner to have made out a case warranting interference in a petition filed under Article 226 of the Constitution of India.

30. While contending that this Court has no jurisdiction to quash the order of rejection of objections by the Assessing Officer, Shri Vinay Kuthiala, learned Senior Advocate, seeks reliance on the decision rendered by the High Court of Madras in Kalanithi Maran (supra). We are unable to persuade ourselves to agree with such submission. The procedure for filing the objections and obligations to decide the same, came to be evolved with following observations made by the apex Court in GKN Driveshafts (supra), wherein it is held as under:

> "5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years."

31. Since then, the practice has been in vogue. The mechanism evolved is only a safeguard, a protection from harassment of the assessee, for avoiding unwarranted harassment, from undesirable adjudicatory process, so initiated, perhaps on jurisdictional error or such material which ex-facie may be false or reason(s) which prima facie appears to be baseless or without any cause or justification. The object being, affording an opportunity to an assessee of putting across its case, by placing authentic and undisputed material, satisfying no escapement of income from assessment, enabling the authority to consider, and if so required, drop the proceedings. There can be a fact situation where out of malice or for extraneous reasons, an Assessing Officer may decide the objections, in a palpably illegal manner. What if it is against the mandate of the said decision? In any event, orders passed by a Statutory authority are always amenable for challenge in a writ Court which power, perhaps the Court may exercise, when warranted, in the attending facts and circumstances.

Non Cooperative Attitude

32. Non cooperative attitude and conduct of the petitioner is vehemently pressed as a primary ground for rejection of the petition. Specific attention is drawn to the affidavit filed in response to the petition: (a) petitioner failed to furnish information during the entire period of 8½ months. (b) Save and except for filing of photocopies of few bank accounts; unverified and unauthenticated statement of account of the loaner and the order of reassessment so passed qua him, no information privy only to the petitioner, stands furnished. (c) No response to a detailed questionnaire dated 23.5.2016 is furnished. (d) Endeavour of the revenue in having a centralized investigation and assessment of all parties concerned, has, yet not, yielded any result, for such order came to be quashed by this Court and now the matter is pending before the Apex Court. (e)

On the petitioner's asking, proceedings of assessment relating to financial year 2009-10 and 2012-13 in relation to the HUF, a separate legal entity, also stand stayed by this Court.

33. Much emphasis is laid on the following observations made by the Apex Court in Sasi Enterprises (supra):-

> "17. We are, in these appeals, concerned with the question of non- filing of returns by the appellants for the assessment year 1991-92, 1992-93 and 1993-94. Each and every order passed by the revenue as well as by the Courts were taken up before the higher courts, either through appeals, revisions or writ petitions. The details of the various proceedings in respect of these appeals are given in paragraph 30 of the written submissions filed by the revenue, which reveals the dilatory tactics adopted in these cases. Courts, we caution, be guarded against those persons who prefer to see it as a medium for stalling all legal processes. We do not propose to delve into those issues further since at this stage we are concerned with answering the questions which have been framed by us." (Emphasis supplied)

34. In the given facts and circumstances, we are not inclined to dismiss the petition on such a ground. However, on this issue, we refrain from making any observation, save and except that petitioner is duty bound to fully cooperate in the expeditious adjudication of all proceedings.

35. But at this point of time, we do wish to express our anguish on a particular fact. Neither in the petition nor in response, it stands mentioned that with respect to similar proceedings initiated against the HUF, of which petitioner is a member, on her asking, this Court in CWP No. 2029 of 2015, by way of interim order dated 26.03.2015, had stayed the same. In fact, it was only when submissions on merits were ending and that too on a query put by the Court, after going through the response so filed during the course of hearing, to which no opportunity of filing rejoinder was sought, that it came to be disclosed. Though the petition is pending adjudication before this Court, but neither was any request for postponement of the present petition nor tagging it with the same was made. On a specific query as to why no steps for expeditious disposal of the said petition were taken by either of the parties, Court was simply informed that interim order is subject matter of challenge before the Apex Court. Significantly proceedings have not been stayed. Still further, no request for adjournment of the present petition was made. In fact, learned counsel vehemently proceeded to end their submissions with the judgment being reserved. We refrain from saying anything more.

Reasons to believe

36. The expression "reasons to believe" stands adequately elaborated by the Apex Court in its various pronouncements. The issue is no longer debatable.

37. By relying upon its earlier decision, rendered by a Constitution Bench (five-Judge) judgment, in Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calcutta and another, AIR 1961 SC 372, a Three-Judge Bench of the apex Court in S. Narayanappa and others v. Commissioner of Income-Tax, Bangalore, (1967) 63 ITR 219 : [AIR 1967 SC 523], held that:

> "if there are in fact some reasonable grounds for the Income-tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the Income Tax Officer to issue the notice under S. 34. Whether these grounds are adequate or not is not a matter for the Court to investigate. In other words, the sufficiency of the grounds which induced the Income-tax Officer to act is not a justiciable issue. It is of course open for the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief.

> Again the expression "reason to believe" in S. 34 of the Income-tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith: it cannot be merely a pretence. To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the Section. To this limited extent, the action of the Income-tax Officer in starting proceedings under S. 34 of the Act is open to challenge in a Court of law".
>
> (Emphasis supplied)

38. The position came to be reiterated by a two-Judge Bench of the apex Court in Lakhmani (supra), wherein the Court held that the grounds or reasons which lead to the formation of belief must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly, all material facts.

39. Later on in Phool Chand (supra), it stood clarified that decision to quash the action in Lakhmani Mewal Das (supra), was based on its given fact situation, where information received by the Assessing Officer was wholly vague, indefinite, farfetched, remote and without any basis for holding a reasonable belief, warranting action, under Section 147. It further observed that:

> "19.....Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the same facts and material which was available with the I.-T.O. at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the "true" and "full" facts in the case and the I.-T.O. would have the jurisdiction to reopen the concluded assessment in such a, case. It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under S. 147 of the Act, on receipt of the information subsequently. The subsequent information on the basis of which the I.-T.O. acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or non-specific."
>
> ... ...
>
> "26... ...One of the purposes of S. 147, appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing." It would be travesty of justice to allow the assessee that latitude."
>
> (Emphasis supplied)

40. The Apex Court also had an occasion to deal with the amended provisions in Rajesh Jhaveri (supra). The Court found the scope and effect of section 147 to 148 as substituted with effect from April 1, 1989, to be substantially different from the earlier provisions. For conferment of jurisdiction under original section 147(a), two conditions required satisfaction (i) the Assessing Officer must have reason to believe that the income profits or gains chargeable to income tax have escaped assessment, and (ii) he must also have reason to believe that such

escapement occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. However, under the substituted section 147, only the first condition required satisfaction of reason to believe, that the income had escaped assessment. It further observed that:-

> "19. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers."
>
> "20.....At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction." (Emphasis supplied)

41. It is also the law that the Assessing Officer is not precluded to reopen assessment of an earlier year on the basis of his finding of fact, so made on the basis of fresh material, so discovered, in the course of assessment of next assessment year [Ess Ess Kay Engineering (supra)].

42. In Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calutta and another, AIR 1961 SC 372, the apex Court held that:

> "9. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example - "I have produced the account books and the documents : You, the assessing officer examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account-books and the documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them - including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed."
>
> (Emphasis supplied)

43. The Apex Court in M/s S. Ganga Saran and sons (Pvt.) Ltd., Calcutta v. Income Tax Officer and others, (1981) 3 SCC 143 has observed as under:

> "6..... (a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief, entertained by the Income-tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income-tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under Section 147 (a). If there is no rational and intelligible nexus between the reasons and the belief, so that on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income-tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid." (Emphasis supplied)

44. The Apex Court in Income Tax Officer, Cuttack and others v. Biju Patnaik, 1991 Supp. (1) SCC 161, observed that while examining the existence of reasons, record can be looked into.

45. In M/s Niranjan & Co. Pvt. Ltd. v. Commissioner of Income Tax, West Bengal-I and others, 1986 (Supp) SCC 272, the apex Court held that:

> "21. It was contended on behalf of the assessee/appellant relying on the observations of this Court in Commr. of Income-tax, Gujarat v. A. Raman and Co., (AIR 1968 SC 49) (supra), that the Income-tax Officer must have had reason to believe and in consequence of information he must have that reason to believe and it was submitted that the information was already there and there was no new information from which the Income-tax Officer could have formed the belief. Having regard to the facts of this case as discussed above and the nature of the information indicated before, we are of the opinion that there was information in the form of a revised return and since the information mentioned before came to the knowledge of the Income-tax Officer subsequent to the making of the first assessment and the information being such from which a reasonable person could have formed the belief that there was escapement of income or under-assessment of income, it cannot be said that there was no jurisdiction of the Income-tax Officer to re-open the assessment. Whether in fact the reassessment to be made pursuant to the notice issued, the income assessed would be more by Re, 1/- or less than the income already assessed is not material or relevant for the question of jurisdiction to issue the notice under S. 147 of the Act."
>
> (Emphasis supplied)

46. Mr. Vishal Mohan, learned counsel, has referred to a decision of this Court in Sahil Knit Fab (supra). So far as the ratio of law is concerned, there is no dispute and we need not discuss in view of our discussion (supra). On facts, we find the decision of the Appellate Authority, so rendered in favour of the assessee, to be affirmed in the peculiar facts and circumstances, for it was found that there was no plausible reason available with the Assessing Officer, forming a belief of escapement of income. Though the assessee had claimed deduction on the basis of loss(s) in business but after five years, the Assessing Officer worked out profit at the rate of 14%, by comparing the profit of another company engaged in similar business, which approach was considered to be illogical and unrealistic. The jurisdictional issue was sought to be raised after a gap of five years, without considering the change of business environment.

47. It is not in dispute that reasons of belief came to be placed before the sanctioning authority. Though initially, in vain, an attempt was made to argue that notice (Annexure P-2) came to be issued without obtaining any prior sanction and/or no reasons of belief were ever prepared or placed before the sanctioning authority, but when confronted, Shri Vishal Mohan, learned counsel, in all fairness did not press the point any further.

48. The factum of investment came to the notice of the Revenue only upon receipt of information from the office of L.I.C. Shimla.

49. From the pleadings of the parties and the material placed on record, it is evidently clear that in the nine preceding years, income of the HUF, cumulatively from agricultural source is Rs. 73.40 lacs. In the relevant year, income from such source is also not more than Rs. 16,00,000/- and even from other source it is Rs. 16.38 lacs (approx.). Undisputedly, petitioner is member of the HUF.

50. For the relevant year (2009-10) Smt. Pratibha Singh declared her individual income, from all sources, to be Rs. 4,81,340/- and Sh. Virbhadra Singh, declared his income from all sources to be Rs. 5,03,330/-. It is not argued before us that prior to the filing of objections (dated 16.6.2016), petitioner(s) ever disclosed either the factum of investment or the source of purchase of such policies.

51. Though specifically not pleaded but from communication dated 21.6.2016 (Page 32) it can be inferred that the factum of purchase of policy from another source, i.e. HUF came to be disclosed by the Karta, i.e. Shri Virbhadra Singh on 15.1.2014. Quite apparently, similar proceedings also came to be initiated against the said HUF, for in the relevant year, income declared from agricultural source was not more than Rs. 7,35,000/-. In the said proceedings, Karta tried to explain the source in the following manner:

> "That no new FDR's have been purchased by the assess except renewal of old FDR's. During the referred year the assessee had purchased LIC policies of worth Rs. 25,00,000/- in his own name. The assessee has issued cheques of Rs. 15,00,000/- i.e. (Rs.10,00,000/- vide No. "500256" dated 18/06/2008 and Rs. 5,00,000/- vide no. "632173" dated 18/06/2008 payable at ICICI Bank, shimla and UCO Bank, Shimla respectively) and the source of remaining Rs. 10,00,000/- was agricultural income from orchard being managed by Sh. Anand Chauhan. Out of the same agriculture income, two more LIC policies of Rs. 50,00,000/- each were purchased in the name of assessee and his wife Mrs. Pratibha Singh. The LIC premium paid receipts of the said policies are enclosed herewith for your kind verification (Annexure A-5).
>
> (Emphasis supplied)

52. Adjudicatory proceedings pertaining to the HUF could not be completed. To ensure that proceedings of assessment with respect to the petitioner do not become time barred, rendering it to be fait accompli, the Assessing Officer rightly questioned the source of such huge investment. The undisputed claim of the petitioner being purchase of such policies only from the agricultural income of the HUF. It is in this backdrop, we find reasoning adopted by the Assessing Officer in Paras (ii), (iii) and (iv) of order dated 24.11.2015 to be clear, cogent and reasonable.

53. Significantly petition is conspicuously silent about the exact amount of income of the HUF from the said agricultural source.

54. In the instant case, based on the information supplied by LIC, finding the income disclosed by the Assessee to be far less than the subscribed amount, which information, prima facie, was not found to be true and also the assessee's justification, prima facie not emanating from the record, the Assessing Officer, based on certain definite information, decided to carry on with the assessment, both by assigning reasons and affording opportunity to the petitioner.

55. To contend that the department was aware purchase of policies out of the funds of HUF would still not make the case any better, for: (i) material placed on record reveals income of the HUF, from the agricultural source, to be not more than Rs. 72.40 lacs (approximately); (ii) which fact is also not disputed in the petition; (iii) in any case, it was the only adjudicated amount, to be accepted to be correct, considering the petitioner herself impugning the action of assessment of the said assessee.

56. The petitioner may have justifiable explanation for the said amount, but from the material placed before us, it cannot be said that the reasons of belief are ex facie false, incorrect, untenable or that objections raised by the petitioner stand rejected only on flimsy grounds, in an arbitrary manner.

57. The burden to prove the income which stands accounted for, is on the assessee. In Sreelekha Banerjee V. Commissioner of Income Tax, (1963) 49 ITR (SC) 112, the Court held that:

> "It seems to us that the correct approach to questions of this kind is this. If there is an entry in the account books of the assessee which shows the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked; what the source of that money is and to prove that it does not bear the nature of income. The department is not at this stage required to prove anything. It can ask the assessee to bring any books of account or other documents or evidence pertinent to the explanation if one is furnished, and examine the evidence and the explanation. If the explanation shows that the receipt was not. of an income nature, the department cannot act unreasonably and reject that explanation to hold that it was income. If, however, the explanation is unconvincing and one which deserves to be rejected, the department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source. The department does, not then proceed on no evidence, because the fact that there was receipt of money is itself evidence against the assessee. There is thus, prima facie, evidence against the assessee which he fails to rebut, and being unrebutted, that evidence can be used against him by holding that it was a receipt of an income nature. The very words 'an undisclosed source' show that the disclosure must come from the assessee and not from the department. In cases of high denomination notes, where the business and the state of accounts and dealings of the assessee justify a reasonable inference that he might have for convenience kept the whole or a part of a particular sum in high denomination notes, the assessee prima facie discharges his initial burden when he proves the balance and that it might reasonably have been kept in high denomination notes. Before the department rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence which it has in its possession. The department cannot by merely rejecting unreasonably a good explanation, convert good proof into no proof."

58. When an assessee claims to have borrowed money, onus to establish such fact lies upon him. But discharged such onus, would still not preclude the Assessing Officer to otherwise examine the genuineness of the transaction, as an independent and unbiased fact finding authority.

59. What is required to be proved by the assessee is not only identity but also creditworthiness and genuineness of the transaction, beyond reasonable doubt, as held in Mangilal Jain (supra); CIT v. United Commercial and Industrial Co. P. Ltd., (1991) 187 ITR 596); and Shankar Industries (supra).

60. We find existence of reasonable ground, enabling the Assessing Officer to form a belief, with regard to the non-disclosure/escapement of income. The belief cannot be said to be

arbitrary, capricious or without any basis. It is neither pretentious. There is rational connection between the material and the reasons. Doubt stands raised with regard to the transactions being bogus in nature. Whether, at the first instance, assess was obliged to disclose receipt of such huge amounts, or not is definitely a matter, which requires consideration by the Assessing Officer, during the course of proceedings. The principle of 'cause and justification' so laid in Rajesh Jhaveri (supra), stands fully substantiated by the Revenue.

61. The Assessing Officer has rejected the objections on the grounds, which appear to be reasonable on the basis of material before him.

62. It cannot be said that the belief is arbitrary or irrational or there is not intelligible nexus between the reasons and the belief "so that on such reasons, no one properly instruct on facts and law, could reasonably entertain the belief", as held by the apex Court in Ganga Saran (supra).

63. Also, the belief of the Assessing Officer, on the information so received by him, is not such that "from which a reasonable person could have formed the belief that there was" no escapement of income or underassessment of income, as held by the apex Court in A. Raman (supra).

Undue haste and non application of mind

64. Submission that process of recording of reasons, obtaining sanction, and issuance of notice, was carried out without application of mind and in undue haste is factually incorrect.

65. Reasons for belief, were placed before the Principal Commissioner of Income Tax, Shimla, who wrote "Yes, it is a fit case for issuing notice under Section 148". Prescribed performa was filled up with the requisite information before the matter came up for consideration by such authority.

66. From the affidavit, so filed in response to the petition, which goes unrebutted, it is evident that the Assessing Officer had been applying his mind for quite some time, it being a different matter that he could have expedited the process. Be that as it may, information which came to be received was processed and placed before the appropriate authority on 22.3.2016. It is not that the sanctioning authority had no material before according sanction. Only after perusing the reasons of belief, so recorded by the Assessing Officer, and finding it to be a case fit for issuance of notice, did the authority accord its sanction. It is brought to our notice that offices of the Assessing Officer and the Sanctioning Authority are in the very same building and petitioner is also a local resident. It was convenient for the authority to have dealt with the matter the very same day. It is not a herculean, much less an impossible task to accomplish.

67. Significantly, no malafides stand alleged, much less against any one the concerned officers.

68. While contending that the sanctioning authority acted mechanically by simply stating "Yes", rendering the impugned action to be wholly illegal, Mr. Vishal Mohan, learned counsel, invites our attention to the decision rendered by the Apex Court in Chhugamal Rajpal (supra). In the said case, the Court specifically observed total non application of mind by the Assessing Officer, whose reasons were not only vague but in the realm of uncertainty, warranting investigation pertaining to the loans, allegedly made by certain persons. It is in this backdrop, Court observed that the Assessing Officer himself was not sure about the truth of alleged transactions. The Court found that there was no material with the Assessing Officer, enabling him to record reasons of belief, that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his/her assessment for the accounted year in question, income chargeable to tax had escaped assessment for that year. The exercise of power by the authority was found to be mechanical in nature, for had he applied his mind, he would'nt have formed satisfaction, in according sanction, and also as a result of non application of mind, noted the word "Yes" and affixed his signatures thereunder.

69. Our attention is invited to the decision rendered by the Calcutta High Court in S.P. Agarwalla (supra), wherein it is observed that the Commissioner has to consider and apply his mind to the material relied upon by the Assessing Officer and that such power is not to be exercised mechanically. Commissioner can consider sufficiency and relevancy of the material while refusing or granting such sanction.

70. Also attention is invited to the decision rendered by the Madhya Pradesh High Court in Arjun Singh (supra), wherein it was observed that exercise of power by the sanctioning authority, in less than 24 hours indicated non application of mind. On first brush, it appears to be like that. But closer scrutiny reveals the decision distinguishable on facts. The jurisdictional authority was trying to reopen assessment, on the basis of alleged escapement of income, in relation to which, after registration of the F.I.R., not only the Court of competent jurisdiction discharged the assessee but even the jurisdictional officer, after investigation had concluded the adjudicatory proceedings, ten years prior to the initiation of impugned action. The Court found the Assessing Officer not possessing any material, enabling him to record reasons of belief. Also simultaneous issuance of notices of inquiry and reassessment came to be initiated against the assessee who was called upon to furnish information of money spent on the construction of a house and much prior to conclusion of such inquiry, the Assessing Officer, by pre-judging the issue, without any basis or material, proceeded to reassess the income declared by the assessee. It is in this backdrop, the Court found the revenue to have acted with undue haste.

71. On this count, our attention is also invited to the decision rendered by the Delhi High Court in Central India Electric Supply (supra), where the sanctioning authority had simply appended its signature below the word “Yes” so affixed by a rubber stamp. In the given facts, the Court found the decision taken to be purely mechanical in manner.

72. However the instant case is not that of mere rubber stamping, for the competent authority, in principle, was in agreement with the reasons assigned by the Assessing Officer, so placed before him, which came to be considered and sanction accorded, with proper application of mind. He himself wrote “Yes, it is a fit case for issuing notice u/s 148”.

73. Hence, in the given facts and circumstances, we do not find such action to be illegal, raising suspicion or doubt, with regard to proper application of mind by the authorities concerned.

Protective and Precautionary Principle

74. While contending that revenue was not sure as to whether the alleged escaped income was to be assessed qua the present petitioner or the said HUF, Mr. Vishal Mohan, learned counsel, invites our attention to the decision rendered by a Division Bench of Gujarat High Court in Sagar Enterprises (supra). The said decision is clearly distinguishable on facts. Considering the fact that undisclosed income of the assessee came to be added by way of protective addition in the previous assessment year, the Court found that it was not open for the revenue to account for the same in the succeeding financial years. It is in this backdrop, it held the revenue itself, not sure of the year of its taxability, hence such income could not be deemed to be chargeable to tax, having escaped assessment.

75. In fact, the principle of protective precautionary assessment came up for consideration before the apex Court in Lalji Haridas (supra), wherein by upholding, action of reassessment initiated by the Revenue, they observed that “In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B. That being so, we do not think that Mr. Nambiar would be justified in resisting the enquiry which is proposed to be held by respondent No.1 in pursuance of the impugned notice issued by him against the appellant. Under these circumstances we do not propose to deal with the point of law sought to be raised by Mr. Nambiar”.

76. In Income Tax Officer, A-Ward, Lucknow v. Bachu Lal Kapoor, AIR 1966 SC 1148, the apex Court reiterated the aforesaid principle.

77. In Sunil Kumar Jain (supra), the Court affirmed the action of the Jurisdictional Officer in reopening assessments even in case where such income came to be assessed in the hands of another. In this backdrop, it was observed that:-

> "Going to the merits of the case, we find that it is not in dispute that the cash amount of Rs. 2,19,000 and the pawned articles valued at Rs. 10,506 have been claimed by the petitioners as belonging to them. Merely because it has been taxed at the hands of Sri Prem Chandra Jain will not preclude the Income-tax Officer from assessing the same at the hands of the right person. From the reason recorded for reopening of the assessment which has been reproduced above it will be seen that the basis for initiating proceedings is the claim made by the petitioners on the basis of the alleged will executed by Smt. Shyama Devi, thus it cannot be said that there was no relevant material for taking proceedings under section 147 of the Act."
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> "In the case of Lalji Haridas [1961] 43 ITR 387 the apex court has held that in cases where it appears to the income-tax authorities that certain income has been received during the relevant year but it is not clear who has received that income; and, prima facie, it appears that the income may have been received by A or by B or by both together, it would be open to, the income-tax authorities to determine the question who is responsible to pay tax by taking assessment proceedings both against A and B.
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> In the case of S. Gyani Ram and Co. [1963] 47 ITR 472 this court has held that the mere fact that a particular income has been assessed in the hands of a particular person as his income will not prevent the Income-tax Officer from coming to the conclusion on fresh materials that that income is the income of another person and taking proceedings under section 34 of the Act for reassessment against the latter on the ground that this income had escaped assessment in his assessment.
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> In the case of Sidh Gopal Gajanand [1969] 73 ITR 226 this court has held that the validity of notice under section 34 of the Indian Income-tax Act, 1922 cannot be impugned on the ground that the assessment proceeding was already pending in respect of the same income against another entity and where it appears that the income may have been received either by A or by B or by both together, it would be open to the income-tax authorities to determine the said question by taking appropriate proceedings against both A and B.
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> In the case of R. Dalmia [1972] 84 ITR 616 the Delhi High Court has held that where the items of escaped income in respect of which the assessment is proposed is specific but the question as to whether the income, if earned, was earned by one person singly or by him along with others is a matter of inquiry, if the Income-tax Officer has reason to believe that it could have been earned either by one person singly or by him along with others there is nothing to prevent him from initiating proceedings against the concerned assessees in both capacities. In such a case where it appears to the Income-tax Officer, that certain income had been received during a particular year but it is not clear who has received that income it is open to the Income-tax Officer to start proceedings against all the persons individually or collectively to ascertain the correct position. In the case of Sohan Singh [1986] 158 ITR 174 the Delhi High Court has taken a similar view.
>
> In the case of Smt. Durgawati Singh [1998] 234 ITR 249 this court has held that it is settled that when there is a doubt as to which person amongst two was liable to be assessed, parallel proceedings may be taken against both and alternative assessments may also be framed. It is also equally true that while a protective assessment is permissible, it is not open to the income-tax appellate authorities

constituted under the Act to make a protective order. The law does not permit assessment of the same income successively in different hands. The tax can only be levied and collected in the hands of the person who has really earned the income and is liable to pay tax thereon.

In the case of Banyan and Berry [1996] 222 ITR 831 the Gujarat High Court has held that where there is doubt or ambiguity about the real entity in whose hands a particular income is to be assessed, the assessing authority is entitled to have recourse to making a protective assessment in the case of one and a regular assessment does not affect the validity of the other assessment inasmuch as if ultimately one of the entities is really found to be liable to assessment, then the assessment in the hands of the entity alone remains the effective assessment and the other becomes infructuous. The levy is enforceable only under one assessment and not under both."

78. The principle squarely applies in the facts of instant case, which for brevity we need not reiterate.

79. Reliance on a decision dated 04.03.2016, rendered by the Calcutta High Court in Prem Chand Shaw (supra), is only for the purpose of pressing the provisions of Section 292-B of the Act, which, in the instant case, we do not find to be applicable.

80. While drawing our attention to the decision rendered by the Full Bench of Delhi Court in Sophia Finance Ltd. (supra), Shri Vinay Kuthiala wants us to adjudicate the merits of the matter, which under these proceedings is impermissible. The decision can be of help only to the extent that the authority would be empowered to examine the transaction, which in his belief required explanation.

81. In the instant case, we find that the petitioner seeks adjudication, on merits, of the fact in issue, which is impermissible in law. In the absence of definite and authentic information, this Court cannot as a fact finding authority, by way of a roving inquiry examine the matter, holding the proceedings initiated under Section 148 of the Act to be untenable on merits. Assessee is always open to make all such submissions before the appropriate authority.

82. At this stage, what is required to be considered by the jurisdictional authority is only reasons to believe and not "the established fact of escapement of income", in lines of Rajesh Jhaveri (supra).

83. We further find the order rejecting the objections to be a reasoned one. It is certainly not cryptic. Every issue raised by the assessee stands considered and dealt with, with a rider that it is open for the assess to appear before the Jurisdictional Officer and place all material for just determination and conclusion of the proceedings. The view expressed by the Assessing Officer is only prima facie. It is not a case of change of opinion.

84. Thus in the given facts and the circumstances, we do not find the impugned action to be illegal, arbitrary, whimsical or capricious. It cannot be said that there was no material before the Assessing Officer to proceed in accordance with law. It also cannot be said that there was no basis for the Assessing Officer to have formed reasons of belief. We do not find it to be a fit case, warranting interference by this Court, for the action cannot be said to be ex facie illegal or based on extraneous reasons and circumstances. This Court is not required to go into the correctness or sufficiency of reasons. It definitely is not a case where the Assessing Officer lacked jurisdiction. It is also not a case of jurisdictional error. It also cannot be said that he exceeded such jurisdiction. Also, exercise of such power, statutory in nature, cannot be said to be either arbitrary or based on extraneous factors, consideration or circumstances. No malafides stands alleged against anyone.

85. We are quite convinced that reasons to believe formed by the Assessing Officer emanate from the record, having material bearing on the question of jurisdictional fact, so raised by him.

86. Perusal of material placed on record does not reflect the impugned action to be ex-facie illegal or not borne out from the record. This Court is not required to go into the sufficiency of material which led to the formation of reasons of belief, more so, when reasons are relevant and emanate from the record and are also germane for just adjudication of facts in issue. There is proper compliance of procedure. Also the assessee can adequately represent herself before the authority which otherwise has jurisdiction to initiate the impugned action.

87. Repetitive though it may sound, but we reiterate that it is not a case of lack of jurisdiction. It is also not a case where the authority has exceeded its jurisdiction or the action is based on no material or that no reasons are recorded by the Assessing Officer or that reasons assigned are absolutely irrelevant or based on extraneous factors/circumstances. It also cannot be said that the impugned action is not bonafide or is based on vague , irrelevant or unspecific information. It is not that the Assessing Officer has prejudged the issue and proceeded to initiate action with a predetermined mind. In fact, there is no such assertion in the petition. Also no malafides stand alleged.

88. It cannot be said that rejection of the objections are based on frivolous or extraneous factors and circumstances. There is complete and proper application of mind to the attending facts and circumstances. The objections rejected, by a speaking order also stand duly communicated to the petitioner. Mere rejection of objections would not lead to formation of opinion about the Assessing Authority under all circumstances deciding the matter in favour of the revenue. No material stands placed before us justifying investment of huge amount out of the declared income of HUF. It is not that the assess is precluded from producing such material before the Assessing Officer.

89. Significantly, before this Court, what is the other stand of the HUF, vis-a-vis its transaction with said Anand Chauhan or Shrikand Orchard in Tehsil Rampur, District Shimla, in relation to the agricultural land, is a closely guarded secret. Whether such fact is relevant or not is a subject matter of consideration by the fact finding authority.

90. No other point is urged.

91. It stands clarified that we have not expressed any opinion on the merits of the case, which, the authority below, shall adjudicate, in accordance with law, uninfluenced of any observations made by this Court.

92. Hence in view of our aforesaid discussion, we find no merit in the present petitions, which stand dismissed.

93. Since no interim order was passed, no further order or direction is required to be passed in the miscellaneous application which also stands dismissed alongwith the main petition.

In view of the aforesaid, present petition, stands disposed of accordingly, as also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Cr. Revision No.4186 of 2013 &
Cr. Revision No.139 of 2014.
Reserved on : 28.11.2016.
Decided on : 26.12.2016.

1. Cr. Revision No.4186 of 2013.

Sudershan Singh ...Petitioner.

Versus

State of Himachal Pradesh & ors. ...Respondents.

2. Cr. Revision No.139 of 2014.

Rakesh Kumar ...Petitioner.

Versus

State of Himachal Pradesh & ors. ...Respondents

Code of Criminal Procedure, 1973-Section 133- Petitioner is co-owner in possession of the land – the villagers requested the petitioner to allow them to construct the road – petitioner gave an undertaking to provide land for the construction of the road – the retaining wall was damaged during the construction of the road – when Gram Panchayat did not construct the wall, the petitioner himself erected the same – it was claimed that the obstruction was caused to the road- proceedings were initiated against the petitioner and notice was issued to him- held, that obstruction has been caused to the road –SDM had rightly passed the order after visiting the spot and verifying the facts- petition dismissed. (Para- 6 to 8)

For the petitioner		Mr. T.S. Chauhan, Advocate, in Cr. Revision No.4186 of 2013 and Ms. Bhavna Dutta, Advocate, in Cr. Revision No.139 of 2014.
For the respondent	:	Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Rajat Chauhan, Law Officer, for respondents No.1 & 2. Ms. Bhavna Dutta, Advocate, for respondent No.3 in Cr. Revision No.4186 of 2013 and Mr. T.S. Chauhan, Advocate, for respondent No.3 in Cr. Revision No.139 of 2014.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

Both the Criminal Revision arise out of one and the same judgment and common questions of law and facts are involved in the same, hence, both the revisions were taken up for hearing together and are being disposed of by this common judgment.

The present Criminal Revision under Section 397 read with Section 401 of the Code of Criminal Procedure is maintained by the petitioner Sudershan Singh in Criminal Revision No.4186 of 2013 (hereinafter referred to as 'the petitioner') and Rakesh Kumar in Criminal Revision No.139 of 2014 (hereinafter referred to as 'respondent No.3.') to quash and set aside the impugned order dated 19.11.2013, passed by learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, H.P.

2. The facts giving rise to this petition are that the petitioner is co-owner-in-possession of Khasra No.2391 and 2478, situated in Village Mohal Sandhiar (Baradh) P.O Chhat, Tehsil Ghumarwin, District Bilaspur, H.P. It is averred in the petition that the villagers requested the petitioner to allow them to construct a road from Barud to Paneta and petitioner gives an undertaking that he is ready to provide his land for construction of road, as per the survey and allowed the construction of the road over his land, as per the survey. The 'Kachha' road was constructed at the spot, in the year 2006, after erecting a retaining wall to give support to the residential house of the petitioner, so that it may not collapse due to the construction of the road. In the year 2011, the wall constructed for giving support to the residential house of the petitioner was collapsed due to the use of JCB by Gram Panchayat and due to the collapse of the wall certain creaks were developed in the house of the petitioner. Thereafter, the road was closed on account of the collapsed retaining wall, the matter was also brought to the notice of Gram Panchayat, an agreement took place between the members of Gram Panchayat and the petitioner. The Gram Panchayat, has agreed to re-erect the damaged wall, vide agreement dated 20.3.2011. The Gram Panchayat, in pursuance to the agreement dated 20.3.2011 did not re-erect the retaining wall, which was damaged by them till 2013, when the house of petitioner again developed more creaks. The petitioner erected the retaining wall, which are two feet in length and one feet in height to support his house. It is further averred that when the respondents threatened to damage the entire wall forcibly, the petitioner Sudershan Kumar filed a suit before the learned Court below, thereafter respondent No.3 reported the matter to the police on 4.2.2013, on the basis of which complaint/'Kalendera' under Section 133 of Cr. P.C, was prepared by the Station House Officer, Police Station, Ghumarwin and the same was sent to

respondent No.2/Sub Divisional Magistrate, Ghumarwin, thereafter the proceedings were initiated and passed the impugned order dated 19.11.2013.

3. Learned counsel appearing on behalf of the petitioner has argued that the impugned order passed by the learned Sub Divisional Magistrate, Ghumarwin, is contrary to law, as the learned Magistrate has no power to pass an order under Section 133 Cr. P.C, as the Civil Suit was pending adjudication. On the other hand, learned counsel appearing on behalf of respondent No.3 has argued that the impugned order passed by the learned Magistrate, is just and reasoned. He has further argued that whole of the parapet was required to be removed and the impugned order may be modified accordingly by allowing the revision petition of respondent No.3.

4. In rebuttal, learned counsel appearing on behalf of the petitioner has argued that the impugned order is required to be set aside with a direction to the parties to get their case decided in a proper manner in the Civil Court.

5. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

6. The petitioner led his evidence in the learned Court below by producing five witnesses. On the other hand, respondent (now petitioner) has produced two witnesses. CW-1 Geeta Devi has deposed that the pillar and wall raised on the road be removed, so that road become wider for 108 Ambulance. In her cross-examination, she has stated that this road is open for small vehicles and large vehicles cannot pass through this road. CW-2 Giatri Devi, has stated that due to narrow road, heavy vehicles cannot pass through the road. In her cross-examination, she has stated that she does not know whether the tractor pass through the road or not. She has also stated that she does not know how much land has been given by Sudarshan Singh for the road. CW-3 Gian Chand, has deposed that the respondent has raised two feet wall and has narrowed the road. CW-4 Rakesh Kumar, has stated that the road was constructed in the year 2006 by Gram Panchayat and after six years Sudarshan Singh, has narrowed it by raising a wall. In his cross-examination, he has stated that the trucks do not pass through this road. He has stated that he does not know how much land Sudharshan Singh, has given for road. CW-5 Piar Chand, has stated that Sudharshan Singh, has blocked the road by raising parapet. On the spot, there is a pillar due to which small vehicles cannot cross. In his cross-examination, he has stated that he does not know whether the road/path is in Government land or in private land. He has stated that earlier tractor use to pass through this road. He has stated that he does not know whether the tractor of Nanda Pradhan, goes through this way or not. Petitioner Sudershan Singh, has stated that he is working as Forest Guard and deposed that he has not blocked any road. Earlier a false complaint was registered, thereafter Gram Panchayat visited the spot. He has stated that he has filed a Civil Suit against the State of Himachal Pradesh and Gram Panchayat, Chhat. In his cross-examination, he has stated that he has given written consent to make the road. He has stated that he has given consent to small vehicles not to heavy vehicles and JCB etc.

7. From the above, it is clear from the record that the public nuisance has been caused by the petitioner and the impugned order passed by the learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, dated 19.11.2013, is just, reasoned and as per the Section of 133 Cr. P.C, the obstruction/public nuisance is required to be removed immediately, as it was obstructing the public passage. The learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, has passed the impugned order dated 19.11.2013, after visiting the spot and verifying the fact with regard to the passing of the vehicles and the impugned order asking for the removal of the parapet to the extent of two feet in length and one feet in width is seems to be just and reasoned, after appreciating the evidence and facts. The order of learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, is as per law and he has taken into consideration that after removing a portion of parapet, there will be a smooth turning of vehicles. So, I do not find any illegality or infirmity with the order (s) passed by the learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, directing the removal of a portion of the parapet. The order

passed by the learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, is after appreciating the evidence, which has come on record and law has been applied correctly. So, no interference is required in the impugned order dated 19.11.2013, passed by the learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur.

8. With these observations, both these revisions are requires dismissal and are accordingly dismissed. No orders as to costs. Pending applications, if any shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Surat Ram and another. ...Appellants.

Versus

Himachal Gramin Bank, Churag Branch, Tehsil Karsog, District Mandi, H.P. ...Respondent.

RSA No.466 of 2007.
Reserved on : 23.11.2016.
Decided on : 26.12.2016.

Code of Civil Procedure, 1908- Section 100- Plaintiff had advanced a sum of Rs. 6,500/- to the defendant No. 1 for running a karyana shop – defendant No. 2 stood guarantor- the loan was not repaid and the suit was filed for the recovery of the amount – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- held in appeal that the case of the plaintiff was proved by oral and documentary evidence- Appellate Court had rightly appreciated the evidence- appeal dismissed. (Para-8 to 11)

For the appellants Mr. G.R. Palsra, Advocate.
For the respondent Mr. Ramakant Sharma, Sr. Advocate with Ms. Anita Dogra, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal is maintained by the appellants against the judgment and decree passed by learned Addl. District Judge, Mandi, H.P, camp at Karsog, in Civil Appeal No.56 of 2006, dated 9.8.2007, whereby the learned Addl. District Judge, Mandi, H.P, camp at Karsog, had set aside the judgment and decree passed by learned Civil Judge (Senior Division), Karsog, District Mandi, in Civil Suit No.6 of 2005, dated 31.3.2006.

2. Briefly stating facts giving rise to the present appeal are that respondent/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for recovery of Rs. 64,597/- against the appellants/defendants (hereinafter referred to as 'the defendants') alleging that defendant No.1 availed loan from the plaintiff-bank for a sum of Rs. 6500/- on 4.3.1987, for running his 'Karyana shop". Plaintiff-bank agreed to provide loan of Rs. 6500/- i.e. Rs. 5000/- for shed and Rs. 1500/- for 'Karyana goods" at the rate of 14% per annum with quarterly rests on providing at least one guarantor for the said loan and interest. On 24.3.1987, defendant No.1 executed demand promissory note, agreement and other requisite documents for a sum of Rs. 6500/- payable with interest thereon, at the rate of 14% quarterly rests. Defendant No.2 stood guarantor for defendant No.1, both are jointly and severally liable for the payment of the aforesaid loan amount. Defendant No.1 was sanctioned Rs. 6500/-, out of which Rs. 5000/-, was paid to Sant Ram, who prepared the shed and Rs. 1500/- were paid to Churamani and sons, as per terms and conditions of the loan agreement. Defendant No.1 placed on record the balance confirmation letters and acknowledged his liability on different dates i.e. balance confirmation letters dated

23.1.1989, 20.11.1991, 15.5.1993, 27.10.1993, 12.6.1996, 16.7.1997, 29.2.2000 and 10.2.2003, but defendants failed to pay the amount, in accordance with the terms and conditions laid down in the agreement, as such the plaintiff-bank recalled the entire amount and issued notices to the defendants. The total amount due alongwith interest upto 7.1.2005 becomes Rs. 64597/- alongwith interest at the rate of 12% per annum from the date of institution of the suit till its realization of the total amount.

3. The suit has been resisted and contested by the defendants by filing written statement and has taken the preliminary objections qua maintainability, estoppel and cause of action. It has been contended by the defendant that he has never applied for the loan nor any loan was provided by the said bank to defendant No.1. Defendant No.1 stood guarantor of defendant No.2. Defendant further denied the execution of demand promissory note, agreement and other documents for the alleged loan of Rs. 6500/-, when defendant No.1 stood guarantee for defendant No.2. Plaintiff-bank obtained the signatures on the bank documents of defendant No.1, on the pretext of guarantor of defendant No.2. Defendant further averred that at that time Rajinder Sachdeva, was Manager of Himachal Gramin Bank, Churag, numerous fake and fraud loan cases had been made by him and has been convicted by the learned Court below. The Manager was absconded and declared as Proclaimed Offender in FIR No.163/89, FIR No.44/90, FIR No.47/1990 etc. under Sections 420, 467, 468 of the Indian Penal Code. Defendant further averred that Sant Ram never prepared the shed and fake and fraud bills were collected by the bank.

4. The learned trial Court framed following issues :

"1. Whether the plaintiff is entitled for the recovery of Rs. 64597/- along with interest at the rate of 14% p.a. with quarterly rests, as prayed for ? OPP.

2. Whether the present suit is not maintainable ? OPD.

3. Whether the plaintiff is estopped by his act, conduct and deeds to file the present suit ? OPD.

4. Whether the plaintiff has no cause of action ? OPD.

5. Whether the defendant No.1 never applied for the loan and defendant No.2 has never given guarantee for defendant No.1 ? OPD.

6. Relief."

5. The learned trial Court after deciding Issue No.1 against the plaintiff, Issue Nos.2 to 4 in favour of the defendants, Issue No.5 against the defendant dismissed the suit. However, the learned lower Appellate Court set aside the findings of the learned Court below and decreed the suit of the plaintiff and thereafter the present appeal was admitted on the following substantial questions of law :

"1. Whether the learned First Appellate Court has misread and misconstrued the oral as well as documentary evidence of parties especially documents Ex.D1 to Ex.D4 which has materially prejudice the case of the appellants ?

2. Whether the learned First Appellate Court has fallen into error by not considering this fact that the then Branch Manager Shri Rajinder Sachdev has prepared false and fake loan cases and criminal case has been registered against him and the first Appellate Court has not taken note of previous judgment and decree in Civil Suit No.12/89 dated 19.4.1990 and due to this fact the case of the appellants have been materially prejudiced ?

3. Whether the judgment and decree of the learned First Appellate Court is not sustainable in the eyes of law because of the fact that amount of

Rs. 6500/- has been shown as loan case in the present case as well as in Civil Suit No.12/89 which fact has been totally ignored by the learned First Appellate Court which has materially prejudiced the case of the present appellants ?"

6. Learned counsel appearing on behalf of the appellant has argued that the judgment and decree passed by the learned Court below is against the law. On the other hand, learned counsel appearing on behalf of the respondent has argued that the judgment and decree passed by the learned Court below is just, reasoned and after appreciating the facts, which have come on record, to its true perspective.

7. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

8. It is proved that on 4.3.1987, defendant No.1 Surat Ram, applied for a loan of Rs. 6500/- to the plaintiff-bank for running his "Karyana" business and loan of Rs. 6500/- was sanctioned and advanced in favour of defendant No.1. The shed was constructed by defendant No.1 through Sant Ram and amount of Rs. 5000/-, was paid at the instance of defendant No.1 to Sant Ram. Defendant No.1 also purchased the goods worth of Rs. 1500/- from Churamani and sons and amount of Rs. 1500/-, was paid to Churamani and sons at the instance of defendant Surat Ram. PW-1 Maninder Jistu, Branch Manager, Churag Branch of the plaintiff-bank has deposed that he had been authorized on behalf of the plaintiff-bank to institute and plead the case vide General Power of Attorney Ex.PW1/A. He has stated that at the time of institution of the suit, the plaintiff-bank was entitled to recover an amount of Rs. 64,597/- from the defendants. In his cross-examination, he showed his ignorance about a criminal case registered against Rajinder Sachdeva, the then Manager of the plaintiff-bank. PW-2 Mast Ram, employee of the plaintiff-bank, who remained posted as Clerk-cum-Cashier in Churag Branch, has stated that defendant No.1 had applied for a loan of Rs. 6500/-, for running "Karyana" business out of which Rs. 5000/-, were transferred in favour of Sant Ram at the instance of defendant Surat Ram, as Sant Ram had constructed shed of Surat Ram worth of Rs. 5000/-. Surat Ram had also purchased goods worth of Rs. 1500/- from Churamani & Sons. He has further stated that defendant No.1 had executed consideration voucher Ex.PW2/A, transfer vouchers Ex.PW2/B, Ex.PW2/C, demand promissory note Ex.PW2/D, agreement Ex.PW2/E, receipt Ex.PW2/F, letter of authority Ex.PW2/H. Letter of witness Ex.PW2/B, loan application Ex.PW2/K. He has also deposed that defendant No.2 had stood guarantor, who had executed the guarantee deed Ex.PW2/L. In his cross-examination, he has shown his ignorance that Rajinder Sachdeva was posted as Branch Manager of the plaintiff-bank in the year 1987 and had prepared the fake loan case. He has also stated that he does not know if Rajinder Sachdeva stood tried in a criminal case for preparing false and fake loan cases and that said Rajinder Sachdeva absconded and was declared as Proclaimed Offender. PW-3, Ashok Thakur, has deposed that Rajinder Sachdeva was posted as Branch Manager of Churag Branch of the plaintiff-bank in the year 1987, but he has denied that Rajinder Sachdeva had prepared the documents pertaining to the false loan cases. PW-4 R.K. Sharma, remained posted as Branch Manager at Churag Branch of the plaintiff-bank from June 1994 to June 1998 and as per his statement, defendant No.1 Surat Ram had signed the balance confirmation letter Ex.PW4/A, in his presence. In his cross-examination, he has shown his ignorance about the documents pertaining to false loan cases by Rajinder Sachdeva, the then Manager of the plaintiff-bank. PW-5 Anil Sharma, has also admitted that in the year 1987, Rajinder Sachdeva was Manager of the Churag Branch of the plaintiff-bank, but he has stated that said Rajinder Sachdeva, had not prepared the false documents pertaining to the false loan cases. PW-6 Swaroop Singh, also remained posted in Churag Branch of the plaintiff-bank from August 1993 to June 1995 and as per his statement, Surat Ram had executed balance confirmation letter Ex.PW6/A in his presence. PW-7 B.R. Kaundal, has deposed that balance confirmation letter Ex.PW7/A was executed by defendant Surat Ram in his presence on 29.2.2000. He has also shown his ignorance that Rajinder Sachdeva, Branch Manager of Churag Branch, had prepared the document of false loan cases. DW-1, Surat Ram, has deposed that he had not applied for loan to the plaintiff-bank nor he had received the same. He had only stood as

guarantor of Geeta Ram at that time and his signatures was procured by the bank employee on several papers. He has also deposed that later on bank employee procured his signatures on papers and he had told them that he had not applied for the loan nor received the same. He has also deposed that a case of cheating was registered against the then Branch Manager, who had prepared false documents of several loan cases. The Manager had absconded and declared as Proclaimed Offender. In his cross-examination, he has admitted that his signatures on pronote Ex.PW1/D, balance confirmation letters Ex.PW2/B, Ex.PW2/C, Ex.PW7/A and Ex.PW5/A. DW-2 Devi Ram has proved on record the statement of account Ex.DW2/A of defendant Surat Ram. DW-3 Krishan Lal, has deposed that defendant Surat Ram, had purchased goods amounting to Rs. 1500/- from him, vide bill Ex.PW2/G and amount of Rs. 1500/- was paid by him to the plaintiff-bank. PW-2 has also deposed that Surat Ram had applied for loan of Rs. 6500/-, to the plaintiff-bank vide application Ex.PW2/K. The loan of Rs. 6500/- was sanctioned by the bank in favour of defendant Surat Ram and defendant Surat Ram had executed documents Ex.PW2/A, Ex.PW2/B, Ex.PW2/D, agreement Ex.PW2/A, revival letters Ex.PW2/H and statement of Surat Ram Ex.PW2/D. PW-2 has proved on record that the loan of Rs. 6500/- was sanctioned in favour of the defendant Surat Ram and has executed the aforementioned documents. Ex.PW2/E agreement whereby the defendant had agreed to return loan of Rs. 6500/-, to the plaintiff-bank with interest at the rate of 14% per annum with quarterly rests in installment of Rs. 150/- per month. Defendant No.2 had stood as guarantor of defendant No.1, who had executed the guarantee deed Ex.PW2/L. As per the statement of PW-3, it is proved that defendant Surat Ram had acknowledged his liability by executing balance confirmation letter Ex.PW3/A to Ex.PW3/D. Similarly, PW-4 has proved on record balance confirmation letter Ex.PW4/A. PW-5 has also proved on record the balance confirmation letters Ex.PW5/A. PW-6 and PW-7 have also proved on record the balance confirmation letters Ex.PW6/A and Ex.PW7/A, respectively. Defendant No.1 had acknowledged his liability by executing the balance confirmation letter and thus, the period of limitation was extended from time to time till institution of the suit.

9. The case of the plaintiff is also corroborated by DW-3, who is owner of shop M/s Churamani & sons. As per his statement, he has sold goods worth of Rs. 1500/- to defendant Surat Ram, vide bill Ex.PW2/G and then amount of Rs. 1500/- was paid to him by the plaintiff-bank.

10. The net result of the above discussions is that the findings arrived at by the learned lower Appellate Court are just, reasoned and after appreciating the facts, which have come on record, to its true perspective. Substantial question of law No.1 is answered accordingly holding that the learned lower Appellate Court below has not misconstrued the oral as well as documentary evidence, which has come on record. As far as substantial question of law No.2 is concerned, the learned lower Appellate Court below has not committed any error, as in the present suit, the judgment and decree has been passed, after appreciating the fact, which has come on record in the present case to its true perspective. The learned Court below has decided the present case in the facts and circumstances and the evidence, which has come on record in the present case is rightly appreciated, so the findings of the learned lower Appellate Court does not suffer from any illegality and infirmity, as it has been proved on record that the defendant has taken a loan of Rs. 6500/- from the plaintiff-bank.

11. In view of the above discussion, there is no illegality and infirmity in the judgment and decree passed by the learned lower Appellate Court, so no interference of this Court is required. In these circumstances, the appeal of the appellant is without merit and deserves dismissal, hence the same is dismissed. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

The New India Insurance Company, through its Divisional Manager. ...Appellant.

Versus

Smt. Hiravati Sharma and others. ...Respondents.

FAO No.407 of 2011.
Cross Objection: 327 of 2012.
Reserved on : 30.11.2016.
Decided on: 26.12.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was travelling in the vehicle with the goods – vehicle fell down due to the rashness and negligence of the driver – deceased sustained grievous injuries and died – compensation of Rs. 3 lacs was awarded by the Tribunal- held, that income of the deceased was rightly taken to be Rs. 3,500/- per month and compensation was rightly assessed as Rs. 3 lacs- there was no proof that accident had taken place due to the mechanical defect – the deceased was owner of goods and insurance company cannot escape from liability – appeal dismissed. (Para- 10 and 11)

For the appellant	Mr. B.M. Chauhan, Advocate.
For the respondents	Mr. N.S. Shandil, Advocate, for respondents No.1 & 2. Nemo for respondents No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1994, is maintained against the award dated 26.7.2011, passed by learned Motor Accident Claims Tribunal, Shimla, in MAC Petition No.18-S/2 of 2009, whereby the learned Tribunal below has awarded compensation of Rs. 3,00,000/- to the petitioners alongwith interest at the rate of 8% per annum.

2. The brief facts giving rise to the present appeal are that respondents No.1 & 2, who are the claimants/cross objectors in present the appeal (hereinafter referred to as the 'petitioner') maintained a petition for compensation on account of the death of their son in an accident caused due to the rash and negligent driving of respondent No.4 (hereinafter referred to as 'respondent No.3') while driving the vehicle owned by respondent No.3 (hereinafter referred to as 'respondent No.1') and insured by the appellant herein (hereinafter referred to as 'respondent No.2').

3. As per the petitioner, on 14.2.2009, Deepak Sharma was travelling in the vehicle i.e. Mahindra Pick Up bearing registration No.CH-23T-9715 (Engine No.21794 and Chassis No.41974), as owner of goods was going from Koti to Dhalli and thereafter to Kotkhai, when the vehicle reached near Karyalghati, it met with an accident and the vehicle went down the highway. Deepak Sharma, received grievous injuries and died at the spot. The accident has taken place due to the rash and negligent driving of the driver of vehicle. After the death of Deepak Sharma, the petitioners had been left high and dry. The petitioners had claimed compensation of Rs. 5,00,000/-, on account of the death of their son. Respondent No.1 was registered owner of Mahindra Pick Up bearing No. CH-23T-9715. Respondent No.1 was vicariously liable for rash and negligent act of his driver. Respondent No.2 had provided comprehensive insurance cover to the vehicle for the period from 31.8.2008 to 30.8.2009. The respondent No.2 was liable to indemnify the insured.

4. Respondent No.1 had resisted and contested the claim petition. He had admitted his ownership and possession of vehicle bearing No. CH-23T-9715. Respondent No.1 had

purchased the vehicle from registered dealer at Chandigarh on 31.8.2008. Respondent No.2 had provided comprehensive insurance cover to the vehicle. On 14.2.2009, respondent No.3 had been on the wheel of the vehicle. Respondent No.3 had been taking Deepak Sharma and his goods to Kotkhai. The charge of rash and negligent driving against the driver had been denied. The accident had taken place due to sudden mechanical brake down of the vehicle. Respondent No.1 had expressed ignorance about the age, income and occupation of the deceased. The petitioners were not dependent for maintenance on their son. They were not entitled to compensation from respondent No.1.

5. Respondent No.2 had also resisted and contested the claim petition. It had admitted having provided insurance cover to vehicle bearing No. CH-23T-9715 at the time of accident. Further alleged that respondent No.1 had contravened the terms and conditions of the insurance policy. Respondent No.3 had not been in possession of a valid and effective driving licence. Deepak Sharma had been travelling in the vehicle as gratuitous passenger. Risk of carriage of gratuitous passenger had not been covered by the insurance policy provided by respondent No.2. It is alleged that respondent No.1 was required to get the vehicle registered within one month of sale thereof. Temporary registration No.CH-23T-9715 could not be treated valid at the time of accident. The petitioners were parents of respondent No.3. The deceased had not been in receipt of income of Rs. 5000/- per month. Respondent No.2 was not liable to pay compensation to the petitioners.

6. The learned Tribunal below framed the following issues :

"1. Whether Sh. Deepak Sharma died due to rash and negligent driving of Mahindra Pick Up bearing temporary No.CH-23T-9715 by respondent No.3? OPP.

2. In case No. (i) is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom ? OPP.

3. Whether Sh. Deepak Sharma was travelling in vehicle in question at the time of accident as an unauthorized or gratuitous passenger ? OPR.

4. Whether the vehicle in question was being driven in contravention of terms and conditions of the insurance policy ? OPR-2.

5. Whether the respondent No.3 was not holding valid and effective driving licence at the time of accident ? OPR- 2.

6. Whether the petition is result of collusion between the petitioners and respondent No.1 and 3 ? OPR-2.

7. Relief."

7. After deciding Issue Nos.1 & 2 in favour of the petitioners, Issue Nos.3 to 6 against the respondents, the learned Tribunal below awarded an amount of Rs. 3,00,000/- to the petitioner and against the respondents, as the vehicle was insured by respondent No.2, the liability was to be fixed by respondent No.2 to pay the amount of compensation. The petitioner who is respondent No.1 in the present case has also maintained cross objections under Order 41 Rule 22 CPC, for enhancement of the compensation. These cross objections are also dealt with the present appeal.

8. Learned counsel appearing on behalf of the appellant has argued that the learned Tribunal below has not taken into consideration the fact that the deceased was gratuitous passenger and so, the Insurance Company was having no liability. On the other hand, learned counsel appearing on behalf of the petitioner, who are the respondents in the present appeal and who maintained cross objections has argued that the deceased was owner of the goods, as he was carrying the manure in his vehicle for selling to the owners of the apples orchard, which is generally business of the people in the area from where the deceased belongs. He has further argued that the amount of compensation as awarded by the learned Tribunal below is too much on the lower side and requires to be enhanced.

9. In rebuttal, learned counsel appearing on behalf of the appellant has argued that the amount of compensation as awarded by the learned Tribunal below is already on the excessive side and the question of enhancement does not arise. He has further reiterated that as the deceased was gratuitous passenger, no amount is required to be paid by the Insurance Company, as the vehicle was plied in violation of the terms and conditions of the Insurance Policy.

10. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record of the case carefully.

11. PW-1 Head Constable Prem Chand, had tendered in evidence copy of FIR No.29/09 under Sections 279 and 304-A of the Indian Penal Code, Police Station, Dhalli, Ex.PW1/A. Respondent No.3 had been booked on charges of rash and negligent driving by the local police. PW-2 Krishan Dutt, has deposed that his son Deepak Sharma had been looking after his household and property. Petitioner No.2 had been owner-in-possession of property, as per jamabandi Ex.PW2/A. Deepak Sharma, had been cultivating vegetables and had been earning Rs. 5000/- per month from all sources. On 14.2.2009, Deepak Sharma, had been carrying his goods to Kotkhai and had boarded the vehicle of respondent No.1. The driver had been driving the vehicle rashly and negligently, as a result of which vehicle had gone down the highway in the area of Karyalghati. Deepak Sharma had suffered fatal injuries in the accident. After the death of their son, the petitioners had been left high and dry. Ex.PW2/B was death certificate of Deepak Sharma, Ex.PW2/C, postmortem report of the dead body of Deepak Sharma. The date of birth of Deepak Sharma was 2.8.1989. Deepak Sharma had left the School from 8th standard. The petitioners were from B.P.L family and Ex.PW4/A was BPL card of the petitioners. Bishan Singh while appearing as PW-3 has stated that on 15.2.2009, he had been on way from his house to Shimla. When PW-3 had been passing through Karyalghati, he had noticed marks of the accident. PW-3 had stopped and found one vehicle having gone down the highway. PW-3 had found the dead body of Deepak Sharma, at some distance from the vehicle. The respondent examined Sanjay Sharma as RW-1, who has stated that on 14.2.2009, he had been on the wheel of the vehicle. Deepak Sharma had boarded the vehicle alongwith his goods for Kotkhai. When the vehicle was in the area of Karyalghati, shaft of the vehicle had suddenly broken down. The vehicle had gone down the highway. Deepak Sharma had suffered fatal injuries, but there is no proof of mechanical defect as stated by RW-1. He was interested person to say so and the learned tribunal below has rightly held that the accident has occurred due to rash and negligent driving of respondent No.1, who is driving the vehicle and appeared before the learned tribunal below as RW-1. RW-2 Lokeshwar Dutt, who has stated having purchased the vehicle from registered dealer at Chandigarh on 31.8.2008. The dealer had got the vehicle insured, as per the insurance policy, Ex.PW2/B. Respondent No.1 had produced the driving licence of respondent No.3. The accident had taken place on 14.2.2009 at about 9:30 PM. So, the learned Tribunal below has rightly held that the accident has occurred due to the rash and negligent driving of the driver of the vehicle. As far as the status of the deceased was concerned, it has come on record that he was owner of the goods. Further, the Insurance Company has charged the premium for two workmen also. It has also come on record that the manure belongs to the deceased. The Insurance Company cannot escape his liability for the owner of the goods. In this case, the Insurance Company has already charged premium for two workmen also. As far as the compensation amount is concerned, the learned tribunal below has rightly taken the income of the petitioner at the rate of Rs. 3500/- per month, as there was no specific proof with regard to his income as alleged by the petitioners. I find no illegality in the compensation as worked out by the learned tribunal below.

12. The net result of the above discussion is that the findings arrived at by the learned Tribunal below holding that the Insurance Company is liable, needs no interference, as the same are just, reasoned and after appreciating the fact, which has come on record, to its true perspective. Further, this Court finds that there is no infirmity and perversity with the impugned award passed by the learned Tribunal below awarding Rs. 3,00,000/-, to the petitioner, as the

learned Tribunal below has taken into consideration the income of the deceased earning about Rs. 3500/- per month. No other points argued needs no consideration.

13. With these observations, the appeal as well cross objections requires dismissal and accordingly dismissed. Pending application (s), if any, shall also stands disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

CWP No. 3072 of 2016 alongwith
CWP No. 3078 of 2016 and
CWP No. 3080 of 2016
Reserved on: 22.12.2016
Date of Decision: December 26, 2016

1. CWP No. 3072 of 2016
Sh. Virbhadra Singh ...Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & others. ...Respondents.
2. CWP No. 3078 of 2016
Smt. Pratibha Singh ...Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & others. ...Respondents.
3. CWP No. 3080 of 2016
Sh. Vikramaditya Singh ...Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & others. ...Respondents.

Income Tax Act, 1961- Section 147 and 148- Petitioner filed a return showing the income from salary and house property- a notice was issued by the Income Tax Authorities – the petitioner filed a fresh return – proceedings were initiated against the petitioner under Section 147 of the Act- a survey was conducted with respect to the affairs of V and it was found that he had given loan to the petitioner, which was held to be unexplained credit in the hands of the petitioner- the petitioner filed a reply stating that the amount was re-paid with interest – the notice was the result of non-application of mind and there was no dispute regarding the identity of the person, genuineness of the transaction or creditworthiness of the loaner- held in the writ petition that the objections were rejected by the Assessing Officer – Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year and if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax – the original return was not subjected to assessment – however, the Assessing Officer is not precluded to re-open assessment on the basis of his finding of fact so made on the basis of fresh material so discovered in the course of assessment of next assessment year – it is not disputed that investigations were conducted against V and it was found that loan was advanced to the petitioner and his family members – the petitioner and family members admitted the receipt of money in response to the notice- the order rejecting objection was not cryptic – the objections were considered and rejected – the action is not ex-facie illegal – it is not a case of lack of jurisdiction – the Writ Court is not a fact finding authority- writ petition dismissed.

(Para-11 to 89)

Cases referred:

Thansingh Nathmal v. The Superintendent of Taxes, Dhubri and others, AIR 1964 SC 1419
The Commissioner of Income-tax, Gujarat v. M/s A. Raman and Co., AIR 1968 SC 49
Bellary Steels & Alloys Ltd. V. CCT, (2009) 17 SCC 547

Indo Asahi Glass Co. Ltd. v. ITO, (2002) 10 SCC 444
K.S. Rashid and Son v. Income Tax Investigation Commission, AIR 1954 SC 207
Union of India Versus Guwahati Carbon Ltd., (2012) 11 SCC 651
Munshi Ram Versus Municipal Committee, Chheharta, (1979) 3 SCC 83
Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calcutta and another, AIR 1961 SC 372
S. Narayanappa and others v. Commissioner of Income-Tax, Bangalore, (1967) 63 ITR 219 : [AIR 1967 SC 523]
Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calutta and another, AIR 1961 SC 372
M/s S. Ganga Saran and sons (Pvt.) Ltd., Calcutta v. Income Tax Officer & ors, (1981) 3 SCC 143
Income Tax Officer, Cuttack and others v. Biju Patnaik,1991 Supp. (1) SCC 161
M/s Niranjan & Co. Pvt. Ltd. v. Commissioner of Income Tax, West Bengal-I and others, 1986 (Supp) SCC 272
Sreelekha Banerjee V. Commissioner of Income Tax, (1963) 49 ITR (SC) 112
CIT v. United Commercial and Industrial Co. P. Ltd., (1991) 187 ITR 596)
Income Tax Officer, A-Ward, Lucknow v. Bachu Lal Kapoor, AIR 1966 SC 1148

For the Petitioner:	M/s Vishal Mohan, Pranay Pratap Singh, Sushant Keprate, Aditiya Sood and Jai Vardhan Khurana, Advocates, for the petitioner(s).
For the Respondents:	Mr. Vinay Kuthiala, Sr.Advocate with Ms Vandana Kuthiala, Advocate and Mr. Diwan Singh Negi, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Invoking Extra Ordinary Writ jurisdiction of this Court, petitioner Sh. Virbhadra Singh lays challenge to the impugned notice dated 29.3.2016 (Annexure P-2) and order dated 24.11.2016 (Annexure P-5), whereby proceedings for assessment stands initiated by the Revenue under the provisions of Income Tax Act, 1961 (hereinafter referred to as the Act).

2. Petitioners Smt. Pratibha Singh (CWP No. 3078 of 2016) and Sh. Vikramaditya Singh (CWP No. 3080 of 2016) by way of separate petitions also lay challenge to similar notice/order. As prayed for, by the learned counsel, these petitions were heard together and in principle, only facts of petitioner Sh. Virbhadra Singh (CWP No. 3072 of 2016), were argued before us, for the difference pertained to the amount of income declared and the dates of filing of returns under Section 139 of the Act. Hence we proceed to discuss the facts of CWP No. 3072 of 2016.

3. The issues, which this Court is called upon to consider, are: (a) whether an order passed by an authority under the Act, in view of availability of equally efficacious remedy, is amenable to interference by way of writ jurisdiction, (b) whether exercise of power by the jurisdictional authority, in initiating action for assessment of escaped income, is justiciable by a Writ Court, (c) whether the jurisdictional authority had sufficient material to form reasons of belief, (d) whether such reasons do exist and if so, can this Court go into sufficiency thereof, (e) whether sanction accorded by the appropriate authority is in accordance with law, (f) whether the order passed by the authority is in conformity with the settled procedure of law, and (g) whether action of the authorities below can be said to be arbitrary, whimsical or capricious.

4. Petitioner, a permanent resident of Himachal Pradesh, is regularly assessed to income tax. On 02.08.2012, he filed a return, declaring his net taxable income for the assessment year 2012-13 (hereinafter referred to as the relevant year), to be Rs. 17,60,090/- (Annexure P-1, page 11), and the source mainly being salary and income from house property.

Prima facie, finding certain income to have escaped assessment, on 29.03.2016 he received a notice, under Section 148 of the Act, so issued by the Deputy Commissioner of Income Tax, Shimla (Annexure P-2, page 15).

5. Pursuant thereto, on 20.04.2016, petitioner filed a fresh return declaring the very same income. Also a request for supply of "reasons" for re-opening the case was made, which was duly complied with vide communication dated 09.05.2016 (Annexure P-3, page 16). Objections thereto, so filed by the petitioner on 29.06.2016 (Annexure P-4, page 59), stand rejected by the Assessing Officer in terms of order dated 24.11.2016 (Annexure P-5, page70).

6. Perusal of aforesaid communications reveals that on 29.03.2016, the Assessing Officer, forwarded his reasons of belief to the superior officer i.e. Joint Commissioner of Income Tax, Shimla, and the very same day, the said officer, after expressing his satisfaction thereupon, on finding the case fit for issuance of notice under Section 148 of the Act, returned the file and same day, notice issued by the Assessing Officer, was served upon the petitioner.

7. It was the information received from the Deputy Director of Income Tax (Investigation), Faridabad, vide communication dated 15.12.2015, which led the Assessing Officer initiate action against the petitioner under Section 147 of the Act.

8. Survey conducted with respect to the affairs of one Vakamulla Chandrashekhar (hereinafter referred to as the loaner) revealed that in the relevant year, following payments were made: (i) Rs. 2.4 Crores to Sh. Virbhadra Singh; (ii) Rs. 1.5 Crore to Smt. Pratibha Singh; and (iii) Rs. 2 Crores to Sh. Vikramaditya Singh. The loaner stated such payments to be interest free loans, made out of his "agricultural income" and "unsecured loans" so received by him from third parties. *Prima facie,* such plea was found to be not true, hence on careful appreciation of material before him, the Assessing Officer, formed reasons of belief, relevant portion whereof, is extracted herein under:-

> "4. Summary of findings
>
> I have carefully perused the return of income of Sh. Virbhadra Singh (Assessment Year 2012-13) and information received from and copies of the statements recorded by the Investigation Wing and the following facts emerge:-
>
> 4.1 Sh. Virbhadra Singh is showing his return with gross total income of Rs.18,66,089/- from salary and income from other sources.
>
> 4.2 Sh. Virbhadra Singh has received interest free unsecured loans of Rs. 2.4 Crores from Sh. Vakamulla Chandrashekhar in Financial Year 2011-12.
>
> 4.3 Sh. Vakamulla Chandrashekhar submitted that he advanced the above mentioned loans to Sh. Virbhadra Singh out of his agricultural income of Rs. 3.4 Crores in Financial Year 2011-12 and out of unsecured loans taken by him from Sh.Gurusharan Singh (Rs. 0.49 Crores), Jai Bharat Foods (Rs. 0.73 Crores) etc.
>
> 4.4 However, it was proved that Sh. Vakamulla Chandrashekhar was not having sufficient agricultural land to substantiate his claim.
>
> 4.5 Sh. Ram Parakash Bhatia, who was controlling various paper entities including Jai Bharat Foods, admitted on oath that he had provided accommodation entries to Sh. Vakamulla Chandrashekhar in lieu of unaccounted cash. He also stated on oath that no actual agriculture produce were purchased by him from Sh. Vakamulla Chandrashekhar.
>
> 4.6 Sh. Gurusharan Singh denied giving any loan to Sh. Vakamulla Chandrashekhar.
>
> 4.7 Thus, the creditworthiness of Sh. Vakamulla Chandrashekhar remain unproved to advance such huge amount of Rs. 2.4 Crores as interest free unsecured loan to Sh. Virbhadra Singh in Assessment Year 2012-13.

4.8 From the discussion made above, it is clear that Rs. 2.4 Crores received by Sh. Virbhadra Singh in Assessment Year 2012-13 from Sh. Vakamulla Chandrashekhar was unexplained credit in the hand of Sh. Virbhadra Singh and needs to be assessed in the hands of Sh. Virbhadra Singh u/s 68 of the Income Tax Act, 1961.

5. Reasons forming belief

In view of the above, I have reasons to believe that an amount of Rs. 2.4 Crores which was received by Sh. Virbhadra Singh from Sh. Vakamulla Chandrashekhar in Assessment Year 2012-13 as interest free unsecured loan is actually unexplained credit in the hand of Sh. Virbhadra Singh, which has escaped assessment in the case of Sh. Virbhadra Singh for Assessment Year 2012-13 within the meaning of section 147/148 of the Income Tax Act, 1961."

(Emphasis supplied)

9. Though factum of receipt of such payments came to be admitted by the petitioner, only in the objections filed in response to a notice issued under Section 148 of the Act, but he justified the same by raising a plea that: (i) In the year 2014, the amount stood repaid alongwith interest @ 10%; (ii) There was no dispute about (a) identity of the person, (b) genuineness of the transaction, (c) creditworthiness of the loaner; (iii) In the relevant year, the loaner had himself disclosed an income of Rs. 65,59,020/-, which was in addition to "huge agricultural income". (iv) The relevant jurisdictional authority, vide order dated 27.03.2015 had already assessed the amount in question, in the hands of the loaner (v) As assessee was not obliged to maintain books of accounts, provisions of Section 68 of the Act were not applicable. (vi) Impugned action was a result of total non-application of mind.

10. In the writ petition no additional ground stands pleaded.

11. *Prima facie* finding the explanation not to be satisfactory, such objections came to be rejected by the Assessing Officer by *inter alia* observing that: (i) Parties contradicted with regard to the nature of loan; (ii) in the absence of any proof or evidence, justifying income from agricultural source or unsecured loans, creditworthiness of the creditor remained to be examined; (iii) Though in the hands of the loaner, a sum of Rs. 3,40,85,000/-, so claimed as income from agriculture was assessed as an income from undisclosed source, under Section 68 of the Act, yet genuineness of the transaction required examination. More so, when such assessment was subject matter of challenge in an appeal before the appropriate jurisdictional authority; (iv) Even though assessee was not maintaining books of accounts, but however, information to which only he had access, in the nature of bank accounts etc. required submission and examination, in deciding a jurisdictional issue of fact; (v) In the absence of any prior assessment, there is no jurisdictional error in the Assessing Officer, calling upon the assessee to place all material in its power and possession, enabling the officer to decide the fact in issue; (vi) There was proper application of mind by the sanctioning authority; and (vii) Assessee's participation in the assessment proceedings would also help proper adjudication of the case on merits.

12. In response to the petition, Revenue justifies its action by (i) expressing doubts about the creditworthiness of the loaner; (ii) the nature of transaction; (iii) Revelation of a fact that in the relevant year, certain investments for purchase of a Farm House at Delhi, were made by the children of the petitioner in the name of M/s Maple Destination and Dreambuilt Pvt. Ltd. Company; (iv) Non-cooperative attitude of the assessee in: (a) not furnishing information and placing on record material within his power and possession of which only he had access; (b) not responding to a detailed questionnaire dated 23.05.2016; (c) placing on record only unauthenticated photocopies of few bank accounts; (v) Uncertainty with regard to the order of assessment made in the case of the loaner by the jurisdictional authority; (vi) Reasons of belief being only *prima facie* in nature; and (vii) The assessee having ample opportunity of placing all material and substantiating his case.

13. During the course of hearing, learned counsel cited following decisions which we have considered. The need to clarify such fact arises only for the reason that in the pleadings and/or proceedings conducted so far by the Assessing Officer, parties have referred to several decisions.

Mr. Vishal Mohan, learned counsel cited:-

(i) *GKN Driveshafts (India) Ltd. V. Income-Tax Officer and others*, (2003) 259 ITR 19 : (2003) 1 SCC 72; (ii) *Ajanta Pharma Ltd. v. Assistant Commissioner of Income-Tax and others*, (2004) 267 ITR 200 (Bombay); (iii) *Income-Tax Officer, I Ward, Distt. VI, Calcutta, and others v. Lakhmani Mewal Das,* (1976) 103 ITR 437 : (1976) 3 SCC 757; (iv) *Sagar Enterprises v. Assistant Commissioner*, (2002) 257 ITR 335 (Guj); (v) *M/s Chhugamal Rajpal v. S.P. Chaliha and others*, (1971) 1 SCC 453; (vi) *S.P. Agarwalla alias Sukhdeo Prasad Agarwalla v. Income-Tax Oficer, E-Ward, Dist. III(2), Calcutta and others*, (1983) 140 ITR 1010 (Calcutta); (vii) *Arjun Singh, Ajay Singh v. Assistant Director of Income-Tax (Investigation)*, (2000) 246 ITR 363 (Madhya Pradesh); (viii) *Central India Electric Supply Co. Ltd. v. Income-Tax Officer*, (2011) 333 ITR 237 (Delhi); and ITA No.45 of 2007, decided on 14.3.2012, titled as *Commissioner of Income Tax, Shimla v. M/s Sahil Knit Fab.*

Mr. Vinay Kuthiala, learned Senior Counsel cited:-

(i) CWP No.347 of 2014, decided on 4.7.2014, titled as *Joint Commissioner of Income Tax v. Kalanithi Maran*; (ii) *Commissioner of Income Tax, Gujarat v. Vijaybhai N. Chandrani*, (2013) 14 SCC 661; (iii) *Commissioner of Income Tax and others v. Chhabil Dass Agarwal*, (2014) 1 SCC 603; (iv) *Lalji Haridas v. Income-Tax Officer and another*, (1961) 43 ITR 387; (v) *Assistant Commissioner of Income Tax vs. Rajesh JhaveriStock Brokers Private Limited*, (2008) 14 SCC 208 = (2007) 291 ITR 500; (vi) *Raymond Woolen Mills Ltd. vs. ITO* (1999) 236 ITR 34 (SC) : 2008 (14) SCC 218; (vii) *Phool Chand Bajrang Lal and another v. Income-Tax Officer and another*, (1993) 203 ITR 456 : (1993) 4 SCC 77; (viii) *Ess Ess Kay Engineering Co. P. Ltd. v. Commissioner of Income Tax*, 247 ITR 818; (ix) Decision dated 04.03.2016, rendered by the Calcutta High Court in ITA No.297 of 2006, titled as *Prem Chand Shaw (Jaiswal) V. Assistant Commissioner, Circle-38, Kolkata & Anr;* (x) *Sunil Kumar Jain v. CIT*, 284 ITR 626 (Allahabad); (xi) *Mangilal Jain V/S Income Tax Officer*, (2009) 315 ITR 105 (Mad); (xii) *Shankar Industries v. Commissioner of Income Tax, Central*, 114 ITR 689 (Cal); (xiii) Civil Misc. Writ Petition No. 181 (Tax) of 2004, decided on 16.09.2006, by Allahabad High Court, titled as *M/s Ema India Ltd. Versus Asstt. Commissioner of Income Tax Central Circle-I;* (xiv) Sasi Enterprises v. Assistant Commissioner of Income Tax, (2014) 5 SCC 139; and (xv) *Commissioner of Income tax v. Sophia Finance Ltd.,* (1994) 205 ITR 98.

14. The relevant provisions, to which our attention is invited are Sections 68, 147 to 153 of the Act.

15. Section 147 is evidently clear. Insofar as its application to the instant facts is concerned, what is required, is fulfillment of essential ingredient(s) that: (i) The Assessing Officer (ii) must have reason(s) to believe, (iii) that any income chargeable to tax has escaped assessment (iv) for any assessment year, (v) which he is empowered to (vi) may assess, and (vii) if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax having escaped assessment.

16. However, for initiating such action, in compliance of Section 148, the Assessing Officer has to (i) record his reasons (ii) forward the same to an authorized officer, as the case may be, so mentioned in Section 151, (iii) who, shall record his satisfaction on the reasons recorded by the Assessing Officer that it is a fit case for issuance of such notice, and only thereafter, (iv) The Assessing Officer shall issue a notice to the assessee, requiring him/her to furnish within a specified period, return of his/her income, in a prescribed form.

17. In view of the statutory mandate, so contained in Section 153, in the given facts and circumstances, assessment proceedings are necessarily required to be completed before 31.12.2016.

18. Section 68, which deals with the concept of deemed income, provides that where any sum is found credited in the books of an assessee maintained for any previous year, and he offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee.

19. As a matter of abandoned caution, in a tabulated form, we reproduce facts, relevant to each one of the petitioners:

Assessment Year **2012-13**	CWP 3072 of 2016 Shri Virbhadra Singh (Karta of HUF)	CWP 3078 of 2016 Smt. Pratibha Singh (Wife)	CWP 3080 of 2016 Shri Vikramaditya Singh. (Son)
Net income disclosed in original return	**Rs. 17,60,090/-**	**Rs. 12,97,055/-**	**Rs. 1,97,150/-**
Date of filing Return	2.8.2012 (P-1)	28.7.2012 (P-1)	7.8.2013 (P-1)
Date of Notice u/s 148 of the Act	29.3.2016 (P-2)	29.3.2016 (P-2)	29.3.2016 (P-2)
E. Return refiled	20.4.2016 after receipt of notice u/s 148 of the Act.	28.3.2013 for amount of Rs. 14,33,200/-	28.4.2016 for amount of Rs. 1,97,150/-
Date on which request for supply of reasons was made	27.4.2016	25.4.2016	28.4.2016
Reasons supplied on	9.5.2016	9.5.2016	9.5.2016
Objections filed on	29.6.2016 (P-4)	16.6.2016 (P-4)	29.6.2016 (P-5).
Rejection of Objections is same in all petitions except CWP 3080, Page 70	24.11.2016 (P-5)	24.11.2016 (P-5)	24.11.2016 (P-6)
Loan Advanced by Vakamulla Chandershekhar	**2.4 crores**	**1.5 crore**	**2 crores**

20. It is a common case of parties that original return dated 02.08.2012 filed by the petitioner, in compliance of Section 139 was not subjected to assessment under sub-section (3) of Section 143. Return dated 02.08.2012, came to be processed only under sub-section (1) of Section 143, in which there is no reference of these transactions. Thereafter, the first communication *inter se* the parties, is the notice dated 29.03.2016, issued by the Assessing Officer under Section 148 of the Act.

SCOPE OF JURISDICTION

21. Scope of interference with an order passed by an authority under a Statute, providing an equally alternate and efficacious remedy, is now well settled. The issue is no longer *res integra,* hence we restrict the discussion only to the decisions pertaining to the Statute in issue.

22. A Constitution Bench of the apex Court in *Thansingh Nathmal v. The Superintendent of Taxes, Dhubri and others,* AIR 1964 SC 1419, observed that:

> "7.....The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Art. 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Art. 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."
>
> (Emphasis supplied)

23. A three-Judge Bench of the apex Court in *The Commissioner of Income-tax, Gujarat v. M/s A. Raman and Co.,* AIR 1968 SC 49, held that:

> "6. The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income-tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the Income-tax Officer had in his possession any information: the Court may also determine whether from that information the Income-tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on the information in his possession he should commence a proceeding for assessment or reassessment, must be decided by the Income-tax Officer and not by the High Court. The Income-tax Officer alone is entrusted with the power to administer the Act; if he has information from which it may be said prima facie, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under Article 226 of the Constitution, to set aside or vacate the notice for reassessment on a re-appraisal of the evidence."
>
> (Emphasis supplied)

24. In *Raymond Woolen Mills Ltd. (supra)*, their Lordships of the Supreme Court rejected challenge to the issuance of notice for reassessment by observing that at the stage of notice, court can only consider whether there is a prima facie case for reassessment. *Reopening of proceedings cannot be quashed by going into the "sufficiency" or "correctness" of the material relied upon by the assessing authority*.

25. In *Vijaybhai N. Chandrani (supra)*, the Apex Court while reversing the view taken by the High Court in quashing a notice of reassessment issued under Section 153-C of the Act, by relying upon its earlier decisions, in *Bellary Steels & Alloys Ltd. V. CCT,* (2009) 17 SCC 547; and *Indo Asahi Glass Co. Ltd. v. ITO,* (2002) 10 SCC 444, directed the assessee to first exhaust

alternate remedies provided under the Act, by filing reply to the notice and take consequential action, if any, before the jurisdictional forum.

26. In *Chhabil Dass Aggarwal (supra)*, in somewhat similar circumstances, where notice issued under Section 148 of the Act and the *ex-parte* assessment proceedings came to be quashed by a writ Court, the Apex Court, by referring to its several judicial pronouncements, including that of the Constitution Bench (Five Judges) in *K.S. Rashid and Son v. Income Tax Investigation Commission,* AIR 1954 SC 207, observed that restriction of not entertaining a writ petition, when an efficacious and alternate remedy is available, is self imposed. It is essentially a rule of policy, convenience and discretion, rather than the rule of law. Only where an exceptional case, warranting interference; existence of sufficient grounds; for invoking extra ordinary jurisdiction, is made out, power, which is discretionary in nature, must be exercised. Where hierarchy of appeal is provided by a statute, party must exhaust the statutory remedies before invoking the writ jurisdiction. The right or liability created by a statute giving a special remedy for enforcing it must be availed of. The Court reiterated the principle laid down in *Union of India Versus Guwahati Carbon Ltd.,* (2012) 11 SCC 651 and in *Munshi Ram Versus Municipal Committee, Chheharta,* (1979) 3 SCC 83, that when a statute provides for a person aggrieved, a particular remedy to be sought in a particular Forum and in a particular way, it must be sought in that manner, to the exclusion of all other modes and Forums. But it did recognize certain exceptions to this rule and that, *inter alia* being, where the action of the statutory authority is not in accordance with the statutory provisions; in defiance of fundamental principles of judicial procedure; and in total violation of principle of natural justice.

27. Justifying the action of the petitioner in bypassing the statutory remedy and directly assailing the notice for reassessment, Mr. Vishal Mohan, learned counsel, seeks reliance on the decision rendered by the Bombay High Court, in *Ajanta Pharma Ltd. (supra)*. The decision came to be rendered in the given facts and circumstances, where reason for reassessment being non-discloser of invoice/details of the purchase of the trading goods exported and failure to co-relate the trading exports with the trading goods exported was found to have been non-existent, in fact contradicted from the record rendering the reasons of the Assessing Officer to be totally "flimsy" and not "sufficient to draw conclusion about the escapement of income" and there being "no material" before the Assessing Officer, entitling him to reopen the case of assessment, the Court found the notice so issued to be *ex-facie,* bad in law. Hence it exercised its discretionary power in quashing such action. Significantly, the Court observed that a writ would lie only if the impugned action is *ex-facie* without jurisdiction or again in excess of the jurisdiction vested in the authority or the action being totally arbitrary. It cautioned that extra ordinary jurisdiction cannot be allowed to be availed as a matter of course and while deciding the issue of jurisdiction, finding of the authority on the factual aspect may be necessary, in which case, necessarily the assessee would be required to approach the Assessing Officer.

28. Mr. Vinay Kuthiala, learned Senior Counsel, also invites our attention to a decision dated 16.09.2006, rendered in *Ema India Ltd. (supra),* which we need not discuss in view of the settled position of law.

29. Thus it cannot be said that jurisdiction of this Court, in entertaining a petition even when an equally efficacious remedy is available to a party, is totally ousted. Notwithstanding the statutory remedies available to the aggrieved party, restriction imposed by a writ Court is more in the nature of restraint. With the ever increasing and growing scope of judicial review, exercise of extraordinary writ jurisdiction cannot be circumscribed.

30. But however, in the given facts and circumstances, for reasons to follow, we do not find the petitioner to have made out a case warranting interference in a petition filed under Article 226 of the Constitution of India.

31. While contending that this Court has no jurisdiction to quash the order of rejection of objections by the Assessing Officer, Mr. Vinay Kuthiala, learned Senior Advocate, seeks reliance on the decision rendered by the High Court of Madras in *Kalanithi Maran(supra)*.

We are unable to persuade ourselves to agree with such submission. The procedure for filing the objections and obligation to decide the same, came to be evolved with the following observations made by the apex Court in *GKN Driveshafts (supra)*, wherein it is held as under:

> "5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years."

32. Since then, the practice has been in vogue. The mechanism evolved is only a safeguard, a protection from harassment of the assessee, for avoiding unwarranted harassment, from undesirable adjudicatory process, so initiated, perhaps on jurisdictional error or such material which *ex-facie* may be false or reason(s) which *prima facie* appears to be baseless or without any cause or justification. The object being, affording an opportunity to an assessee of putting across its case, by placing authentic and undisputed material, satisfying no escapement of income from assessment, enabling the authority to consider, and if so required, drop the proceedings. There can be a fact situation where out of malice or for extraneous reasons, an Assessing Officer may decide the objections, in a palpably illegal manner. What if it is against the mandate of the said decision itself? In any event, orders passed by a Statutory authority are always amenable for challenge in a writ Court which power, perhaps the Court may exercise, when warranted, in the attending facts and circumstances.

NON COOPERATIVE ATTITUDE

33. Non cooperative attitude and conduct of the petitioner is vehemently pressed as a primary ground for rejection of the petition. Specific attention is drawn to the affidavit filed in response to the petition: (a) petitioner failed to furnish information during the entire period of 8½ months. (b) Save and except for filing of photocopies of few bank accounts; unverified and unauthenticated statement of account of the loaner and the order of reassessment so passed qua him, no information privy only to the petitioner, stands furnished. (c) No response to a detailed questionnaire dated 23.5.2016 is furnished. (d) Endeavour of the revenue in having a centralized investigation and assessment of the loaner and the loanee, has, yet not, yielded any result, for such order came to be quashed by this Court and now the matter is pending before the Apex Court. (e) On the petitioner's asking, proceedings of assessment relating to financial year 2009-10 and 2012-13 in relation to the HUF, a separate legal entity, also stand stayed by this Court.

34. Much emphasis is laid on the following observations made by the Apex Court in *Sasi Enterprises (supra)*:-

> "17. We are, in these appeals, concerned with the question of non- filing of returns by the appellants for the assessment year 1991-92, 1992-93 and 1993-94. Each and every order passed by the revenue as well as by the Courts were taken up before the higher courts, either through appeals, revisions or writ petitions. The details of the various proceedings in respect of these appeals are given in paragraph 30 of the written submissions filed by the revenue, which reveals the dilatory tactics adopted in these cases. Courts, we caution, be guarded against those persons who prefer to see it as a medium for stalling all legal processes. We do not propose to delve into those issues further since at this stage we are concerned with answering the questions which have been framed by us." (Emphasis supplied)

35. In the given facts and circumstances, we are not inclined to dismiss the petition on such a ground. However, on this issue, we refrain from making any observation, save and except that petitioner is duty bound to fully cooperate in the expeditious adjudication of all proceedings.

REASONS TO BELIEVE

36. The expression "reasons to believe" stands adequately elaborated by the Apex Court in its various pronouncements. The issue is no longer debatable.

37. By relying upon its earlier decision, rendered by a Constitution Bench (five-Judge) judgment, in *Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calcutta and another,* AIR 1961 SC 372, a Three-Judge Bench of the apex Court in *S. Narayanappa and others v. Commissioner of Income-Tax, Bangalore,* (1967) 63 ITR 219 : [AIR 1967 SC 523], held that:

> "if there are in fact some reasonable grounds for the Income-tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the Income Tax Officer to issue the notice under S. 34. Whether these grounds are adequate or not is not a matter for the Court to investigate. In other words, the sufficiency of the grounds which induced the Income-tax Officer to act is not a justiciable issue. It is of course open for the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. Again the expression "reason to believe" in S. 34 of the Income-tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith: it cannot be merely a pretence. To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the Section. To this limited extent, the action of the Income-tax Officer in starting proceedings under S. 34 of the Act is open to challenge in a Court of law".
>
> (Emphasis supplied)

38. The position came to be reiterated by a two-Judge Bench of the apex Court in *Lakhmani Mewal Das (supra)*, wherein the Court held that the grounds or reasons which lead to the formation of belief must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly, all material facts.

39. Later on in *Phool Chand (supra)*, it stood clarified that decision to quash the action in *Lakhmani Mewal Das (supra)*, was based on its given fact situation, where information received by the Assessing Officer was wholly vague, indefinite, farfetched, remote and without any basis for holding a reasonable belief, warranting action, under Section 147 of the Act. It further observed that:

> "19.....Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the same facts and material which was available with the I.-T.O. at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the "true" and "full" facts in the case and the I.-T.O. would have the jurisdiction to reopen the concluded assessment in such

a, case. It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under S. 147 of the Act, on receipt of the information subsequently. The subsequent information on the basis of which the I.-T.O. acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or non-specific."

... ...

"26... ...One of the purposes of S. 147, appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing." It would be travesty of justice to allow the assessee that latitude."

(Emphasis supplied)

40. The Apex Court also had an occasion to deal with the amended provisions in *Rajesh Jhaveri (supra).* The Court found the scope and effect of section 147 to 148 as substituted with effect from April 1, 1989, to be substantially different from the earlier provisions. For conferment of jurisdiction under original section 147(a), two conditions required satisfaction (i) the Assessing Officer must have reason to believe that the income profits or gains chargeable to income tax have escaped assessment, and (ii) he must also have reason to believe that such escapement occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. However, under the substituted section 147, only the first condition required satisfaction of reason to believe, that the income had escaped assessment. It further observed that:-

"19. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification.If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers."

"20.....At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction." (Emphasis supplied)

41. It is also the law that the Assessing Officer is not precluded to reopen assessment of an earlier year on the basis of his finding of fact, so made on the basis of fresh material, so discovered, in the course of assessment of next assessment year [*Ess Ess Kay Engineering Co. (supra)*].

42. In *Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calutta and another,* AIR 1961 SC 372, the apex Court held that:

> "9. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example - "I have produced the account books and the documents : You, the assessing officer examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account-books and the documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them - including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed."
>
> (Emphasis supplied)

43. The Apex Court in *M/s S. Ganga Saran and sons (Pvt.) Ltd., Calcutta v. Income Tax Officer and others,* (1981) 3 SCC 143 has observed as under:

> "6..... (a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief, entertained by the Income-tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income-tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under Section 147 (a). If there is no rational and intelligible nexus between the reasons and the belief, so that on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income-tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid." (Emphasis supplied)

44. The Apex Court in *Income Tax Officer, Cuttack and others v. Biju Patnaik*,1991 Supp. (1) SCC 161, observed that while examining the existence of reasons, record can be looked into.

45. In *M/s Niranjan & Co. Pvt. Ltd. v. Commissioner of Income Tax, West Bengal-I and others,* 1986 (Supp) SCC 272, the apex Court held that:

> "21. It was contended on behalf of the assessee/appellant relying on the observations of this Court in Commr. of Income-tax, Gujarat v. A. Raman and Co., (AIR 1968 SC 49) (supra), that the Income-tax Officer must have had reason to believe and in consequence of information he must have that reason to believe and it was submitted that the information was already there and there was no new information from which the Income-tax Officer could have formed the belief.

> Having regard to the facts of this case as discussed above and the nature of the information indicated before, we are of the opinion that there was information in the form of a revised return and since the information mentioned before came to the knowledge of the Income-tax Officer subsequent to the making of the first assessment and the information being such from which a reasonable person could have formed the belief that there was escapement of income or under-assessment of income, it cannot be said that there was no jurisdiction of the Income-tax Officer to re-open the assessment. Whether in fact the reassessment to be made pursuant to the notice issued, the income assessed would be more by Re, 1/- or less than the income already assessed is not material or relevant for the question of jurisdiction to issue the notice under S. 147 of the Act."
>
> (Emphasis supplied)

46. Mr. Vishal Mohan, learned counsel, has referred to a decision of this Court in *Sahil Knit Fab (supra).* So far as the ratio of law is concerned, there is no dispute and we need not discuss in view of our discussion (supra). On facts, we find the decision of the Appellate Authority, so rendered in favour of the assessee, to be affirmed in the peculiar facts and circumstances, for it was found that there was no plausible reason available with the Assessing Officer, forming a belief of escapement of income. Though the assessee had claimed deduction on the basis of loss(s) in business but after five years, the Assessing Officer worked out profit at the rate of 14%, by comparing the profit of another company engaged in similar business, which approach was considered to be illogical and unrealistic. The jurisdictional issue was sought to be raised after a gap of five years, without considering the change of business environment.

47. It is not in dispute that reasons of belief came to be placed before the sanctioning authority. Though initially, a vain attempt was made to argue that notice (Annexure P-2) came to be issued without obtaining prior sanction and/or no reasons of belief were ever prepared or placed before the sanctioning authority, but when confronted, Shri Vishal Mohan, learned counsel, in all fairness did not press the point any further.

48. Now in the instant case, the fact that investigation came to be conducted against the "Tarini Group" owned by Vakamulla Chandershekhar (loaner) is not disputed in the petition. The Assessing Officer, as is evident from the reasons of belief and response filed to the petition, was in receipt of information from the Deputy Director of Income Tax (Investigation), Faridabad, which revealed that out of his agricultural income and advances received from his friends, loaner had advanced payments as interest free unsecured loan to the petitioner and his family members.

49. The factum of advancement of such money came to be admitted only in response to the notice. Prior thereto, both the petitioner and his family members maintained stoic silence.

50. Also, the source from which the loaner itself received such income, prima facie, was found to be false, which fact surfaced only during the course of investigation conducted under Section 131-133A of the Act. There were only paper transactions. Neither did the loaner receive any unsecured advance from anyone, much less the three entities, particulars whereof were disclosed by him, nor did he have sufficient income from agricultural source. Such fact also stood substantially corroborated with the disclosure of his income in the previous years. Further Smt. Tripurana Ahalya Devi, whom loaner claimed to be his Aunt, on oath, denied having know him at all, much less entered into any transaction with him, monetary or otherwise. Even transactions of unsecured loans were discovered to be bogus, for being mere paper entries taken from Ram Prakash Bhatia,who allegedly owned 17 concerns, including the ones so disclosed by the loaner, from a small room at C-48/3A-1, Lawrence Road, Delhi-35. Similarly Gurcharan Singh also denied having either known or entered into any transaction of any nature with the loaner, and that for making false entries of unsecured loans, someone had opened an account in his name.

51. Noticeably, as already observed, prior to issuance of notice dated 29.03.2016 under Section 148 of the Act, neither the petitioner nor anyone of his family members ever

disclosed having received such huge amount of Rs. 5.9 crores from the loaner. Even with the filing of fresh return, factum of such transaction never came to be disclosed. Such admissions came only with the filing of statement of objections dated 29.06.2016. Whether obliged in law to do so or not, petitioner also chose not to answer the questionnaire.

52. But what really acquires significance is the very nature of transaction raising reasonable doubt about its genuineness. Whereas petitioner contends the transaction to be interest bearing, the loaner terms it as a non interest bearing loan. Also, from the record so made available to us, *prima facie,* even the petitioners appear to have taken a divergent view. No authentic documents of payment of interest stand filed. What is the special relationship which the petitioner held with the loaner remains undisclosed. Are they family members? Friends? or have any business relationship? Nothing remains disclosed. Disclosure of such information would only enable the Assessing Officer in proper adjudication of fact in issue.

53. Whether there is contradiction in the stand taken by the petitioner before us, itself is a question which needs to be examined by the Assessing Officer, for the writ petitioner wants the Court to believe that loan was repaid with interest at the rate of 10%. No authentic document of such transaction stands placed before us. In fact qua payment of interest no document stands placed either by the petitioner's wife or his son. In the case of petitioner, the document annexed does not conclusively establish payment of interest. The Assessing Officer, in our considered view, has considered the entire material while forming its prima facie view with regard to the alleged payments of interest. Also what was the purpose of loan and what was the source from where it came to be returned is a question, which being a jurisdictional fact requires adjudication by the Assessing Officer. The petitioner may also have justifiable explanation of repayment, but from the material placed before us, it cannot be said that either the initiation of process of assessment or rejection of objections is on flimsy grounds or in an arbitrary manner.

54. The burden to prove the income which stands accounted for, is on the assessee. In *Sreelekha Banerjee V. Commissioner of Income Tax,* (1963) 49 ITR (SC) 112, the Court held that:

> "It seems to us that the correct approach to questions of this kind is this. If there is an entry in the account books of the assessee which shows the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked; what the source of that money is and to prove that it does not bear the nature of income. The department is not at this stage required to prove anything. It can ask the assessee to bring any books of account or other documents or evidence pertinent to the explanation if one is furnished, and examine the evidence and the explanation. If the explanation shows that the receipt was not. of an income nature, the department cannot act unreasonably and reject that explanation to hold that it was income. If, however, the explanation is unconvincing and one which deserves to be rejected, the department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source. The department does, not then proceed on no evidence, because the fact that there was receipt of money is itself evidence against the assessee. There is thus, prima facie, evidence against the assessee which he fails to rebut, and being unrebutted, that evidence can be used against him by holding that it was a receipt of an income nature. The very words 'an undisclosed source' show that the disclosure must come from the assessee and not from the department. In cases of high denomination notes, where the business and the state of accounts and dealings of the assessee justify a reasonable inference that he might have for convenience kept the whole or a part of a particular sum in high denomination notes, the assessee prima facie discharges his initial burden when he proves the balance and that it might reasonably have been kept in high denomination notes. Before the department

rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence which it has in its possession. The department cannot by merely rejecting unreasonably a good explanation, convert good proof into no proof."

55. It is a matter of record that order reassessing income of the loaner came to be passed by the jurisdictional authority, i.e. Assessing Officer at New Delhi only on 27.3.2015. Before us there is nothing on record to show that prior to initiation of impugned action, the present jurisdictional officer was aware of passing of any such order. Perhaps for this reason, such fact is missing in the reasons recorded by the Assessing Officer.

56. Assuming hypothetically that order of assessment against the loaner, which is subjudice, attains finality, even then what would be its effect on the nature of transactions and creditworthiness of the loaner would be a matter of consideration by the Assessing Officer. Whether such order itself would be sufficient establishing creditworthiness of the loaner, particularly when in the last six preceding years, he disclosed income from agricultural source to be less than Rs. 3,00,000/-and its unusual increase to Rs. 85,00,000/-only in the year in question, is again a matter to be considered by the Jurisdictional Officer. *Prima facie* it stands noticed by the officer that income of the loaner, cumulative from all sources, for the last five preceding years, is far less than Rs. 5.9 Crores, the amount lent to the petitioner and his family member.

57. Also, according to the loaner, in the recent years by understating its value, a company closely held by the petitioner's children, had purchased a Farm House at New Delhi, for a sum of Rs. 6.61 crores.

58. When an assessee claims to have borrowed money, onus to establish such fact lies upon him. But discharge of such onus, would still not preclude the Assessing Officer in otherwise examining the genuineness of the transaction, as an independent and unbiased fact finding authority.

59. We find existence of reasonable ground, enabling the Assessing Officer to form a belief, with regard to the non-disclosure/escapement of income. The belief cannot be said to be arbitrary, capricious or without any basis. It is neither pretentious. There is rational connection between the material and the reasons. Doubt stands raised with regard to the transactions being bogus in nature. Whether, at the first instance, assessee was obliged to disclose receipt of such huge amounts, or not is definitely a matter, which requires consideration by the Assessing Officer, during the course of proceedings. The principle of 'cause and justification' so laid in *Jhaveri (supra),* stands fully substantiated by the Revenue.

60. The Assessing Officer has rejected the objections on the grounds, which appear to be reasonable on the basis of material before him.

61. It cannot be said that the belief is arbitrary or irrational or there is no intelligible nexus between the reasons and the belief "so that on such reasons, no one properly instruct on facts and law, could reasonably entertain the belief", as held by the apex Court in *Ganga Saran (supra).*

62. Also, the belief of the Assessing Officer, on the information so received by him, is not such that "from which a reasonable person could have formed the belief that there was" no escapement of income or underassessment of income, as held by the apex Court in *A. Raman (supra).*

63. What is required to be proved by the assessee is not only identity but also creditworthiness and genuineness of the transaction, beyond reasonable doubt, as held in *Mangilal Jain (supra)*; *CIT v. United Commercial and Industrial Co. P. Ltd.,* (1991) 187 ITR 596); and *Shankar Industries (supra).*

EXERCISE OF UNDUE HASTE AND NON APPLICATION OF MIND BY THE JURISDICTIONAL AUTHORITIES

64. Submission that process of recording of reasons, obtaining sanction, and issuance of notice, was carried out without application of mind and in undue haste is factually incorrect.

65. From the affidavit, so filed in response to the petition, which goes unrebutted, and for which no opportunity was sought, it is evident that the Assessing Officer had been applying his mind for more than three months, it being a different matter that he could have expedited the same. Be that as it may, information which came to be received by him in December, 2015, was processed and placed before the appropriate authority on 29.3.2016. It is not that the sanctioning authority had no material before according sanction. Only after perusing the reasons of belief, so recorded by the Assessing Officer, and finding it to be a case fit for issuance of notice, did the authority accord its sanction. It is brought to our notice that offices of the Assessing Officer and the Sanctioning Authority are in the very same building and petitioner is also a local resident. It was convenient for the authority to have dealt with the matter the very same day. It is not a herculean, much less an impossible task to accomplish.

66. Significantly, no malafides stand alleged, much less against any one the concerned officers.

67. Hence, in the given facts and circumstances, we do not find such action to be illegal, raising suspicion or doubt, with regard to proper application of mind by the authority concerned.

68. We further find the order rejecting the objections to be a reasoned one. It is certainly not cryptic. Every issue raised by the assessee stands considered and dealt with, with a rider that it is open for the assessee to appear before the Jurisdictional Officer and place all material for just determination and conclusion of the proceedings. The view expressed by the Assessing Officer has been held to be a prima facie one. It is not a case of change of opinion.

69. While contending that the sanctioning authority acted mechanically by simply stating "Yes", rendering the impugned action to be wholly illegal, Mr. Vishal Mohan, learned counsel, invites our attention to the decision rendered by the Apex Court in *Chhugamal Rajpal (supra)*. In the said case, the Court specifically observed total non application of mind by the Assessing Officer, whose reasons were not only vague but in the realm of uncertainty, warranting investigation pertaining to the loans, allegedly made by certain persons. It is in this backdrop, Court observed that the Assessing Officer himself was not sure about the truth of alleged transactions. The Court found that there was no material with the Assessing Officer, enabling him to record reasons of belief, that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his/her assessment for the accounted year in question, income chargeable to tax had escaped assessment for that year. The exercise of power by the authority was found to be mechanical in nature, for had he applied his mind, he would'nt have formed satisfaction, in according sanction, and also as a result of non application of mind, noted the word "Yes" and affixed his signatures thereunder.

70. Our attention is invited to the decision rendered by the Calcutta High Court in *S.P. Agarwalla (supra)*, wherein it is observed that the Commissioner has to consider and apply his mind to the material relied upon by the Assessing Officer and that such power is not to be exercised mechanically. Commissioner can consider sufficiency and relevancy of the material while refusing or granting such sanction.

71. Also attention is invited to the decision rendered by the Madhya Pradesh High Court in *Arjun Singh (supra)*, wherein it was observed that exercise of power by the sanctioning authority, in less than 24 hours indicated non application of mind. On first brush, it appears to be so. But closer scrutiny reveals the decision to be distinguishable on facts. The jurisdictional authority was trying to reopen assessment, on the basis of alleged escapement of income, in

relation to which, after registration of the F.I.R., not only the Court of competent jurisdiction discharged the assessee but even the jurisdictional officer, after investigation had concluded the adjudicatory proceedings, ten years prior to the initiation of impugned action. The Court found the Assessing Officer not possessing any material, enabling him to record reasons of belief. Also simultaneous issuance of notices of inquiry and reassessment came to be initiated against the assessee who was called upon to furnish information of money spent on the construction of a house and much prior to conclusion of such inquiry, the Assessing Officer, by pre-judging the issue, without any basis or material, proceeded to reassess the income declared by the assessee. It is in this backdrop, the Court found the revenue to have acted with undue haste.

72. On this count, our attention is also invited to the decision rendered by the Delhi High Court in *Central India Electric Supply (supra)*, where the sanctioning authority had simply appended its signature below the word "Yes" so affixed by a rubber stamp. In the given facts, the Court found the decision taken to be purely mechanical in manner.

73. However, the instant case is not that of mere rubber stamping, for the competent authority, in principle, was in agreement with the reasons assigned by the Assessing Officer, so placed before him, which came to be considered and sanction accorded, with proper application of mind. He himself wrote "I am satisfied that it is a fit case for issue of notice u/s 148".

PROTECTIVE AND PRECAUTIONARY PRINCIPLE

74. Capacity/creditworthiness of the creditor and genuineness of the transaction is a question of fact, which we afraid cannot be allowed to be agitated or adjudicated in the present proceedings. Whether assessment of income in the hands of loaner would conclusively establish genuineness and nature of the transaction or his creditworthiness, in our view, is a question of fact to be considered only by the Assessing Officer, after going through the relevant material, which the parties may choose to place, more so in the light of Explanation 2(b) of Section 147 and Section 68 the Act. Whether it is a case of double taxation; protective and precautionary assessment or whether income assessed in the hands of one can be assessed as an income in the hands of another, in the given facts and circumstances, is yet to be considered and decided by the adjudicating authority, based on settled principles of law.

75. While contending that revenue was not sure as to whether the alleged escaped income was to be assessed qua the present petitioner or loaner, Mr. Vishal Mohan, learned counsel, invites our attention to the decision rendered by a Division Bench of Gujarat High Court in *Sagar Enterprises (supra)*. The said decision is clearly distinguishable on facts. Considering the fact that undisclosed income of the assessee came to be added by way of protective addition in the previous assessment year, the Court found that it was not open for the revenue to account for the same in the succeeding financial years. It is in this backdrop, it held the revenue itself, not sure of the year of its taxability, hence such income could not be deemed to be chargeable to tax, having escaped assessment.

76. In fact, the principle of protective precautionary assessment came up for consideration before the apex Court in *Lalji Haridas (supra)*, wherein by upholding, action of reassessment initiated by the Revenue, they observed that "In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B. That being so, we do not think that Mr. Nambiar would be justified in resisting the enquiry which is proposed to be held by respondent No.1 in pursuance of the impugned notice issued by him against the appellant. Under these circumstances we do not propose to deal with the point of law sought to be raised by Mr. Nambiar".

77. In *Income Tax Officer, A-Ward, Lucknow v. Bachu Lal Kapoor,* AIR 1966 SC 1148, the apex Court reiterated the aforesaid principle.

78. In *Sunil Kumar Jain (supra),* the Court affirmed the action of the Jurisdictional Officer in reopening assessments even in case where such income came to be assessed in the hands of another. In this backdrop, it was observed that:-

> "Going to the merits of the case, we find that it is not in dispute that the cash amount of Rs. 2,19,000 and the pawned articles valued at Rs. 10,506 have been claimed by the petitioners as belonging to them. Merely because it has been taxed at the hands of Sri Prem Chandra Jain will not preclude the Income-tax Officer from assessing the same at the hands of the right person. From the reason recorded for reopening of the assessment which has been reproduced above it will be seen that the basis for initiating proceedings is the claim made by the petitioners on the basis of the alleged will executed by Smt. Shyama Devi, thus it cannot be said that there was no relevant material for taking proceedings under section 147 of the Act."
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> "In the case of *Lalji Haridas* [1961] 43 ITR 387 the apex court has held that in cases where it appears to the income-tax authorities that certain income has been received during the relevant year but it is not clear who has received that income; and, prima facie, it appears that the income may have been received by A or by B or by both together, it would be open to, the income-tax authorities to determine the question who is responsible to pay tax by taking assessment proceedings both against A and B.
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> In the case of *S. Gyani Ram and Co.* [1963] 47 ITR 472 this court has held that the mere fact that a particular income has been assessed in the hands of a particular person as his income will not prevent the Income-tax Officer from coming to the conclusion on fresh materials that that income is the income of another person and taking proceedings under section 34 of the Act for reassessment against the latter on the ground that this income had escaped assessment in his assessment.
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> In the case of *Sidh Gopal Gajanand* [1969] 73 ITR 226 this court has held that the validity of notice under section 34 of the Indian Income-tax Act, 1922 cannot be impugned on the ground that the assessment proceeding was already pending in respect of the same income against another entity and where it appears that the income may have been received either by A or by B or by both together, it would be open to the income-tax authorities to determine the said question by taking appropriate proceedings against both A and B.
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> In the case of *R. Dalmia* [1972] 84 ITR 616 the Delhi High Court has held that where the items of escaped income in respect of which the assessment is proposed is specific but the question as to whether the income, if earned, was earned by one person singly or by him along with others is a matter of inquiry, if the Income-tax Officer has reason to believe that it could have been earned either by one person singly or by him along with others there is nothing to prevent him from initiating proceedings against the concerned assessees in both capacities. In such a case where it appears to the Income-tax Officer, that certain income had been received during a particular year but it is not clear who has received that income it is open to the Income-tax Officer to start proceedings against all the persons individually or collectively to ascertain the correct position. In the case of Sohan Singh [1986] 158 ITR 174 the Delhi High Court has taken a similar view.
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> In the case of *Smt. Durgawati Singh* [1998] 234 ITR 249 this court has held that it is settled that when there is a doubt as to which person amongst two was liable to be assessed, parallel proceedings may be taken against both and alternative assessments may also be framed. It is also equally true that while a protective assessment is permissible, it is not open to the income-tax appellate authorities constituted under the Act to make a protective order. The law does not permit

assessment of the same income successively in different hands. The tax can only be levied and collected in the hands of the person who has really earned the income and is liable to pay tax thereon.

In the case of *Banyan and Berry* [1996] 222 ITR 831 the Gujarat High Court has held that where there is doubt or ambiguity about the real entity in whose hands a particular income is to be assessed, the assessing authority is entitled to have recourse to making a protective assessment in the case of one and a regular assessment does not affect the validity of the other assessment inasmuch as if ultimately one of the entities is really found to be liable to assessment, then the assessment in the hands of the entity alone remains the effective assessment and the other becomes infructuous. The levy is enforceable only under one assessment and not under both."

79. While drawing our attention to the decision rendered by the Full Bench of Delhi Court in *Sophia Finance(supra)*, Shri Vinay Kuthiala wants us to adjudicate the merits of the matter, which under these proceedings is impermissible. The decision can be of help only to the extent that the authority would be empowered to examine the transaction, which in his belief required explanation.

80. If the reasons assigned by the Assessing Officer for initiating action are considered in the light of law laid down by the Supreme Court, it is not possible to hold that he did not have any material before him for entertaining a belief, that the income of the petitioner had escaped assessment.

81. Perusal of material placed on record does not reflect the impugned action to be *ex-facie* illegal or not borne out from the record. This Court is not required to go into the sufficiency of material which led to the formation of reasons of belief, more so, when reasons are relevant and emanate from the record and are also germane for just adjudication of facts in issue. There is proper compliance of procedure. Also the assessee can adequately represent himself before the authority which otherwise has jurisdiction to initiate the impugned action.

82. It is not a case of lack of jurisdiction. It is also not a case where the authority has exceeded its jurisdiction or the action is based on no material or that no reasons are recorded by the Assessing Officer or that reasons assigned are absolutely irrelevant or based on extraneous factors/circumstances. It also cannot be said that the impugned action is not bonafide or is based on vague , irrelevant or unspecific information. It is not that the Assessing Officer has prejudged the issue and proceeded to initiate action with a predetermined mind. In fact, there is no such assertion in the petition. Also no malafides stand alleged.

83. It cannot be said that rejection of the objections are based on frivolous or extraneous factors and circumstances. There is complete and proper application of mind to the attending facts and circumstances. The objections rejected, by a speaking order, also stands duly communicated to the petitioner. Mere rejection of objections cannot lead to formation of an opinion about the Assessing Authority, under all circumstances, deciding the matter in favour of the revenue.

84. In the instant case, we find that the petitioner seeks adjudication, on merits, of the fact in issue, which is impermissible in law. In the absence of definite and authentic information, this Court cannot as a fact finding authority, by way of a roving inquiry examine the matter, holding the proceedings initiated under Section 148 of the Act to be untenable on merits. Assessee is always open to make all such submissions before the appropriate authority.

Reliance on a decision dated 04.03.2016, rendered by the Calcutta High Court in *Prem Chand Shaw (supra),* is only for the purpose of pressing the provisions of Section 292-B of the Act, which, in the instant case, we do not find to be applicable.

85. Thus in the given facts and the circumstances, we do not find the impugned action to be illegal, arbitrary, whimsical or capricious. It cannot be said that there was no

material before the Assessing Officer to proceed in accordance with law. It also cannot be said that the there was no basis for the Assessing Officer to have formed reasons of belief. We do not find it to be a fit case, warranting interference by this Court, for the action cannot be said to be ex facie illegal or based on extraneous reasons and circumstances. This Court is not required to go into the correctness or sufficiency of reasons. It definitely is not a case where the Assessing Officer lacked jurisdiction. It is also not a case of jurisdictional error. It also cannot be said that he exceeded such jurisdiction. Also, exercise of such power, statutory in nature, cannot be said to be either arbitrary or based on extraneous factors, consideration or circumstances. No malafides stands alleged against anyone.

86. We are quite convinced that reasons to believe formed by the Assessing Officer emanate from the record, having material bearing on the question of jurisdictional fact as also fact in issue so raised by him.

87. At this stage, what is required to be considered by the jurisdictional authority is only reasons to believe and not "the established fact of escapement of income", on the lines of *Rajesh Jhaveri (supra).*

88. It stands clarified that we have not expressed any opinion on the merits of the case, which, the authority below, shall adjudicate, in accordance with law, uninfluenced of any observations made by this Court.

89. No other point is urged.

90. Hence in view of our aforesaid discussion, we find no merit in the present petitions, which stand dismissed.

91. Since no interim order was passed, no further order or direction is required to be passed in the miscellaneous application which also stands dismissed alongwith the main petition.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Yudh Chand Saklani .....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No.: 4895 of 2015
Reserved on: 30.11.2016
Date of Decision: 26.12.2016

Constitution of India, 1950- Article 226- A proposal was prepared to notify Ner Chowk Panchayat as Municipal Corporation – objections were invited from the inhabitants who opposed the formation of municipality – a notification was issued declaring the areas of Ner chowk as Municipal Corporation – present writ petition was filed challenging the decision – respondents replied that Nagar Panchayat fulfilled the criteria required for the constitution of new Municipality – the town was a hub of Industrial and Business activities – there was a considerable floating population of workers in the area which required civic amenities- these amenities could only be provided by a Municipality – the procedure prescribed by the law was followed and it was prayed that writ petition be dismissed – held, that allegations of malafides were made against a member of legislative assembly- it was incumbent to implead that person as a party – the proposal fulfilled the criteria laid down in the Act- objections were invited and considered – the proposal was approved by the Cabinet – mere error in the nomenclature by mentioning Nagar Parishad instead of Nagar Panchayat will not invalidate the notification- no record was produced to show that notification was not in a public interest or was issued with some ulterior motive – the Courts are

not to interfere with the legislative function unless the decision was not in public interest but was taken with ulterior motive at the behest of some interested persons – petition dismissed.

(Para- 11 to 43)

Cases referred:

Tulsipur Sugar Co. Ltd. Vs. The Notified Area Committee, Tulsipur, (1980) 2 SCC 295

Baldev Singh and Ors. Vs. State of Himachal Pradesh, (1987) 2 SCC 510

Sundarjas Kanyalal Bhathiaja and ors. Vs. The Collector, Thane, Maharashtra and ors., AIR 1990 SC 261

Karnail Singh and another Vs. Darshan Singh and Ors., 1995 Supp.(1) SCC 760

Solapur Midc Industries Association and ors. Vs. State of Maharashtra & ors., (1996) 9 SCC 621

Nagar Panchayat Kurwai and another Vs. Mahesh Kumar Singhal and ors., (2013) 12 SCC 342

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Digvijay Singh, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Rupinder Thakur, Additional Advocate General and Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 to 5.

Ms. Nishi Goel, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

This writ petition has been filed by the petitioner as a *pro bono publico* praying for the following reliefs:

> *"(i) A writ of certiorari may be issued and the impugned notifications Annexure P-9 dated 07.01.2015 and Annexure P-10 dated 19.01.2015 declaring Nerchowk as Municipal Council may be quashed and set aside being illegal, arbitrary and unconstitutional.*
>
> *(ii) A writ of certiorari may be issued setting aside and quashing Annexure P-16 dated 26.09.2015 which includes Gram Sabha area for inclusion into Municipal Council Ner Chowk.*
>
> *(iii) Any other or further writ, order or direction which this Hon'ble Court may deem fit in the facts and circumstances of the present case may also be passed in favour of the petitioner.*

2. As per the petitioner, in the year 2013, Excise and Taxation Minister of Himachal Pradesh, who was also Member of Legislative Assembly from Balh constituency in District Mandi desired that Ner Chowk Panchayat of District Mandi, which falls in Balh constituency be notified as Municipal Council under Section 3 of the Himachal Pradesh Municipal Act, 1994. It is further the case of the petitioner that "in order to satisfy such desire" of the MLA concerned, respondents No. 1 to 3 prepared a proposal and thereafter respondent No. 3, i.e. Director, Urban Development to the Government of Himachal Pradesh directed Deputy Commissioner, Mandi (respondent No. 5) to examine the proposal after taking into consideration the criteria laid down to notify an area as Municipal Council, vide communication dated 01.02.2013 (Annexure P-1). As per the petitioner, the entire proposed area comprised of villages having "arable lands" and both inhabitants of the area as well as livestock were dependent thereupon and in fact there was no need or requirement of specifying Ner Chowk either as a Municipal Council or as a Nagar Panchayat.

3. As per the petitioner, the proposal of the respondent-State to classify Ner Chowk as Municipal Council, which was "swayed only by Hon'ble Excise & Taxation Minister's desire" was strongly opposed by the affected inhabitants including the petitioner during the stage of investigation conducted by the authorities. Resolutions were passed by Gram Sabhas of Gram

Panchayat Kasarla, Gram Panchayat Bhangrotu, Gram Panchayat Dador and Gram Panchayat Ner against the said proposal.

4. Further as per the petitioner, to satisfy the desire of Excise and Taxation Minister, respondent No. 2 vide notification dated 04.06.2014, proposed that areas of Dador, Ner, Kasarla, Malthed and Bhangrotu Panchayats be declared as municipal areas. According to the petitioner, this notification was issued without considering the objections filed by the local inhabitants. Further as per the petitioner, respondent No. 3 also invited objections vide Notification dated 04.06.2014 (Annexure P-4) from the inhabitants of the area as per the provisions of Sub-section (5) of Section 4 of the Himachal Pradesh Municipal Act, 1994. Vide notification dated 04.06.2014, proposal was to classify the specified area as "Nagar Panchayat" and not as "Municipal Council". Again, inhabitants of the affected area opposed the formation of municipality by filing written objections, however, respondents without properly and legally considering the written objections of the inhabitants of the proposed area and without affording any reasonable opportunity of being heard to them, issued notification dated 07.01.2015 (Annexure P-9), declaring areas of Ner Chowk specified in the schedule enclosed as Nagar Panchayat Ner Chowk, District Mandi, Himachal Pradesh, in exercise of powers conferred by Section 4 of the Himachal Pradesh Municipal Act, 1994. Further as per the petitioner, since Excise & Taxation Minister of Himachal Pradesh, i.e. the local Member of the Legislative Assembly had desired that Ner Chowk be notified as Municipal Council and not as Nagar Parishad, therefore, respondent-State by-passed the procedure prescribed in Sub-section (2) of Section 3 of the Himachal Pradesh Municipal Act, 1994 and vide corrigendum dated 19.01.2015 (Annexure P-10) converted Ner Chowk from "Nagar Panchayat" to "Nagar Parishad", i.e. Municipal Council. As per the petitioner, while doing so, neither any notice was issued nor any objections or suggestions were invited. Further as per the petitioner, thereafter respondent No. 2 on 18.03.2015 issued a notification under Sub-sectio (2) of Section 3 of the Himachal Pradesh Panchayati Raj Act for excluding the Gram Sabha areas proposed to be included in the Nagar Parishad Ner Chowk and invited suggestions and objections, which were duly filed by the affected persons, however, without considering the suggestions/objections and even before the report of respondent No. 5 being available on record, respondent No. 3 vide notification dated 26.09.2015 excluded the areas of Gram Sabhas for inclusion in Municipal Council. As per the petitioner, the said exclusion was on the basis of notification dated 07.01.2015 and not on the basis of objections raised by the affected people and report submitted by respondent No. 5 in public hearing. Further as per the petitioner, without finalization of the objections, State divided Ner Chowk municipality into wards and respondent No. 5 vide notification dated 03.10.2015 invited objections, which were not yet finalized at the time of filing of the petition. In this background, the petitioner has filed this petition praying for the reliefs already mentioned above.

5. Respondents No. 1 to 3 in their reply denied the allegations made in the petition. It was mentioned in the reply that information/proposal received from the Deputy Commissioner, Mandi vide letter No. 7666, dated 07.01.2014, as per which, annual income of proposed Nagar Panchayat was Rs. 14,075,912/- and tentative population was 15161, was forwarded to the State Government vide letter dated 19.02.2014 with the observation that as per the provisions of Section 3 of the H.P. Municipal Act, 1994, proposed Nagar Panchayat fulfilled both criteria required for constitution of new Municipality. It was further mentioned in the reply that as per the report furnished earlier by the Deputy Commissioner, dated 13.02.2002, Gram Panchayat Dador vide resolution No. 16 dated 01.07.2001 had submitted its No Objection Certificate for constitution of Nagar Panchayat, Ner Chowk as the adjoining area and the said town was a hub of industrial and business activities, and there was a considerable floating population of workers in the area, which required civic amenities, which could only be provided by a Municipality. It was further mentioned in the reply that for providing proper civic facilities to the inhabitants of the area, the constitution of Nagar Panchayat was necessary for the development of the same. It was further mentioned in the reply that Section 4 of the Himachal Pradesh Municipal Act, 1994 empowered the State Government to issue notification by proposing any local area to be Municipal area after observing the procedure laid down therein. As per the

respondents, the procedure so laid down was followed, which included affixing the notification of the proposal at some conspicuous place in the office of Deputy Commissioner within whose jurisdiction the proposed local area existed for inviting objections as well as taking into consideration the objections which were so received. It was further mentioned in the reply that the objections which were received through Deputy Commissioner, Mandi were placed before the competent authority and after going through the same, it was found that inhabitants had raised objections regarding deprivation of benefits of Gram Panchayat area, i.e. MANREGA, levying of Municipal Charges etc. and burden of taxes on BPL families. It was further mentioned in the reply that after taking into consideration the report of the Deputy Commissioner which was to the effect that Ner Chowk area fulfilled the criteria laid down in law to be declared a Municipality and further keeping in view the fact that it was a hub of Industries and urbanization in the said area was giving rise to problems related to urbanization which could be handled only by way of urban development schemes of the Government of India and State Government, the objections so raised by the inhabitants were not found sustainable. It was further mentioned in the reply that the matter for constitution of Nagar Parishad Ner Chowk was placed before Council of Ministers for necessary approval and thereafter, after obtaining approval of the Council of Ministers, notification dated 07.01.2015 was issued. It was further mentioned in the reply that as per the approval accorded by the Council of Ministers, Nagar Parishad, Ner Chowk, i.e. Municipal Council was constituted by including certain areas/Panchayats, however, while issuing notification dated 07.01.2015, by mistake it was shown as Nagar Panchayat instead of Nagar Parishad and this was lateron rectified by issuing corrigendum dated 19.01.2015. As per the respondent-State, this was a bonafide mistake and the same did not require inviting objections being an administrative matter. On these bases, respondents No. 1 and 3 opposed the petition.

6. Remaining respondents in their respective replies also supported the plea of the State and it was mentioned in their respective replies that the procedure as contemplated both under the Himachal Pradesh Municipal Act, 1994 as well as Himachal Pradesh Panchayati Raj Act was followed in issuance of notifications which were impugned by way of the present writ petition. It was also mentioned in their respective replies that there was no illegality committed by the State in the issuance of the notifications subject matter of the writ petition.

7. Rejoinder was filed to the reply filed to the reply filed by respondents No. 1 to 3, however, no rejoinder(s) were filed to the replies so filed by the remaining respondents.

8. Mr. Sanjeev Bhushan, learned Senior Counsel for the petitioner primarily argued that the entire exercise undertaken by the respondents was in violation of the statutory provisions provided both in the Himachal Pradesh Municipal Act, 1994 as well as Himachal Pradesh Panchayati Raj Act. As per Mr. Bhushan, the procedure contemplated in Sections 3 and 4 of the Himachal Pradesh Municipal Act, 1994 was not followed and further even otherwise as the process was initiated by the respondents to convert Ner Chowk into a Nagar Panchayat, the subsequent act of declaring/converting the same into a Nagar Parishad without inviting any objections etc. in this regard was *per se* illegal and not permissible in law. Mr. Bhushan also argued that there was no public interest involved in the declaration of areas of Ner Chowk specified in Schedule appended with notification dated 07.01.2015 as Nagar Parishad, because this entire exercise in fact had been undertaken by the respondent-State to appease the local member of Legislative Assembly from Balh constituency, who also happened to be the Excise and Taxation Minister. On these grounds, Mr. Bhushan prayed that the petition be allowed and the notifications impugned by way of this petition be quashed and set aside.

9. On the other hand, Mr. Shrawan Dogra, learned Advocate General has argued that there was no merit in the contention of the petitioner that the exercise of declaring Ner Chowk as Nagar Parishad Ner Chowk was done to satisfy the whims of the local MLA as alleged or that the issuance of impugned notification was in violation of the statutory provisions contemplated and laid down in Sections 3 and 4 of the Himachal Pradesh Municipal Act, 1994 or the provisions of the Himachal Pradesh Panchayati Raj Act. Mr. Dogra argued that the entire process was undertaken by the respondent-State strictly in accordance with the provisions by

duly notifying the proposal and thereafter inviting objections and dealing with the objections objectively. It was further submitted by Mr. Dogra that the petition so filed by the petitioner could not be termed as a public interest litigation because no public spirited person would ever oppose the conversion of a "Panchayat" into a "Nagar Parishad" when the proposed area was fulfilling the criteria contemplated in Himachal Pradesh Municipal Act, 1994 to be declared a "Nagar Parishad". According to Mr. Dogra, by declaring the areas specified in the Schedule appended with notification dated 07.01.2015 as Nagar Parishad, these areas were to get all the facilities of urbanization, which was in larger public interest. It was also argued by Mr. Dogra that the petition in fact was not maintainable as the person against whom malafides were alleged to the effect that the entire process was undertaken by the Government at the behest of said person, was not impleaded as party respondent in the case. Mr. Dogra argued that even otherwise in the entire writ petition, the petitioner could not point out as to what was the personal advantage which the local MLA was to gain in case the area in issue was declared as a Nagar Parishad. According to Mr. Dogra, it was the duty of the representative of the people of an area to work for the welfare of the people of that area and in case a local MLA moves a proposal for converting Panchayat areas into a Nagar Parishad, if the area in issue fulfills the condition contemplated in the Himachal Pradesh Municipal Act, 1994, then there is nothing wrong in it until and unless it could be proved that the same was being done by the person concerned with an ulterior motive. Mr. Dogra also argued that petitioner was not able to demonstrate as to what prejudice was caused to him by issuance of corrigendum vide which the proposed areas were declared as Nagar Parishad instead of Nagar Panchayat, because the factum remained that the entire formalities which were contemplated to be undertaken in declaring the proposed areas to be a Nagar Parishad were in fact undergone and undertaken by the department. Mr. Dogra also argued that it was not a case where Nagar Panchayat was converted as Nagar Parishad, but it was a case where Panchayat areas were converted into Municipality, be it Nagar Panchayat or Nagar Parishad. On these counts Mr. Dogra prayed that there was no merit in the petition and the same be dismissed.

Ms. Nishi Goel, learned counsel appearing for respondent No. 6 has adopted the arguments of learned Advocate General.

10. We have heard the learned counsel for the parties and have also gone through the pleadings as well as the records of the case, which were directed by this Court to be made available vide order dated 15.07.2016.

11. Before dealing with the case on merit, we would like to deal with the issue raised by learned Advocate General with regard to maintainability of the petition that the same was not maintainable as the person against whom allegations of malafides were made was not impleaded as a party respondent.

12. A perusal of the averments made in the petition clearly demonstrate that there are allegations of *malafide* made in paras-4 & 7 of the same, which are being reproduced hereinbelow:

> *"4. That in the year 2013, the present Hon'ble Excise and Taxation Minister of Himachal Pradesh, who is also MLA from Balh constituency, desired that Nerchowk Panchayat of District Mandi, which falls in Balh constituency, may be notified as Municipal Council under Section 3 of the H.P. Municipal Act, 1994. In order to satisfy such desire, the respondents No. 1 and 3 prepared a proposal. The respondent No. 3 vide communication dated 01.02.2013 directed respondent No. 5 to examine the proposal after taking into consideration the criteria laid down to notify an area as Municipal Council. The communication dated 01.02.2013 is appended herewith and marked as Annexure P-1. The perusal of the same will reveal that the respondent No. 5 was directed to take into consideration the following instructions:-*
>
> *(a) The population as latest census should exceed five thousands;*

(b) The revenue general for local administration should exceed Rs.Ten lakhs; and

(c) The resolution passed by concerned Gram Panchayats in favour of constitution of Municipal Council.

7. That in order to satisfy the desire of the Hon'ble Excise and Taxation Minister of the State, the respondent No. 2, vide notification dated 04.06.2014 proposed that the areas of Dador Panchayat, Ner Panchayat, Kasarla Panchayat, Malthed Panchayat and Bhangrotu Panchayat should be declared as municipal area. It is submitted that this impugned notification was issued without considering the abovestated objections filed by local inhabitants. However, vide this notification the respondent No. 3 invited objections from the inhabitants of the areas specified as required under Section 4(5) of the Act. The notification dated 04.06.2014 alongwith specified area is appended herewith and marked as Annexure P-4."

13. Incidentally, the said Member of Legislative Assembly has not been impleaded as a party respondent in the petition. In other words, allegations have been made and malafides have been alleged against a person, who has not been impleaded as a party respondent in the petition. In our considered view, when petitioner was leveling allegations of nepotism against the Member of the Legislative Assembly, who also happened to be holding the office of Minister, then it was incumbent upon the petitioner to have had impleaded the said person as party respondent in the case. Said person was not only a property party, but he was also a necessary party as the allegations leveled against him were not innocuous but were serious. Therefore, in our considered view, there is considerable force in the said contention of Mr. Dogra and the petition in fact is bad for non-joinder of necessary parties, however, we will not dwell on this issue any further and will now proceed to adjudicate the case on merit.

14. Sections 3 and 4 of Himachal Pradesh Municipal Act, 1994 provide as under:

*"**3. Classification of municipalities**.- (1) There shall be constituted three classes of municipalities in accordance with the provisions of this section as specified below :-*

(i) "Nagar Panchayat" for a transitional area with population exceeding two thousand and generating annual revenue exceeding rupees five lakhs for the local administration;

(ii) "Municipal Council" for a smaller urban area with population exceeding five thousand and generating the annual revenue exceeding rupees [ten] lakhs for the local administration;

(iii) "Municipal Corporation" for a larger urban area with population exceeding fifty thousand and generating annual revenue exceeding rupees two crores for the local administration and which has been declared to be a municipal area under section 3 of the Himachal Pradesh Municipal Corporation Act, 1994 (12 of 1994) :

Provided that a municipality under this section may not be constituted in such urban areas or part thereof as the State Government may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as it may deem fit, by notification, specify to be an industrial township:

Provided further that no cantonment or part of a cantonment shall form part of a municipality.

Explanation.- In this sub-section, " a transitional area", "a smaller urban area" or "a larger urban area" means such area as the State Government may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as the

State Government may deem fit, specify, by notification for the purpose of this section.

(2) The State Government shall, by notification, constitute the municipalities and specify the class to which a municipality shall belong in accordance with the provisions of this section after observing the procedure as laid down in section 4: Provided that the municipalities existing at the commencement of this Act and listed as Nagar Panchayat or as Municipal Council in the Schedule to this Act, would be deemed to have been constituted and notified as such, under and in accordance with the provisions of this section:

Provided further that the State Government may, after giving a reasonable notice of not less than thirty days of its intention to do so, amend the schedule, by notification and declare any Nagar Panchayat as a Municipal Council or any Municipal Council as a Nagar Panchayat.

***4. Procedure for declaring municipal area**.- (1) The State Government may, by notification, propose any local area to be a municipal area under this Act.*

(2) Every such notification under sub-section (1) shall define the limits of the local area to which it relates.

(3) A copy of every notification under this section, with a translation thereof in such language as the State Government may direct shall be affixed at some conspicuous place in the office of the Deputy Commissioner, within whose jurisdiction the local area to which the notification relates lies, and at one or more conspicuous places in that local area.

(4) The Deputy Commissioner shall certify to the State Government the date on which the copy and translation were so affixed and the date so certified shall be deemed to be the date of publication of the notification.

(5) If any inhabitant desires to object to a notification issued under sub-section (1), he may, within six weeks from the date of its publication submit his objection in writing through the Deputy Commissioner to the State Government and the State Government shall take his objection into consideration.

(6) When six weeks from the date of publication have expired, and the State Government has considered and passed orders on such objections as 22 may have been submitted to it, the State Government may, by notification, declare the local area for the purposes of this Act, to be a municipal area.

(7) The State Government may, by notification, direct that all or any of the rules which are in force in any municipal area shall, with such exceptions and adaptations as may be considered necessary, apply to the local area declared to be a municipal area under this section, and such rules shall forthwith apply to such municipal area without further publication.

(8) When a local area, the whole or part of which was a notified area under the Himachal Pradesh Municipal Act, 1968 (19 of 1968) or a Nagar Panchayat under this Act, is declared to be Municipal Council under this section, the Municipal Council shall be deemed to be a perpetual successor of such notified area committee or of Nagar Panchayat, as the case may be, and in respect of all its rules, bye-laws, taxes, and all other matters, whatsoever and the Nagar Panchayat shall continue in office and shall notwithstanding anything contained in this Act be deemed to be the Municipal Council until the appointment and election of members is notified by the State Government under section 27.

(9) A municipality shall come into existence on such day as the State Government may, by notification, appoint in this behalf."

15. A perusal of these provisions demonstrate that as per Section 3 of the Act, three classes of Municipality are contemplated, i.e., Nagar Panchayat, Municipal Council and Municipal Corporation. Municipal Council or Nagar Parishad is contemplated for a smaller urban area with population exceeding five thousand and generating the annual revenue exceeding rupees ten lakhs for the local administration.

16. Section 4 of the Himachal Pradesh Municipal Act, 1994 lays down the procedure for declaring Municipal areas. As per this Section, State Government may by notification propose any local area to be a municipal area under the Act. A copy of such notification has to be affixed at some conspicuous place of the office of Deputy Commissioner, within whose jurisdiction the local area to which notification relates lies and at one or more conspicuous places in that local area. It further contemplates that Deputy Commissioner shall certify to the State Government the date on which the copy and translation were so affixed and the date so ordered shall be deemed to be the date of publication of the notification and if any inhabitant desires to object the notification, he may within six weeks from the date of its publication, submit his objections in writing to the State Government through the Deputy Commissioner and the State Government shall take the objections into consideration. This Section further contemplates that after expiry of six weeks from the date of publication and after State Government has considered and passed orders on objections as have been submitted to the notification, the State Government may by notification declare the local area for the purposes of this Act to be a municipal area.

17. Therefore, now it has to be gathered from the records as to whether the procedure contemplated in Section 4 of the Himachal Pradesh Municipal Act, 1994 has been followed in letter and spirit by the respondents before the issuance of impugned notification or not, to consider the allegations of the petitioner that the procedure has not been followed.

18. As per the records, Secretary (Urban Development) to the Government of Himachal Pradesh issued notification dated 04.06.2014 proposing areas as specified in the Schedule enclosed thereto to be declared as municipal area under Section 4 of the Himachal Pradesh Municipal Act, 1994 in order to constitute a municipality under Sub-section (2) of Section 3 of the Act to be classified as Nagar Panchayat at Ner Chowk for better development and improved arrangement in the said area.

19. Vide this notification, inhabitants of the area specified in the Schedule were called upon to submit their objections/suggestions, if any, to the proposed declaration to Secretary (Urban Development) in writing through Deputy Commissioner within a period of six weeks from the date of publication of the notification in the Rajpatra. There is a communication available on record dated 19.02.2014 from Director, Urban Development, Himachal Pradesh to Secretary (Urban Development) to the Government of Himachal Pradesh, on the subject "Proposal regarding constitution of Nagar Panchayat Nerchowk" to the effect that as per the proposal received from Deputy Commissioner, Mandi, the figures of population and annual revenue were as under

1.	Total income of proposed N.P. Nerchowk (revenue generation from own source)	14075912-00
2	Total population (Tentative population in the proposed area)	15161 souls

20. This demonstrates that the proposal fulfilled the criteria contemplated under Sub-clause (ii) of Sub-section (1) of Section 3 of the Himachal Pradesh Municipal Act, 1994, as per which, "Municipal Council/Nagar Parishad" means a smaller urban area with population exceeding five thousand and generating annual revenue exceeding rupees ten lakhs for local administration.

21. Records also demonstrate that the Council of Ministers on 19.02.2014 approved the constitution of "Nagar Panchayat" at Ner Chowk and thereafter, notification dated 04.06.2014

was issued by the Government. The factum of issuance of notification dated 04.06.2014 is not disputed by the petitioner nor inviting objections on the proposal by the authorities is disputed. What is disputed by the petitioner is that the objections which were filed by the affected persons pursuant to the said notification were neither considered nor decided by the authorities before issuing notification declaring Ner Chowk initially as a "Nagar Panchayat" and thereafter as a "Nagar Parishad" by way of corrigendum.

22. Records demonstrate that after the issuance of notification dated 04.06.2014, objections were received from various quarters, which are available on record. Records further demonstrate that vide notification dated 07.01.2015, respondent-State in exercise of powers conferred by Section 4 of the Himachal Pradesh Municipal Act, 1994, declared the areas of Ner Chowk specified in the Schedule enclosed with said notification as Nagar Panchayat, Ner Chowk, District Mandi. This was followed by issuance of a corrigendum dated 19.01.2015 to the effect that words "Nagar Panchayat", Nerchowk published vide notification dated 07.01.2015 be read as "Nagar Parishad", Nerchowk.

23. Records also demonstrate that before issuance of notification dated 07.01.2015, the matter was placed before the Cabinet on 25.11.2014. What was approved by the Cabinet is as under:

"Approved the constitution of Nagar Parishad, at Nerchowk".

24. Pursuant to this, notification dated 07.01.2015 was issued in which as per respondent-State, inadvertently instead of words "Nagar Parishad", the words "Nagar Panchayat" were mentioned, which mistake was corrected/rectified vide corrigendum dated 19.01.2015.

25. The above discussion demonstrates that the area which was proposed to be declared Municipality, fulfilled the criteria for being declared as a Nagar Panchayat as well as Nagar Parishad. Besides this, both for declaring the proposed area either as "Nagar Panchayat" or as "Nagar Parishad", the statutory requirement was issuance of a notice under Section 4 of the Himachal Pradesh Municipal Act, 1994 and inviting objections from the inhabitants desirous to object to the said notification. It is not the case of the petitioner that had the initial proposed notification dated 04.06.2014 been issued for Nagar Parishad Nerchowk instead of Nagar Panchayat Nerchowk, then either its tone and tenor would have been different or its contents would have had been different or the procedural formalities which were required to be fulfilled would have been different. Probably, the only difference would have been that instead of words "Nagar Panchayat", the proposal would have contained the words "Nagar Parishad". Be that as it may, fact of the matter still remains that the proposal was to convert areas of Panchayat specified in the proposal into a Municipality.

26. We have already discussed above that inviting of objections is not disputed by the petitioner and during the course of arguments, learned counsel for the petitioner could not objectively point out as to what would have been substantive difference in the objections invited, had the initial proposal itself been for Nagar Parishad instead of Nagar Panchayat. The objections on record demonstrate that the objections against the proposed Nagar Panchayat, as invited vide notification, dated 04.06.2014, were not to this effect that the proposal should not be for Nagar Panchayat, but should be for Nagar Parishad. The objections were to this effect that the Panchayat areas should be allowed to remain as Panchayat areas only. Besides this, it is evident from the reply filed by respondents No. 1 to 3 that the objections so received were taken into consideration and they were not found to be sustainable, as primarily the objections demonstrated that the objectors therein were aggrieved by the fact that if the area was permitted to be converted into a Municipality, then it would deny the inhabitants of the area benefits of Gram Panchayat area, MANREGA and the inhabitants would be subjected to levy of Municipal charges etc. The objections so filed, as is evident from the reply filed by respondents No. 1 and 3, were overruled in larger public interest taking into consideration the benefits which otherwise the inhabitants were to gain once this area was declared as Municipality. Therefore, it cannot be said

that the objections were either not considered or decided before the impugned notifications were issued by the department.

27. A perusal of notification dated 07.01.2015 also demonstrates that it is mentioned therein that before issuance of this notification, objections/suggestions received from inhabitants of Gram Panchayat Nerchowk, District Mandi within the prescribed limit were considered and decided by the Government. There is no reason for us to disbelieve the same as nothing has been placed on record to the contrary by the petitioner.

28. Records also demonstrate that these objections/suggestions were placed before the Urban Development Minister for consideration, however, the same did not find favour with the Minister concerned as it was decided that "notification of constituting Ner Chowk as N.P. may be issued as it is the fastest growing urban area in the State".

29. Therefore, in view of above, there is no merit in the contention of the petitioner that the objections which were received against the proposal were neither considered nor decided before the issuance of impugned notification. At the cost of repetition, we are re-stating that during the course of arguments, learned counsel for the petitioner could not point out as to what would have been the qualitative difference in objections submitted by the objectors had the initial proposal not been for Nagar Panchayat, but the same had been for a Nagar Parishad.

30. Now coming to the argument of learned counsel for the petitioner that this entire exercise was undertaken by the State Government not in public interest but at the behest of local MLA to satisfy his whims, according to us, this argument is also not sustainable on merit. First of all, as we have already observed above, the MLA against whom malafides have been alleged has not been impleaded as party respondent in the petition. Be that as it may, the petitioner has not produced on record any material from which it could be inferred that the proposal so made by the local MLA was made either with an ulterior motive or the same was not in public interest. It is not a case where the proposal was moved by a person, who had no relation with the area and was a stranger qua the area which was proposed to be declared as a Municipality. In the present case, the proposal was mooted by the local MLA, who, in our considered view, in his capacity as public representative, is duty bound to make efforts to ensure the larger benefit of the people in the area, which he is representing. Further, the petitioner has not been able to demonstrate that after the proposal was mooted by the Local MLA, the State declared the area as Nagar Parishad either by not following the procedure or by flouting the procedure laid down in Section 4 of the Himachal Pradesh Municipal Act, 1994. Therefore, in our considered view, there is no force in this argument of the learned counsel for the petitioner.

31. Coming to the factum of initial notification dated 07.01.2015, having been issued for declaring the proposed area as Nagar Panchayat and thereafter the words "Nagar Panchayat" have been substituted with words "Nagar Parishad" vide corrigendum dated 19.01.2015, in our considered view, the issuance of neither of these two notifications can be faulted with on the basis of grounds taken in the petition. We have already held that the procedure contemplated for declaring the area as a Municipality was strictly followed by the Government before issuance of notification dated 07.01.2015. Respondent-State has duly explained the need to issue corrigendum dated 19.01.2015. Replies filed by the respondents as well as records demonstrate that after fulfilling all the formalities as are contemplated in Section 4 of the Himachal Pradesh Municipal Act, 1994, when the matter was placed before the Cabinet for its approval on 25.11.2014, the approval granted by the Cabinet is as follows:

"Approved the constitution of Nagar Parishad at Nerchowk".

This was followed by issuance of notification dated 07.01.2015, however, inadvertently in this notification, instead of "Nagar Parishad", the words published were "Nagar Panchayat". To correct/rectify this mistake, corrigendum dated 19.01.2015 was issued, in which the words "Nagar Panchayat", Nerchowk were substituted with words "Nagar Parishad", Nerchowk. It is also pertinent to observe that before issuance of corrigendum, there was no requirement to serve a notice of not less than 30 days, as is contemplated in second proviso to Sub-section(2) of Section

3 of the Himachal Pradesh Municipal Act, 1994, because pursuant to notification dated 07.01.2015, the procedure contemplated in Sub-Section (2) of Section 3 of the Himachal Pradesh Municipal Act, 1994 had not yet been completed and corrigendum was issued by the State Government before that. Therefore, there is no merit in the contention of the learned counsel for the petitioner that corrigendum dated 19.01.2015 is not sustainable in law as it is in violation of second proviso to Sub-section(2) of Section 3 of the Himachal Pradesh Municipal Act, 1994.

34. Now coming to notification dated 26.09.2015, vide which Gram Sabha areas have been excluded for the purpose of including them into Municipal Council, respondents No. 2 and 4 in their reply have stated that in view of final notification issued by the Department of Urban Development Annexure P-9, dated 07.01.2015 and corrigendum Annexure P-10, dated 19.01.2015 regarding Nagar Parishad, Ner Chowk, Panchayati Raj Department had issued final notification for exclusion of the areas from respective Gram Panchayats/Gram Sabhas taking into consideration the opinion of the Law Department, wherein it was mentioned that the provisions of the second proviso to Sub-section(2) of Section 3 of the Himachal Pradesh Municipal Act, 1994 have precedence over the Himachal Pradesh Panchayati Raj Act. It was also mentioned in the reply that proposal for the inclusion of areas of the respective Gram Panchayats/Gram Sabhas was initiated and notified by the Department of Urban Development at first instance as per the provisions of the Himachal Pradesh Municipal Act, 1994 and, therefore, Panchayati Raj Department had issued final notification vide Annexure P-16, 26.09.2015 for exclusion of areas from the respective Gram Panchayats/Gram Sabhas and role of the Panchayati Raj Department was limited to follow the provisions of Panchayati Raj Act where the Urban Development Department had notified the Gram Panchayat areas to be included in Municipal limits. Incidentally, the stand so taken by the Panchayati Raj Department to justify the issuance of notification dated 26.09.2015 (Annexure P-16) has not been rebutted by the petitioner by filing any rejoinder etc. We otherwise also find considerable merit in the averments so made in the reply for the reason that the fact of the matter remains that the affected inhabitants of Gram Panchayats/Gram Sabhas, who were excluded from Gram Panchayats/Gram Sabhas vide notification dated 26.09.2015 (Annexure P-16) were otherwise heard under the provisions of the Himachal Pradesh Municipal Act, 1994, as they were given due opportunity of filing their objections vide notification dated 04.06.2014. Therefore, it cannot be said that the affected parties were not given an opportunity of being heard, as is being tried to be portrayed by the petitioner.

35. Even otherwise, declaration of Municipalities is a legislative function, which is undertaken by the Government in larger public interest and ordinarily Courts are not to interfere in the decisions so undertaken by the State Government until and unless the judicial conscious of the Court is satisfied that the decision so taken is not in public interest, but has been taken with ulterior motive at the behest of some interested person or persons who personally stand to gain by the declaration of such Municipality. In this case, the petitioner has not been able to demonstrate or prove the same. Petitioner has not been able to demonstrate or prove that the declaration of area subject matter of the writ petition into a Nagar Parishad is either not in public interest or this decision has not been taken by the Government in larger interest of inhabitants of the area, but the same has been taken by the State Government to help a few individuals or the declaration was not done by following statutory requirements of the Himachal Pradesh Municipal Act, 1994.

36. It is settled law that function of the Government while establishing a Municipality is neither executive nor administrative, but it is a legislative process.

37. In **Tulsipur Sugar Co. Ltd.** ***Vs.*** **The Notified Area Committee, Tulsipur,** ***(1980) 2 SCC 295,*** the Hon'ble Supreme Court while dealing with U.P. Town Areas Act, 1914 has held that power of the State Government to make a declaration under the same is legislative in character.

38. The Hon'ble Supreme Court in **Baldev Singh and Ors.** ***Vs.*** **State of Himachal Pradesh,** ***(1987) 2 SCC 510,*** has held that affording of hearing to affected persons is essential

prerequisite for constituting notified area, however, hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way.

39. The Hon'ble Supreme Court in **Sundarjas Kanyalal Bhathiaja and ors.** ***Vs.*** **The Collector, Thane, Maharashtra and ors.,** ***AIR 1990 SC 261,***has also held that rules of natural justice are not applicable to legislative action plenary or subordinate. The Hon'ble Supreme Court in para-23 of the judgment has held:

> *"23. Reverting to the case, we find that the conclusion of the High Court as to the need to reconsider the proposal to form the Corporation has neither the attraction of logic nor the support of law. It must be noted that the function of the Government in establishing a Corporation under the Act is neither executive nor administrative. Counsel for the appellants was right in his submission that it is legislative process indeed. No judicial duty is laid on the Government in discharge of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with. If they are complied with,, then, the Court could say no more. In the present case the Government did publish the proposal by a draft notification and also considered the representations received. It was only thereafter, a decision was taken to exclude Ulhasnagar for the time being. That decision became final when it was notified under Section 3(2). The Court cannot sit in judgment over such decision. It cannot lay down norms for the exercise of that power. It cannot substitute even "its juster will for theirs.""*

40. In **Karnail Singh and another** ***Vs.*** **Darshan Singh and Ors.,** ***1995 Supp.(1) SCC 760,*** the Hon'ble Supreme Court has held that amalgamation of two gram sabhas into one is an administrative decision taken by the authorities in public interest and the Court would not interfere unless the same is vitiated with malafides.

41. The Hon'ble Supreme Court in **Solapur Midc Industries Association and ors.** ***Vs.*** **State of Maharashtra and ors.,** reported in ***(1996) 9 SCC 621,***has held:

> *"3. It is not disputed that since the State Government has not yet withdrawn the industrial estate/industrial area concerned from the hold of the Corporation, the provisions of the 1961 Act continue to apply. The Preamble thereof is suggestive of its objects sought to be achieved namely the orderly establishment in industrial areas and industrial estates of industries, and to assist generally in the organisation thereof, and for that purpose to establish the Industrial Development Corporation and for purposes connected with the matters therewith. The purpose of the 1949 Act on the other hand, as is suggestive from its Preamble, is to provide for the establishment of Municipal Corporations with a view to ensure a better municipal government of the cities in which municipal corporations are set up. These being the basic differences as to the ambit of the two statutes, the High Court, in our view, rightly arrived at the conclusion that there was inter se no conflict between the two. There may be certain areas such as provision for civil amenities in which there is identity of purpose but these are ancillary and incidental to the main purpose of the respective two statutes. The suggestion drawn from the Assembly debates, to which our attention has been drawn, while passing the 1961 Act, suggestive of the fact that the industrial estates or industrial areas on ripening were meant to be kept under the purview of the 1961 Act until some civic administration in the form of a Panchayat or Municipality could take over is not supported by any statutory provision available in the respective two Acts. As said before the topics of legislation being different, there was no question of their rubbing against each other because being enacted under two different legislative fields."*

42. The Hon'ble Supreme Court in **Nagar Panchayat Kurwai and another** ***Vs.*** **Mahesh Kumar Singhal and ors.,** reported in ***(2013) 12 SCC 342,*** has held that Nagar Panchayat, is a unit of self-government, which is a sovereign body having both constitutional and

statutory status and considerable powers are conferred on it to carry out various schemes for economic development and social justice at the local level.

43. In view of above discussion as well as law laid down by the Hon'ble Supreme Court, we do not find any merit in the petition, which is accordingly dismissed, so also the pending application(s), if any. Interim order, if any, stands vacated. No order as to costs.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

HPSEB & Another ....Appellants-Defendants
Versus
Shri Babu Ram ....Respondent-Plaintiff

RSA No.61 2007
Date of decision: 27.12.2016

Code of Civil Procedure, 1908- Order 33 Rule 2- Plaintiff filed a suit for compensation of Rs.2 lacs for electrocution due to the negligence of the defendants – the defendants denied the claim of the plaintiff – suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the suit was decreed for recovery of Rs.1,66,000/- along with interest @ 6% per annum- held in second appeal that Plaintiff had examined himself and two witnesses to prove his version- documentary evidence also proved his version – there was no distance between the roof of the house of the plaintiff and the HT line, whereas distance of 12 feet is required to be maintained as per rules – thus, the negligence was duly proved.(Para-16 to 29)

For the Appellant: Mr. Satyan Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.
For the Respondents: Mr.Surender Kumar Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Instant Regular Second Appeal filed under Section 100 of the Code of Civil procedure, is directed against the judgment and decree dated 17.11.2006, passed by learned District Judge, Mandi, H.P., in Civil Appeal No.8 of 2006, reversing the judgment and decree dated 24.11.2005, passed by learned Civil Judge(Senior Division), Sundernagar, District Mandi, H.P. in Civil Suit No.70/2002, whereby suit for compensation having been filed by respondent-plaintiff (hereinafter referred to as 'plaintiff') was dismissed.

2. Briefly stated facts, as emerged from the record, are that plaintiff-respondent filed a suit as an indigent person under Order 33 Rule 2 of the Code of Civil Procedure for compensation amounting to Rs.two lacs alongwith interest @ 8% against appellant-defendant averring therein that on 16.2.1998, when he was sleeping on the roof of his house at village Jarol, then all of sudden at 9.00 A.M. there was a dazzling spark and a big mass of fire got discharged from the electric wire, passing above the house of the plaintiff, and the said mass of the fire engulfed the plaintiff, as a result of which his body was badly burnt. Plaintiff further averred that in the aforesaid incident he was suffered injury to his right arm, fingers and right leg. It is further averred by the plaintiff in the plaint that his muscles from left leg were removed and planted on the right side of the whole body. Plaintiff further averred that due to electrocution, he was unable to walk, sit and sleep properly and suffered pain continuously. Plaint further reveals that after aforesaid incident, plaintiff became unconscious and was taken to Primary Health Centre, Jarol and thereafter to Civil Hospital, Sundernagar, but doctors at Civil Hospital, Sundernagar referred the plaintiff to PGI, Chandigarh, where he remained admitted for 3½ months. Plaintiff further alleged that after having taking treatment from PGI, Chandigarh, he again remained as indoor

patient at Civil Hospital, Sundernagar for 3½ months and in this process, his entire savings were spent on his treatment. Plaintiff also claimed that he was accompanied by two attendants and was given three bottles of blood and 500 bottles of glucose and in this process he spent more than Rs.two lacs on his treatment. Plaint further suggests that at the time of accident, plaintiff was a qualified carpenter and used to earn Rs.200/- per day, but by the said accident he has now been deprived of doing any physical work. It is further averred in the plaint that there is a history of longevity in his family, since his father is still alive and his grand-father expired at the age of 90 years and at that relevant time he was 25 years of age. In the aforesaid background, the plaintiff claimed compensation to the tune of Rs.two lacs with interest from the defendants.

3. Defendants, by way of detailed written statement refuted the version having been put forth by the plaintiff on the ground of maintainability, estoppel, cause of action, non-joinder and mis-joinder of necessary parties and lack of jurisdiction. Apart from above, defendant also contested the case of the plaintiff on merits by stating that he is not a poor person, rather, he has handsome income from the land and other sources. Defendants admitted that they have installed 33 KV H.T. line, which passes through village Jarol in the year 1965, and the same is well maintained having rail polls of iron and none of the house come underneath the line at the time of its erection. Defendants further claimed that no accident from electricity wires has taken place and as such the plaintiff is not entitled for any compensation. Defendants further averred that no complaint, whatsoever, was received by the staff of the defendants nor any FIR was lodged. Defendants further claimed that at the time of alleged accident, plaintiff was not owner of house at Jarol, rather he had one small *khokha* from where he used to sell beedies, cigrates and toffees etc. Defendants further claimed that there was no house underneath the electricity line, as claimed by the plaintiff, and if any person constructs anything under the line then that person himself is responsible for the same and no compensation, if any, can be claimed against the defendants. In nutshell, defendants stated that since there was no accident, as alleged by the plaintiff, there is no question of negligence on the part of defendants and plaintiff was not entitled to any compensation. Defendants further stated that they have maintained the electricity line and there was neither complaint of loose sagging of line nor it ever touched the ground and the line was erected as per law. It is further alleged by the defendants that requisite height as well as vertical and horizontal distances are maintained from the ground level as well as from the houses. In the aforesaid background, defendants sought dismissal of the suit.

4. Learned trial Court, on the pleadings of the parties, framed the following issues:-

"1. Whether on 16.2.1995 there was discharge from electric wires passing over the houses of the plaintiff as alleged? OPP.

2. Whether this discharge from the electric wires was on account of negligent act/omission on behalf of officials of defendants as alleged, if so, to what effect? OPP.

3. Whether the plaintiff suffer on accout of electrocution and as such he is entitled for damages? If so, to what extent? OPP.

4. Whether the plaintiff is also entitled to interest? If so, at what rate? OPP.

5. Whether the suit is not maintainable? OPD.

6. Whether the suit is barred by limitation? OPD.

7. Whether the plaintiff is estopped by his act and conduct from filing the suit? OPD.

8. Whether the suit is bad for non-joinder of necessary parties? OPD.

9. Whether the court has no jurisdiction to entertain the suit as alleged? OPD.

10. Whether the plaint is not properly valued as alleged? OPD.

11. Whether the suit of the plaintiff is liable to be dismissed with special cost U/S 35-A of the CPC? OPD.

12. Whether the plaintiff has suppressed the material facts from the court as alleged? If so, to what effect?

13. Relief."

5. Subsequently, learned trial Court on the basis of pleading of the parties, vide judgment dated 24.11.2005 dismissed the suit having been filed by the plaintiff seeking therein compensation on account of electrocution suffered by him due to negligence of the defendants.

6. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned District Judge, Mandi, which came to be registered as Civil Appeal No.8 of 2006. Learned District Judge, taking note of the pleadings as well as evidence adduced on record by respective parties, allowed the appeal, set aside the judgment and decree passed by learned trial Court and decreed the suit of the plaintiff for Rs.1,66,000/- alongwith interest at the rate of 6% per annum from the date of filing of the suit till its realization.

7. In the aforesaid background, appellant-defendant filed instant Regular Second Appeal laying therein challenge to the judgment and decree passed by learned District Judge, Mandi, whereby suit of the plaintiff was decreed with a prayer to quash and set aside the same.

8. This Regular Second Appeal was admitted on the following substantial question of law:-

"(1) Whether the plaintiff was entitled to compensation without the negligence having been proved and as such, there has been misreading of evidence by the first appellate Court?

9. Mr.Satyan Vaidya, learned Senior Advocate, vehemently argued that judgment passed by the learned District Judge, whereby suit having been filed by the present plaintiff was decreed, is not sustainable as the same is not based upon correct appreciation of evidence adduced on record by respective parties and as such same deserves to be quashed and set aside. Mr.Vaidya further contended that learned District Judge, while coming to the conclusion that plaintiff suffered injury on account of electrocution, miserably failed to appreciate the evidence in its right perspective, as a result of which great prejudice has been caused to the appellant, who in no manner could be termed to be negligent as has been held by the Court below. With a view to substantiate his aforesaid argument, Mr.Vaidya contended that there is nothing on record suggestive of the fact that plaintiff was able to prove the manner/circumstances in which he suffered electricity shock because as per evidence led on record by the plaintiff, electricity lines in question were in existence for many years and similarly the slab covered house was also in existence for many years. Mr.Vaidya, while specifically inviting the attention of this Court to the statement, having been made by the plaintiff PW-2, wherein he claimed that on that ill-fated day, he was basking in the sun at around 9.00 A.M., when the plaintiff claimed to have suffered electric shock, while sleeping over the slap on account of dazzling spark coming from overhead electric wires in the form of a round ball of fire. Mr.Vaidya forcefully contended that it is impossible to believe that there was dazzling spark in the electric wires, because no positive evidence worth the name was led on record by the plaintiff from where it could be inferred that spark, if any, was caused due to joining of the electric wires.

10. Mr.Vaidya, while referring to the judgment passed by learned trial Court, strenuously argued that the same is based upon correct appreciation of evidence adduced on record and as such there was no occasion, whatsoever, for the first appellate Court to set aside the same that too on very flimsy grounds and as such impugned judgment having been passed by learned first appellate Court deserves to be quashed and set a side. Mr.Vaidya, further contended that no definite opinion with regard to dazzling spark allegedly coming from the overhead electric wires could be given without there being examination, if any, of technical expert, who would have proved the possibility of generation of such spark and the consequent possibility and capability of causing injury to human being by such spark and as such findings recorded by the learned District Judge in the absence of such evidence has rendered judgment

and decree passed by learned Court below vitiated and as such same deserves to be quashed and set aside.

11. While concluding his arguments, Mr.Vaidya invited the attention of this Court to medical evidence on record to suggest that even nature of injury suffered by the plaintiff was not properly appreciated by learned District Judge, because, if for the sake of arguments it is accepted that dazzling spark came from overhead electric wires, the possible nature of the injuries, which could have been inflicted on the person of the plaintiff are not proved and as such, judgment passed by learned first appellate Court, whereby appellants-defendants have been held to be negligent, is not sustainable being contrary to the material available on record.

12. Mr.Vaidya further contended that learned District Judge has brushed aside the legal evidence led by the defendants, particularly, positive evidence led on record that there is automatic tripping of electricity in case of any fault on the line or fault, as alleged by the plaintiff and as such version of plaintiff is doubtful that there was some dazzling spark emanated from the electricity wires at the relevant point of time. Mr.Vaidya further contended that learned District Judge assessed the compensation on higher side because otherwise also plaintiff would have been entitled to compensation to the extent of 40% loss of income suffered by him. In the aforesaid background, Mr.Vaidya prayed that the present appeal may be accepted and the suit filed by the plaintiff may be dismissed after setting aside the impugned judgment passed by learned District Judge.

13. Mr.Surinder Verma, learned counsel representing the respondents, supported the judgment passed by the learned District Judge. Mr.Verma, while referring to the judgment passed by learned District Judge, strenuously argued that bare perusal of the same suggests that same is based upon correct appreciation of evidence adduced on record by the respective parties and as such there is no scope of interference of this Court, especially in view of the fact that Court below has dealt with each and every aspect of the matter very meticulously. Mr.Verma further contended that bare perusal of the judgment passed by learned trial Court, whereby the suit having been filed by the present plaintiff was dismissed, clearly suggests that evidence led on record by the plaintiff was not read in its right perspective, as a result of which erroneous finding had come on record which was rightly set aside by the learned first appellate Court in the appeal having been preferred by the plaintiff.

14. Mr.Verma further contended that bare perusal of the evidence led on record by the plaintiff clearly suggests that he was electrocuted due to negligence on the part of the defendants and as such he was rightly compensated by the learned District Judge, while decreeing the suit of the plaintiff for compensation. With a view to substantiate aforesaid arguments, Mr.Verma invited the attention of this Court to the oral as well as documentary evidence led on record by the plaintiff to demonstrate that plaintiff successfully proved on record that when he was sleeping on the roof of his house, there was dazzling spark and a big mass of fire got discharged from the electric wire, passing above the house of the plaintiff and said mass of the fire engulfed the plaintiff, as a result of which he suffered injuries on his body and he was unable to walk, sit and sleep properly. He invited the attention of this Court to the medical evidence led on record by the plaintiff to suggest that plaintiff successfully proved on record that in the aforesaid incident he was rendered 40% disable and as such he was entitled to be compensated qua the amount which he actually spent on his treatment.

15. In the aforesaid background, Mr.Verma strenuously argued that there is no illegality and infirmity in the impugned judgment passed by first appellate Court, whereas judgment passed by learned trial Court clearly suggests that same is not based upon proper appreciation of evidence, as such, the same was rightly set aside by the first appellate Court. Mr.Verma further prayed that the appeal filed by the appellant may be dismissed.

16. Minute scrutiny of impugned judgment vis-à-vis evidence, be it ocular or documentary, adduced on record by respective parties, nowhere suggests that there has been misreading and mis-appreciation of evidence by the learned first appellate Court, while decreeing

the suit of the plaintiff after setting aside the judgment and decree passed by learned trial Court below. Rather, this Court is of the view that plaintiff successfully proved on record that he suffered injuries on his person after being electrocuted while he was sleeping on the roof/slab of his house.

17. Plaintiff, with a view to prove his case, examined himself as PW-1 and successfully proved on record the version put forth by him in the plaint by stating that on 16.2.1998, when he was sleeping on the roof of his house, a dazzling spark came from High Tension Wires passing over his house, as a result of which he suffered injuries on his body. He also stated that he was taken to Chandigarh for treatment for such burnt injury on his right arm and leg. He also stated that he suffered 40% disability in the aforesaid accident as was assessed by the doctor. Cross-examination conducted upon this witness suggests that appellants-defendants were not able to extract anything contrary to what he stated in his examination-in-chief, rather plaintiff admitted in his cross-examination that High Tension Line is existing for the last 30-40 years and he has one house at Jarol. The aforesaid statement cannot be read in isolation, especially in view of further statement having been given by plaintiff, wherein he stated that said house was purchased by him from PW-2 Balak Ram. Plaintiff specifically stated that the house in which he is living is in existence for the last 40 to 45 years and the same is *pucca* house. Perusal of cross-examination conducted on the aforesaid plaintiff witness nowhere, suggests that any suggestion worth the name regarding negligence, if any, on his part was put to him, rather question with regard to existence of property and its ownership were put to plaintiff, who successfully proved on record that at the time of accident he was living in the house which was in existence for more than last 40 to 45 years.

18. With a view to prove his case, plaintiff also examined PW-2 Balak Ram and PW-3, Bangalu, who also corroborated the version put forth by the plaintiff. PW-2 specifically stated that earlier he was living in the said house for the last 4-5 years prior to purchase made by the plaintiff. It has also come in his statement that on the date of accident, Balak Ram was sleeping on the roof of the house and accident took place due to sparking of the wires. In his cross-examination, he corroborated the version put forth by the plaintiff that the house, which was sold by him to the plaintiff, was constructed by his ancestors about 30 to 35 years back. Interestingly, cross-examination conducted on this witness, nowhere suggests that suggestion, if any, was put to him that it was only after 1998-99, plaintiff raised fresh construction of the house over the purchased land/ house, rather question with regard to income of the plaintiff were put to this witness.

19. PW-3 specifically stated that he saw dazzling light coming from High Tension Line in the shape of balloon, which fell on the plaintiff Babu Ram. He also stated that thereafter Babu Ram was shifted to local dispensary. Like PW-2, he also stated in his cross-examination that electric wires passing through Jarol are quite old and Balak Ram sold his house to the plaintiff.

20. Apart from above oral evidence, plaintiff also led on record documentary evidence in shape of sale deed Ex.PW-2/A, whereby PW-2 Balak Ram had sold his land comprised in Khasra Nos.2324/1117 and 2324/1117/1, measuring 0-0-9 bigha for total consideration of Rs.50,000/- on 6.8.1999. Perusal of aforesaid sale deed clearly suggests that there is/was a house existing over the land referred hereinabove. Similarly, Jamabandi for the year 1997-98 annexed with sale deed also suggests that Khasra No.2624/1117, measuring 0-1-0 bigha is recorded as ***'Gair Mumkin Makan'*** and as such version put forth by the defendants in their written statement that there is no house of the plaintiff over the disputed land was rightly rejected by learned first appellate Court in appeal having been preferred by the plaintiff.

21. Conjoint reading of the statements of aforesaid plaintiff witnesses, coupled with the documentary evidence led on record by the plaintiff, clearly proves on record that High Tension Lines passes over the house of the plaintiff, which is in existence for more than 35-40 years. It also stands proved on record that at the time of incident, house was owned and possessed by plaintiff, who had purchased it from Balak Ram PW-2.

22. Aforesaid plaintiff witness is unequivocally stated that on that day when plaintiff was sleeping on the roof of this house, dazzling light came from High Tension line in the shape of balloon and engulfed the plaintiff, as a result of which he sustained injuries on his person.

23. Defendant, with a view to refute the claim of the plaintiff, examined one Garza Ram as DW-1, who happened to be Foreman at that relevant time. He in his statement stated that 33 KV HT line is under his supervision and no complaint, whatsoever, was received in the year 1998 from any person. He also stated that there is no house at Jarol, but in his cross-examination stated that High Tension line was installed in the year 1965. In his cross-examination he also admitted that plaintiff suffered burn injuries though exact cause is not known to him. He also stated that he cannot say that the plaintiff was sleeping on 16.2.1998 on the roof of his house. He also stated that he was not aware that the house of the plaintiff is under High Tension line. It has also come in his statement that High Tension line has to be 22 feet from the ground, but he feigned ignorance about the height of the said line from the roof of the house of the plaintiff.

24. DW-2 Surender Kumar, T-mate with Sub Division, Sundernagar, stated that in the event of any fault of the High Tension line, there is automatic tripping. He further stated that plaintiff has built his house in the year 1998, whereas High Tension line was laid much prior to that. In his cross-examination, he also admitted that High Tension line passes over the house of the plaintiff. He further admitted that a person standing on the house of the plaintiff can even touch the said standing person.

25. Perusal of aforesaid statements having been made by the defendant witnesses clearly suggests that there are material contradictions in the stand having been taken by both the aforesaid witnesses with regard to existence of the house of the plaintiff on the spot. DW-1 in his statement stated that there is no house of the plaintiff in Jarol, whereas DW-2 though admitted that the plaintiff has house at Jarol, but, the same was built in the year 1998, whereas High Tension line was laid much prior to that. DW-2 further admitted that High Tension line passes over the house of the plaintiff. As has been discussed above, DW-2 in his statement categorically admitted that person standing on the roof of the house of the plaintiff can even touch the High Tension line, which clearly belies the stand taken by the appellants-defendants in their written statement that there is no house of the plaintiff below the High Tension line and the height of the High Tension line has been properly maintained under the H.P. Electricity Act. Evidence led on record, be it ocular or documentary, nowhere suggests that defendants were able to prove on record that plaintiff raised construction of his house in the year 1998-99, as claimed by DW-2 in his statement. Similarly, no evidence worth the name has been led on record by the defendants to prove the averments contained in the written statement that there is no house of the plaintiff at Jarol below HT line. Perusal of the impugned judgment passed by the learned first appellate Court clearly suggests that court below while concluding that defendant-department was negligent in maintaining the HT line passing over the house of the plaintiff, carefully examined the provisions contained in Indian Electricity Act and Rules, wherein under Rule 80, height of 12 feet is/ was required to be maintained from the upper portion of the roof of the building, but in the instant case, as emerged from the statement of DW-2, there was no distance at all between the roof of the plaintiff and the HT line because he categorically stated that HT line passing over the roof of the plaintiff could even touch the head of the person. Aforesaid statement having been made by DW-2 coupled with the fact that defendants failed to maintain height in terms of Rule 80 of the Indian Electricity Act, as reproduced in the impugned judgment of the trial Court, this Court is unable to accept the contention having been made by Shri Vaidya, learned Senior counsel representing the appellants-defendants, that plaintiff was not able to prove any negligence on the part of the appellants-defendants and as such he was not entitled to any compensation.

26. Conjoint reading of the evidence led on record by the plaintiff as well as defendant clearly proves on record that on ill-fated day plaintiff suffered injuries on his person after being electrocuted. Plaintiff successfully proved on record that house in question was in

existence prior to laying of HT line by the defendants and as such by no stretch of imagination it can be concluded especially, in view of the evidence led on record by the defendant that construction, if any, was raised by the plaintiff after laying of the HT line. Medical evidence led on record by the plaintiff clearly proves on record injuries suffered by the plaintiff during aforesaid incident. PW-4 Dr.L.D. Vaidya specifically proved disability certificate Ex.PW-4/A. Ghanshayam Gupta, also proved on record that on 16.2.1998 plaintiff was admitted in the hospital and thereafter referred to PGI, Chandigarh for better treatment. Prescription slip made at the time of admission of the plaintiff after accident also suggests that the plaintiff had suffered electric shock injuries and even after getting back from the PGI, he was periodically checked up by doctors at Sundernagar. Dr.Anil Chauhan PW-5 also supported the version put forth by the plaintiff that he was treated for electric burn injury and he proved on record discharge certificate Ex.PW-5/A. Cross-examination conducted upon these witnesses nowhere suggests that defendants-appellants were able to extract anything contrary to what they stated in their examination-in–chief. Similarly, there is no mention, if any, with regard to other reason, if any, of injuries allegedly suffered by the plaintiff.

27. Hence, this Court sees no illegality and infirmity in the judgment passed by learned first appellate Court, which is admittedly based upon correct appreciation of evidence adduced on record by the plaintiff. This Court, after carefully examining the entire evidence led on record, has no hesitation to conclude that plaintiff successfully proved on record that he suffered injuries on his body after being electrocuted by the HT wire passing over his house, whereas no positive evidence has been led on record by the defendants, which could persuade this Court to conclude that appellants-defendants were not negligent in maintaining the HT wire, which was admittedly in existence prior to construction of the house in question. Substantial question of law is answered accordingly.

28. Consequently, in view of the aforesaid detailed discussion, this Court sees no illegality and infirmity in the judgment passed by learned first appellate Court and as such the same is upheld and that of the learned trial Court is set aside. Hence, present appeal fails and the same is, accordingly dismissed.

29. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Kewal Ram ....Appellant-Defendant

Versus

Murat Singh ....Respondent-Plaintiff

Regular Second Appeal No.253 of 2008
Judgment Reserved on: 23.12.2016
Date of decision: 27.12.2016

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for the recovery of Rs.27,000/- pleading that the defendant had offered to purchase apple crop of the orchard of the plaintiff for a sum of Rs.1,01,000/- - defendant paid Rs.76,000/- and remaining amount of Rs.25,000/- was to be made after the sale of the apple- the amount was not paid – hence, the suit was filed – the suit was decreed by the Trial Court – an appeal was filed, which was dismissed- held in second appeal that the plaintiff examined himself and two witnesses to prove his version- oral evidence was corroborated by documents – the defendant denied the version of the plaintiff but did not lead any evidence to prove his version – the evidence was correctly appreciated- appeal dismissed. (Para-18 to 30)

Cases referred:
Rajasthan State Road Transport Corporation and Another vs. Bajrang Lal, 2014 (4) SCC 693
D.R. Rathna Murthy vs. Ramappa, 2011(1) SCC 158
Life Insurance Corporation of India and Another vs. Ram Pal Singh Bisen, 2010(4) SCC 491
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant: Mr.Y.P. Sood, Advocate.
For the Respondent: Mr.B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant Regular Second Appeal is directed against the judgment and decree dated 25.2.2008 passed by learned District Judge (Forest), Shimla in Civil Appeal No.43-S/13 of 2007/06, affirming the judgment and decree dated 29.11.2005, passed by Civil Judge(Senior Division), Chopal, District Shimla in Civil Suit No.22-1 of 2005, whereby suit for recovery having been filed by the plaintiff-respondent *(hereinafter referred to as the `plaintiff')* has been decreed.

2. Briefly stated the facts, as emerged from the record, are that the plaintiff filed a suit for recovery of a sum of Rs.27,000/- against the defendant in the Court of learned Civil Judge(Senior Division), Chopal, District Shimla, stating therein that the defendant approached him and offered to purchase the apple crop in the apple season of the year 2004 from the apple orchard of plaintiff. Plaintiff further averred that deal was settled between plaintiff and defendant for full and final consideration amounting to Rs.1,01,000/- only. As per plaintiff, defendant made payment of Rs.76,000/- to the plaintiff being part payment of the cost of apple crop but remaining balance payment of Rs.25,000/- was to be made after sale of entire apple crop in the market. Plaintiff further claimed that defendant had agreed in writing and had undertaken to make the remaining payment of the sale of apples in the market. Plaintiff averred in the plaint that defendant acknowledged the liability to pay the balance amount of Rs.25,000/- in favour of plaintiff on 31.8.2004 and beside above, defendant-appellant acknowledged the liability to make payment to the plaintiff on 11.7.2004, on which day he admitted the payment of Rs.11,000/- made by him to the plaintiff on 10.7.2004 and Rs.11,000/- earlier to 10.7.2004. Plaintiff further averred in the plaint that defendant-appellant acknowledged the liability to pay an amount of Rs.25,000/-, being balance payment, payable to the plaintiff, which is still recoverable from the defendant. Since defendant failed to make the payment within the stipulated period, plaintiff claimed an amount of Rs.27,000/- alongwith pending and future interest @ 8% per annum for one year i.e. w.e.f. 11th July, 2004 to 10th July, 2005.

3. Defendant by way of written statement refuted the aforesaid claim of the plaintiff as set up in the plant in toto by stating that he neither approached the plaintiff nor offered to purchase his apple crop. He further stated that no deed was finally settled between him and plaintiff and as such there is no question of payment of Rs.27,000/- and remaining balance of Rs.25,000/-. Defendant also denied that he ever acknowledged the liability to pay the balance amount of Rs.25,000/- to the plaintiff on 31.8.2004.

4. By way of replication, plaintiff reasserted his claim as set up in the plaint controverting the stand taken by the defendant in the written statement in toto.

5. On the basis of aforesaid pleadings learned trial Court below framed following issues:-

"1. Whether the plaintiff is entitled for the relief of recovery of Rs.27,000/- as prayed for? OPP.

2. Whether the suit is not maintainable in the present form? OPD.

3. *Whether the plaintiff has no locus-standi and cause of action to file the present suit? OPD.*

4. *Relief."*

6. Subsequently, learned trial Court vide judgment dated 29.11.2005 decreed the suit of the plaintiff for a sum of Rs.27,000/- and held him entitled for recovery of Rs.27,000/- from defendant with future interest @ 8% per annum from 11th July, 2004 to 10th July, 2005 till the realization of total decreetal amount with entire costs of the suit.

7. Appellant-defendant being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court filed an appeal in the Court of learned District Judge, Shimla, which came to be registered as Civil Appeal No.43-S/13 of 2007/06. Further, fact remains that aforesaid appeal, having been preferred by the defendant, was dismissed, as a result of which, judgment and decree passed by learned trial Court came to be upheld.

8. In the aforesaid background, appellant-defendant approached this Court by way of filing instant Regular Second Appeal praying therein for quashing and setting aside the judgments and decrees passed by both the learned Courts below.

9. This Court vide order dated 10.7.2009 admitted the instant appeal on the following substantial question of law:-

"Whether the findings recorded by the courts below in the absence of proof of execution and signatures of the appellant on Exhibit PW-1/A and PW-1/B are sustainable in view of the fact that the first appellate court below itself has come to the conclusion that the engtries made in PW-1/A and PW-1/B have not been proved in accordance with Section 67 of the Evidence Act?"

10. Mr.Y.P. Sood, learned counsel representing the appellant, vehemently argued that the judgments and decrees passed by both the Courts below are not sustainable in the eyes of law as the same are not based upon correct appreciation of evidence. Mr.Sood, while referring to the judgment passed by both the Courts below, further contended that both the Courts below, while decreeing the suit of plaintiff, mis-appreciated and mis-read the entire pleadings and evidence, as a result of which great prejudice has been caused to the appellant-defendant who successfully proved on record that at no point of time he had purchased apple crop of the plaintiff, as alleged in the plaint.

11. With a view to substantiate his arguments that Courts below have failed to appreciate that there has been complete variance in the pleadings and evidence led by the plaintiff, Mr.Sood strenuously argued that bare perusal of plaint suggests that respondent had specifically alleged that out of alleged amount of Rs.1,01,000/-, Rs.76,000/- were paid to him and Rs.25,000/- were agreed to be paid by the appellant lateron. But in evidence, respondent alleged that he had made payment of Rs.11,000/- in two installments; first of Rs.10,000/- and second of Rs.1,000/- and remaining amount of Rs.65,000/- was paid by the defendant on 10th July, 2004. Mr.Sood, while referring to the variance allegedly made by the plaintiff in the plaint as well as in the replication, contended that Courts below miserably failed to appreciate the material variance between the pleadings and proof and as such failed to exercise jurisdiction vested in it in accordance with law, as a result of which findings returned by the appellate Court are vitiated and cannot be allowed to sustain.

12. Mr. Sood, further contended that diary Ex.PW-1/A and pages of the diary Ex.PW-1/B could not be relied upon by the Courts below while fastening the liability on the appellant, especially when entries made in the same were not proved in accordance with Section 67 of the Indian Evidence Act. He further argued that no transaction could be proved, if any, between the parties by placing reliance upon the aforesaid diary Ex.PW-1/A and Ex.PW-1/B and no decree, whatsoever, could be passed by Courts below on the basis of self-created evidence. Mr.Sood, further contended that learned Courts below miserably erred in recording findings on the basis of inadmissible evidence i.e. diary Ex.PW-1/A. He further contended that contents of Ex.PW-1/B

were never proved to have been recorded at the instance of appellant; neither the signatures of the same have been proved to be that of appellant. Since respondent-plaintiff did not lead any evidence as to in whose presence and when entries Ex.PW-1/B were made at the instance of appellant, no decree for recovery of amount as claimed in plaint could be passed against the defendant by the Courts below while placing reliance upon the aforesaid documents and as such judgments passed by both the Courts below deserve to be quashed and set aside.

13. While concluding his arguments, Mr.Sood invited the attention of this Court to the observations/findings returned by first appellate Court that, ***"Though the writing and signatures of the defendant on 12.7.2004 have not been proved in accordance with the provisions of Section 67 of the Indian Evidence Act, yet it appears that this diary was maintained by the plaintiff in the regular course of business",*** to suggest that even first appellate Court was convinced that no reliance, if any, could be placed upon the writings and signatures allegedly made in Diary Ex.PW-2/A and Ex.PW-2/B by the defendant, but despite that, judgment and decree passed by trial Court was upheld, which clearly suggests that there is no application of mind by the learned first appellate Court while analyzing and examining the genuineness and correctness of impugned judgment and decree passed by learned trial Court. In the aforesaid background, Mr.Sood prayed that appeal may be accepted and the judgment and decree passed by the Courts below may be quashed and set aside.

14. In support of his contention Mr.Sood, also placed reliance on the judgments of Hon'ble Apex Court in ***Rajasthan State Road Transport Corporation and Another vs. Bajrang Lal, 2014 (4) SCC 693, D.R. Rathna Murthy vs. Ramappa, 2011(1) SCC 158*** and ***Life Insurance Corporation of India and Another vs. Ram Pal Singh Bisen, 2010(4) SCC 491.***

15. Mr.B.C. Verma, learned counsel representing the respondent supported the judgments and decrees passed by both the Courts below. Mr.Verma vehemently argued that bare perusal of the judgments and decree passed by both the Courts below, nowhere suggests that the same are not based upon correct appreciation of the evidence available on record by the respective parties, rather, close scrutiny of same suggests that Courts below have dealt with each and every aspect of the matter meticulously and as such, there is no scope of interference, whatsoever, by this Court in the concurrent findings of fact and law returned by both the Courts below.

16. With a view to refute the contentions having been made by the counsel representing the appellant, Mr.Verma, invited the attention of this Court to the statements having been adduced on record by the plaintiff witnesses to demonstrate that apart from documentary evidence, Ex.PW-1/A and Ex.PW-1/B, there was overwhelming evidence led on record by the plaintiff to prove that defendant had purchased standing apple crop of the orchard of the plaintiff and in this regard he had paid an amount of Rs.75,000/- to the plaintiff and remaining Rs.25,000/- was agreed to be paid by the defendant after sale of the apple crop. He also refuted the contention put forth on behalf of Mr.Sood, learned counsel representing the appellant-defendant, that no reliance could be placed upon the documentary evidence i.e. Ex.PW-2/A and Ex.PW-2/B since it was not proved in accordance with law. As per Mr.Verma, both the Courts below rightly placed reliance upon the documentary evidence adduced on record by the plaintiff to conclude that an amount of Rs.25,000/- was payable by the defendant to the plaintiff on account of his liability to pay the balance sale consideration to the plaintiff.

17. Mr.B.C. Verma, learned Counsel appearing for the respondent-plaintiff, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited, especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by

Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

18. Perusal of pleadings as well as evidence led on record by respective parties to substantiate their pleadings clearly establish on record that there was a deal between the plaintiff and defendant with regard to apple crop in the apple season of year 2004. As per deal, plaintiff sold entire apple crop in the apple season of year 2004 to the defendant for full and final consideration/costs of Rs.1,01,000/- only. Plaintiff specifically stated in the plaint that out of aforesaid agreed amount, defendant made part payment of Rs.76,000/-, whereas remaining amount of Rs.25,000/- was to be paid after sale of entire apple crop in the market, which was agreed by the defendant in writing and he had undertaken to make the same good after sale of the apple in the market.

19. With a view to substantiate his aforesaid claim, plaintiff examined himself as PW-1 and reiterated the version put forth by him in the plaint by stating that he sold the apple orchard to defendant in the year 2004 for a sale consideration of Rs.1,01,000/-. He further stated that out of agreed amount, an amount of Rs.76,000/- was paid to him by the defendant and remaining amount of Rs.25,000/- was agreed to be paid lateron. It has also come in his statement that Rs.11,000/- were paid in the month of June and an amount of Rs.65,000/- was paid by the defendant on 10th of July. He also stated that he had made entry in his diary on 10.7.2004 and on 11.7.2004 it was acknowledged by the defendant that he has still to make payment of Rs.25,000/- to the plaintiff. Plaintiff further stated before the Court below that on 31.8.2004, one deed was scribed by Jhinu Ram, wherein it was again agreed by the defendant to make payment of Rs.25,000/- to him. Plaintiff also stated before the Court that on 12.7.2005, he deposited an amount of Rs.65,000/- in shape of FDR in the bank at Jhiknipul. He also stated that since defendant failed to make balance amount of Rs.25,000/- to him, he filed a suit for recovery of an amount of Rs.25,000/- alongwith interest. During his statement, he also proved entry allegedly made by him as well as by defendant on 10th and 11th July, 2004 in his diary Ex.PW-1/A. Cross-examination conducted upon this witness, nowhere suggests that defendant was able to extract anything contrary to what plaintiff stated in his examination-in-chief. He specifically denied that no transaction to sell the Orchard to the defendant was ever entered into between him and the defendant for an amount of Rs.1,01,000/-. He also denied the suggestion that no payment of Rs.65,000/- was made by the defendant on 10.7.2004. He further denied the suggestion put to him by the defendant that an amount of Rs.25,000/- is not outstanding against the defendant. Close scrutiny of aforesaid statement having been made by PW-1 clearly proves on record the contents of plaint having been filed by the plaintiff.

20. With a view to substantiate his aforesaid claim, plaintiff also examined PW-2 Sham Singh and PW-3 Jhinu Ram. PW-2 also corroborated the version put forth by the plaintiff with regard to sale of apple orchard to the defendant by the plaintiff for a total consideration of Rs.1,01,000/-. He also supported the version put forth by PW-1 that out of aforesaid amount an amount of Rs.10,000/- was paid in advance in his presence. Similarly, in his cross-examination, defendant was not able to extract anything contrary to what he stated in examination-in-chief, rather he specifically denied the suggestion put to him that no advance payment of Rs.10,000/- was paid by the defendant to the plaintiff.

21. PW-3 Jhinu Ram admitted that he scribed document Ex.PW-3/A, wherein defendant undertook to make balance payment of Rs.25,000/- to the plaintiff. He admitted his signatures on the document Ex.PW-3/A encircled 'B'. He also admitted that defendant acknowledged all the terms and conditions laid down in document Ex.PW-3/A. Cross-examination conducted upon this witness also nowhere, suggests that defendant was able to extract anything contrary to what he stated in his examination-in–chief. He also denied the suggestion put to him by the defendant that apples from the orchard of the plaintiff were not forwarded to the defendant and defendant was not an apple contractor. Aforesaid plaintiff witnesses PW-2 and PW-3 clearly proved the stand of the plaintiff that he had sold apple crop in the year 2004 from his apple orchard to defendant for a total consideration of Rs.1,01,000/-.

Both the aforesaid witnesses categorically stated that an amount of Rs.75,000/- was received by the plaintiff as an advance payment, whereas remaining amount of Rs.25,000/- was to be paid by the defendant after sale of the apple crop. True, it is that to substantiate aforesaid claim, plaintiff also placed reliance upon documentary evidence Ex.PW-1/A and Ex.PW-1/B and stated that in the month of June, 2004, defendant had made payment of Rs.11,000/- and on 10th July, 2004, he had made payment of Rs.65,000/-. Similarly, plaintiff also stated that he had made entry in his diary Ex.PW-2/A, wherein defendant acknowledged that he still to make payment of Rs.25,000/- to the plaintiff. As has been noticed above, that apart from documentary evidence, as discussed above, plaintiff by way of leading cogent and convincing evidence in shape of PW-2 and PW-3 successfully proved on record that he had sold his apple crop to defendant for total consideration of Rs.1,01,000/-, out of which he received Rs.75,000/- in total and as such, it cannot be concluded by trial Court below, while decreeing the suit of the plaintiff, solely placed reliance upon entry made in the diary i.e. Ex.PW-1/A and Ex.PW-1/B. Rather, plaintiff by way of leading oral evidence, as has been discussed above, successfully proved that there was deal between him and defendant with regard to apple crop in the year 2004 and just to substantiate his aforesaid claim, he placed reliance upon documentary evidence, which certainly corroborated oral version put forth by the plaintiff as well as his witnesses.

22. Apart from above, factum with regard to payment of Rs.65,000/- on 10.7.2004 stands duly proved from the statement of PW-4 i.e. Incharge, H.P. State Cooperative Bank, Jhiknipul, who corroborated the version put forth by the plaintiff that on 12.7.2004 he deposited Rs.65,000/- in shape of FDR i.e. Ex.PW-1/D in the name of Murat Singh i.e. plaintiff. There is nothing in cross-examination of this witness, which could be beneficial in any way to the case of defendant. Hence, this Court after conjoint reading of aforesaid statements of plaintiff witnesses has no hesitation to conclude that plaintiff successfully proved on record that defendant owed him Rs.25,000/- as balance payment towards total consideration of Rs.1,01,000/- in terms of oral agreement entered into between him and the plaintiff.

23. At the cost of repetition, it may be stated that oral evidence led on record was sufficient for courts below to conclude that defendant owed Rs.25,000/- to plaintiff on account of balance payment out of total consideration and reliance, if any, placed on record by the courts below, while decreeing the suit of the plaintiff on documentary evidence as discussed above, is only of corroborative nature. If plaint of plaintiff as well as his statement made before the Court is read in its entirety, it nowhere suggests that entire claim of the plaintiff was based upon documentary evidence i.e. diary Ex.PW-2/A and Ex.PW-2/B, rather, same was entered in evidence in support of his claim which he otherwise proved successfully by leading cogent and convincing oral evidence. To the contrary, if the written statement having been filed by the defendant as well as his statement is perused and examined carefully, it is total case of denial. He denied that no payment of Rs.65,000/- was ever made by him to the plaintiff. He also denied that he ever gave undertaking in writing on 31.8.2004, 10.7.2004 and 11.07.2004.

24. Apart from this, defendant did not examine any witness in support of his aforesaid claim, whereas, plaintiff by leading convincing evidence ,as has been discussed above, successfully proved his claim as set up in the plaint. PW-3 Jhinu Ram, who scribed document Ex.PW-3/A successfully proved on record that 31.8.2004 defendant Kewal Ram had acknowledged his liability to pay balance amount of Rs.25,000/- to the plaintiff. Cross-examination conducted upon the aforesaid witness, nowhere suggests that any suggestion was put to him that he had some motive to falsely depose against the defendant. Rather, in cross-examination, he was put a suggestion that the plaintiff never offered his orchard to the defendant for sale which was specifically denied by PW-3 Jhinu Ram. There was no suggestion worth name with regard to document Ex.PW-3/A, which certainly compel this Court to conclude that on 31.8.2004, defendant acknowledged his liability to pay Rs.25,000/- to the plaintiff. Similarly, if document Ex.PW-3/A is taken into consideration, it certainly gives support to the contention of PW-1 that he had made certain entries on 10th and 11th July, 2004, wherein defendant had acknowledged balance payment of Rs.25,000/- payable by him to the plaintiff.

25. This Court, with a view to ascertain the genuineness and correctness of findings returned by the Courts below that "perusal of signatures of defendant appended in diary Ex.PW-1/A are similar to his signatures appended by him on the summons", also perused both the documents which clearly suggests that there is striking similarity between both the signatures allegedly appended by the defendant on both the documents. There cannot be any quarrel with regard to the observation having been made by the learned first appellate Court while rejecting the appeal preferred by the appellant-defendant that writing and signatures of defendant on11.7.2004 have not been proved in accordance with Section 67 of the Indian Evidence Act, but, as has been discussed in detail above, the aforesaid assertion/stand may not have any bearing on the other findings returned by the Courts below, which are otherwise based upon correct appreciation of evidence adduced on record by the plaintiff. Certainly record suggests that writings and signatures of the defendant, as contained in the documentary evidence Ex.PW-2/A, were not proved in accordance with the provisions of Section 67 of the Indian Evidence Act, but as has been observed above, plaintiff, apart from placing reliance upon aforesaid documentary evidence, successfully proved on record by leading oral cogent and convincing evidence that he sold his apple crop to defendant for a total consideration of Rs.1,01,000/-, out of which he had received an amount of Rs.75,000/- from defendant. Since defendant was unable to shatter the testimony of aforesaid plaintiff witnesses, claim set up by the plaintiff could not be defeated merely on the averments contained in the written statement having been filed by the defendant.

26. At this stage, it may be noticed that case of the defendant was of total denial and he, apart from himself, failed to examine any witness in support of his claim. If defendant was seriously aggrieved with the assertion/claim of the plaintiff that defendant appended his signatures on the diary Ex.PW-1/A on 11.7.2004 and acknowledged balance payment, definitely he had option to move an appropriate application before appropriate Court of law for getting his signatures compared from the handwriting expert or Government Examiner of Questioned Documents, but, unfortunately, there is nothing on the file suggestive of the fact that any steps were ever taken by the defendant in this regard. Similarly, if defendant was prejudiced with the observation, if any, made by the learned Court below while recording the statement of PW-1, he had remedy of assailing the same by way of appropriate proceedings before the appropriate court of law.

27. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***(p.269)***

28. Hence, this Court after carefully examining the evidence available on record has no hesitation to conclude that apart from documentary evidence Ex.PW-1/A, there was ample evidence led on record by the plaintiff to prove his claim and as such Courts below rightly decreed the suit of the plaintiff for an amount of Rs.27,000/- and there is no illegality and infirmity in the judgments having been passed by both the Courts below. Though writings contained in the document Ex.PW-1/B were not proved in accordance with Section 67 of the Indian Evidence Act, but, oral evidence led on record clearly corroborates the entries made in the diary Ex.PW-1/A. Substantial question is answered accordingly.

29. As far as judgments relied upon by the learned counsel appearing for the appellant-defendant are concerned, this Court is of the view that the same are not applicable in the present facts and circumstances of the case, especially in view of the law laid down by the Hon'ble Apex Court in ***Laxmidevamma's*** case *(supra)*.Moreover, this Court, while examining the correctness and genuineness of submissions having been made by the learned counsel representing the appellant, has perused evidence led on record by the respective parties, perusal whereof clearly suggests that the same have been appreciated in its right perspective.

30. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy, appears to be based upon correct appreciation of oral as well as documentary evidence. Hence, the present appeal fails and is dismissed, accordingly. There shall be no order as to costs.

31. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Parkash Chand & Others ....Appellants-Plaintiffs

Versus

State of H.P. & Others ..Respondents-Defendants

Regular Second Appeal No.436 of 2006.
Judgment Reserved on: 05.12.2016.
Date of decision: 27.12.2016

Code of Civil procedure, 1908- Section 100- Plaintiffs pleaded that their land was acquired for the construction of Chamera Hydro Electric Project Stage-II (NHPC) – Government decided to award Rs.2,50,000/- to the affected families, who were not given employment as per the agreement entered at the times of acquisition – employment or the compensation was not paid to the plaintiffs – hence, the suit was filed for the recovery of compensation- defendants denied the claim of the plaintiffs and asserted that requisite compensation was paid to the plaintiffs – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed and the judgement and decree passed by the Trial Court were set aside – held in second appeal that acquisition was not disputed – it was also not disputed that one member of the family of the ousted person was to be provided employment and in the alternative compensation – it is admitted that plaintiffs had received compensation of Rs.2,50,000/- regarding 3-2 bighas of land – plaintiff asserted that they are entitled to financial package regarding 17 biswas of land– record shows that 17 biswas of land was not independent but part of the acquired land – financial package was received by all the legal representatives of P, the previous owner- plaintiffs are not entitled to separate compensation – appeal dismissed. (Para-17 to 28)

For the Appellants: Mr.Anand Sharma, Advocate.

For Respondents 1 & 2: Mr.P.M. Negi, Additional Advocate General with Mr.Ramesh Thakur, Deputy Advocate General.

For Respondent No.3: Mr.Sameer Thakur, Advocate vice Mr.Rajnish Maniktala, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree dated 22.6.2006, passed by the learned District Judge, Chamba, District Chamba, H.P., reversing the judgment and decree dated 5.8.2005, passed by learned Civil Judge(Senior Division), Chamba, District Chamba, whereby the suit filed by the appellants-plaintiffs has been decreed.

2. Briefly stated facts of the case are that the appellant-plaintiffs *(herein after referred to as the `plaintiffs'),* filed a suit for recovery of Rs.2,50,000/- from the defendants being compensation amount in lieu of employment which was to be offered to the family members of oustees of Chamera Hydro Electric Project, Stage-II (NHPC). It is averred by the plaintiffs that the land belonging to them had been acquired on behalf of defendant No.3, Chamera Hydro Electric Project, Stage-II (NHPC) vide notification under Section 4 of the Land Acquisition Act dated 28.4.1988 and during the process of acquisition through private negotiation list of 120 families, whose land had been acquired, was prepared by defendant No.3 as *'oustees'*. It is further averred by the plaintiffs that their names figured at Sr.No.11 of the list of oustees, whereas name of Smt.Ghimo, mother of the plaintiffs, figured at Sr.No.21. It is stated that on 18.11.2002 a High Power Committee constituted by the Government decided that a sum of Rs.2,50,000/- be awarded to the affected families, who were not given any employment as agreed at the time of negotiation between the claimants and Chamera Project Authorities. It is averred by the plaintiffs that uniform rate of compensation i.e. at the rate of Rs.40,000/- per bigha was decided to be paid by defendant No.3, whereas the land valued about Rs.4,00,000/- per bigha. It is further alleged in the plaint that defendant No.3 had deposited Rs.2,50,000/- for each of the 120 families, whose names figured in the list of oustees, and the said amount was deposited on 21.7.2003 with defendant No.2 for payment. It is alleged by the plaintiffs that they approached defendant No.2 for release of Rs.2,50,000/-, but the same was refused without assigning any valid reason. It is further alleged by the plaintiffs that their parents were having land in the same area to the extent of 3-2 bighas, which was also acquired and their names figured at Sr.No.21 in the list, as referred to above, but as their father, namely, Premo had died on 28.3.1994, the name of their mother Smt.Ghimo was shown as one of the oustees in place of their father being widow. It is further averred by the plaintiffs that their mother Smt.Ghimo had died on 7.3.2002, leaving behind Class-I legal heirs. It is also averred by the plaintiffs that since they were not given amount of Rs.2,50,000/-, despite being oustees, as stated above, they were constrained to file Civil Writ Petition No.673/2003, which was withdrawn by them on 23.9.2003 with permission to file Civil Suit in the competent Court of law. Suit in question has been filed by the plaintiffs claiming recovery of Rs.2,50,000/- with costs and interest at the rate of 12% per annum w.e.f. 22.7.2003 with the prayer that the same be decreed.

3. Defendants No.1 and 2, by way of filing written statement, raised various preliminary objections qua maintainability, suppression of material facts and locus standi. On merits, defendants admitted the plaintiffs to be resident of village Jukhradi and owners of land measuring 3-2-16 bighas. It is averred by the defendants that the above said land was owned by the father of plaintiffs, namely, Premo son of Madho son of Paraga, which had been acquired through private negotiation during 1988 vide award No.2/1988, dated 31.12.1988 in Mohal Karian by NHPC Chamera Project6-II. It is further averred by the defendants that the plaintiffs were not owners of the land measuring 4-9-0 bighas, as this land was infact owned by one another Premo son of Mussadi son of Kundan resident of village Karian. Thus, the plaintiffs have

no locus standi as they are suppressing the true facts just to take this benefit twice. It is also alleged that the plaintiffs alongwith their sisters, who are legal heirs of deceased Premo son of Madho, have already been paid sufficient package of Rs.2,50,000/-, which were acknowledged by them and other legal heirs. It is further alleged that at the time of disbursement of package, an amount of Rs.2,50,000/- has been disbursed against Sr.No.21 in the list of oustees to the plaintiffs being legal heirs of Sh.Premo son of Madho. The defendants admitted that matter was discussed in the State Level Meeting held under the Chairmanship of Chief Minister and thereafter High Level Committee was constituted in which 120 families had been identified, who were the land owners and were given sufficient package of Rs.2,50,000/- each in lieu of employment. It is further asserted that perusal of list of oustees clearly shows that the land measuring 4-9-0 bighas was owned by Premo son of Mussadi son of Kundan, which has no concern with the plaintiffs and that the names of plaintiffs No.1 and 2 have been wrongly mentioned in the list of oustees due to typing mistake against entry made at Sr.No.11. In the aforesaid background the defendants prayed for dismissal of the suit.

4. Defendant No.3 also, by way of filing written statement, resisted the suit by raising preliminary objections of jurisdiction and that there was no cause of action against defendant No.3, since the entire amount of land acquired by defendant No.3 has been deposited with defendants No.1 and 2 with regard to land acquired for Chamera Stage-II. It is further alleged by defendant No.3 that no cause of action arose by filing of CWP No.673/2003 by the plaintiffs and subsequently withdrawal thereof. In view of above, defendant No.3 prayed for dismissal of the suit filed by the plaintiffs.

5. The plaintiffs filed replication, whereby they again reaffirmed their own case and refuted the case of defendants as pleaded in the written statement.

6. On the pleadings of the parties, the learned trial Court framed the following issues:-

"1. Whether the plaintiffs are entitled for recovery of Rs.2.50 lacs from the defendants as alleged? OPP.

2. Whether the suit is not maintainable as alleged? OPD 1 and 2.

3. Whether the plaintiffs have no locus standi to file the present suit as alleged? OPD.

4. Whether this Court has no jurisdiction to try this case as alleged? OPD.

5. Relief."

7. Learned trial Court vide judgment and decree dated 5.8.2005 decreed the suit of the plaintiffs against defendants No.1 and 2 for recovery of Rs.2,50,000/-, however, dismissed against defendant No.3

8. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, appellants-defendants No.1 and 2 filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* read with Section 21 of the H.P. Courts Act, assailing therein judgment and decree dated 5.5.2008 passed by learned Civil Judge(Senior Division), Chamba, in the Court of learned District Judge, Chamba.

9. Learned District Judge, Chamba vide impugned judgment and decree dated 22.6.2006 accepted the appeal preferred by the defendants by setting aside the judgment and decree passed by the learned trial Court.

10. In the aforesaid background the present appellants-plaintiffs filed this Regular Second Appeal before this Court.

11. This second appeal was admitted on the following substantial question of law:

"(1) Whether the findings of the learned lower appellate court are based upon misreading of evidence and calls for an interference by this court?

12. Mr.Anand Sharma, learned counsel representing the appellants-plaintiffs, vehemently argued that the judgment passed by the learned first appellate Court is not sustainable in the eyes of law as the same is not based upon correct appreciation of evidence adduced on record by the appellants-plaintiffs and as such same deserves to be quashed and set aside. Mr.Sharma, while referring to the evidence available on record, contended that learned first appellate Court while reversing the judgment and decree passed by the learned trial Court has mis-read and mis-construed the record and has returned the erroneous findings that the plaintiffs are not entitled for compensation to the tune of Rs.2,50,000/- on account of financial package announced by the defendants payable to the oustees in lieu of employment to their family members. Mr.Sharma further contended that it stands duly proved on record that the names of plaintiffs were figuring at Sr.No.11 of the list of oustees prepared by the Department, on the basis of information submitted by the Authorities who had acquired the land on behalf of NHPC. Mr.Sharma furthercontended that learned first appellate Court failed to appreciate that the names of the plaintiffs were included in the list of oustees at Sr.No.11 in the independent capacity since their land measuring 17 biswas was also acquired by the respondents on behalf of NHPC for construction of Dam.

13. With a view to substantiate the aforesaid contentions, Mr.Sharma invited the attention of this Court to Ex.PA i.e.; Jamabandi for the year 1988-89, wherein names of plaintiffs have been reflected as owners in possession of land measuring 0-17 biswas, comprised in Khata No.209/220, Khatauni No.289, Khasra No.196, which was not inherited by the plaintiffs from their parents, but they had purchased the same from the Central Government andsuch land comprised in Khata No.205 min, Khatauni No.285 min, Khasra Nos.46, 86 was acquired independently of Khasra No.196 which actually belonged to theirparents. Mr.Sharma further contended that learned first appellate Court completely ignored mutation No.653 i.e. Ex.PL, whereby the names of the plaintiffs, on the basis of Sale Certificate issued by the Central Government, were incorporated in the Revenue Records and thereafter their names were reflected in the names of list of oustees prepared by the Department for the purpose of granting financial package in terms of understanding arrived at between the NHPC as well as the State Government.

14. Mr.Sharma further contended that learned first appellate Court erred in not taking into consideration the specific pleataken by defendants No.1 and 2 that the plaintiffs-appellants were not entitled for the compensation amount against the name reflected atSr.No.11 in the list of oustees because the same belonged to one Shri Premo son of Shri Mussadi having 14-9 bighas of land. Mr.Sharma also stated that thereis no evidence led on record in this regard by the defendants and as such learned trial Court rightly drawn an adverse inference against defendants No.1 and 2 for having failed to establish the specific plea raised by them in the written statement. In the aforesaid background, Mr.Sharma prayed that suit filed by the appellants-plaintiffs be decreed and the judgment and decree passed by the first appellate Court may be quashed and set aside.

15. Mr.P.M. Negi, learned Additional Advocate General duly assisted by Mr.Ramesh Thakur, learned Deputy Advocate General, supported the judgment and decree passed by the learned first appellate Court. Mr.Negi vehemently argued that the bare perusal of judgment passed by the first appellate Court suggests that the same is based upon correct appreciation of evidence available on record and there is no illegality and infirmity in the same and the same needs to be upheld. While refuting the contention having been put forth on behalf of Mr.Anand Sharma, Mr.Negi stated that it duly stands proved on record that on account of land, the plaintiffs, being sons of Premo, had already received financial package alongwith other family members to the tune of Rs.2,50,000/- qua the land which was acquired for the construction of Dam by the said Authorities and as such they were estopped from filing independent claim of financial package on the ground that since their land measuring 17 biswas was also acquired in independent capacity, they are also entitled to financial package to the tune of Rs.2,50,000/-.

Mr.Negi further stated that appellants-plaintiffs have no concern with the another financial package sanctioned in the name of Premo son of Mussadi son of Kundan and as such learned appellate Court rightly concluded that the plaintiffs cannot be allowed to take advantage of typographical mistake crept during preparation of list of oustees. While concluding his arguments, Mr.Negi, while referring to the statement of Tehsildar (Relief & Rehabilitation), strenuously argued that if for the sake of arguments it is presumed that 17 biswas of land, independent of land measuring 3-2-16 bighas, owned bytheir father was also acquired apart from land measuring 3-2-16 bighas, even then it stands proved thatthe same was also included in the aforesaid land measuring 3-2-16 bighas and accordingly financial package to the tune of Rs.2,50,000/- was made in favour of the plaintiffs as well as other legal representatives of late Shri Premo son of Madho. While concluding his arguments, Mr.Negi strenuously argued that once it stands duly proved on record that the plaintiffs are the sons of late Shri Premo, whose land measuring 3-2-16 bighas has admittedly been acquired and qua the same compensation has been given to him and as such they cannot be allowed to claim financial package independently on account of their names reflected at Sr.No.11 in the list of oustees because aforesaid financial package is payable to the oustees in terms ofnegotiation held with the claimants and National Hydroelectric Power Corporation Limited *(for short `NHPC')* Authorities. In the aforesaid background, Mr.Negi prayed that present petition may be dismissed.

16. I have heard learned counsel for the parties and gone through the record of the case.

17. Close scrutiny of pleadings as well as documents available on record suggests that defendants acquired huge chunk of land for the construction of Chamera Hydro Electric Project, Stage-II, Karian, Tehsil and District Chamba, H.P. through a private negotiation held with the claimants and National Hydroelectric Power Corporation Limited *(for short `NHPC')* Authorities. Record further suggests that in lieu of land acquired by the Authorities, uniform compensation at the rate of Rs.40,000/- per bigha was paid to all the affected persons. It has been specifically pleaded in the pleadings of both the parties that at the time of acquisition of land, Memorandum of Understanding *(for short `MOU')* was entered into between the State Government as well as defendant No.3-Chamera Hydro Electric Project, wherein condition was stipulated that one member of the family of oustees would be provided job in upcoming Project. Perusal of Ex.PC, i.e. proceedings of meeting of High Powered Committee held on 18.11.2002, suggests that Authorities decided to give alternative package in lieu of employment to the affected families @ Rs.3,00,000/- in cases of Chamera-I and Rs.2,50,000/- per affected family in cases of Chamera-II. Perusal of aforesaid document further suggests that it was agreed that amount in question would be given in one installment to Chamera-II and in two equal installments to Chamera-1. With the declaration of aforesaid package, no claim from any person regarding employment in Chamera-I and Chamera-II was to be entertained by the Authorities as far as employment is concerned. It also emerge from the record that after aforesaid decision having been taken, the Authorities concerned prepared list of oustees so that due and admissible compensation in terms of aforesaid decision having been arrived at between defendants No.1, 2 and 3 is paid to the affected families whose land was acquired for the construction of Project. In the present case plaintiffs; namely; Parkash Chand, Baldev and Mohinder, who admittedly are sons of sons of late Shri Premo son of Shri Madho, residents of village Jukhrari, P.O. Bharis Kothi, Tehsil and District Chamba, H.P. filed a suit for recovery of Rs.2,50,000/- in terms of financial package announced by the Authorities in lieu of employment to one member of the affected families. As per plaintiffs, they owned and possessed land measuring 3-2-16 bighas in the name of Smt.Ghimo wife of late Shri Premo. Plaintiffs further claimed that apart from above, they had land measuring 4-9 bighas at village Karian, Tehsil and District Chamba, which was also acquired by the State of Himachal Pradesh for and on behalf of defendant No.3 vide notification under Section 4 of the Land Acquisition Act on 28.4.1988. Plaintiffs, on the basis of list of 120 families prepared by the Authorities, claimed that they being oustees, whose names figured at Sr.No.11, are also entitled to the financial package to the tune of Rs.2,50,000/-, but despite several requests their claim has not been entertained by the Authorities. As per own case

of the plaintiffs, their parents were having land in the same area which was also acquired by the Authorities and they were also included in the list of oustees at Sr.No.21. It is admitted case of the plaintiffs that on account of acquisition of land measuring 3-2 bighas belonging to their parents they had received financial package to the tune of Rs.2,50,000/- which was lateron received by all the Legal Representatives including plaintiffs in equal share. In nutshell plaintiffs' case is that since 17 biswas of land independent of 3-2 bighas of land owned and possessed by their parents was also acquired for the purpose of construction of Project, they are also entitled to financial package announced by the Authorities in lieu of employment toone member of the family in independent capacity.

18. On the other hand, defendants refuted the claim of the plaintiffs by stating that plaintiffs have no concern with the another financial package sanctioned in favour of Shri Premo son of Mussadi son of Shri Kundan, whose name has been reflected at Sr.No.11 of the list of oustees. Defendants further claimed that the plaintiffs cannot be allowed to take advantage of typographical mistake committed by the staff while preparing list of oustees. As per defendants, plaintiffs being legal heirs of Shri Premo son of Shri Madho son of Shri Parago, have no concern with the land of Shri Premo son of Shri Mossadi son of Shri Kundan and as such they cannot take the benefit of financial package twice, especially when it is admitted case of the plaintiffs that they have already received financial package of Rs.2,50,000/- on account of land measuring 3-2-16 bighas owned and possessed by their father Premo son of Madho.

19. Interestingly, in the present case, plaintiffs initially claimed that their land measuring 4-9 bighas at village Karian Tehsil and District Chamba was acquired by the State of Himachal Pradesh on behalf of NHPC and as such they are entitled to financial package on account of the same in terms of their names figuring at Sr.No.11 in the list of oustees.

20. While refuting the stand having been taken by defendants in the written statement, plaintiffs by way of replication claimed that they filed suit being owners of land measuring 0-17 bighas, comprising of Khasra No.196, as depicted in Jamabandi for the year 1988-89. Plaintiffs further claimed that note appended in red ink in the aforesaid Jamabandi clearly suggests that land in question was acquired by the State of Himachal Pradesh for NHPC on 31.3.1994. Plaintiffs further claimed in the replication that their father namely; Premo; was owner in possession of 3-2-16 bighas, whereas they are owners to the extent of 0-17 bighas of land which was entered in their names and had allegedly purchased it from custodian department vide mutation No.633 attested on 28.2.1989. Plaintiffs in their replication have categorically stated that amount of package has been rightly sanctioned in their names, but in the column of land it has been wrongly mentioned as 4 bighas 9 biswas of land.

21. Learned trial Court on the basis of documentary evidence adduced on record decreed the suit of the plaintiffs and held them entitled to the amount of Rs.2,50,000/-, whereas, learned first appellate Court in appeal having been filed by the defendants reversed the judgment and decree passed by the learned trial Court and came to the conclusion that the plaintiffs have already availed the package of Rs.2,50,000/- qua the land which was earlier in the name of their late father Shri Premo son of Shri Madho which was passed to them after the death of their mother, Smt.Ghimmo. Learned first appellate Court also concluded that land measuring 0-17 bighas, comprising of Khasra No.196, which was allegedly purchased by the plaintiffs from the custodian department already stood included in the land of Smt.Ghimmo widow of Shri Premo son of Shri Madho and as such, no separate compensation to the tune of Rs.2,50,000/- can be claimed by the plaintiffs qua the land measuring 0-17 bighas. Learned first appellate Court also observed that plaintiffs have already availed package to the tune of Rs.2,50,000/- being legal heirs of late Smt.Ghimmo widow of late Shri Premo alongwith their sisters being Class-I heirs and as such they cannot be allowed to claim the aforesaid package again and again on the strength of name reflected qua Sr.No.11 in the list of oustees.

22. In the instant case, plaintiff Mohinder Kumar, with a view to prove his case appeared as PW-1 and stated that 17 biswas of land owned and possessed by them had been acquired by defendant No.3, but none of the plaintiffs was provided job. He also stated that his

father also owned land in village Jukhrari which was acquired by NHPC but since he alongwith his other two brothers were not provided job by NHPC, they were held entitled to financial package to the tune of Rs.2,50,000/- each. It is the admitted case of the plaintiffs that they have already received an amount of Rs.2,50,000/- on account of financial package announced by the respondents in lieu of job. Whereas, defendants with a view to refute the claim of plaintiffs cited one Shri Sirikanth, Naib Tehsildar (R&R), D.C. Office, Chamba, who in his statement deposed that Land Acquisition cases are being dealt with by him in the capacity of Naib Tehsildar (Relief & Rehabilitation). He also stated that defendant No.3 had deposited an amount of Rs.2,50,000/- for all the oustees of Chamera-II. He also stated that the plaintiffs filed present suit with regard to land of other person namely; Premo son of Mussadi son of Kundan and they have no connection with the same. He also stated that land measuring 17 biswas, comprising Khasra No.196, Ex.PA, is already included in the land measuring 3-2-16 bighas and the land shown vide Ex.PB had also been shown/entered in the award Mark DA which also includes some other land besides the land shown vide Ex.PA and Ex.PB in the names of Premo son of Madho.

23. This Court with a view to ascertain the genuineness and correctness of aforesaid statements having been made by Shri Sirikant, Naib Tehsildar (Relief & Rehabilitation) perused documentary evidence available on record. While going through the record, this Court could lay its hand to Ex.PM i.e. certificate issued by Land Acquisition Officer, Chamera Hydro Electric Project, Karian, District Chamba. Perusal of aforesaid certificate suggests that land measuring 2-5-16 bighas owned and possessed by Premo son of Madho son of Parago, resident of Mohal Karian, Tehsil and District Chamba, Hadbast No.174, Khatauni No.106/164 min, Kitta 5, measuring 3-2 bighas was acquired by NHPC vide award dated 31.12.1988. It also emerge from this certificate that total area of the land was 3-4 bighas and Shri Premo son of Madho had 1/3rd share in the same and as such he was owner in possession of the land measuring 2-5-16 bighas. It clearly emerge from Ex.PM that NHPC had acquired 2-5-16 bighas of land belonging to Premo son of Madho son of Parago, resident of village Karian vide award dated 31.12.1988. Since aforesaid land was acquired by the defendants, family members of late Shri Premo were entitled to financial package as per understanding arrived at between the Authorities. It is also not disputed that qua the aforesaid land having been acquired by the defendants, plaintiffs being LRs of Premo son of Madho received complete financial package which was further divided into equal shares of the legal representatives of deceased Premo son of Madho. Now, if Ex.PA and Ex.PB having been placed on record by the plaintiffs are perused, land measuring 3-2 bighas, which was in the name of their father late Shri Premo, was acquired. As per own case of plaintiffs, as stated in replication, land measuring 17 biswas comprising Khasra No.196 was acquired by the defendants independently of land measuring 2-5-16 bighas owned and possessed by their father late Shri Premo. But perusal of Ex.PA and Ex.PB clearly suggests that land measuring 3-2-16 bighas in total belonging to late Shri Premo son of Madho son of Parago was acquired by the defendants which clearly corroborates the version put forth on behalf of Shri Sirikanth, Tehsildar (Relif & Rehabilitation), D.C. Office, Chamba. He categorically stated that land measuring 17 biswas comprising in Khasra No.196 was already included in land measuring 3-2-16 bighas at the time of passing award Mark DB. If land measuring 17 biswas is added to 2-5-16 bighas, it exactly comes 3-2-16 bighas, meaning thereby that learned first appellate Court rightly came to conclusion that land measuring 17 biawas comprising in Khasra No.196 Ex.PA stands included in land measuring 3-2-16 bighas and as such plaintiffs are not entitled to another financial package in lieu of employment since they have already received financial package to the tune of Rs.2,50,000/- on account of acquisition of their land measuring 3-2-16 bighas. Hence, this Court after perusing aforesaid documents Ex.PM, Ex.PA and Ex.PB, sees no illegality and infirmity in the findings returned by the first appellate Court and by no stretch of imagination it can be said that first appellate Court misread and misconstrued the documentary evidence available on record while denying the claim of plaintiffs.

24. Similarly, list of persons, who have applied/submitted their family details for employment in Chamera Hydro Electric Project Stage-II, suggests that name of Smt.Ghimo Devi widow of Premo i.e. father of plaintiffs was reflected at Sr.No.21. It also emerge from the list that

land measuring 3-2-0 bighas was acquired. Similarly, at Sr.No.11 of the list, name of some Parkash son of Premo resident of village Jukhrari has been shown, but, the name of the land owner whose land was acquired by the NHPC has been shown as Premo son of Mussadi. More interestingly qua the name at Sr.No.11 land measuring 4-9-0 bighas has been shown to be acquired by the Authorities.

25. Since total land acquired qua Sr.No.11 has been shown to be 4-9-0 bighas, version put forth on behalf of the plaintiffs that his name stands figured at Sr.No.11 cannot be accepted for two reasons; firstly, name shown at Sr.No.11 is of Parkash son of Premo son of Mussadi, secondly, qua Sr.No.11, 4-9-0 bighas land has been shown to be acquired by the Authorities, whereas, as per own case of plaintiffs 17 biswas of land owned and possessed by them independent of their father was acquired. This Court, after carefully examining the particulars given qua Sr.No.11 in the list of oustees has reason to accept the version put forth on behalf of defendants that Parkash son of Premo son of Mussadi is different from plaintiffs and they are not entitled to second financial package on account of 17 biswas of land owned and possessed by them independent of their father. This Court after carefully examining the aforesaid aspect of the matter is convinced and satisfied that land measuring 17 biswas owned and possessed by the plaintiffs was included by the authorities while passing award and thereafter the plaintiffs being LRs of late Shri Premo son of Shri Madho son of Shri Parago has received an amount of Rs.2,50,000/- on account of financial package in lieu of job which was to be offered to one member of the family of the oustees whose land was acquired by the Authorities for construction of Project.

26. This Court also viewed this case from another angle. As per understanding arrived at between Government and the NHPC, one member of the family was to be offered employment in lieu of acquisition of their land but lateron it was resolved that in lieu of employment one time financial package to the tune of Rs.2,50,000/- would be provided to the affected family. Hence, this Court sees no force in the claim of the plaintiffs that since 17 biswas of land owned and possessed by them independent of their father was acquired by the Authorities, they are also entitled to financial package because admittedly financial package is payable in lieu of employment which was to be offered to one member of the family.

27. In the present case, since it is admitted case of the parties that financial package to the tune of Rs.2,50,000/- stands received by all the Legal Representatives of deceased Premo, there is no force in the claim of the plaintiffs and as such same was rightly rejected by the first appellate Court. Hence, this Court, after examining the evidence available on record, sees no force in the contentions having been put forth on behalf of the plaintiffs that learned first appellate Court, while reversing the judgment and decree passed by the learned trial Court, misread and misconstrued the evidence. Rather, perusal of evidence available on record clearly suggests that the learned trial Court failed to arrive at correct decision on the basis of evidence available on record. Substantial question is answered accordingly.

28. In view of the detailed discussion made hereinabove, this appeal is dismissed. The judgment passed by the learned first appellate Court below is upheld and that of the learned trial Court is quashed and set aside.There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J

Ricky Sharma s/o Sh. Raman Sharma & Others .....Petitioners/Accused

Versus

State of H.P. and others .....Non-petitioners

Cr.MMO No. 318/2016
Date of order: 27.12.2016

Code of Criminal Procedure, 1973- Section 482 and 320- Petition has been filed for quashing of the FIR registered for the commission of offences punishable under Sections 498-A, 406 and 109 of I.P.C. – it has been pleaded that matter has been compromised between the parties and permission be granted to compound the matter - since parties have voluntarily compromised the matter; therefore, permission granted- FIR and consequent proceedings ordered to be quashed.

(Para-5 to 7)

Case referred:

JT Narinder Singh and others Vs. State of Punjab and another, 2014(4) SC 573

For petitioners	:	Mr. H. S. Rana, Advocate
For non-petitioners No.1 & 2	:	Mr. M. L. Chauhan, Addl.A. G.
For non-petitioner No.3/ complainant	:	Mr. Sanjeev Kuthiala, Advocate

The following order of the Court was delivered:

P. S. Rana, J. (Oral)

Present petition is filed under Section 482 read with section 320 Code of Criminal Procedure 1973 on behalf of petitioners for giving permission to compound criminal offence punishable under sections 498-A, 406 & 109 IPC relating to FIR No.100/2011 dated 20.4.2011 registered at Police Station Baddi District Solan (H.P.).

Brief facts of case:

2. It is alleged by prosecution that on dated 20.04.2011 at village Basanti Bagh Baddi accused persons committed cruelty upon complainant by way of beating her and also by way of expelling her from matrimonial house. It is alleged by prosecution that accused persons were entrusted with ishtridhan of complainant and accused persons converted ishtridhan to their personal use. After investigation challan filed against accused persons before Judicial Magistrate Ist Class Court No.2 Nalagarh Distt. Solan (H.P.) and Judicial Magistrate Ist Class Court No.2 Nalagarh framed charge against accused persons on dated 09.09.2013 under sections 498-A, 406 & 109 IPC. Accused persons did not plead guilty and claimed trial. Learned Trial Court listed the case for prosecution evidence.

3. Court heard learned Advocate appearing on behalf of petitioners and learned Additional Advocate General appearing on behalf of non-petitioners No.1 & 2 and also heard Smt. Shruti Sharma complainant present in person . Court also perused the entire records carefully.

4. Following points arises for determination:

1) Whether petition filed under Section 482 read with section 320 Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of petition?

3) Final order.

Findings upon point No.1 with reasons:

5. Submission of learned Advocate appearing on behalf of petitioners that lawful compromise has been executed inter se parties in matrimonial dispute and permission to compound the present case be granted is accepted for reasons hereinafter mentioned. In the present case Court recorded statement of complainant namely Shruti Sharma and also recorded statements of accused persons namely Ricky Sharma, Raman Kumar, Asha Kiran, Pradeep Thakur, Punam Thakur and Ramesh Sharma placed on record. Accused persons have also paid Rs.4,60,000/- (Four lac sixty thousand) to complainant in Court by way of drafts No.258668 and 010675.

6. Hon'ble Apex Court of India in ruling reported in **2014(4) SC 573 JT Narinder Singh and others Vs. State of Punjab and another** held that following criminal cases should not

be compounded. (1) Murder criminal case (2) Rape criminal case (3) Dacoity criminal case (4) Prevention of Corruption Act criminal case (5) Criminal cases filed under section 307 IPC. Hon'ble Apex Court of India in ruling cited supra held that following criminal cases should be compounded. (1) Commercial transaction criminal cases (2) Matrimonial disputes criminal cases (3) Family disputes criminal cases. It is held that present case falls in the category of matrimonial dispute criminal case. Court is of the opinion that it is expedient in the ends of justice to give permission to compound the present case. Hence permission to compound the present case is granted in the ends of justice while exercising inherent powers under section 482 Code of Criminal Procedure 1973. Point No.1 is answered in affirmative.

Point No.2 (Final Order).

7. In view of findings upon point No.1 present petition filed under Section 482 read with section 320 of Code of Criminal Procedure 1973 is allowed and permission to compound criminal case No.90/2 of 2011 title State Vs. Ricky Sharma and others pending before learned Judicial Magistrate Court No.2 Nalagarh Distt. Solan (H.P.) under sections 498-A, 406 and 109 IPC is granted in the ends of justice and accused persons are acquitted qua criminal offence punishable under sections 498-A, 406 & 109 IPC. Statement(s) of complainant Smt. Shruti Sharma and accused persons namely Ricky Sharma, Raman Kumar, Asha Kiran, Pradeep Thakur, Punam Thakur and Ramesh Sharma recorded on 27.12.2016 will form part and parcel of order. File of learned Trial Court alongwith certified copy of order be sent back forthwith for compliance. Cr.MMO No.318/2016 is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Surinder Kumar & Others ....Appellant-Plaintiffs

Versus

Smt. Sumati Kumari Joshi & Others ....Respondents-Defendants

Regular Second Appeal No.315 of 2006
Date of decision: 27.12.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that he had become the owner of the suit land by abandonment or in the alternative by adverse possession- defendant denied the claim of the plaintiff and set up a counter-claim- the suit was dismissed by the Trial Court and counter-claim was decreed – plaintiff filed an appeal, which was dismissed – held in second appeal thatthe suit was dismissed and counter claim was decreed – a decree of possession was passed in favour of the defendants – appeal was filed against the dismissal of the suit and decree of the counter claim – counter claim is treated as suit for all intents and purposes – separate appeal was required to be filed regarding the decree of the counter-claim – a single appeal was not maintainable – appeal dismissed. (Para- 24 to 48)

Cases referred:

Rajni Rani and Anothr versus Khairati Lal and Others, (2015)2 SCC 682
Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11
Narhari and others vs. Shanker and others, AIR 1953 S.C.419
Gangadhar and another vs. Shri Raj Kumar, AIR(1983) Supreme Court 1202
Tamilnad Mercantile Bank Shareholders welfare Association(2) versus S.C.Sekar and others (2009)2 Supreme Court Cases 784
B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 Supreme Court Cases 123
Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilala Kabrawala and others, AIR 1964 SC 11
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellants: Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate.
For Respondents No.1to 20 Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree dated 23.3.2006, passed by the learned Additional District Judge (Presiding Officer), Fast Track Court, Solan Camp at Nalagarh, District Solan, H.P., affirming the judgment and decree dated 30.03.2005, passed by the learned Civil Judge(Senior Division), Nalagarh, whereby the suit filed by the predecessor-in-interest of the appellants-plaintiffs *(hereinafter referred to as the `plaintiffs')* has been dismissed.

2. Briefly stated the facts, as emerged from the record, are that appellants-plaintiffs are legal heirs of original plaintiff Kishori Lal, who died during the pendency of the suit. It is averred in the plaint that the suit filed by the predecessor-in-interest of the plaintiffs was for declaration that he had become owner of suit property comprised in Khasra Nos.926, 927, 928, 1058 and 1059, measuring 421.71 sq.mtrs. and plot comprised in Khasra No.1051, measuring 26.25 sq.meters, situated in up-Mohal New Nalagarh by abandonment, alternatively by adverse possession.

3. It is averred in the plaint that respondents-defendants *(hereinafter referred to as the 'defendants')* are the progeny of Nand Karan who might be living in Nalagarh Town and his share might have been devolved in favour of his heirs, if any. It is further averred that Dwarka Dass, Piara Lal and Sukhdev were seen by deceased plaintiff Kishori Lal. They were Gautam Brahmins and predecessor-in-interest of the plaintiffs was also stated to be Gautam Brahmin. The aforesaid Dwarka Dass, Piara Lal and Sukhdev left Nalagarh Town before the partition of the country and settled in Delhi and when left Nalagarh, they handed over the property to predecessor-in-interest of the plaintiffs i.e. Kishori Lal and asked him to construct his house etc. Consequently, predecessor-in-interest of the plaintiffs constructed his house over the suit property by spending huge amount and started living there. But, when after 2-3 years all the aforesaid persons namely; Dwarka Dass, Piara Lal and Sukhdev came back and saw the predecessor-in-interest of the plaintiffs living in the house upon the suit property, which was constructed by him in the year 1951 and which construction was within their knowledge, predecessor-in-interest of the plaintiffs proclaimed himself to be owner in possession of the said property because from 1951 till date neither the aforesaid persons during their life time nor their progeny ever objected the same.

4. It is further averred in the plaint that the defendants were not born in Nalagarh and have neither Ration Card nor names in the Voter List, whereas the predecessor-in-interest of the plaintiffs lived in the house over the suit land and has electric meter and water connection since 1962 in the name of his son Ashok Kumar. It is further averred that the possession of predecessor-in-interest of the plaintiffs has also been recognized and recorded in the settlement record by Settlement Officer at the time of Settlement of the town. The entry in the revenue record in the column of ownership is nothing but since the names were continuing so it continued and no interference was made in this column of ownership by Settlement Authority. The fact remains that predecessor-in-interest of defendants never interfered in the possessary rights of plaintiffs.

5. It is further averred in the plaint that the value of the land during the year 1948 was not more than 48 to 50 rupees and relations between both the families were cordial. The owners abandoned this property in favour of deceased plaintiff Kishori Lal on 26 Bhadhon of Bikrami year 2004 corresponding to the year 1948. In the aforesaid background the predecessor-in-interest of the plaintiffs filed a civil suit.

6. Defendants, by way of filing written statement, resisted and contested the claim of the plaintiffs. They also filed counter claim against the plaintiffs. In the written statement, defendants admitted the possession of Kishori Lal over land measuring 421-71 sq.mtrs., but denied the plea of abandonment. It was pleaded that house of Kishori Lal had collapsed and in the year 1958 he was allowed by the then owners to occupy two rooms in the house situated over Khasra Nos.926, 927, 928, 1058 and 1059, total land measuring 421-71 sq.mtrs. as licensee till he was not able to construct his own house. Now, with the death of Kishori Lal, the license stands extinguished. It is averred by the defendants that no construction was made by Kishori Lal over this land.

7. As regards land comprised in Khasra No.1051 measuring 26.25 sq.mtrs. it is averred that Kishori Lal had never been in possession of this land. The defendants-respondents filed counter claim for possession of suit property measuring 421.71sq.mtrs. They prayed for injunction to restrain the plaintiffs from changing the nature of this land and from demolishing the structure. Qua Khasra No.1051, defendants sought an injunction to restrain plaintiffs from disposing of the same. In the aforesaid background the defendants prayed for dismissal of the suit.

8. The predecessor-in-interest of the plaintiffs filed replication-cum-written statement to the counter claim, whereby the averments of the plaint are re-asserted and that of counter claim are denied. It is pleaded that Kishori Lal during his life time raised construction which was never objected and even if the plea of licensee taken by defendants does not sustain since licence has become irrevocable in view of the fact that Kishori Lal was allowed to raise construction on this land.

9. On the pleadings of the parties, the learned trial Court framed the following issues:-

"1. Whether predecessor-in-title of defendants have abandoned the rights qua suit property in favour of plaintiff, if so, its effect? OPP.

2. Whether the plaintiff has acquired title qua the suit land by way of adverse possession in the alternative? OPP.

3. Whether the plaintiff is entitled for the declaration that he is owner in possession of the suit land? OPP.

4. Whether the plaintiff is also entitled qua correction of revenue record vis-à-vis injunction, as prayed? OPP.

5. Whether the plaintiff has no cause of action and locus standi, as alleged? OPD.

6. Whether the suit of the plaintiff is not maintainable? OPD.

7. Whether the plaintiff is estopped to file the present suit by his admission, acts and omission? OPD.

8. Whether deceased Kishori Lal was a licensee in possession over the suit property, as alleged? OP-Counter Claimants

9. Whether Counter claimants are entitled for the relief of possession qua suit land, as prayed? OP-Counter Claimants

10. Whether counter claimants are entitled for the relief of permanent prohibitory injunction, as prayed?OP-Counter Claimants

11. Whether there is no cause of action for filing counter-claim, as alleged? OPP.

12. Whether the counter claim is not maintainable? OPP.

13. Relief."

10. Learned trial Court vide common judgment and decree dated 30.03.2005 dismissed the suit of the plaintiffs and decreed the counter claim filed by the defendants.

11. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiffs-appellants was dismissed and counter claim by the defendants-respondents were decreed, appellants-plaintiffs filed an appeal assailing therein judgment and decree dated 30.03.2005 passed by learned Civil Judge(Senior Division), Nalagarh, in the Court of learned Additional District Judge (Presiding Officer, Fast Track Court), Solan camp at Nalagarh.

12. Learned Additional District Judge (Presiding Officer, Fast Track Court), Solan, Camp at Nalagarh vide judgment and decree dated 23.3.2006 dismissed the appeal preferred by the plaintiffs-appellants by affirming the judgment and decree passed by the learned trial Court. Learned first appellate Court also affirmed the decree passed by the learned trial Court in the counter claim.

13. In the aforesaid background, the present appellants-plaintiffs filed this Regular Second Appeal before this Court, details whereof have already been given above.

14. This second appeal was admitted on the following substantial question of law:

"(1) When the defendants-respondents admitted the possession of the plaintiffs-appellants over the suit land and also acknowledged the plaintiffs-appellants having raised permanent structure long before the institution of suit and counter claim, have not both the Courts below acted in excess of their jurisdiction in decreeing the counter claim granting decree for possession to the defendants-respondents by dismantling the structure of the plaintiffs by ignoring from consideration the provisions of Specific Relief Act, whereby it was imperative for the Courts below to have seen the feasibility of compensating the defendants in terms of money?

2. When the defendants themselves set up a case of creation of license in favour of the plaintiffs and admitted the raising of permanent structures by the plaintiffs over the suit property, was not the same resulted in creation of permanent license as per the provisions of Section 60 of the Easement Act? Have not both the Courts below acted with material illegality and irregularity in mechanically passing the decree for possession by removal of structures when the defendants or their predecessors never revoked the alleged license and acaquiesced in the acts of the plaintiffs in raising permanent structures over the suit land?

3. Whether both the Courts below have committed grave error of jurisdiction in granting the decree for possession by dismantling the structures by ignoring the fact that the counter claim filed by the defendants-respondents was beyond the period of limitation, as per the facts established on the record?

4. Whether findings of both the Courts below that plaintiffs-appellants have failed to prove that adverse possession are the result of misreading of Ex.DA and other documents which were inadmissible in evidence and further failing to consider that the presumption attached to the revenue entries stood duly rebutted on account of rival claim put forth by the parties. Have not both the Courts below committed grave error of law in misconstruing and misapplying correct principles of law while deciding the issue of adverse possession?

5. Whether both the Courts below have acted with material illegality in not property appreciating the contention put forth by the plaintiffs regarding abandonment of the right by the predecessor-in-interest of defendants-respondents in favour of the plaintiffs-appellants when the value of the

property in suit at the relevant time was less than Rs.100 and for creation of such right no registered document was required?

6. When the counter claim filed by the defendants-respondents was not in consonance with the provisions of Code of Civil procedure and valuation, are not the judgments and decrees passed b y both the Courts below illegal, erroneous and perverse and stand vitiated?"

15. At this stage, it may be noticed that today i.e. on 27th December, 2016, when this matter was listed before this Court,attention of Mr.Bhupender Gupta, Senior Advocate, representing the appellants-plaintiffs was invited towards the judgment passed by Hon'ble Apex Court in ***Rajni Rani and Anothr versus Khairati Lal and Others, (2015)2 SCC 682*** and ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11***, which was further followed by this Court while dismissing ***RSA No.293 of 2006***, *titled as* ***Piar Chand & Others versus Ranjeet Singh & Others,*** wherein Hon'ble Apex Court has held that while dismissing the counter claim, Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree and same needs to be laid challenge, if any, by way of filing separate appeal affixing required court fee.

16. In view of aforesaid law having been laid down by the Hon'ble Apex Court, this Court deemed it fit to frame additional substantial question of law for proper adjudication of the case at hand. The additional substantial question of law is as under:-

1. "Whether the learned First Appellate Court has erred in entertaining the composite appeal having been preferred by the appellants-plaintiffs against the judgment and decree passed by learned trial Court dismissing the suit of the plaintiffs and decreeing the counter claim preferred by the defendants-respondents that too without affixing separate/ requisite court fee as far as counter claim is concerned.

17. Mr. Bhupender Gupta, learned Senior Advocate, vehemently argued that the judgments passed by both the Courts below are not sustainable as the same are not based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, same deserves to be quashed and set-aside. Mr. Gupta, further contended that bare perusal of the of the judgments passed by both the Courts below suggests that evidence led on record by the appellants-plaintiffs has not been read in its right perspective and as such, great prejudice has been caused to the appellants-plaintiffs against whom decree for possession has been passed.

18. Mr.Gupta, while making his submission qua the additional issue having been framed by this Court, contended that genuine and legitimate claim of the appellants-plaintiffs cannot be allowed to be defeated on mere technicalities and this Court has wide power to ignore such technicalities and can proceed ahead to decide the matter on the basis of the evidence adduced on record by the respective parties to do substantive justice in the matter. Mr.Gupta, further claimed that the learned trial Court while dismissing the suit of the plaintiffs decreed the counter claim of the defendants-respondents and appellants-plaintiffs rightly preferred composite appeal against the same before the learned District Judge laying challenge therein to the composite decree passed in the suit as well as in the counter claim in favour of the defendants. He further contended that no appeal, if any, could be filed without there being any decree and as such, appellants-plaintiffs had no option but to file composite appeal against the impugned judgment and decree, whereby suit of the plaintiffs-appellants was dismissed and counter claim of the defendants-respondents was decreed.

19. In the aforesaid background, Mr.Gupta, strenuously argued that the counter claim filed by the defendants-respondents deserve to be dismissed after setting aside the judgment and decree passed by the Courts below. In support of his contention Mr. Gupta, also placed reliance on the judgments of Hon'ble Apex Court in ***Narhari and others vs. Shanker and others, AIR 1953 S.C.419, Gangadhar and another vs. Shri Raj Kumar, AIR(1983) Supreme Court 1202, Tamilnad Mercantile Bank Shareholders welfare Association(2)***

versus S.C.Sekar and others (2009)2 Supreme Court Cases 784 and B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 Supreme Court Cases 123.

20. Mr.Gupta,Learned Senior Counsel, vehemently argued that the impugned judgment and decree passed by learned first appellate is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence as well as law on point. Mr.Gupta contended that bare perusal of impugned judgment passed by learned first appellate Court suggests that the same is based on conjectures and surmises and learned first appellate Court has fallen in grave error while affirming the judgment and decree passed by the learned trial Court that too on the very flimsy grounds.

21. Mr.Ajay Sharma, learned Senior counsel appearing for the respondents-defendants, supported the judgment passed by the learned first appellate Court. Mr. Sharma, vehemently argued that bare perusal of the judgment passed by the learned first appellate Court suggests that the same is based upon correct appreciation of evidence adduced on record by the respective parties and as such, there is no scope of interference, whatsoever, by this Court especially in view of the concurrentfindings of fact recorded by the Court below. He further contended that the present appeal is not maintainable in view of the law laid down by the Hon'ble Apex Court in ***Rajni Rani and another vs. Khairati Lal and Others, (2015) 2 SCC 682,*** which was further followed by this Court while passing ***judgment dated 16.9.2016 in RSA No.293 of 2006.***Mr. Sharma also placed reliance on the judgment of Hon'ble Apex Court in ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilala Kabrawala and others, AIR 1964 SC 11.***

22. Mr. Sharma, while concluding his arguments, further contended that apart from above, this Court has very limited power while exercising power under Section 100 CPC to re-appreciate the evidence and as such, he placed reliance on the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**, herein below:-

> "16. Based on oral and documentary evidence, both the Courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the Courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."

23. I have heard learned counsel for the parties and have gone through the record of the case.

24. Keeping in view the specific objection with regard to maintainability having been raised by the appellants-plaintiffs in the light of the judgment passed by the Hon'ble Apex Court, this Court deems it fit to take additional substantial question of law framed by this Court at first instance for adjudication.

25. Perusal of the counter claim filed on behalf of the defendants-respondents suggests that while filing written statement they asserted counter claim but fact remains that no requisite fee was paid on the aforesaid counter claim. The appellants-plaintiffs denied the aforesaid counter claim of the respondents-defendants terming the same to be false and claimed that there was no negligence on the part of the appellants-plaintiffs as claimed in the counter claim.

26. Careful perusal of the trial court record further suggests that appellants-plaintiffs refuted the aforesaid counter claim of the respondents-defendants by way of replication as well as by filing separate written statement. However, the fact remains that learned trial Court after framing issues, as have been reproduced above, dismissed the suit of the plaintiffs and decreed the cross-objection having been filed by the respondents-defendants. Operative part of the judgment and decree passed by the learned trial Court clearly suggests that the learned trial Court dismissed the suit of the appellants-plaintiffs, whereas decreed the counter claim of ownership and possession preferred on behalf of the respondents-defendants. Careful perusal of the decree sheet available on record suggests that decree for possession was passed in favour of the respondents-defendants and against the appellants-plaintiffs.

27. Careful perusal of the decree, as referred, hereinabove, suggests as follows:-

> "The cumulative effect of the aforesaid discussions and findings is that the plaintiff failed to establish the claim. Accordingly, suit stands dismissed, however, counter claimants are successful and counter claim stands decreed with cost. They are entitled for decree of possession qua the suit property comprised in Khewat/Khatauni Nos.141/185 bearing Khasra No.926, 927, 928, 1058 and 1059, total measuring 421.71 sq.mtrs alongwith house which was on licence with deceased plaintiff and further L.R.'s of deceased plaintiff are directed to surrender and handover the possession to the counter-claimants. However, they are at liberty to take material of so stated existing construction of kitchen, bathroom, latrine over suit property after putting counter-claimants in possession of the suit property by dismantling the said structure at their own cost. Consequently, a decree for injunction is also passed in favour of the counter-claimants as prayed."

28. Perusal of aforesaid decree prepared by the learned trial Court, while dismissing the suit and accepting the counter claim of the defendants, clearly suggests that proper decree was drawn as far as acceptance of the counter claim filed by the defendants is concerned.

29. Appellants-plaintiffs, being aggrieved with the aforesaid judgment and decree, approached the learned District Judge by way of an appeal under Section 96 CPC laying therein challenge to aforesaid judgment and decree passed by the learned trial Court. At this stage, it would be appropriate to reproduce cause title/ head note of appeal preferred by the appellants-plaintiffs before the learned District Judge, which reads thus:-

> "Appeal against the judgment and decree dated 30.3.2005 passed by the learned trial court Civil Judge(Senior Division), Nalagarh in a civil suit No.230/1 of 1999 and counter claim No.55/1 of 2004, titled as Kishori Lal v ersus Sumati Devi and others, whereby the suit of the appellants/plaintiffs has been dismissed and the counter claim of the respondents/defendants/ counter claimants has been decreed with costs."

30. Careful perusal of aforesaid cause title as well as relief claimed in the appeal clearly suggests that appellants-plaintiffs before the learned first appellate Court prayed that the appeal filed by them be accepted with costs and the judgment and decree dated 30.3.2005 passed by learned trial Court be set aside, but there is no prayer, if any, for setting aside the judgment and decree passed by the learned trial Court, whereby counter claim filed by the defendants-respondents have been decreed and they were declared owners in possession of the suit property.

31. Before adverting to the submissions having been made on behalf of the learned counsel representing both the parties, it would be appropriate to refer to relevant provisions of law applicable in the present case i.e. Order 8 Rule 6A:

> "6A. Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of

suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:

Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.

(4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

32. Aforesaid provisions of law entitles defendant in a suit to set up counter claim against the claim of the plaintiff in respect of cause of action accruing to him against the plaintiff either before or after filing the suit, but definitely before defendant files his defence or before the time stipulated for delivering the defence is expired. Needless to say that aforesaid right of filing counter claim is in addition to his right of pleading as set up in Rule 6. Further perusal of aforesaid provisions of law suggests that counter claim, if any, filed on behalf of the defendant would be treated as a plaint and same would be governed by Rules applicable to the plaint. Similarly, counter claims filed on behalf of the defendant would have same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and the counter claim.

33. Similarly, Rule 6A(3) enables the plaintiff to file a written statement, if any, to the counter claim filed by the defendant. Rule 6D specifically provides that in case suit of the plaintiff is stayed, discontinued or dismissed, the counter claim filed on behalf of the defendant would nevertheless be proceeded with.

34. Similarly, Rule 6E provides that if plaintiff fails to file reply to the counter claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him/her, or make such order in relation to the counter-claim as it deems fit. It would be relevant here to refer to Order VIII Rule 6F:

"6F. Relief to defendant where counter-claim succeeds.- Where in any suit a set-off or counter-claim is established as a defence against the plaintiffs claim and any balance is found due to the plaintiff or the defendant, as the case may be , the Court may give judgment to the party entitled to such balance."

35**.** Perusal of aforesaid Order VIII Rule 6F clearly suggests that where in any suit a set-off or counter claim is established as a defence against the plaintiffs' claim and any balance is found due to the plaintiff or the defendant, Court may give judgment to the party entitled to such balance. Further perusal of Order VIII Rule 6G suggests that no pleadings, if any, subsequent to the written statement filed by a defendant other than by way of defence to set up a claim can be presented except with the leave of Court.

36. Under Order VIII Rule 10 when any party fails to file written statement as required under rule 1 or rule 9 within the stipulated time, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

37. Careful perusal of aforesaid provisions of law clearly suggests that counter claim, if any, preferred by the defendant in the suit is in nature of cross suit and even if suit is dismissed counter claim would remain alive for adjudication. Since counter claim is in nature of cross suit, defendant is required to pay the requisite court fee on the valuation of counter claim.

It has been specifically provided in the aforesaid provisions that the plaintiff is obliged to file a written statement qua counter claim and in case of default court can pronounce the judgment against the plaintiff in relation to the counter claim put forth by the defendant as it has an independent status. As per Rule 6A(2), the Court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim.

38. In the present case, as clearly emerged from the judgment passed by the learned trial Court, learned trial Court effectively determined the rights of the parties on the basis of counter claim as well as written statement thereto filed by the respective parties and as such it attained the status of decree. It would be profitable here to reproduce definition of the term *'decree'* as contained in Section 2(2) of CPC:-

> *"2.(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [1][* * *] Section 144, but shall not include –*
>
> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"*

39. Close scrutiny of aforesaid definition of "decree" clearly suggests that there should be formal expression of adjudication by the Court while determining the rights of the parties with regard to controversy in the suit, which would also include the rejection of plaint. Similarly, determination should be conclusive determination resulting in a formal expression of the adjudication. It is settled principle that once the matter in controversy has received judicial determination, the suit results in a decree, either in favour of the plaintiff or in favour of the defendant.

40. In this regard, it would be appropriate to place reliance on the judgment of the Hon'ble Apex Court in ***Rajni Rani and Another vs. Khairati Lal and Others,*** **(2015)2 SCC 682**, wherein the Court has held as under:-

> "16. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible."

41. After perusing aforesaid judgment passed by Hon'ble Apex Court, this Court need not to elaborate further on the issue at hand because Hon'ble Apex Court has categorically held that if by virtue of order of the Court rights have finally been adjudicated, it would assume the status of decree. Hon'ble Apex Court has also stated that Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree. Learned Apex Court has further held that in such like situation order passed by trial Judge has the status of decree and challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee.

42. If the matter is viewed from another angle, admittedly appellants-plaintiffs filed suit for declaration that they became owners of the suit property as detailed hereinabove by abandonment and alternative by adverse possession. Aforesaid claim having been set up by the plaintiffs in the present suit was dismissed; meaning thereby plaintiffs were not declared as owners of the suit land. Whereas, in the aforesaid suit having been filed by the plaintiffs, defendants filed written statement-cum-counter claim seeking declaration to the effect that they may be declared owners in possession of the suit property, which relief was extended by the trial Court by decreeing the counter claim of the defendants declaring them to be the owners in possession of the suit property.

43. Since, as has been observed above, no challenge has been laid to the judgment and decree passed by the trial Court decreeing the counter claim of the defendants, whereby they have been declared to be owners in possession of the suit property, composite appeal laying therein challenge to the judgment and decree passed by learned Civil Judge(Senior Division), Nalagarh, District Solan, in Civil Suit No.230/1 of 1999 was not maintainable. Moreover, relief as claimed in the appeal having been filed by the appellants-plaintiffs could not be extended to them without setting aside the judgment and decree passed in the counter claim in favour of the defendants. Once defendants have been declared to be owners in possession of the suit property by the trial Court while decreeing their counter claim, it is not understood how relief as prayed for in Civil suit having been filed by the plaintiffs could be extended without setting aside the judgment and decree passed in the counter claim.

44. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court, this Court sees no force in the contention put forth on behalf of the counsel representing the appellants-plaintiffs that in the absence of specific decree drawn by learned trial Court at the time of decreeing the counter claim filed by the defendants, plaintiffs could not file separate appeal. Additional substantial question of law is answered accordingly.

45. Consequently, in view of the detailed discussion made hereinabove, this Court is of the view that learned first appellate Court erred in entertaining the composite appeal having been preferred on behalf of the appellants-plaintiffs laying challenge therein to the judgment passed by the learned trial Court dismissing the suit of the appellants-plaintiffs as well as decreeing the counter claim preferred on behalf of the defendants-respondents. In view of the law laid down by the Hon'ble Apex Court *(supra)* as well as provisions contained in the law as discussed above, appellants-plaintiffs being aggrieved with the dismissal of the suit and decreeing the counter claim ought to have filed separate appeals by affixing separate court fee and composite appeal, as has been preferred in the present case, was not maintainable. In view of the aforesaid findings having been returned by this Court on the additional substantial question of law, other substantial questions of law have become redundant and as such, are not required to be answered at this stage.

47. As far as judgments relied upon by the learned counsel appearing for the appellants-plaintiffs are concerned, this Court is of the view that the same are not applicable in the present facts and circumstances of the case, especially in view of the law laid down by the Hon'ble Apex Court *(supra).*

48. In view of the detailed discussion made hereinabove, as well as latest law laid down by the Hon'ble Apex Court in ***Rajni Rani's*** case *(supra)***,** the present appeal is not maintainable and the same is accordingly dismissed. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Joginder Singh ....Petitioner.
Versus
State of Himachal Pradesh ....Respondent.

Cr.R. No. : 33 of 2010.
Reserved on: 15.12.2016.
Decided on: 28.12.2016.

Punjab Excise Act, 1914- Section 61(i)(a)- Accused was found in possession of 12 bottles of country liquor – he was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held, that only three bottles were sent for analysis out of which two were found to be country liquor – no permit is required for possessing two bottles and the prosecution version that the accused was found in possession of 12 bottles was not proved- revision petition allowed and judgments of Trial Court and Appellate Court set aside- accused acquitted.(Para-9 to 14)

Cases referred:
State of H.P. versus Ramesh Chand, Latest HLJ 2007 (HP) 1017
Dharam Pal and another v. State of Himachal Pradesh, 2009 (2) Shim. LC 208

For the petitioner Mr. Kapil Dev Sood, Sr. Advocate with Mr. Rajnish K. Lal, Advocate.
For the respondent Mr. Vikram Thakur and Mr. Punit Rajta, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, petitioner/accused has challenged the judgment passed by the Court of learned Additional Sessions Judge, Fast Track Court, Hamirpur, in Criminal Appeal No. 36 of 2007, dated 15.01.2010, vide which learned Appellate Court, while dismissing the appeal filed by the present petitioner, upheld the judgment of conviction and sentence imposed upon the present petitioner by the Court of learned Chief Judicial Magistrate, Hamirpur, in Case No. 206-I-05/20-III-06, dated 16.05.2007, whereby learned trial Court convicted the present petitioner for commission of offence punishable under Section 61 (1) (a) of Punjab Excise Act, as applicable to State of Himachal Pradesh (hereinafter referred to as 'Act') sentenced him to undergo simple imprisonment for a period of three months and to pay a fine of Rs. 5,000/- for commission of offence punishable under Section 61 (1) (a) of the Act.

2. The case of the prosecution was that on 29.04.2005, at about 6:00 p.m. when PW5 ASI Chaman Lal and HHC Jagat Ram were present at main bazaar, a secret information was received that Joginder Singh (petitioner/ accused) had kept huge quantity of liquor and in case search was made, the same could be recovered. As per the prosecution, on the basis of said information, rukka Ext. PW5/A was prepared, which was sent to Police Station, on the basis of which, FIR Ext. PW5/B was registered. Witnesses PW2 Kishore Chand and PW1 Anil Kumar were associated and the search of shop of accused was conducted in the presence of said witnesses, which led to recovery of 12 bottles of country liquor bearing mark Una No. 1, each containing 750 ml. of country liquor. Permit was demanded from the accused for possessing the bottles which could not be produced by him. Out of bottles so seized from the accused, three bottles were retained as samples which were sent to C.T.L. Kandaghat for chemical analysis through PW4 Constable Chaman Lal. Result of chemical analysis Ext. PW5/E revealed that each sample of country liquor contained 50 % proof alcohol in it. After the completion of investigation, challan was filed in the Court and as a prima facie case was found against the accused, he was

accordingly charged for commission of offence punishable under Section under Section 61 (1) (a) of Punjab Excise Act, as applicable to State of Himachal Pradesh, to which he pleaded not guilty and claimed trial.

3. On the basis of evidence led by the prosecution both ocular as well as documentary, learned trial Court held that prosecution was able to prove its case against the accused that he was found in possession of country liquor in excess of the limit of retail sale and he had failed to produce any permit for possessing them as was required in law. On these bases, it was held by the learned trial Court that accused had violated the provisions of Section 61 (1) (a) of the Act and it convicted the accused.

4. Feeling aggrieved by the judgment so passed by the learned trial Court, accused filed an appeal which was dismissed by learned Appellate Court vide judgment dated 15.01.2010. While upholding the judgment of conviction passed by the learned trial Court it was held by the learned Appellate Court that the prosecution had established the case against the appellant/accused beyond the shadow of reasonable doubt and learned trial Court had correctly awarded the sentence of three months' simple imprisonment alongwith fine of Rs. 5,000/- on the accused as 12 bottles of country liquor, brand Una No. 1, were recovered from the accused and such type of liquor smuggling was causing loss to the State Exchequer.

5. The judgments so passed against the accused by both the learned Courts below are under challenge by way of this revision petition.

6. Mr. Kapil Dev Sood, learned senior counsel appearing for the petitioner has argued that the judgment of conviction passed against the accused by the learned trial Court as well as judgment passed by learned Appellate Court are perverse because learned trial Court as well as learned Appellate Court failed to appreciate that the prosecution was not able to prove that the petitioner in fact was in possession of 12 bottles of country liquor. According to Mr. Sood it was admitted case of the prosecution that out of 12 bottles allegedly seized from the accused, only three were sent for chemical analysis. It was argued and urged by Mr. Sood that as only three bottles were sent for chemical analysis, it could not be assumed that remaining 9 bottles which were allegedly recovered from the accused were also containing country liquor. Mr. Sood further argued that out of three bottles which were allegedly recovered from the petitioner containing country liquor and sent for chemical analysis, a perusal of the report of Chemical Examiner demonstrated that country liquor was found in only two of them. He drew attention of this Court to report of the Chemical Examiner Ext. PW5/E, as per which opinion given after the chemical analysis of the samples of country liquor bottles was as under.

> *"Opinion:- The samples of country liquor lots No. 1479 and 1479/2 contain 50.0 % proof alcohol strength each."*

On the strength of the opinion so given by the chemical examiner, it was argued by Mr. Sood that as prosecution could prove on record that only two bottles allegedly recovered from the accused were containing country liquor and the same were within the permissible limit, his conviction for violating the provisions of Section 61 (1) (a) of the Punjab Excise Act as applicable to the State of Himachal Pradesh was totally perverse. On these bases, it was submitted by Mr. Sood that the judgment of conviction passed by the learned Trial Court and upheld by learned Appellate Court was liable to be set aside.

7. On the other hand, Mr. Vikram Thakur, learned Deputy Advocate General argued that though Ext. PW5/E does refer to country liquor having been found only in two bottles out of three bottles sent to CTL Kandaghat but this did not absolve the petitioner from the commission of offence for which he stood convicted by both the learned Courts below. Mr. Thakur further argued that it was a matter of record that petitioner was apprehended with 12 bottles of country liquor. On these bases, it was urged by Mr. Thakur that learned Courts below rightly held the accused guilty of the offence for which he was charged with and the same did not call for any interference.

8. I have heard the learned senior counsel appearing for the petitioner as well as learned Deputy Advocate General and also gone through the records of the case as well as the judgments passed by both the Courts below.

9. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and undeserved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

10. It is a matter of record that out of 12 bottles which were allegedly recovered from the petitioner, three were retained as samples, which as per the prosecution were sent to CTL Kandaghat for chemical analysis. It is also a matter of record that report of the Chemical Examiner, H.P.C.T.L. Kandaghat is to the effect that samples of country liquor, lot No. 1479/1 and 1479/2 contained 50% proof alcohol strength each. There is no opinion qua sample of country liquor "lot No. 1479/3". A perusal of this document further shows that there is some interpolation/overwriting in the same and that numerical figure "2" mentioned in the opinion pertaining to lot No. 1479/3 had been subsequently converted into "3". Be that as it may, the fact of the matter still remains that as per the report of the Chemical Examiner, only two samples were found to be containing 50% proof of alcohol strength each. Chemical Examiner was not examined as a witness by the prosecution. It is not a disputed issue that no permit is required for possessing two bottles of country liquor. From the record it cannot be said that prosecution was able to prove that accused in fact was in the possession of 12 bottles of country liquor without a permit. Prosecution was not even been able to prove that accused was in possession of three bottles of country liquor. Therefore, in these circumstances, when the prosecution was not able to demonstrate from the material produced on record that the accused in fact was in possession of bottles of country liquor in excess of what is permitted without a permit, learned trial Court erred in convicting accused for violating provisions of Section 61 (1) (a) of the Act and learned Appellate Court also erred in upholding the judgment of conviction so passed by the learned trial Court. Both the learned Courts below erred in not appreciating that in the absence of any evidence to demonstrate that the petitioner was possessing more than the permissible limit of country liquor bottles, he could not have been convicted for violating the provisions of Section 61 (1) (a) of the Act.

11. This Court in ***2003 CR.L.J. 1346, Mahajan v. State of Himachal Pradesh, Cr. Rev. No. 69 of 2000, dated 02.05.2002*** has held.

> *"In exercise of the powers conferred by Ss. 5 and 58 of the Punjab Excise Act, the Governor, Himachal Pradesh on 29-3-1985 issued an order bearing No. EXN.F(1)-4/76 published in Himachal Rajpatra (Extra-ordinary) on 30-3-1985 prescribing the limit for possession of Indian made foreign spirit (for short, IMFS) in respect of the areas/territories comprised in Himachal Pradesh immediately before 1st November, 1966. This order was issued by way of amendment of O. 2 of Himachal Pradesh Intoxicants Licence and Sale Orders, 1965. The relevant order reads:-*
>
> *"2-A. Limit for retail possession:*
>
> *The following are the maximum quantities of intoxicants which can be sold in each transaction in retail sale under the Punjab Excise Act, 1914, in the said area:-*

(1)	*Foreign spirit*	*Two bottles each of the capacity of 750 ml.*
(2)	*Beer whether imported or made in India.*	*Twelve bottles each of the capacity of 650 ml.*
(3)	*Cider (liquor manufactured by fermentation of juice of any fruit) whether imported or made in India.*	*Six quarter bottles.*
(4)	*Country liquor*	*Two bottles each of the capacity of 750 ml.*
(5)	*Country fermented liquor.*	*Six quart bottles.*
(6)	*Bhang*	*100 grams.*
(7)	*Rectified spirit*	*One pint of 375 ml.*
(8)	*Denatured spirit*	*One bottle of 650 ml.*

Note.—The limit of transportation mentioned at Items Nos. (1) and (2) above shall be alternative with the limit mentioned at Item No. (4) :

Provided that a person may, for bona fide consumption by him, the members of his family, or his guest, purchase, transport and possess foreign spirit up to 12 bottles of the capacity of 750 ml. each inclusive of imported spirit and 36 bottles of the capacity of 650 ml. each of Beer on the authority of a permit in Form L-50 granted by the Excise Officer, holding the charge of the District, on payment of a permit fee according to the following scale for a financial year or part thereof:-

Quantity	*Permit fee*
Exceeding six bottles of IMFS of 750 ml. each and 12 bottles of 650 ml. each of Beer but not exceeding 12 bottles of IMFS and 36 bottles of Beer.	*Fifty rupees only*

Note :-- <u>The possession limit by one family living in a separate and distinct premises will be six bottles of IMFS of 750 ml. each and 24 bottles of Beer of 650 ml. each at one time</u>. Imported liquor will be considered as part of stocks of IMFS and bottles of foreign liquor which may be of one litre or two litres will be converted, for this purpose, to the limits prescribed for IMFS in 750 ml. bottles:

Provided further that in case of possession and purchase of denatured spirit for industrial purposes, a permit may be obtained from the Excise Officers of the 1st Class as declared by the State Government."

(Emphasis supplied)

In view of the above quoted order issued by the State Government, the permissible prescribed limit for possession of Indian made Foreign Spirit without permit at one time by a family is six bottles of IMFS of 750 ml. each and 24 bottles of Beer of 650 ml. each.

In the present case, as per the prosecution story, eight bottles of XXX Rum were recovered from the possession of the accused. Admittedly, samples out of only three bottles were taken by the Investigating Officer and sent for analysis. Such samples were found to be of IMFS vide report Ex. P.W.5/E.

In view of such report, at the most, the prosecution has been able to prove the possession of the accused only qua three bottles of IMFS. Nothing has come on

the record to show that the remaining five bottles alleged to have been recovered from the accused also contained IMFS.

Before the accused could be convicted for the offence, the prosecution was obliged to prove that he was in conscious possession of IMFS in excess of the prescribed limit of six bottles of 750 ml. each. The prosecution, as stated above, could prove the possession of the accused only qua three bottles, which possession is below the prescribed limit. The conviction and sentence imposed upon the accused by the two Courts below, on this short ground alone cannot be sustained."

12. This Court in ***Latest HLJ 2007 (HP) 1017, State of H.P. versus Ramesh Chand, Cr. Appeal No. 159 of 2000, decided on 21.06.2007*** has held.

"It is well settled law that in appeal against acquittal if two views are reasonably possible of the evidence on the record, then the view in support of acquittal of the case should be preferred. In the instant case the regrettable features are that the respondent was alleged to have been found in possession of 12 bottles of IMFL near the bus stand Sujanpur and it has come in evidence that many persons were present during that time but no attempt was made to associate an independent witness by the police in order to inspire confidence in the prosecution case in view of the fact that no article connecting the accused was found in his ruck-sack. Secondly, out of 12 bottles of IMFL, samples of only three bottles were taken, so the prosecution has left us in lurk as to what another nine bottles contained. Thirdly, there is no link evidence, who had taken the case property to the police station; further LHC Mahant Ram (PW-4) is stated to have taken the sample for analysis to Chemical Laboratory, Kandaghat, but as PW-4 did not whisper even a single word about it. No one came forward to say that the case property/samples were not tempered withy. It is imperative on the prosecution to over-rule the possibility of tempering with the case property/or the samples till its examination. Since link evidence is missing in the instant case, benefit of which has to be given to the accused. Lastly, the seal with which the case property was sealed was not produced by LHC Mahant Ram, with whom it was entrusted. In view of the above discrepancies, case of the prosecution does not inspire confidence and conviction cannot be sustained on the version given by the official witnesses before the trial court. Accordingly, the impugned judgment of acquittal cannot be disturbed.

For the reasons aforesaid, the appeal merits dismissal which is accordingly dismissed. The respondent is discharged of the bail bonds, entered upon by him during the proceedings of the trial."

13. This Court in ***2009 (2) Shim. LC 208, Dharam Pal and another v. State of Himachal Pradesh, Cr. Rev. No. 4 of 2003, dated 8th April, 2009*** has held.

"According to prosecution, 48 bottles were recovered from the van. The prosecution case is that samples were taken only from four bottles which were ultimately sent for chemical examination and report of the Chemical Examiner Ex.PW-5/F was obtained. In Mahajan Vs. State of Himachal Pradesh, 2003 Cr. L.J. 1346, 8 bottles of XXX Rum were recovered but samples were taken from three bottles and such samples were found to be of IMFS. On those facts a learned Single Judge of this Court in para 12 has held as follows:

> *"In view of such report, at the most, the prosecution has been able to prove the possession of the accused only qua three bottles of IMFS. Nothing has come on the record to show that the remaining five bottles alleged to have been recovered from the accused also contained IMFS."*

There is nothing on record to show that the bottles from which the samples were not taken were in fact containing liquor. In other words, there is no worth

believing material on record to show that 44 bottles were containing liquor. Therefore, prosecution case at its best is that four bottles were containing liquor."

14. In view of discussion held above as well as the law laid down by this Court, this revision petition is allowed and judgment of conviction and sentence imposed upon the petitioner by the Court of learned Chief Judicial Magistrate, Hamirpur, in case No. 206-I-05/20-III-06, dated 16.05.2007, is set aside alongwith judgment passed in Criminal Appeal No. 36 of 2007, dated 15.01.2010 by the Court of learned Additional Sessions Judge, Fast Track Court, Hamirpur. Petitioner is acquitted of the offence for which he was charged. Amount of fine deposited by the petitioner, if any, is directed to be refunded to him as per law. Pending miscellaneous application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Kashetar Pal Singh alias Kripal Singh … Petitioner

Versus

Harpal Singh and another … Respondents

Cr. MMO No. 109 of 2014
Reserved on: 14.12.2016
Date of decision: 28.12.2016

Code of Criminal Procedure, 1973- Section 133- The petitioner filed an application pleading that respondent No. 1 had blocked flow of rainy and domestic water - respondent No.1 pleaded that civil litigation was going between the parties – no water was blocked by him and false application was filed – SDM dismissed the application by holding that there was no nuisance and general public was not involved in the dispute- a revision was filed before Additional Sessions Judge, which was dismissed- held, that power under Article 227 of the Constitution of India is to be used sparingly for keeping the Subordinate Courts within the bounds of their authority and not for correcting mere errors – it was not disputed that a civil suit was pending between the parties regarding the subject matter – there was no public nuisance as it was not established that drain was being used by public at large – filing of an application before Criminal Court to settle the civil dispute amounted to abuse of the process of the Court – petition dismissed with cost of Rs.10,000/- (Para-9 to 19)

Cases referred:

Radhey Shyam and another Vs. Chhabi Nath and others, (2015) 5 Supreme Court Cases 423
Ouseph Mathai and others Vs. M. Abdul Khadir, (2002) 1 Supreme Court Cases 319
Waryam Singh and another Vs. Amarnath and another, A.I.R. 1954 S.C. 215,
State of M.P. Vs. Kedia Leather & Liquor Ltd. and others, (2003) 7 Supreme Court Cases 389,

For the petitioner: Mr. Sanjeev Kumar Suri, Advocate.
For the respondents: Mr. Sunny Modgil, Advocate, for respondent No. 1.
Ms. Parul Negi, Deputy Advocate General, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this petition filed under Article 227 of the Constitution of India, petitioner has prayed for quashing of judgment dated 20.12.2013 passed by the Court of learned Additional Sessions Judge (II), Una, Camp at Amb, in Criminal Revision No. 1/2012 RBT No. 2/2013/2012, vide which learned Court below while dismissing revision petition so filed by the present petitioner upheld the order passed by learned Sub Divisional Magistrate, Amb, District Una, in case No. 74/CR/07 titled State Vs. Harpal Singh instituted under Section 133 of Cr.P.C. dated 03.09.2010.

2. Brief facts necessary for adjudication of this petition are that petitioner Kashetar Pal Singh filed an application before Gram Panchayat, Lower Bhanjal dated 08.04.2007 to the effect that respondent No. 1 Harpal Singh had blocked the flow of rainy and domestic water of the petitioner as well as other local residents near the house of the petitioner which had caused damage to the house of the petitioner. On these bases, a Kalandra was filed by the police, Police Station Amb, under Section 133 of Cr.P.C. against respondent No. 1 Harpal Singh in the Court of learned Sub Divisional Magistrate, Amb, on the ground that Harpal Singh had blocked the flow of water forcibly causing danger to the house of petitioner and that on 03.07.2007 police visited the spot and associated petitioner as well as respondent No. 1 with the inquiry which revealed that the houses of petitioner, Satya Devi and Pushpa Devi, were adjacent to each other and respondent No. 1 Harpal Singh had constructed his house later on and had made Nallah for free flow of rain water underneath his house and rain water was also going through the same and Harpal thereafter had blocked the free flow of water by putting cement, concrete etc. on the drain as a result of which water was not going through the drain and was seepaging in the house of Kashetar Pal Singh endangering the house ofKashetar Pal Singh. It was on the basis of this inquiry that police submitted Kalandra before learned Sub Divisional Magistrate, Amb.

3. Respondent No. 1 in his response submitted before learned Sub Divisional Magistrate stated that he had not blocked any rainy water as alleged. According to him, petitioner had constructed septic tank adjacent to the drain behind his abadi and at the back side of abadi of petitioner. As per respondent No. 1, he had not blocked/obstructed any water and in fact, police had prepared a false Kalandra against the respondent. It was also mentioned in his response that there was civil litigation going on between the parties on the same subject matter in the Court of Civil Judge (Jr. Division), Court No. 1, Amb i.e. case No. 121/07 and parallel proceedings were not maintainable on the same cause in the Court of learned Sub Divisional Magistrate.

4. Learned Sub Divisional Magistrate vide order dated 03.09.2010 dismissed Kalandra by holding that there was no nuisance and further the matter in issue was not of public interest and general public was not involved in the said dispute.

5. This decision of learned Sub Divisional Magistrate was challenged by way of a revision petition which was dismissed by the Court of learned Additional Sessions Judge (II), Una, Camp at Amb on 20.12.2013.

6. While dismissing the revision petition, it was held by learned Court below that under Section 133 of Cr.P.C. Sub Divisional Magistrate on taking such evidence as he thinks fit could remove nuisance or unlawful obstruction from any public place or from any way, river or channel which is or may be lawfully used by the public. Learned Revisional Court held that the report submitted by police did not mention that path was a public path. It further held that as per report there was dispute of drain between the parties and Executive Magistrate could not take cognizance of private disputes of the parties under Section 133 of Cr.P.C. Learned Court further held that object of Section 133 of Cr.P.C. was to enable an Executive Magistrate to pass quick orders and deal speedily with the cases of public nuisance or where obstruction was caused to the right of public at large. It was further held by learned Revisional Court that there was no evidence to hold that drain on the spot was used by general public. It also held that it was also a matter of record that on the same cause of action there was a civil case pending between the parties in the Court of Civil Judge (Jr. Division), Court No. 1, Amb. Learned Appellate Court also held that in the said civil suit petitioner Kashetar Pal had sought relief of prohibitory injunction restraining Harpal from raising any sort of construction, blocking the rainy as well as domestic flow of water over the portion ABCDEFGH as shown yellow in colour in the site plan which was being used as drain being part of land measuring 0-35-38 hectares, Khata No. 187 min, Khatauni No. 417 min, Khasra No. 1090. Learned Revisional Court also held that perusal of the pleadings of the parties before Civil Court demonstrated that there was no dispute of public nuisance on the spot and Section 133 of Cr.P.C. did not apply to private nuisance. It further held that as there was a civil dispute between the parties and the dispute in issue did not involve public nuisance, therefore, the order of learned Sub Divisional Magistrate could not be said to be

illegal and that revision petition was without any substance as there was nothing on record to prove that drain was used by public at large. It was further held by learned Revisional Court that there was neither any illegality nor perversity in the order passed by learned Sub Divisional Magistrate and that the same did not warrant any interference.

7. Feeling aggrieved by the said judgment passed by learned Revisional Court, petitioner has filed this petition under Article 227 of the Constitution of India.

8. Before proceeding any further, it is necessary to deal with the scope of this Court while exercising its supervisory jurisdiction conferred upon it under Article 227 of the Constitution of India.

9. A three-Judge bench of Hon'ble Supreme Court in ***Radhey Shyam and another Vs. Chhabi Nath and others***, ***(2015) 5 Supreme Court Cases 423***, has held that all the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. The Hon'ble Supreme Court has further held that control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or Revisional powers or power of superintendence under Article 227. The Hon'ble Supreme Court has further held that while appellate or Revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional.

10. It is settled law that power under Article 227 is intended to be used most sparingly and only in appropriate cases for the purpose of keeping subordinate courts within the bounds of their authority and not for correcting mere errors.

11. The Hon'ble Supreme Court in ***Ouseph Mathai and others Vs. M. Abdul Khadir***, ***(2002) 1 Supreme Court Cases 319***, has held that no doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said Article as a matter of right. In fact power under this Article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

12. A five-Judge bench of Hon'ble Supreme Court in ***Waryam Singh and another Vs. Amarnath and another***, ***A.I.R. 1954 S.C. 215***, has held that this power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in - 'Dalmia Jain Airways Ltd. V. Sukumar Mukherjee', AIR 1951 Cal 193 (SB) (B), is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

13. Coming to the facts of this case, learned counsel for the petitioner could not deny the fact that the issue with regard to which Kalandra was filed before learned Sub Divisional Magistrate was already subject matter of civil suit which had been instituted by him against respondent No. 1.

14. During the course of arguments, learned counsel for the petitioner neither could point out as to what was the jurisdictional error committed by the learned Court below while deciding the revision petition or what was the perversity with the findings arrived at by learned Revisional Court and by the Court of learned Sub Divisional Magistrate to the effect that the issue raised in Kalandra was in fact a private dispute inter se the present petitioner and respondent No. 1 and there was no element of public nuisance involved in the same. In fact, it is evident from a perusal of the judgment passed by learned Revisional Court as well as other material placed on record by the parties that the issue which was raised by the petitioner by way of filing a complaint before Gram Panchayat was in fact a private dispute existing between

him and respondent No. 1 qua which he had already instituted a civil suit in the Court of competent jurisdiction. Therefore, it cannot be said that the Revisional Court erred while coming to the conclusion that the findings retuned by learned Sub Divisional Magistrate that the issue raised in the Kalandra was not a matter of public interest, was the correct decision.

15. In my considered view, it was correctly held by learned Revisional Court that the dispute did not involve public nuisance and there was no illegality with the order passed by learned Sub Divisional Magistrate. Learned Revisional Court also correctly held that there was nothing on record to demonstrate that the drain was used by the public at large and that it was a matter of record that there was a civil dispute between the petitioner and respondent No. 1 on the same cause and the dispute in fact did not involve public nuisance.

16. In fact, taking into consideration that the petitioner had already filed a suit on the same cause against respondent Harpasl Singh, his act of moving an application before Gram Panchayat and on the basis of the same of getting a Kalandra submitted under Section 133 of Cr.P.C. before learned Sub Divisional Magistrate, Amb, was nothing but an abuse of the process of law. Learned Sub Divisional Magistrate by correctly concluding that there was no element of public interest/public nuisance involved in the complaint/ Kalandra so filed, rightly dismissed the same. Similarly learned Revisional Court after appreciation of material on record correctly held that the issue raised by the petitioner did not fall within the ambit of Section 133 of Cr.P.C.

17. Proceedings under Section 133 of Cr.P.C. are not intended to settle private dispute between two members of the public. It is settled law that if a dispute is of civil nature then dispute cannot be entertained by Magistrate under Section 133 of Cr.P.C. The provisions of the said section can be used only for settlement of dispute in relation to a public right in the general interest of public at large.

18. The Hon'ble Supreme Court in ***State of M.P. Vs. Kedia Leather & Liquor Ltd. and others***, ***(2003) 7 Supreme Court Cases 389***, has held that to bring in application of Section 133 of Cr.P.C., there must be imminent danger to the property and consequential nuisance to the public. The Hon'ble Supreme Court further held that the object and purpose behind Section 133 of the Code was essentially to prevent public nuisance and it involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be caused to the public.

19. In view of my findings returned above and the law laid down by the Hon'ble Supreme Court, I do not find any merit in the present petition and the same is accordingly dismissed with cost, assessed at Rs.10,000/-, which shall be deposited by the petitioner in the Registry of this Court within a period of six weeks from today and thereafter, paid to respondent No. 1 by the Registry of this Court as per procedure. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, also stands vacated.

20. For the limited purpose of ascertaining as to whether the cost so imposed upon the petitioner is deposited by him in the Registry or not, the case shall be listed on **01.03.2017**.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sh. Narotam Dutt Sharma ...Non-applicant/Plaintiff

Versus

H.P.State Co-operative Bank Ltd. and others ..Non-applicants/Defendants/Applicant.

OMP No. 297 of 2016 in
C.S. No. 16 of 2016.
Reserved on: 22.12.2016.
Decided on: 28.12.2016.

Code of Civil Procedure, 1908- Order 7 Rule 11- An application for rejection of the plaint filed by defendant No.4 pleading that plaint does not disclose any cause of action against defendant No.4 **-** defendant No.4 had taken action in discharge of his official duties and is not liable – held, that defendant No.4 has been arrayed as party because he remained the Managing Director of the Bank – acts done in discharge of official duty are protected and immune from prosecution, provided they are done in good faith and without malafide – malafide means that the act is not done for the proposed purpose – malafide should be pleaded by specific allegations – merely by saying that action was not justified and was out of bias will not amount to plea of malafide- general and vague allegations of malafide have been levelled – no evidence can be led regarding a plea not asserted in the plaint- application allowed and plaint ordered to be rejected against the defendant No.4.(Para-7 to 23)

Cases referred:

State of Punjab and another vs. Gurdial Singh and others, AIR 1980 SC 319
State of Andhra Pradesh and others vs. Goverdhanlal Pitti (2003) 4 SCC 739
Ludovico Sagrado Goveia vs. Cirila Rosa Maria Pinto and others (2016) 9 SCC 615
State of Himachal Pradesh and others versus Baldev and others 2016 (1) SLC 361
Salem Advocate Bar Association, T.N. vs. Union of India (2005) 6 SCC 344
S.S. Rana vs. Registrar, Coop. Societies and another (2006) 11 SCC 634
Chandresh Kumar Malhotra vs. H.P.State Coop. Bank and others 1993 (2) Sim. L.C. 243
Vikram Chauhan vs. The Managing Director and others Latest HLJ 2013 (HP) 742 (FB)
Thalappalam Ser. Co-op. Bank Ltd. and others vs. State of Kerala & others 2013 AIR SCW 5683
Sanjeev Kumar and others vs. State of H.P. and others Latest HLJ 2014 (HP) 1061
Sumer Chand Katoch vs. The Kangra Central Cooperative Bank Ltd. 1996 (2) Sim. L.C. 134

For the Non-applicant/ Plaintiff. : Mr. P.P. Chauhan, Advocate.

For the Non-applicants/ Defendants/Applicant: Mr. Sunil Mohan Goel, Advocat for non-applicants/defendants No. 1 and 2.
Ms. Renuka Thakur, Advocate, vice Mr. Peeyush Verma, Advocate, for non-applicant/ defendant No.3.
Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate, for the applicant/ defendant No.4.
Defendant No.5 ex parte.
Mr. R.L.Chaudhary, Advocate, for non-applicant/defendant No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This order shall dispose of the application filed by the applicant/defendant No.4 for rejection of the plaint on the ground that it does not disclose any cause of action against him.

2. The non-applicant/plaintiff (hereinafter referred to as the 'plaintiff'), is an ex-employee of defendant No.1- bank and aggrieved by his supersession has filed this suit mainly seeking therein the decree of declaration, mandatory injunction and compensation to the tune of Rs. 1 crore on account of damages caused to his reputation as well as harassment and mental agony caused to him.

3. Besides, the H.P. State Co-operative Bank Ltd, through its Chairman/Managing Director having been impleaded as defendant No.1, the plaintiff has also impleaded the Managing Director of the Bank as defendant No.2 and in addition thereto, certain private parties including defendant No.4 Amit Kashyap, who worked as the Managing Director of defendant No.1 from the

period w.e.f. 26.10.2010 to 29.01.2013 and thereafter 02.07.2013 to 27.05.2014 have also been impleaded as party defendant by name.

4. It is averred that prior to joining of defendant No.4 as Managing Director of defendant No.1-Bank, the plaintiff was not personally known to him. Whatever documents and materials were brought before him as regards the work and conduct of the plaintiff, appropriate decision in light of the extant service rules was taken thereupon, that too, in a bonafide manner without any ill-will or any other extraneous consideration. Even otherwise, in case the plaintiff was not satisfied with the action/inaction on the part of the defendant No.4, he was free to avail all suitable departmental or legal remedies against these orders, which admittedly have not been availed of or resorted to by the plaintiff. It is further averred that looking to the nature of the relief sought for in the suit, the matter if at all justiciableis inter se between the plaintiff from one hand and defendants No. 1 and 2 on the other hand and the other defendants including defendant No.4 have no concern with the same. The impleadment of the applicant/defendant No.4 by name, signifies as regards the relief No.3 i.e. relief for grant of damages/compensation to the tune of Rs. 1 crore. He has roped the applicant by name, however, such impleadment is not only unnecessary, but it is gross abuse of the process of the Court.

5. It is averred that all the actions of the applicant/defendant No.4 have been taken in his official capacity, that too, in a bonafide manner in discharge of his official duties. That apart, the averments made in the plaint as such suffer from serious vice of insufficiency inasmuch as the plaint does not disclose any cause of action against the applicant and, therefore, deserves to be dismissed. It is averred that there is lack of necessary averments or allegations against the applicant on the basis of which the decree can be passed against the defendant No.4.

6. The plaintiff has contested the application by filing a reply wherein preliminary submission has been made with regard to the maintainability of the application on the ground that the same is misconceived and therefore, deserves to be dismissed. That apart, it is claimed that a legal notice dated 17.7.2015 was issued to the applicant with the same averments, however, he failed to reply the same and, therefore, it does not lie in his mouth to make averments in the application that the suit is not maintainable. As a matter of fact, the applicant/defendant No.4 had failed to discharge his duties in accordance with rules and regulations and that too, promptly and, therefore, the suit is maintainable. In addition thereto, it is submitted that categoric allegations of malafide have been made in paras 10 to 18 of the plaint, which is indicative of legal malafide on the part of the applicant. The adamancy shown by the applicant to change the Inquiry Officer is indicative of his malafide attitude towards the plaintiff. On reply to the merits of the application, it is submitted that the private parties including the applicant are necessary parties to the suit as they cannot escape the liability as it is on account of their acts that the plaintiff has been constrained to file the instant suit.

I have heard the learned counsel for the parties and have gone through the record of the case carefully.

7. It is not in dispute that the applicant/defendant No.4 has been made as a party in this suit only because he at one time remained the Managing Director of the defendant No.1-Bank. Therefore, as per the settled law the acts done in discharge of official duty, are normally protected and are immune from the prosecution provided that these acts are done in good faith are bonafide and should not be tainted with the bias of malafides.

8. Mr. P.P. Chauhan, learned counsel for the non-applicant/plaintiff would argue that it is only on account of illegal and malicious act of the applicant that he has been arrayed as a party to the suit and to buttress this submission he has relied upon the contents of paras 10 to 18 of the plaint which reads thus:

> *"10. That the aforesaid request for change of enquiry officer made by the plaintiff vide letter dated 28.01.2011 was turned down vide letter dated 01.03.2011 illegally and maliciously and without passing a speaking order.*

11. That on 24.04.2011 vide an un-dated letter the plaintiff had made a request for being promoted to the post of Senior Manager in pursuance to the approval by the Registrar dated 17.08.2010. However, no heed was paid thereto.

12. That vide impugned letter dated 11.06.2011, the request for further promotion during the pendency of the departmental proceedings made on 24.04.2011 vide an undated letter was turned down. The said communication was wholly illegal and against the well settled legal position by Hon'ble Supreme Court of India and this Hon'ble Court that in case during Departmental Promotion Committee, no chargesheet has been issued either in criminal case or departmental case, the promotions cannot be withheld. This principle of law was very much in the knowledge of the Bank and has been ignored purposely and knowingly.

13. That subsequent to the aforesaid, vide a letter of plaintiff dated 29.06.2011 it was brought to the notice of the concerned authority that since the enquiry had been conducted on 20.04.2011 and a report thereof had been submitted to the concerned authority thereof, promotion orders of the plaintiff be kindly not delayed.

14. That in the month of June 2012, the plaintiff received an order whereby the plaintiff was informed that though the enquiry report had been submitted by the enquiry officer on 22.04.2011 wherein all three charges levelled against the plaintiff stood proved the same was not being accepted in view of the objection raised by the plaintiff. It was further pointed out therein that the enquiry had been conducted within a day. Hence a de-novo enquiry by the same official was ordered, copy of which was received through fax by the plaintiff on 15.06.2012. It is further stated that the said inquiry has been conducted by Sh. Jitender Jamwal, the then Assistant Manager in District Office Mandi and the Defendant No.6 herein, who was present on 20.04.2011 and which fact is discernible from the order dated 12.10.2012 and also verifiable from the fact that the proceedings have been written in his handwriting. The said Sh. Jitender Jamwal was neither Inquiry Officer nor in anyway connected with the inquiry. The said Sh. Jitender Jamwal was working in District Office, Mandi and the plaintiff was working under him and during the course of their official dealings, there were clashes between the two on many occasion and the said Sh. Jitender Jamwal used to threat the plaintiff with dire consequences. This is how the said defendants No. 5 and 6 have taken undue interest in harming the career and reputation of the plaintiff by holding the inquiry in illegal and arbitrary manner.

15. That in response to the aforesaid order directing a de-novo enquiry by the same official, the plaintiff once again reiterated his objection qua the appointment of the same enquiry officer. The same was filed/received in the office of the concerned authority, i.e. the defendant Nos. 2, 4 and 5 on 20.06.2012.

16. That thereafter to the utter surprise of the plaintiff vide impugned order dated 12.10.2012 the Managing Director of the Bank i.e. the defendant Nos. 2 and 4 have ordered the dismissal of the plaintiff from service in the utmost illegal, arbitrary and malicious manner with a view to harass the plaintiff as well as jeopardize his reputation.

17. That from aforementioned facts and attending circumstances it is clearly evident that the memorandum dated 28.09.2010 was issued post grant of approval dated 17.08.2010 wherein the promotion of the plaintiff by the Registrar had been approved on 22.04.2011 but till June, 2012 no action had been taken thereon. Moreover, after June, 2012 nothing has been done qua the pending enquiry which had been ordered undated and received by the plaintiff through fax on 15.06.2012.

> *18. That the aforesaid facts and attending circumstances reflected a complete non-application of mind on the part of the Managing Director i.e. the defendant Nos. 2 and 4 besides malicious act on his part with a view to harass the plaintiff and cause loss of reputation and monetary benefits to him. As the Managing Director of the Bank, i.e. the defendant Nos. 2 and 4, re-ordered holding of fresh enquiry, as the enquiry report submitted on 22.04.2011 was completed within a day. After having passed the aforesaid order received by the plaintiff in 15.06.2012, the Managing Director of the Bank i.e. the defendant Nos. 2 and 4 took a volte face and based on the enquiry report submitted on 22.04.2011 which was completed within a day proceeded to dismiss the plaintiff."*

9. As observed earlier, it is only on account of the fact that the applicant/defendant No.4 has been impleaded as a party as at the relevant time he served as Managing Director of the Bank, therefore, malafide in the case of the applicant would mean any act performed by him not for the proposed purpose.

10. What is the true import of malafides in relation to exercise of power has been succinctly brought forth by Hon'ble Mr. Justice Krishna Iyer in ***State of Punjab and another*** vs**.** ***Gurdial Singh and others, AIR 1980 SC 319*** in his Lordship's inimitable style in the following manner:

> *"9. The question, then, is what is mala fides in the jurisprudence of power? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power - sometimes called colourable exercise or fraud on power and often-times overlaps motives, passions and satisfactions - is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfillment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in Law when he stated: "I repeat……that all power is a trust -- that we are accountable for its exercise -- that, from the people, and for the people, all springs, and all must exist". Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the purpose and intent of the power, whether this be malice- laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power, vitiates the acquisition or other official act."*

11. It is more than settled that malafide should be pleaded by specific allegations. Merely to say that the action was not justified and it was out of bias that the impugned action was taken, is not, in the least, any allegation of malafide.

12. The legal meaning of 'malice' and the grounds for holding an action of the State to be malafide was considered by the Hon'ble Supreme Court in ***State of Andhra Pradesh and others*** vs. ***Goverdhanlal Pitti (2003) 4 SCC 739*** wherein malice were attributed to the State in the matter of acquiring of land and it was held :

> "12. *The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means 'something done without lawful excuse'. In other words, 'it is an act done wrongfully and wilfully without*

reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others'. [See Words and Phrases legally defined, Third Edition, London Butterworths 1989].

13. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all, it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object. Prof. Wade in its authoritative work on Administrative Law [8th Edn., at pg. 414] based on English decisions and in the context of alleged illegal acquisition proceedings, explains that an action by the State can be described mala fide if it seek to 'acquire land' 'for a purpose not authorised by the Act'. The State, if it wishes to acquire land, should exercise its power bona fide for the statutory purpose and for none other'.

14. The legal malice, therefore, on the part of the State as attributed to it should be understood to mean that the action of the State is not taken bona fide for the purpose of the Land Acquisition Act and it has been taken only to frustrate the favourable decisions obtained by the owner of the property against the State in the eviction and writ proceedings."

13. Reverting back to the case, a perusal of paras 10 to 18 of the plaint reveal that only general and vague allegations of malafides have been alleged and the same obviously cannot be treated to be a foundation for the malafide. There must be specific pleading regarding malafides and as observed above, the mere use of expression as 'malafides' or for extraneous reasons or for an ulterior motive etc. is not enough and details must be furnished and material facts have to be set out against the particular person alongwith the incidents in a manner as provided under Order 6 Rule 4 CPC.

14. Having failed to establish 'malice' in fact, Mr. P.P.Chauhan, learned counsel for the plaintiff would then argue that malice in law is writ large in the action of the applicant. This plea is not legally tenable after all legal malafide on the part of the applicant/defendant No.4 can only be understood to mean that the action of the applicant is not taken bonafidely. There is a marked difference between a wrong, erroneous or an illegal decision from the one which is tainted with malafide. From the perusal of the pleadings as quoted above, it is clearly evident that the allegations of malafide are far too general and vague and lack any specific facts and acts and, therefore, such vague allegation cannot be treated to be with foundation for the malafide. Allegations of malafide require high order of credibility, particularly when the imputations are made against the holder of an office having higher responsibility. There must be an averment to bad faith. After all, the malafide means dishonest intention of corrupt motive. Further, the malice must be based on factual matrix which cannot remain in the realm of insinuation, surmises, conjectures or vague suggestions.

15. In ***Ludovico Sagrado Goveia*** vs. ***Cirila Rosa Maria Pinto and others (2016) 9 SCC 615***, the Hon'ble Supreme Court held as under:

"24. Ground VI is totally vague and lacking in particulars. A charge of malafides has to be made out with great clarity and particularity. Also, the appellant cannot claim to be in the dark as every auction-sale was publicly advertised in newspapers. We, therefore, do not accede to the counsel's fervent plea to remit the rest of the writ petition to the High Court for hearing."

16. Confronted with this situation, learned counsel for the non-applicant/plaintiff would then argue that even in absence of specific instances regarding malafides, he would establish the same by leading evidence as he has sufficient weapons in his armoury to establish and prove these facts.

17. I am afraid that even such contention cannot be accepted, as it is more than settled that the pleadings are the foundation of the evidence and no amount of evidence beyond the pleadings can be led. This position has been long settled and was reiterated by a learned

Division Bench of this Court (of which I was a member) wherein this Court has elaborately considered in detail the relevance of pleadings in ***State of Himachal Pradesh and others*** *versus* ***Baldev and others 2016 (1) SLC 361*** and it was observed as under:-

> *"38. While deciding a civil suit, the pleadings are the foundation of the case. The pleadings play an important role in making the judgment and decree and that is why it is said that the pleadings are the heart, soul and essential foundation of a judicial verdict. It is the bedrock of the judicial disposal.*
>
> *39. In the instant case, at the cost of repetition, the plaintiffs-respondents have not prayed for relief of compensation or recovery of possession, no such foundation was laid.*
>
> *40. The Apex Court in the case titled as* ***State of Orissa & Anr. versus Mamata Mohanty, reported in 2011 AIR SCW 1332,*** *held that the relief, not founded on pleadings, cannot be granted. It is apt to reproduce para 35 of the judgment herein:*
>
> > *"35. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide : Sri Mahant Govind Rao v. Sita Ram Kesho, (1898) 25 Ind. App. 195; M/s. Trojan & Co. v. RM. N.N. Nagappa Chettiar, AIR 1953 SC 235; Ishwar Dutt v. Land Acquisition Collector & Anr., AIR 2005 SC 3165 : (2005 AIR SCW 578); and State of Maharashtra v. Hindustan Construction Company Ltd., (2010) 4 SCC 518 : (2010 AIR SCW 2265)) "*
>
> *41. The parties, the Courts of first instance, the Appellate Courts or the Revisional Courts cannot travel beyond the pleadings in view of the mechanism provided in CPC, which provides as to what procedure is to be followed after trial stage, i.e. after framing the issues, in terms of Order XIV CPC and how it has to be taken to its logical end after framing the issues.*
>
> *42. The Apex Court in the case titled as* ***Hari Chand versus Daulat Ram,*** *reported in* ***AIR 1987 Supreme Court 94,*** *held that when the plaintiff fails to prove his case as pleaded in the plaint, the relief cannot be granted by the Court, which is neither pleaded nor prayed. It is apt to reproduce para 11 of the judgment herein:*
>
> > *"11. On a consideration of all the evidences on record it is clearly established that the alleged encroachment by construction of kuchha wall and khaprail over it are not recent constructions as alleged to have been made in May 1961. On the other hand, it is crystal clear from the evidences of Ramji Lal P.W. 1 and Daulat Ram D.W. 1 that the disputed wall with khaprail existed there in the disputed site for a long time, that is 28 years before and the wall and the khaprail have been affected by salt as deposed to by these two witnesses. Moreover the court Amin's report 57C also shows the said walls and khaprail to be 25-30 years old in its present condition. The High Court has clearly come to the finding that though the partition deed was executed by the parties yet there was no partition by metes and bounds. Moreover there is no whisper in the plaint about the partition of the property in question between the co-*

sharers by metes and bounds nor there is any averment that the suit property fell to the share of plaintiffs vendor Ramji Lal and Ramji Lal was ever in possession of the disputed property since the date of partition till the date of sale to the plaintiff. The plaintiff has singularly failed to prove his case as pleaded in the plaint."

43. The Apex Court in the case titled as ***Bachhaj Nahar versus Nilima Mandal & Ors.,*** *reported in* ***2009 AIR SCW 287,*** *held that the Court cannot, on finding that the plaintiff has not made out the case put-forth by him, grant some other relief. It is apt to reproduce para 12 of the judgment herein:*

"12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu."

44. The pleadings and particulars are necessary to enable the Court to decide the rights of the parties in the trial.

45. The Apex Court in the case titled as ***National Textile Corporation Ltd. versus Nareshkumar Badrikumar Jagad & Ors.,*** *reported in* ***2011 AIR SCW 6180,*** *has laid down the same principle. It is apt to reproduce para 7 of the judgment herein:*

"7. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: M/s. Trojan & Co. v. RM N.N. Nagappa Chettiar, AIR 1953 AIR 235; State of Maharashtra v. M/s. Hindustan Construction Company Ltd., AIR 2010 SC 1299; and Kalyan Singh Chouhan v. C.P. Joshi, AIR 2011 SC 1127)."

18. The learned counsel for the non-applicant/plaintiff would thereafter argue that an adverse inference ought to be drawn against the applicant/defendant No.4 as despite the service of notice under Section 80 CPC upon the applicant, he did not choose to contest the same by filing reply and thereby attorned to the contents therein and would rely upon the judgment rendered by the three Hon'ble Judges of the Hon'ble Supreme Court in ***Salem Advocate Bar Association, T.N.*** vs**. *Union of India (2005) 6 SCC 344*** wherein it was held as under:

> *"38. Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid rule of prior notice. The two months period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.*
>
> *39. These provisions cast an implied duty on all concerned governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all concerned governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him."*

19. It is not in dispute that defendant No.1 is only a Co-operative Society and not Government and, therefore, the provisions of Section 80 CPC do not apply. However, learned counsel for the non-applicant/plaintiff would persist that defendant No.1 being a statutory authority would nonetheless fall within the definition of Government as provided under Section 80 CPC. However, I find this contention to be based upon a complete misunderstanding of the provisions of the H.P. State Co-operative Societies Act. Defendant No.1 is only constituted and not created under the Act and functions like any other Co-operative Society and is mainly regulated in terms of the provisions of the Act, except as provided in the byelaws of the Society. The State has no say in the functions of the Society, membership, acquisition of shares and all other matters are governed by the byelaws framed under the Act. The terms and conditions of the employees of the Co-operative Society indisputably are governed by the Rules.

20. For the proper understanding of this proposition, it would be necessary to advert to the judgment rendered by the Hon'ble Supreme Court in ***S.S. Rana vs. Registrar, Coop. Societies and another (2006) 11 SCC 634***, wherein it was observed as under:

> "9. *It is not in dispute that the Society has not been constituted under an Act. Its functions like any other Co-operative Society are mainly regulated in terms of the provisions of the Act, except as provided in the bye-laws of the Society. The State has no say in the functions of the Society. Membership, acquisition of shares and all other matters are governed by the bye-laws framed under the Act. The terms and conditions of an officer of the Co-operative Society, indisputably, are governed by the Rules. Rule 56, to which reference has been made by Mr. Vijay Kumar, does not contain any provision in terms whereof any legal right as such is conferred upon an officer of the Society.*
>
> *10. It has not been shown before us that the State exercises any direct or indirect control over the affairs of the Society for deep and pervasive control. The State furthermore is not the majority shareholder. The State has the power only to nominate one director. It cannot, thus, be said that the State exercises any functional control over the affairs of the Society in the sense that the majority directors are nominated by the State. For arriving at the conclusion that the State has a deep and pervasive control over the Society, several other relevant questions are required to be considered, namely: (1) How the Society was created?; (2) Whether it enjoys any monopoly character?; (3) Do the functions of the Society partake to statutory functions or public functions?; and (4) Can it be characterized as public Authority?*
>
> *11. Respondent No.2, the Society does not answer any of the afore-mentioned tests. In the case of a non-statutory society, the control thereover would mean that the same satisfies the tests laid down by this Court in Ajay Hasia vs. Khalid Mujib Sehravardi [(1981) 1 SCC 722]. [See Zoroastrian Coop. Housing Society Ltd. vs. District Registrar, Coop. Societies (Urban) & Ors. reported in 2005 (5) SCC 632.]*
>
> *12. It is well settled that general regulations under an Act, like Companies Act or the Co-operative Societies Act, would not render the activities of a company or a society as subject to control of the State. Such control in terms of the provisions of the Act are meant to ensure proper functioning of the Society and the State or statutory authorities would have nothing to do with its day-to-day functions.*
>
> *13. The decision of the Seven Judge Bench of this Court in Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology (2002) 5 SCC 111, whereupon strong reliance has been placed, has no application in the instant case. In that case, the Bench was deciding a question as to whether in view of the subsequent decisions of this Court, the law was correctly laid down in Sabajit Tewary vs. Union of India & Ors. [(1975) 1 SCC 485], and it not whether the same deserved to be overruled. The majority opined that the Council of Scientific and Industrial Research (CSIR) was 'State' within the meaning of Article 12 of the Constitution of India. This Court noticed the history of the formation thereof, its objects and functions, its management and control as also the extent of financial aid received by it. Apart from the said fact it was noticed by reason of an appropriate notification issued by the Central Government that CSIR was amenable to the jurisdiction of the Central Administrative Tribunal in terms of Section 14(2) of the Administrative Tribunals Act, 1985. It was on the aforementioned premises this Court opined that Sabhajit Tewary (supra) did not lay down the correct law. This Court reiterated the following six tests laid down in Ajay Hasia vs. Khalid Mujib Sehravardi [(1981) 1 SCC 722]:*

"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with Governmental character.

(3) It may also be relevant factor ..... whether the corporation enjoys monopoly status which is State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government."

This Court further held (Pradeep Kumar Biswas case, SCC P. 134, para 40):

" 40. This picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be -- whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

(Emphasis supplied)

14. As the respondent No.1 does not satisfy any of the tests laid down in Pradeep Kumar Biswas (supra), we are of the opinion that the High Court cannot be said to have committed any error in arriving at a finding that the respondent-Bank is not a State within the meaning of Article 12 of the Constitution of India."

21. Notably, defendant No.1-Bank in the instant case is not different from the bank which was in issue before the Hon'ble Supreme Court in ***S.S. Rana***'s case. That apart, this Court has otherwise repeatedly held that defendant No.1-bank to be not falling within the meaning of Article 12 or under Article 226 of the Constitution. (Refer: ***Chandresh Kumar Malhotra*** vs. ***H.P.State Coop. Bank and others 1993 (2) Sim. L.C. 243, Vikram Chauhan*** vs. ***The Managing Director and others Latest HLJ 2013 (HP) 742 (FB), Thalappalam Ser. Co-op. Bank Ltd. and others*** vs. ***State of Kerala and others 2013 AIR SCW 5683*** and ***Sanjeev Kumar and others*** vs. ***State of H.P. and others Latest HLJ 2014 (HP) 1061***).

22. It needs to be clarified that defendant No.1 is a Co-operative Society governed by the Act wherein though there is a provision for mandatory notice provided under Section 76, however, the same is applicable only to the cases where the dispute touches the Constitution, management or the business of the Society. However, even this provision does not apply to the disputes involving the matters pertaining to service of the employees of the Co-operative Society as held by this Court in ***Sumer Chand Katoch vs. The Kangra Central Cooperative Bank Ltd. 1996 (2) Sim. L.C. 134*** wherein it was held as under:

"*13. The next question is whether the District Judge is right in rejecting the plaint under Order VII, Rule 11 (d), C P. C. on the ground that the suit was not*

maintainable without giving notice under section 76 of the Act. Section 76 of the Act is :-

> *"76. Notice necessary in suits.- No suit shall be instituted against a society or any of its officers in respect of any act touching the constitution, management or the business of the society, until the expiration of two months after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims ; and the plaint shall contain a statement that such notice has been so delivered or left."*

14. By now it is well settled that section 76 of the Act is mandatory and its compliance is must and does not permit any exception as is apparent from its language, which is couched in negative terms. Its language is similar to that of section 80, C. P C , which fell for consideration of the Supreme Court of India in State of Madras v C. P. Agencies, AIR 1960 SC 1309, wherein the learned Judges have held that:-

> *"..... . Section 80 is express, explicit and mandatory and admits of no implications or except ions..... The object of section 80 is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be. brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted. In order to enable the Government or the public officer to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise reliefs asked for."*

15. Under section 76 of the Act also notice of two months is required to be delivered to the Registrar, Co-operative Societies or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims so that the Registrar may look into the matter and issue appropriate directions to the management of the cooperative society either to contest the claim or to accept it in the interest of the society From the scheme of the Act it is clear that the Registrar, Co-operative Societies is a statutory authority who exercises overall control in respect of constitution, management and business of a co-operative society, as such, he plays a vital role in respect of a disputes touching the constitution, management and business of the society. Section 76 of the Act further provides that the plaint shall contain a statement that such a notice has been so delivered or left Therefore, if the mandatory notice under section 76 of the Act is not delivered or left, the plaint can be rejected under Order VII, Rule II (d), C P. C In view of this, the District Judge is right to the extent that compliance of section 76 of the Act is mandatory before a suit is entertained in respect of a dispute touching the constitution, management or the business of the society. (Please see: Gangappa Gurupandappa Gugwad v. Rachawwa, AIR 1971 SC 442 and The Jwali Harijan Co-operative Agricultural Society v. Maghu etc etc . AIR 1992 HP 34.

16. However, the vital question for the application of section 76 of the Act is whether the matter in respect of setting aside the termination order and grant of consequential relief is a matter touching the constitution, management or the business of the society, as stated in section 76 of the Act. This Court may hold without any fear of contradiction that it is not an act touching she constitution and the business of the society. In Deccan Merchants Co-operative Ltd v. Dalichand Jugraj Jain, AIR 1969 SC 1320 ; Co-operative Central Bank Ltd v Additional Industrial Tribunal, Andhra Pradesh, AIR U70 SC 245 and The Allahabad District Co operative Ltd v Hanuman Butt Tewari, AIR 1982 SC !20, it is held by the

learned Judges of the Supreme Court that since the word 'business' is Equated with the actual trading or commercial or other similar business activity of the society, the dispute relating to conditions of service of the workman employed by the society cannot be held to be a dispute touching the business of the society.

17. The words 'touching the constitution, management or the business of a co-operative society used in section 76 of the Act also occur in section 72 of the Act, which provides than any dispute touching the constitution, management, or the business of a co-operative society arising between the parties stated therein, shall be referred to the Registrar for decision and no court shall have jurisdiction to entertain any suit or other proceeding in respect of such dispute. Undoubtedly, these words used in both these sections carry the identical meaning. Section 72 of the Act is para materia to section 96 of the Gujarat Co-operative Societies Act, 1961, which fell for consideration of learned Judges of the Supreme Court in The Gujarat State Co-operative Land Development Bank Ltd v, P. R. Mankad and another (supra). Interpreting the expression 'management of the society', it was held that :-

> *"35. ……..Grammatically, one meaning of the term 'management' is : 'the Board of Directors' or 'the apex body or Executive Committee at the helm which guides, regulates, supervises, directs and controls the affairs of the Society. In this sense, it may not include the individuals who under the overall control of that governing body or Committee, run the day-today business of the Society..... Another meaning of the term 'management' may be: 'the act or acts of managing or governing by direction, guidance, superintendence, regulation and control the affairs of a society'.*
>
> *36. A still wider meaning of the term which will encompass the entire staff of servants and workmen of the Society, has been convassed for by Mr. Dholakia The use of the term 'management' in such a wide sense in section 96 (1) appears to us, to be very doubtful.*
>
> *37. Be that as it may, what has been directly bidden 'out-of-bounds for the Registrar by the very scheme and object of the Act, cannot be indirectly inducted by widening the connotation of 'management', A construction free from contexual contraints, having the effect of smuggling into the circumscribed limits of the expression 'any dispute', a dispute which from its very nature is incapable of being resolved by the Registrar, has to be eschewed. Thus considered, a dispute raised against the Society by its discharged servant claiming reliefs such as reinstatement in service with back wages, which are not enforceable in a Civil Court is outside the scope of the expression 'touching the management of the Society* used in section 96 (I) of the Act of 1961, and the Registrar has no jurisdiction to deal with and determine it Such a dispute squarely falls within the jurisdiction of the Labour Court under the B I. R. Act."*

18. In view of these clear observations of the learned Judges of the Supreme Court, the District Judge was not right in relying upon the judgment of Rajasthan High Court in Sawai Madhopur Co-operative Marketing Society Ltd v. Rajasthan State Co-operative Tribunal, Jaipur and another (supra) The learned Judge of Rajasthan High Court took the view that having regard to the provisions of the Rajasthan Co operative Societies Act and the Rules, the dispute in question relating to validity of the suspension and termination is a dispute touching the management of the society and falls within the ambit of section 75 of the Rajasthan Co operative Societies Act. According to them, the ambit and import of word 'touching' are very wide and it includes any matter which relates to the management of the society, more particularly, when the Registrar deals with the matters relating to the officers and employees as provided in the Act and the Rules. Section 75 of the Rajasthan

Co-operative Societies Act is para materia to section 72 of the Act and also section 96 of the Gujarat Co-operative Societies Act, which was under consideration of the learned Judges of the Supreme Court in The Gujarat State Co-operative Land Development Bank Ltd v. P R Mankad and another (supra). The learned Judges of the Rajasthan High Court have tried to distinguish the judgment of the Supreme Court by stating that, "it appears that attention of their Lordships of the Supreme Court was not drawn to the provision of section 76 under Chapter VII of the Gujarat Act and the Rules made thereunder". Section 76 of the Gujarat Cooperative Societies Act falls under Chapter VII, which deals with the management of societies and reads as under :-

> *"76. The qualifications for the appointment of a manager, secretary, accountant or any other officer or employee of a society and the conditions of service of such officers and employees shall be such as may, from time to time, be prescribed ;*
>
> *Provided that no qualification shall be prescribed in respect of any officer not in receipt of any remuneration."*

19. The reasoning of learned Judges of Rajasthan High Court is that consideration of section 76 of the Gujarat Co-operative Societies Act and the Rules made thereunder prescribing the qualification for the officers and employees of the society would have assisted the learned Judges of the Supreme Court to give wider meaning to the term 'management' covering within its encompass the disputes of appointment, termination and other conditions of service of the officers and the employees of the society. With all respect to the learned Judges of Rajasthan High Court, this Court finds it difficult to agree with this reasoning given by them. It cannot be presumed that the learned Judges of the Supreme Court did not consider section 76 of the Gujarat Co-operative Societies Act for coming to their conclusion inspite of their not referring this section in their judgment. Even if the provision like section 76 of the Gujarat Co-operative Societies Act figures in a chapter pertaining to the management of the societies it does not lead to the conclusion that the term 'management which grammatically means 'the Board of Directors or 'the apex body or 'Executive Committee at the helm would include the officers and employees of the society, who run the day-to-day business under their overall control. Moreover, the Rajasthan Co-operative Societies Act and Rules and the Act and Rules of the State of Himachal Pradesh materially differ in respect of the provisions pertaining to the Officers and employees of the society, more specifically, section 148 (2) (xxvii) and (xxx), as reproduced in paragraph 6 of the judgment in Sawai Madhopur Co-operative Marketing Society Ltd. v. Rajasthan State Co-operative Tribunal, Jaipur and another (supra), on which the learned Judges of Rajasthan High Court mainly based their conclusion. Therefore, applying the ratio of the judgment of the Supreme Court in The Gujarat State Co-operative Land Development Bank Ltd. v. P. R. Mankad and another (supra), this Court holds that the dispute pertaining to termination of the services of the appellant-plaintiff is not the dispute touching the management of the respondent-defendant bank for which notice under section 76 of the Act was required before filing of the suit."*

23. In view of the aforesaid discussion, I find merit in this application and the same is accordingly allowed and consequently, the plaintiff's suit as against defendant No.4/applicant is ordered to be rejected and his name is ordered to be struck off from the array of the defendants in the memorandum of parties. Amended memo of parties be filed within a week.

List the case on **29.12.2016.**

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Smt. Jamuna Devi ....Appellant.
Versus
Arjun and others ... Respondents.

RSA No.: 94 of 2008.
Reserved on:15.12.2016.
Decided on:29.12.2016.

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that N was owner of the suit land, who had executed a Will in favour of the plaintiff – mutation was wrongly sanctioned in favour of the defendants- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that the finding of Trial Court that N was not proved to be the owner and he could not have bequeathed the suit land was not examined by the Appellate Court- Appellate Court examined the veracity of the Will, which was not permissible – appeal allowed – judgment of the Appellate Court set aside- case remanded for fresh adjudication.(Para-11 to 15)

For the appellant. Mr. Aman Sood, Advocate.
For the respondents Mr. Nimish Gupta, Advocate for respondents No. 1(a) and 1(b).
None for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (oral).

By way of this appeal, the appellant/plaintiff has challenged the judgment and decree passed by the Court of learned District Judge, Chamba, in Civil Appeal No. 40/04, dated 26.11.2007, vide which, learned Appellate Court, while dismissing the appeal so filed by present appellant upheld the judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.), Chamba, District Chamba, in Civil Suit No. 97/2001, dated 26.02.2004.

2. Brief facts necessary for the adjudication of this case are that appellant/plaintiff (hereinafter referred to as 'plaintiff') filed a suit for declaration to the effect that mutation No. 717, dated 31.07.1996 and subsequent revenue entries entered on the basis of aforesaid mutation regarding property comprised in Khasra Nos. 442, 443, measuring 0-2-14 bighas, Khata Khatauni No. 136 min/173, 174, situated in Mohal Bharmour, Pargana and Tehsil Bharmour, District Chamba, H.P. (hereinafter referred to as 'suit land') were illegal, null and void and inoperative upon the rights of the plaintiff and also suit for restraining the respondents/defendants (hereinafter referred to as defendants) from interfering, dismantling or changing the nature of the suit land. As per plaintiff, actual owner of the suit land was Nanak Chand, father-in-law of the plaintiff, who had executed a Will in favour of plaintiff on 08.05.1991. After the death of Nanak Chand, defendants No. 1 and 2 got suit property mutated in their favour vide mutation No. 717, dated 31.07.1996 in collusion with revenue staff. Factum of these revenue entries in the revenue record came to her notice in the month of January 2001 when defendants started interfering in her peaceful possession over the suit land. It was further her case that mutation No. 717 and subsequent entries in the revenue record were wrong and illegal and not binding upon the rights of the plaintiff and on these bases, she prayed for the reliefs already mentioned above.

3. The claim of the plaintiff was contested by defendant No. 1 Arjun, who took the stand in the written statement that Nanak Chand was a co-sharer in Khasra Nos. 442 and 443 and he had not executed any Will qua Khasra Nos. 442 and 443 and Will, if any, was procured by Ranjha Ram (defendant No. 2), husband of the plaintiff for the benefit of his wife. It was further mentioned in the written statement defendant No. 2 had also procured another Will in favour of

his son Manoj Kumar and Manoj Kumar had also filed a similar suit against defendant No. 1. It was further the stand of defendant No. 1 that suit property was rightly mutated in favour of defendant No. 1 and that too at the instance of defendant No. 2 and there was no collusion with the revenue staff as alleged. On these bases, claim of the plaintiff was contested by defendant No. 1.

4. On the basis of pleadings of the parties, learned trial Court framed the following issues:-

"1. Whether deceased Nanak Chand had executed a valid Will in favour of the plaintiff as alleged? OPP.

2. Whether revenue entries showing defendants the owners of the suit land are illegal, null and void as alleged? OPP.

3. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction as alleged? OPP

4. Whether the plaint is bad for non joinder of necessary parties? OPD

5. Whether the plaintiff has filed the suit in collusion with defendant No. 2 as alleged? OPD

6. Relief."

5. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective claims, the issues so framed were answered by the learned trial Court in the following manner:-

"Issue No.1	*: No.*
Issue No. 2	*: No.*
Issue No. 3	*:No.*
Issue No. 4	*:Yes.*
Issue No. 5	*:No.*
Relief	*:The suit of the plaintiff dismissed as per operative part of the Judgment."*

6. Learned trial Court dismissed the suit so filed by the plaintiff by holding that there was no evidence on record to prove that Nanak Chand had purchased the suit land from Chatro and that Nanak Chand in fact was not owner of the suit land. On these bases, it was further held by the learned trial Court that when the suit land was not in the name of Nanak Chand, he could not have had bequeathed the suit land by way of Will Ext. PW2/A. While arriving at the said conclusion, learned trial Court held that plaintiff had failed to furnish any jamabandi on record from which it could be demonstrated that Nanak Chand was owner of the suit land and in the absence of entry in the name of Nanak Chand as owner in the jamabandi, it could not be barely presumed that Nanak Chand was owner of the suit land before the execution of the Will. On these bases, it was held by the learned trial Court that Will Ext. PW2/A was not a valid Will as plaintiff had failed to establish that Nanak Chand was owner of the suit land which was bequeathed by way of said Will.

7. Feeling aggrieved by the dismissal of her suit, plaintiff filed an appeal.

8. Learned Appellate Court while dismissing the appeal so filed by the plaintiff returned the findings that though appellant claimed herself to be beneficiary of the Will Ext. PW2/A but she had not claimed in her suit that she had rendered services to her father-in-law during his lifetime. Learned Appellate Court went on to hold that it was settled law that where there was disinheritance of heirs of equal degree and no reason for exclusion was disclosed, then the Will was shrouded with suspicion. Learned Appellate Court further held that scrutiny of the Will Ext. PW2/A demonstrated that there was nothing on record which could show as to why Nanak Chand excluded his wife and sons and why he opted to bequeath his property in favour of

his daughter-in-law especially when there was no mention of plaintiff serving him at any point of time nor the plaintiff had claimed having served her father-in-law during his lifetime. On these bases, it was held by the learned Appellate Court that Will in fact was shrouded with suspicious circumstances and therefore, it could be safely concluded that Shri Nanak Chand had not executed any valid Will in favour of plaintiff.

9. Feeling aggrieved, the plaintiff has filed this appeal which was admitted on 20.11.2008 on the following substantial questions of law:

> *"1. Whether exclusion of the sons and wife from the duly executed Will that too for part of the property in favour of daughter in law can be said to be a suspicious circumstance particularly when the testator has not bequeathed the entire property.*
>
> *2. Whether presumption of genuineness can be attached to a duly executed registered Will?"*

10. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments and decrees passed by both the learned Courts below.

11. A perusal of the judgment passed by the learned trial Court demonstrates that the plaintiff was non-suited by the learned trial Court on the ground that plaintiff had failed to establish that the suit land in fact was owned by the testator of the Will i.e. Shri Nanak Chand. On these bases, it was held by the learned trial Court that when Nanak Chand was not proved to be the owner of the suit land, he could not have had bequeathed the suit property by way of a Will in favour of his daughter-in-law.

12. Findings so returned by the learned trial Court were assailed by way of appeal by the appellant/plaintiff before the first Appellate Court.

13. However, learned Appellate Court rather than adjudicating as to whether the findings returned by the learned trial Court to the effect that Nanak Chand was not proved to be the owner of the suit land on record, ventured to adjudicate on the veracity of the Will on the point as to whether the plaintiff had proved the execution of Will in accordance with law or whether defendant had succeeded in proving that Will was shrouded with suspicious circumstances.

14. In my considered view, learned Appellate Court in the peculiar facts and circumstances of this case erred in doing so. This is for the reason that as learned trial Court had returned the findings that Nanak Chand was not the owner of the suit land which was bequeathed by him by way of Will Ext. PW2/A in favour of plaintiff, therefore, until and unless learned Appellate Court had returned findings on this issue as to whether Nanak Chand was owner of the suit land or not, it could not have had ventured to adjudicate upon the issue as to whether Will Ext. PW2/A was shrouded with suspicious circumstances or not. In this view of the matter, in my considered view, this appeal deserves to be allowed on this short point alone and the matter deserves to be remanded back to the learned Appellate Court with a direction to adjudicate the appeal afresh after taking into consideration the findings returned by the learned trial Court as well as the grounds taken in the appeal by the appellant/plaintiff before the first Appellate Court to challenge the findings so returned by the learned trial Court.

15. Accordingly, this appeal is allowed and judgment and decree passed by the learned Appellate Court in Civil Appeal No. 40/04, dated 25.11.2007, is set aside and the case is remanded back to the learned Appellate Court for adjudication afresh after taking into consideration the findings returned by the learned trial Court while dismissing the suit of the plaintiff and the grounds taken in appeal by plaintiff before the learned Appellate Court in challenge to the judgment and decree so passed by the learned trial Court. Parties through their counsel are directed to appear before the learned Appellate Court on 09.01.2017. Keeping in view the fact that the civil suit pertains to the year 2001, this Court hopes and trusts that learned

Appellate Court shall decide this case, as expeditiously as possible, preferably within a period of six months from today. No orders as to costs. Pending miscellaneous application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Onkar Chand ...Petitioner.
Versus
State of H.P. and others. ...Respondents.

CMPMO No. 508/2016
Decided on: 29.12.2016

Code of Civil Procedure, 1908- Section 24- An application seeking the transfer of election petition filed on the ground that respondent No. 2 had made uncalled for remarks, had disclosed that he was going to set aside the election of the petitioner and behaviour of respondent No. 2 is rude – held, that a transfer petition is not to be dealt in a light hearted manner - transfer of a case from one authority to another should not be granted readily for any fancied notion of the petitioner – the authority should have shown an unfair attitude or biased frame of mind against the petitioner – mere suspicion of denial of justice is not sufficient to order transfer - election petition is pending for ten months – sixteen proceedings have been held, which proves that respondent No. 2 is not biased against the petitioner, otherwise he would have decided the matter by now – mere allegation that justice will not be done is not sufficient to transfer the matter-petition dismissed.(Para-5 to 9)

Case referred:
Usmangani Adambhai Vahora versus State of Gujarat and another (2016) 3 SCC 370

For the Petitioner: Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. Meenakshi Sharma, Addl. A.G. with
Mr. J.S. Guleria, Asstt. A.G. for respondents No.1 and 2.
Nemo for respondents. 3 to 8.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (oral)**:**

By medium of this petition filed under Article 227 of Constitution of India, the petitioner has sought transfer of election petition pending before the Authorized Officer-cum-SDO (C), Sujanpur, District Hamirpur on the ground that the said Officer is biased.

2. The brief facts as are necessary for the adjudication of this petition are that an election petition came to be filed by respondent No.3 against the petitioner, which is pending before respondent No.2. It is averred that respondent No.2, has time and again, during the course of trial, made uncalled for remarks and, therefore, the petitioner apprehends that he would not get justice. It is further averred that respondent No.2 has openly disclosed that he is going to set aside the election of the petitioner. It is also averred that ever since the date of filing of the election petition on 23.2.2016, about 16 dates of hearing stand fixed by respondent No.2 and on each and every date of hearing, respondent No.2 has openly stated that he would decide the election petition within 2-3 months and he is going to set aside the election of the petitioner.

3. Apart from this, the behaviour of respondent No.2 is rude to the extent that the petitioner has been driven to the wall and it is on account of political pressure being exercised

upon him that he has time and again disclosed that he intends to make an adverse decision against the petitioner.

4. I have heard the learned counsel for the petitioner and have gone through the material placed on records of the case.

5. The basic principle governing transfer of petition is that such petition is not to be dealt with in a light-hearted manner and transfer of a case from one authority to another should not be granted readily for any fancied notion of the petitioning litigant because of the reason that such transfer of a case from one authority to another in effect casts doubt on the integrity competence and reputation of the concerned authority. Unless and until a sufficiently cogent ground is disclosed, transfer should not be allowed as a matter of course. The authority from which the case is sought to be transferred must be shown to have disclosed a definitely unfair attitude or biased frame of mind against the petitioner. Transfer can only be ordered when the party has reasonable apprehension that the justice would be denied to him. The mere fact that the party has suspicion in this regard cannot constitute a valid ground. Likewise, mere presumption or possible apprehension cannot and should not be made the basis of transferring a case from one authority to another.

6. In ***Usmangani Adambhai Vahora*** *versus* ***State of Gujarat and another (2016) 3 SCC 370,*** the Hon'ble Supreme Court has held that seeking transfer at the drop of a hat is unconceivable. It was further held that order of transfer is not to be passed as a matter or routine or merely because the interested party has expressed some apprehension about proper conduct of trial. The power of transfer has to be exercise cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to trial. There has to be a real apprehension that there would be miscarriage of justice.

7. On a careful scrutiny of the material placed on record, it cannot be gathered or held that there was a real apprehension or bias against the authority.

8. Evidently, as per the showing of the petitioner himself, the election petition is pending for the last more than ten months and has not been decided against the petitioner and in fact as many as 16 proceedings have been held in the case, which only prove that respondent No.2 is not biased against the petitioner or else by now, the proceedings would have culminated into an adverse order against the petitioner. It cannot be said that there is reasonable apprehension on the part of the petitioner that justice would not be done. The petitioner has failed to point out circumstance from which it can be inferred that he entertains apprehension and that is reasonable in the circumstances as alleged.

9. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice would not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension, the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension. This apprehension must be reasonable and not imaginary, based upon conjecture and surmises. However, no universal or hard and fast rule can be prescribed for deciding a transfer petition, which has always to be decided on the basis of each case.

10. Having said so, I find no merit in the petition and the same is dismissed in *limine, s*o also the pending applications.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ....Appellant.
Versus
Kamlesh alias Kaka ....Respondent.

Cr. Appeal No.409 of 2011.
Reserved on : 20.10.2016.
Date of Decision: 29.12.2016.

N.D.P.S. Act, 1985- Section 21- Accused was found in possession of 14 grams of heroin – accused was tried and acquitted by the trial Court- held in appeal that independent witness had not supported the prosecution version but he had admitted the signatures on the memos – the fact that the documents were signed without any pressure show that witness was not stating the truth before the Court – police officials proved the prosecution version – the findings recorded by the Trial Court that accused was not found in possession of contraband are not correct – appeal allowed and the accused convicted of the commission of offence punishable under Section 21 of N.D.P.S. Act- notice issued to the witness as to why proceedings be not initiated against him for making a false statement. (Para-7 to 25)

For the appellant : Mr. D.S. Nainta and Mr. Virender Verma, Additional Advocate Generals.
For the respondent : Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj Vashisht, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of the accused in a case under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, passed by the learned Special Judge, Kullu, dated 31.3.2011, in Session trial No.43/2008.

2. Briefly stating facts giving rise to the present appeal are that on 31.5.2008, Police party while on patrolling duty, was present at Shishmati Kullu. In the meanwhile, ASI Balbir Singh, received a secret information to the effect that one person, namely, Kamlesh alias Kaka (hereinafter referred to as 'the accused') resident of Shishamati, having his shop near temple of Khalari Narayan, is indulging in the sale of smack. The informant also informed ASI Balbir Singh that if search conducted a large quantity of smack can be recovered. ASI Balbir Singh (Investigating Officer) complied with the provisions of Section 42 (2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and the said information was sent to the higher Police Officers. Thereafter, Investigating Officer alongwith other accompanying Police Officials proceeded to conduct the search of the shop of the accused and accused was found present in the shop. Police reached there at about 4:10 pm, in the second room of the shop, three persons were found taking tea. On inquiry, they disclosed their names as Sonu alias Rajinder, Mandeep alias Sonu and Ashok Kumar. Mandeep alias Sonu and Sonu alias Rajinder joined as witnesses by the police. In addition to this, Investigating Officer also associated ASI Man Singh as witness. Thereafter, Investigating Officer conducted the search of the shop of the accused. During search from the eastern side of the shop, Investigating Officer found two wrapping paper rolls from the lower shelf of the counter. In addition to this, one large packet (***pura***) made of wrapping papers, weighing scale made of brass, one weight of ten grams and one weight of two grams were also found in the same shelf. When the said 'p*ura*' was opened, it was found containing heroin type substance. When the said substance was checked on the narcotic drugs testing kit, then positive result of heroin was found. On weighing the recovered heroin was

found 14 grams. Out of it two samples of 1-1 gram each were separated for chemical analysis. In compliance to the other formalities, Investigating Officer filled in NCB form in triplicate and the case property after sealing the same, was taken into possession. The investigation was later on entrusted to ASI Lal Chand, who made further investigation. After receipt of the chemical examiner's report, challan was presented in the Court.

3. The prosecution in order to prove its case has examined as many as 10 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein he has denied the prosecution case and claimed innocence. No defence was led by the accused.

4. Learned Additional Advocate General appearing on behalf of the appellant has argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt and the learned trial Court has acquitted the accused, just on the basis of surmises and conjectures, therefore, the accused is liable to be convicted.

5. On the other hand, Mr. Ajay Kumar, learned Senior Counsel appearing on behalf of the accused has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. He has further argued that as per the law in ***Nallabothu Ramulu alias Seetharamaiah and others vs. State of Andhra Pradesh,2014 (12) Supreme Court Cases, 261,*** where two views are possible then one favourable to the accused is required to be taken. He has further argued that there is no perversity in the impugned judgment, therefore, the appeal is liable to be dismissed.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, this Court has gone through the record in detail and have minutely scrutinized the statements of the prosecution witnesses.

7. PW-1 Nanak Chand took the information under Section 42 (2) of the Act, to Addl. Superintendent of Police, Kullu, at about 4:25 pm.

8. PW-2 Mandeep alias Sonu has stated that he was taking tea at Shishmati at about 4/4:30 pm, police raided the shop, but except this, he denied each and every aspect of the prosecution case, as such he was declared hostile. This witness has admitted the search of the shop in his presence, but he did not identify the accused, as the same person, who was found present in the shop. In his cross-examination, he deposed that his signatures were obtained by the police on the next day by calling him as well as his friend Sonu to Police Post, Akhara Bazar, Kullu.

9. PW-3 ASI Man Singh has supported the version of PW-10 (Investigating Officer). He has stated that when Investigating Officer prepared the rukka, the same was given to him with a direction to take the same to Police Station, Kullu, on the basis of which FIR No.319 of 2008 was registered and the case file was handed over to him, which he handed over to the Investigating Officer at the spot. He has also identified the case property. According to this witness, Police Party started from Police Post at about 2:00 pm. The secret information was received by Investigating Officer through telephone. The area known as Shishmati is admitted by this witness to be thickly populated. He has further deposed that they reached at the spot after passing through number of houses, shops and temple. The shop of the accused was having three shutters, but he could not disclose about the fact whether all the shutters were open or not. When the question regarding the ownership of the shop was asked from this witness, he disclosed that it was accused who disclosed to them that all the shops were in his possession. He has admitted that except one weighing scale Ex.P-7 weight of ten grams Ex.P-8 and weight of two grams Ex.P-9, they were having no other weighing scale. He has deposed that Investigating Officer firstly weighed two grams of heroin and thereafter separated the same in two parts.

10. PW-4 LHC Manoj Kumari has deposed that on 31.5.2008 Inspector Partap Singh, deposited the case property of this case with her which she entered in register No.19 at Serial No.201. On the next day, she sent one sample parcel alongwith specimen sample seals of '**T**' and '**H**', NCB form in triplicate, copy of FIR, seizure memo to FSL, Junga through Constable Narender

Singh, vide RC No.154 of 2008 Ex.PW4/B. This witness also filled in column No.12 of the NCB form.

11. PW-5 Narender Singh, took the case property to FSL, Junga and deposited the same on 2.6.2008 and receipt Ex.PW5/A and RC Ex.PW4/B were redeposited by him with MHC, Police Station, Kullu, on 4.6.2008.

12. PW-6 HC Nirat Singh, has proved the report under Section 42 (2) of the NDPS Act, endorsement of the then Addl. Superintendent of Police Ex.PW6/A and abstract of the register Ex.PW6/B.

13. PW-7 Inspector Partap Singh, has deposed that on 31.5.2008, ASI Man Singh (PW-1) brought rukka to the Police Station, on the basis of which, he recorded FIR Ex.PW7/A and made endorsement Ex.PW7/B on rukka and handed over the case file to ASI Man Singh with a direction to take the same to Investigating Officer on the spot. On the same day, PW-8 Lal Chand, produced the case property consisting one bulk parcel and two sample parcels alongwith specimen seal impressions of '**T**' as well as NCB form in triplicate. This witness resealed the case property by affixing 3-3 seals of seal '**H**' on sample parcels and five seals of impression '**H**' on bulk parcel. He has also draw specimen sample impressions of seal of '**H**' one of which is Ex.PW7/C and also filled in columns No.9 to 11 of the NCB form and thereafter, he deposited the case property with MHC Police Station, Kullu.

14. PW-8 ASI Lal Chand, has prepared spot map Ex.PW8/A and recorded the statements of witnesses as per their version. This witness arrested the accused vide memo Ex.PW2/C and the case property was produced before the then Station House Officer, Police Station, Kullu, who resealed the same by affixing 3-3 seals of letter '**H**' on sample parcels and six seals of impression '**H**' on the bulk parcel. According to this witness, there were two shops at the spot having three shutters on it, which according to this witness were owned by accused Kamlesh. This witness admitted that adjoining to the shops there was a kiosk (khoka) and a house.

15. PW-9 Nirmal Singh, has partly investigated the case and recorded the statements of Vidya Devi, MHC Manoj Kumari, Constable Narender Kumar, and Head Constable Nirat Singh under Section 161 Cr.P.C.

16. PW-10 ASI Balbir Singh (Investigating Officer) has deposed that on 31.5.2008, he alongwith ASI Man Singh, HC Mohar Singh, HC Chet Ram, Constable Nanak Chand and Constable Kishore, was on patrolling duty and at about 4:00 pm, when they were present at Shishamati, he received a secret information regarding indulgence of the accused in the sale of smack and other narcotics. The said information was found authentic by this witness and as such, he complied with the provisions of Section 42 (2) of the NDPS Act and prepared the information Ex.PW1/A and sent the same to the then Addl. Superintendent of Police Ahmed Sayed through Constable Nanak Chand. Thereafter, this witness alongwith other accompanying Police officials proceeded to the spot and reached there within few minutes. One person was found standing on the counter of the shop. On inquiry, he disclosed his name as Kamlesh (accused). Investigating Officer also found three other persons sitting in the shop and they were having tea and on inquiry, they disclosed their names as Sonu alias Rajinder, Mandeep alias Sonu and Ashok Kumar. The accused as well as those three persons were apprised about the secret information received by Investigating Officer. Thereafter, Investigating Officer had given his personal search to the accused, but nothing incriminating was found from his possession. The search of the shop was conducted and he found two silver foils/wrapping papers rolls, one large packet (pura) made of wrapping papers kept on the lower shelf of the counter. He also found one weighing scale made of brass, one weight of ten grams and one weight of two grams from the same shelf. When the said large packet (pura) was opened, it was found containing heroin type white powder, on checking with the help of narcotic detection kit, it was found positive and the heroin was recovered weighing 14 grams. Two samples of 1-1 gram each were separated from the recovered heroin. The samples were separated sealed in two packets by affixing 3-3 seals of letter

'**T'** on each and the bulk parcel was sealed with seal '**T**' by affixing five seals of letter '**T'** NCB forms in triplicate was filled in one of which is Ex.PW4/C and specimen seal impression of letter '**T**' Ex.PW10/A was also drawn by the Investigating Officer. This witness has duly identified the other specimen sample seals attached with the sample and bulk parcel. Thereafter, the seal was handed over to witness Sonu alias Rajinder. The case property was taken into possession vide memo Ex.PW2/B, thereafter prepared ruqa Ex.PW10/B and handed over the same to ASI Man Singh, with a direction to take the same to Police Station, Kullu. Thereafter, this witness telephonically informed ASI Lal Chand, Incharge, Police Post, City Kullu, to come present on the spot. In his cross-examination, he deposed that when he received secret information, the entire police party was also present there. Thereafter, he enquired about the shop of the accused from a person, but he admitted that he did not associate the said person in the investigation from whom he inquired about the shop of the accused. He has admitted that no personal search of the accused was conducted and only his shop was searched. So far as the alleged independent witnesses are concerned, according to this witness, they were present at the time when he searched the shop. He has also admitted that the area where the shop of the accused is allegedly situated is thickly populated area. He has further deposed that since he was having specific secret information, he only searched one shop of the accused, where the accused was found standing.

17. In the present case, PW-10 ASI Balbir Singh, (Investigating Officer) was having a specific secret information regarding indulgence of the accused in the sale of smack and other narcotics. He found the said information authentic and after complying the provision of Section 42 (2) of the NDPS Act, prepared the information Ex.PW1/A and sent the same to the then Addl. Superintendent of Police Ahmed Sayed through Constable Nanak Chand. Thereafter, this witness alongwith other accompanying Police Officials proceeded to the spot and reached there within a few minutes. One person was found standing on the counter of the shop. On inquiry, he disclosed his name as Kamlesh (accused) in the present case. The Investigating Officer also found three other persons sitting in the shop, who were having tea and disclosed their names as Sonu alias Rajinder, Mandeep alias Sonu and Ashok Kumar. The accused as well as other two-three persons were apprised about the secret information received by the Investigating Officer. Investigating Officer associated ASI Man Singh, Mandeep alias Sonu and Sonu alias Rajinder, as witnesses in the investigation. Investigating Officer gave personal search to the accused, thereafter the search of the shop was conducted and found two silver foils/wrapping papers rolls, one large packet (***pura***) made of wrapping papers kept on the lower shelf on the counter. He has also found one weighing scale made of brass, one weight of ten grams and one weight of two grams from the same shelf. When the said large packet (**pura**) was opened, it was found containing heroin type white powder, the result of which, on checking with the help of narcotic detection kit was found positive. Thereafter, the heroin was recovered weighing 14 grams. He also took two samples of 1-1 gram each, which were separated from the recovered heroin. The samples were separated sealed in two packets by affixing the seals on the sample filled in the NCB forms and seal impression was also taken. This witness duly identified the other specimen sample seals attached with the sample and bulk parcel. The case property was taken into possession by him. Investigating Officer prepared the rukka and sent the same through ASI Man Singh with a direction to take the same to Police Station, Kullu and handed over the further investigation to ASI Lal Chand. The case property was duly identified by this witness in the Court. PW-8 ASI Lal Chand, took further investigation from PW-10 ASI Balbir Singh. He reached at the spot at about 7:50 PM. He prepared the spot map and recorded the statement of witnesses, as per their version. He arrested the accused and produced the case property before the then Station House Officer, Police Station, Kullu, Shri Partap Singh, who resealed the same with seal impression '**H**' on the bulk parcel. The bulk was also sealed by him with six seal impression '**H'**. He has also filled the relevant columns of NCB forms in triplicate and obtained the specimen sample seal of '**H**'. According to PW-8 ASI Lal Chand, there are two shops at the spot having three shutters and these were owned by accused Kamlesh. PW-3 ASI Man Singh, has supported the version of PW-10 ASI Balbir Singh (Investigating Officer) on material aspect of the case. PW-7 Inspector Partap Singh, has stated about the registration of FIR, on the receipt of rukka making

endorsement and handing over the case file to ASI Man Singh with a direction to take the same to Investigating Officer at the spot. As far as taking the case property to FSL in safe custody has also been proved on record, as the narcotics were recovered from the shop of the accused, on the basis of secret information, there is sufficient compliance of Section 42 (2) as required under the Act. PW-2 Mandeep Singh alias Sonu independent witness has admitted his presence in the shop at the time of recovery. He was declared hostile and in his cross-examination, he has admitted his signatures on the documents. He has also admitted that some documents were written. He also admitted the presence of Rajinder alias Sonu at the place. He has stated that his statement was not recorded by the police. He has admitted that the police have come to the shop of the accused. Though, he has thereafter not supported the recovery, but he has admitted his signature in the recovery memo. He has admitted that memo Ex.PW2/A to Ex.PW2/C bears his signature. He also admitted that when he signed these documents no pressure was put by the police.

18. From the above, it is clear that the independent witnesses have tried to shield the accused, but his admission on the signatures of the memos Ex.PW2/A to Ex.PW2/C and his admission with regard to his presence and the presence of other independent witnesses on the spot and that he signed the documents without any pressure shows that he is not stating the truth before the Court.

19. As stated here-in-above, the prosecution by leading cogent, convincing and reliable evidence of PW-8 ASI Lal Chand, PW-10 ASI Balbir Singh and other police witnesses has proved on record the guilt of the accused beyond reasonable doubt that the prosecution has recovered 14 grams of heroin from the shop of the accused on 31.5.2008 at about 4:00 PM, at Shishmati, District Kullu, H.P, which was in the exclusive possession of the accused and accused was in possession of heroin, on the basis of secret information, heroin was lying in the shop of the accused. So, we hold that the accused has committed an offence under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The findings arrived at by the learned Court below with respect to the non compliance of provision of the Act are not in accordance with law and thus are required to be set aside. The findings of the learned Court below that the heroin was not recovered from the possession of the accused are also against the proved facts on record and liable to be set aside.

20. Consequently, the appeal is allowed and accused Kamlesh alias Kaka is convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Thus, accused Kamlesh alias Kaka now convict is required to be heard on quantum of sentence for the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

21. Let the convict be produced before this Court on ***12.01.2017*** by issuing a production warrant.

22. Before parting with the case, we would be failing in our duty, if ignore the manner in which PW-2 Mandeep Singh alias Sonu, independent witness has conducted himself while in the witness box. Taking note of the statement, he made while in the witness box, in our opinion, he has not disclosed true facts. He has admitted his signatures on the recovery memo Ex. PW2/A to Ex.PW2/C. He while in the witness box admits his signatures on these memos. In his cross-examination, he has admitted his signatures on the documents. He has also admitted that some documents were written. He also admitted the presence of Rajinder alias Sonu at the place. He has stated that his statement was not recorded by the police. He has admitted that the police have come to the shop of the accused. Though, he has thereafter not supported the recovery, but he has admitted his signature in the recovery memo. He has admitted that memo Ex.PW2/A to Ex.PW2/C bears his signature. He also admitted that when he signed these documents no pressure was put by the police. If nothing of this sort took place in his presence, he should not have signed these documents. Therefore, he has not spoken the truth and has rendered himself liable to be dealt with in accordance

with law including his prosecution under Section 211 of the Indian Penal Code and also within the meaning of sub-Section (1) of Section 195 of the Indian Penal Code.

23. Section 340 of the Code of Criminal Procedure takes care of such a situation. The provisions contained under the Section ibid reveal that if on an application made to it or otherwise, the Court is of the opinion that it is expedient and in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code, which appears to have been committed in relation to proceeding of a case in that Court, the Court shall hold a preliminary inquiry and after recording a finding that by producing a document or giving a statement in evidence, an offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code is made, order to make a complaint in writing to a Magistrate of the first class having jurisdiction over the matter.

24. Section 340 of the Code of Criminal Procedure contemplates a preliminary inquiry to be conducted by the Court to form an opinion that it is expedient and in the interest of justice to hold inquiry into the offence which appears to have been committed. It is not mandatory for the trial Court to hold preliminary inquiry, because it has the opportunity to see the witness while in the witness box and to observe his demeanour. We, however, feel that the appellate Court, having no such opportunity to observe the demeanour of the witness, should hold an inquiry and give an opportunity of being heard to him, before forming an opinion that an offence within the meaning of clause (b) of sub-Section (1) of Section 195 of the Code of Criminal Procedure appears to have been committed by him. It is only thereafter, an order qua filing a complaint, as contemplated under Section 340 of the Code of Criminal Procedure, should be passed.

25. Therefore, before initiating any action against PW-2 Mandeep Singh alias Sonu, we deem it expedient and in the interest of justice to call upon him to show cause as to why an action be not initiated against him in the light of the observations in this judgment. Consequently, there shall be a direction to the Registry to issue show cause notice to PW-2 Mandeep Singh alias Sonu, for **12.01.2017** and the proceedings be registered against him separately. A copy of judgment be also sent to PW-2 Mandeep Singh alongwith show cause notice. Office of learned Advocate General to collect notice from the Registry of this Court for onward transmission to the Superintendent of Police, Kullu, for effecting service thereof upon the witness Mandeep Singh well before the date fixed. The record of the learned trial Court be retained for being referred to at the time of further consideration of the matter, after taking on record the version of the witness to be referred to as 'the respondent' in the proceedings ordered to be drawn separately against him.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant.

Versus

Labh Singh. .....Respondent.

Cr. Appeal No. 292 of 2014
Reserved on :10.11.2016
Decided on :29.12.2016.

Indian Penal Code, 1860- Section 306 and 498-A- Deceased was married to the accused – one daughter was born – the accused started beating the deceased under the influence of liquor- she complained that her husband used to beat her and he had also tried to kill her – she committed suicide by consuming poison- the accused was tried and acquitted by the Trial Court - held in appeal that marriage of the deceased with the accused was not disputed – it was also not disputed that deceased had consumed poison – the allegations made by the deceased are nothing

but normal wear and tear of normal married life – they do not amount to such willful conduct, which would have driven the deceased to commit suicide – the instances of maltreatment and cruelty pertain to 1-2 years prior to the commission of suicide – there is no evidence that deceased was subjected to cruelty prior to commission of suicide – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-9 to 25)

Cases referred:
State of H.P. Vs. Pardeep Singh and another, Latest HLJ 2013 (HP) 1431
Manju Ram Kalita versus State of Assam (2009) 13 Supreme Court Cases 330

For the appellant	:	Mr. M.A. Khan and Mr. Virender Verma, Addl. AGs.
For the respondent	:	Mr. Rahul Singh Verma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

State of Himachal Pradesh aggrieved by the judgment dated 23.5.2014 passed by learned Additional Sessions Judge, Kullu in Sessions trial No. 7 of 2014(2012) is in appeal before this Court. The complaint is that learned trial Court has failed to appreciate the evidence available on record in its right perspective and acquitted the accused erroneously. The findings of acquittal of the respondent (hereinafter referred to as the 'accused') are claimed to be contrary to the evidence as has come on record by way of the testimony of PW1 Chaman Lal, the brother of deceased, her father Shri Bidhu Ram PW4 and sister Smt. Jamuna Rana PW5. They all stated in one voice that the accused had been administering beating to deceased Chinta Mani and it is on account of that she consumed poison and committed suicide.

2. Deceased Chinta Mani had consumed poison on 7.3.2012. She was brought to Regional Hospital, Kullu and as per MLC Ext.PW9/J admitted there at 9:50 A.M. She later on died and information in this regard was given by HHC Ved Ram No. 228 on PAR duty in Regional Hospital, Kullu at 12:45 P.M. Rapat Ext.PW9/A came to be entered in police station. PSI Ashok Kumar (PW9) accompanied by HC Jai Singh and L.C. Ram Kali went to hospital to conduct inquiry in the matter. In the hospital PW1 Chaman Lal, brother of the deceased was present. He made statement Ext.PW1/A and reported that the deceased was married to accused four years prior to her death as per Hindu rites and customary ceremonies. One daughter was born to them out of this wedlock. After the marriage, the accused started beating the deceased under the influence of liquor. He had been torturing her not only physically but mentally also. He was advised not to do so on several occasions but of no avail. About one year prior to her death she had come to the house of PW1 and complained that her husband had been administering beating to her under the influence of liquor. Also that on one occasion he tried to set her on fire and to kill. She lived in his house for 12-13 days. He thereafter discussed the matter with her husband the accused and she was taken by him to the matrimonial home. The accused allegedly did not mend his behavior and as the deceased was again beaten up by him, therefore, she went to Mohal to the house of her sister PW5 Jamuna Rana. There also she lived for a week and thereafter made to go back to the matrimonial home. It was, therefore, reported by the complainant party that Chinta Mani had committed suicide by consuming poison on account of being tortured mentally as well as physically by her husband, the accused.

3. On the basis of the statement Ext.PW1/A FIR Ext.PW7/B was recorded in Police Station, Sadar Kullu. PW9 had photographed the dead body. The photographs are Ext.P1 to Ext.P8. He also prepared the inquest papers Ext.PW9/B and Ext.PW9/C. He thereafter moved the application Ext.PW9/D to the Medical Officer for conducting post mortem of the dead body. After getting the post mortem conducted, the dead body was handed over to Gaytri Dutt, brother-in-law of the deceased vide memo Ext.PW9/E. Spot map Ext.PW9/F was prepared. One vial 'Nuvon' was taken in possession vide recovery memo Ext.PW2/A from the house of the accused.

The photographs of the house Ext.P12 and Ext.P13 were also taken by PW9. The house was video graphed vide CD Ext.P14. The statements of the witnesses were recorded. The Chemical Examiner's report Ext.PW9/G and MLC of the deceased Ext.PW9/J were also collected from the hospital.

4. On completion of the investigation, challan was prepared by PW8 Shri Sher Singh, the then Inspector/SHO, Police Station, Kullu.

5. Learned trial Court on appreciation of the challan and documents annexed therewith has framed charge for the commission of the offence punishable under Sections 498-A and 306 of the Indian Penal Code against the accused. He, however, pleaded not guilty to the charge and claimed trial. Therefore, in order to sustain charge against him, the prosecution has examined nine witnesses in all. Besides Chaman Lal PW1, brother of the deceased, Shri Bidhu Ram PW4 her father and sister PW5 Smt. Jamuna Rana are the material prosecution witnesses. PW2 Sukh Chand is a witness of recovery of vial which was taken in possession vide memo Ext.PW2/A. The remaining prosecution witnesses PW3 HHC Uttam Singh, PW7 SI Om Chand and PW8 Inspector/SHO Sher Singh are police officials who remained associated during the investigation of the case in one way or the other. Pw9 is the Investigating Officer. PW6 is Dr. Rajinder Kohli who has proved the post mortem report Ext.PW6/A.

6. The accused in his statement recorded under Section 313 Cr.P.C. has admitted that the deceased was his legally wedded wife and she consumed poison and expired in Regional Hospital, Kullu on 7.3.2012 at 12.45 P.M. Rest of the prosecution case has, however, been denied by him either being wrong or for want of knowledge. According to him, he is innocent and the witnesses have deposed falsely against him. He however, did not opt for producing any evidence in his defence.

7. Mr. M.A. Khan, learned Additional Advocate General has vehemently argued that cogent, reliable and convincing evidence produced by the prosecution has proved the commission of offence by the accused beyond all reasonable doubt, however, the same is stated to be erroneously brushed aside and the accused acquitted of the charge framed against him on flimsy grounds.

8. On the other hand, Mr. Rahul Singh Verma, Advocate, learned Counsel representing the accused has urged that the present is a case of no offence and as such the accused has rightly been acquitted of the charge framed against him by the learned trial Court.

9. Before coming to the rival submissions and appreciation of the evidence available on record, it is desirable to take note of as to what constitute an offence within the meaning of Section 498-A and 306 of the Indian Penal Code and also the meaning of 'abetment' in legal parlance. We can draw support in this regard from the judgment of a Division Bench of this Court in ***State of H.P.*** Vs. ***Pardeep Singh and another, Latest HLJ 2013 (HP) 1431***. The relevant text of this judgment is as under:

> ***"10.*** At the outset it is desirable to discuss as to what constitutes the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code. A bare reading of Section 498-A reveals that ***sine qua non*** to establish the said offence is subjecting to cruelty the wife by her husband or relative with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or willful conduct of the husband of such woman or a relative, of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health."

10. The ***Apex Court in Manju Ram Kalita versus State of Assam (2009) 13 Supreme Court Cases 330*** has held as under:

> **"***Cruelty*" for the purpose of Section 498-A IPC is to be established in the context of Section 498-A IPC as it may be different from other statutory provisions. It is to be determined/ inferred by considering the conduct of the man, weighing the

gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide, etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as "cruelty" to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty."

12. So far as the commission of offence punishable under Section 306 of the Indian Penal Code is concerned, the prosecution is required to prove beyond all reasonable doubt that some person has committed suicide as a result of abetment by the accused.

13. In the case in hand, the deceased had committed suicide on 25.5.2008 in her matrimonial home at village Nau-Shehra, District Kangra, H.P. One of the ingredients of the commission of offence under Section 498-A IPC, therefore, stands proved. The prosecution, however, is further required to prove that it is the accused alone who had abetted the commission of suicide by the deceased.

14. Abetment has been defined under Section 107 of the Indian Penal Code. Its simple meaning is that a person abets the doing of a thing who firstly instigates any person to do a thing, or secondly, engages with one or more other person or persons in any conspiracy for doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to doing of that thing, or intentionally aids, by any act or illegal omission, the doing of that thing can be said to have abetted the doing of that thing.

15. ..... It is worthwhile to mention here that in a case of this nature, torture and harassment ordinarily is meted out to the victim in the four walls of the house and such cases mostly depend upon the circumstantial evidence. In the absence of direct evidence, the legislature in its wisdom has enacted Section 113-A of the Indian Evidence Act which provides that if a married woman commits suicide within the period of seven years from the date of marriage and there are allegations that she did so because of being subjected to cruelty either by her husband or relatives of her husband or by both. Having regard to all other circumstances, the Court can presume that she has committed suicide on being abetted by her husband or by such relatives of her husband. The ***Apex Court in Wazir Chand and another versus State of Haryana (1989) 1 Supreme Court Cases 244*** has held that if any person instigates any other person to commit suicide and as a result of such instigation, the other person commits suicide, the person causing the instigation is liable to be punished under Section 306 of the Indian Penal Code.

16. In a case of suicidal death, the onus to prove that suicide was abetted by the accused alone is on the prosecution and to raise the presumption under Section 113-A of the Evidence Act, one of the ingredients that the deceased was subjected to cruelty is required to be proved first by the prosecution."

11. The settled legal principles are, therefore, that in order to bring guilt home to the accused for the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code evidence to coerce the deceased to convince her parents to meet dowry demand of her husband or his relative and that it is due to such willful conduct of the accused which had driven the deceased to commit suicide is required to be proved by the prosecution.

12. Admittedly, the deceased was married to accused Labh Singh. One female issue was born to her out of this wedlock. She consumed 'Nubon' a poisonous substance on 7.3.2012 in the matrimonial home. She was brought to Regional Hospital, Kullu for treatment at 9:50 A.M. She was admitted in the hospital, however, could not be saved and passed away at 12:45 P.M. on that day itself. She, therefore, has died within seven years of her marriage with accused Labh

Singh. As per the medical evidence available on record she was carrying 4-5 months old pregnancy at the time of her death.

13. In the statement under Section 154 Cr.P.C. Ext.PW1/A the instances of cruelty on the perusal thereof reads as follow:

i) Accused used to torture the deceased mentally as well as physically and had also been administering beatings to her.

ii) One year prior to commission of suicide by her, she came to the house of her brother the complainant PW1 Chaman Lal at village Chhurla and told that her husband (accused) used to administer beating to her under the influence of liquor.

iii) Also that on one occasion he attempted to set her on fire.

14. In view of the instances of cruelty as aforesaid nothing suggesting has come on record that her husband had maltreated the deceased in the matrimonial home with a view to coerce her parents to meet demand of dowry of the accused. The allegation if believed to be true amount to bear and tears of normal married life. The same do not amount to such willful conduct of the accused which had driven the deceased to commit suicide within the meaning of Section 498-A and 306 of the Indian Penal Code. True it is that her brother Chaman Lal the complainant while in the witness box as PW1 has supported the allegation against the accused in the statement Ext.PW1/A. However, the alleged maltreatment and incident of beatings to the deceased pertains to one year prior to the commission of suicide by her. The so called threatening by the accused to set her on fire is also not an incident i.e. immediately before the commission of suicide by her but disclosed to PW1 during her visit to his house somewhere one year also before the occurrence. In his cross-examination, he tells us that she disclosed the alleged incident of beatings given to her by the accused in the year 2012 i.e. two years prior to commission of suicide by her. He admitted that the matter was not reported either to police nor he ever consulted the elderly placed persons in the village. He, however, had discussed the matter with the accused and his colleague teacher Tej Singh. The deceased had told him that accused threatened to set her on fire about 8-10 days back on her visit to his house i.e. in the year 2010. The deceased had brought to the notice of Jamuna Rana such conduct and behavior of the accused during her visit which according to PW1 was after 4-5 months of her visit to his house, meaning thereby that to Jamuna also the deceased had revealed the incident somewhere in the year 2010 or 2011. According to Jamuna Rana PW5 the deceased had come to her house somewhere in August and September 2011. Even if the deceased had gone to her house somewhere 6-7 months prior to commission of suicide by her, PW Jamuna Rana has also not made any complaint to anyone including the members of the family of accused against his conduct and behavior. The testimony of PW1 and PW5 lead to the only conclusion that the so called instances of maltreatment and cruelty of the deceased pertain to the period prior to 1-2 years of commission of suicide by her.

15. The present as such is not a case where soon before the death of the deceased she was subjected to cruelty in connection with demand of dowry. In order to bring guilt home to the accused in a case of this nature approximate link between harassment and cruelty in connection with demand of dowry and death of victim resulting out of it should be pleaded and proved. However, in the case in hand, there is no iota of evidence to show that soon before the commission of suicide by the deceased she was treated with cruelty by the accused. The statement of her father Bidhu Ram PW4 is also of no help to the prosecution case for the reason that as per his testimony his deceased daughter had come to his house about two years back and told about she was being maltreated and tortured by the accused. According to him after about one week he made her to understand to return to the matrimonial home. During that visit she allegedly had also informed him qua the accused having attempted to set her on fire and thereby to kill her. However, his statement in cross-examination reveals that he never made any complaint to the police against the accused. No statement that the deceased disclosed setting her

on fire by the accused is however made by him before the police. Therefore, by stating so, this witness has improved his earlier version which is not legally permissible.

16. This alone is the evidence produced by the prosecution to connect the accused in the commission of offence because the remaining prosecution witnesses are police officials who remained associated during investigation of the case in one way or the other. The evidence as has come on record by way of their testimony could have been used as link evidence had the prosecution been otherwise able to establish the involvement of the accused in the commission of offence.

17. The present no doubt is a case where the deceased has committed suicide within seven years of her marriage in the matrimonial home with the accused. However, in the given facts and circumstances as well as the evidence available on record the presumption that it is the accused who abetted the commission of suicide by her cannot be drawn for the reasons that the prosecution has miserably failed to discharge the initial onus upon it. There is again no question of accused having instigated the deceased to commit suicide or abetted the commission of suicide by her within the meaning of Section 107 of the Indian Penal Code. As a matter of fact, the present is a case where nothing suggesting that the deceased was being tortured or harassed by the accused in relation to the demand of dowry or otherwise and the degree of cruelty was so high that she was not able to understand comparison between life and death and in such a state of mind, chosen the pangs of death. True it is that in normal circumstances, no person takes such a drastic step to do away with his/her life that too without there being any cause, however, present is not a case where it can be said that the deceased has committed suicide owing to cruel treatment meted out to her by the accused.

18. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. The personal bond furnished by the accused shall stand cancelled and the surety discharged.

19. Before parting with this judgment, we would be failing in our duty if ignore the facts which otherwise would have been of some help to the investigating agency to unearthen the truth, had the same been taken into consideration and gone into during the course of inquiry, investigation or trial.

20. As per the prosecution case the deceased was found to have consumed poisonous substance early in the morning i.e. 7:45 A.M on 7.3.2012. The reliance in this regard can be placed on the MLC Ext.PW9/J which reveals that the deceased was brought to the Regional Hospital, Kullu for treatment and attended upon by the doctor on duty at 9:50 A.M. As per record the only evidence i.e. rapat Ext.PW9/A the information qua deceased having consumed some poisonous substance and as a result thereof died in the hospital was given at 12:45 P.M. by Ved Ram who allegedly was on PAR duty in the hospital. The MLC reveals that the deceased when brought to hospital was attended upon by Dr. Rajinder Kohli. The first and foremost duty of Dr. Kohli who is PW6 in this case was to have apprised the police of Police Station, Kullu qua the deceased having been brought in serious condition as a case of poisoning to the hospital for treatment. There is no evidence that any such information was given by PW6 Dr. Rajainder Kohli to Kullu police.

21. The information when received at 12:45 P.M. in the Police Station the I.O. PW9 though conducted the investigation, however, did not inquire into this aspect of the matter. He in his cross-examination has admitted that as per the investigation he conducted the deceased was brought to hospital at 9:50A.M. by the accused and other villagers. He neither inquired the matter from those villagers who had brought the deceased to the hospital nor from the Medical Officer who on her arrival in the hospital attended her. It is only the MLC Ext.PW9/J of the deceased was collected by him from the hospital and the other record qua the treatment given to her has not been obtained.

22. Therefore, the doctor on duty i.e. PW6 Dr. Rajinder Kohli prima-facie had not given the intimation to the police of Police Station, Kullu that deceased was brought to the

hospital at 9:50 A.M. for treatment in serious condition as the case of poisoning. Likewise the I.O. PW9 had not conducted inquiry nor tried to find out as to what prevented PW6 Dr. Rajinder Kohli to give requisite information to the police. Had the intimation been received by the police well in time the statement of deceased could have possibly been recorded and had she been found fit to make statement may have divulged the circumstances leading to consumption of poison by her and commission of suicide.

23. As per the evidence available on record Sube Ram, the father of the accused was serving in Regional Hospital, Kullu. Therefore, delaying the intimation to the police can also be on account of some foul play or with a view to help the accused. In case the acts attributed to PW6 Dr. Rajinder Kohli and the I.O. PW9 Ashok Kumar are ultimately turned to be true, they not only committed an act of dereliction of duty and rendered themselves liable to be proceeded against departmentally but also of certain offences punishable under the Penal Laws of the Land. Anyhow, before any direction in this regard is passed by us, it is desirable to afford both of them the opportunity of being heard.

24. Being so, issue show cause notice to PW6 Dr. Rajinder Kohli, the then Medical Officer, Regional Hospital, Kullu and PW9 Shri Ashok Kumar, the then PSI Police Station, Kullu calling upon them to appear in this Court on ***2.3.2017*** in person and show cause why they should not be prosecuted under the Penal Laws of the Land for their act prima facie of omission and why a direction should not be issued to their respective appointing and disciplinary authority to initiate departmental action against them for imposition of penalty.

25. Learned Additional Advocate General to collect the present addresses of both of them and file the same in the Registry within a week.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Subhash Chand ....Petitioner.

Versus

State of H.P. .... Respondent.

Cr. R. No. 182 of 2008.
Reserved on 15.12.2016.
Decided on: 29.12.2016.

Indian Penal Code, 1860- Section 292- **IndianCopy Right Act, 1957**- Section 68-A- Accused was found in possession of pornographic VCDs –he was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed – held in revision that seizure memo contains FIR number along with the sections under which the FIR was registered in the same ink, same pen, same flow and same handwriting as the remaining contents - FIR number has also been mentioned in the statements of the witnesses recorded under Section 161 Cr.P.C. – these documents were prepared prior to sending of ruqua and it was not possible to record the FIR number at that time – this falsifies the version of the prosecution and makes it difficult to rely upon the statements of official witnesses especially when independent witnesses have turned hostile – further independent witnesses were not associated from the locality and were taken by the I.O. with him – there was no compliance of Section 65-B of Indian Evidence Act- appeal allowed – judgment of Trial Court and Appellate Court set aside. (Para-15 to 24)

Cases referred:

Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123

Konnadan Abdul Gafoor Vs. State of Kerala, 2016 CRI.L.J. 2647

For the petitioner. Mr. B.L. Soni, Advocate with Mr. Aman Parth, Advocate.
For the respondent. Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of present revision petition, petitioner has challenged the judgment passed by the Court of learned Sessions Judge, Hamirpur in Cr. Appeal No. 27 of 2008 dated 10.9.2008 vide which, learned appellate court while dismissing the appeal filed by the present petitioner, upheld the judgment passed by the Court of learned Chief Judicial Magistrate, Hamirpur in Cr. Case No. 22-1 of 2007/40-II of 2007 dated 5.4.2008 whereby learned trial court convicted the accused for commission of offences punishable under Section 68-A of Copyright Act and Section 292 of IPC and sentenced him to undergo simple imprisonment for a period of one year and to pay a fine of Rs. 2,000/- for commission of offence punishable under Section 68-A of Copyright Act and to undergo simple imprisonment for a period of one year and to pay fine of Rs. 2,000/- for commission of offence punishable under Section 292 IPC. Both the substantive sentences of imprisonment to run concurrently.

2. The case of the prosecution was that PW6 Sub Inspector Guler Chand, HC Manohar Lal and Constables Sanjeev Kumar and Raj Kumar had gone to Nalti for the purpose of verification of entry in the Daily Diary, Ext. PW6/A, with regard to the factum of accused keeping for sale pirated and pornographic VCDs. As per prosecution, PW2 Subhash Verma and Ramesh Chand were associated by the police party as witnesses and search of the shop of accused was conducted in the course of which 19 VCDs were recovered out of which 9 were found to be MP-3 and 10 were found to be pornographic. Further as per prosecution these VCDs were sealed in a packet with seal 'H'. The CDs were seized vide seizure memo Ext. PW1/A on which signatures of witnesses Sanjeev Kumar, Suhhash and Ramesh Chand were obtained. Ruqua Ext. PW6/E was prepared and sent to the Police Station, on the basis of which, FIR Ext. PW5/B was registered. Statements of witnesses were recorded as per their versions and site plan was also prepared.

3. After completion of the investigation challan was prepared and filed in the Court and as a prima facie case was found against the accused he was charged for commission of offences punishable under Section 68-A of Copyright Act and Section 292 of IPC, to which accused pleaded not guilty and claimed trial.

4. In order to prove its case prosecution, in all, examined 07 witnesses.

5. PW-1, Ramesh Chand, who as per the prosecution was associated by the police party with the search and seizure of VCDs from the accused, did not support the case of the prosecution.

6. PW2, Subhash Verma, the other independent witness who was associated by the prosecution with the search and seizure of the VCDs from the accused also did not support the case of the prosecution.

7. PW3, Sanjeev Kumar, who was part of the police party stated that on 15.11.2006 Subhash Chand Gift Centre was checked at Nalti by Sub Inspector Guler Chand and from the counter of the said shop 19 CDs were recovered. He stated that out of these CDs, 09 were pirated and 10 were pornographic which were checked at the spot. He further stated that these CDs were taken into possession vide memo Ext. PW1/A. In his cross-examination, this witness admitted it to be correct that at Nalti there were 25-30 shops. He also stated that police party did not associate any local person with the investigation. He further stated that Ramesh had joined the investigation at the spot only and that Ramesh was not taken along by the police party. He also stated that the entire proceedings at Nalti consumed about 3 to 4 hours. He admitted that before checking the counter the police party had not given its search to anyone.

8. The next relevant witness is Sub Inspector Guler Chand who entered the witness box as PW6. This witness deposed that he was posted as Sub Inspector at Police Station, Hamirpur since July, 2006. He also deposed that on 15.11.2006 at around 2:45 p.m. some unknown person passed on information that Subhash Chand a shopkeeper at Nalti Bazar had kept pirated CDs in his shop which he used to sell and in case the shop was raided then the said CDs could be recovered. He further stated that on this he entered the Rapat i.e. Rapat No 29, Ext. PW6/A, and went to the spot in a vehicle alongwith HC Manohar Lal, Constable Sanjeev Kumar and on the way he also took witnesses Ramesh and Subhash Verma alongwith him. He further deposed that after reaching the shop of accused, search was carried out which revealed 19 CDs inside the counter which were not bearing any mark or identification sign of any Company and were in fact pirated. He further deposed that all the CDS were checked in a CD-Player which was found in the shop of accused and out of recovered CDs, 10 VCDs were found to be pornographic. He also deposed that remaining 09 pirated VCDs contained songs sung by various artists. He further deposed that Fard was prepared at the spot which was signed by witnesses Ramesh, Subhash and Sanjeev Kumar. He also deposed that he recorded the statements of the witnesses, arrested the accused and sent Ruqua, Ext. PW6/E, through HC Manohar Lal. In his cross-examination, this witness deposed that he had associated witness Subhash from his shop and witness Ramesh from outside the Police Station. He also deposed that he had taken both these witnesses alongwith him. He stated that he had taken the entire raiding party from there (Police Station) only. He also deposed that in Nalti there were about 25-30 shops and that he had not associated any local person of the area or Panch, Pradhan or shopkeeper etc. He also stated in his cross examination that before carrying out the raid he had not given his search to anyone. He also stated in his cross examination that the shop of witness Subhash was adjacent to the Police Station and that witness Ramesh Chand was a resident of village Anu. He further deposed that proceedings took place between 3:15 p.m to 6:00 p.m and Ruqua was sent at around 4:15 p.m.

9. Learned trial court on the basis of evidence produced before it by the prosecution held that the prosecution was able to prove successfully its case against the accused beyond all reasonable doubt for commission of offences punishable under Section 68-A of Copyright Act and Section 292 of IPC. Accordingly learned trial court convicted the accused for commission of the said offences. While returning the finding of conviction learned trial court held that though PW1 and PW2 turned hostile, however, statement of PW3, Constable Sanjeev Kumar, and PW6, Sub Inspector Guler Chand, proved the case of the prosecution as there was nothing to doubt the testimony of these two witnesses. Learned trial court also held that the factum of the Investigating Officer not associating any independent local witness also had no bearing as the requirement of having independent witness to corroborate evidence of Police Officers had to be viewed from a realistic angle. Learned trial court further held that even if search was made in violation of the provisions of Section 100 (4) of Cr.P.C. then also conviction can be recorded if the testimonies are found to be satisfactory. Learned trial court further held that the discrepancies in the statements of prosecution witnesses were otherwise bound to come with the passage of time and they were not sufficient to reject the prosecution case. On these bases, it was held by learned trial court that prosecution had proved that the accused was found in possession of 19 VCDs, out of which 10 were pornographic and 09 were pirated. It was also held by learned trial court that as per the provisions of Section 52-A of Copyright Act it was essential that the name and address of the person who had made the video film and declaration that he had obtained necessary licence or consent from the owner of the copyright for making such video film, the name and address of the copyright owner were mentioned on VCD and if these requirements are not mentioned then it amounts to offence punishable under Section 68-A of Copyright Act. Learned trial court also held that it was not necessary for the prosecution to track and trace the owner of the copyright to adduce evidence for infringement of copyright. It was also held by learned trial court that prosecution witnesses had consistently held that VCDs were found to be pornographic in nature and since the VCDs were kept in a shop therefore there was a reasonable inference that the same was kept for the purpose of sale or hire. On these bases, learned trial court returned the finding of conviction against the accused.

10. In appeal the finding so returned by learned trial court were upheld by learned appellate court. While upholding the judgment of conviction, learned appellate court held that neither non-association of local witnesses was fatal to the case of the prosecution nor there could be any such presumption that CDs were in fact planted by the Investigating Officer. Learned appellate court also held that the Investigating Officer had no animus against the accused and therefore statement of Investigating Officer had to be believed as the Investigating Officer had no interest to state falsely against the accused. Learned appellate court also held that even PW3 had duly supported the version of the Investigating Officer. Learned appellate court also held that it was evident from the police record that CDs were duly played on CD-player and were found to be of above description and further the conclusions arrived at by learned trial court that the pirated CDs were without any name and address and manufacture etc. and other CDs were pornographic was the correct conclusion. Accordingly learned appellate court dismissed the appeal so filed by the accused.

11. Feeling aggrieved by the said judgments passed by learned courts below, the accused has preferred the present revision petition.

12. Mr. B.L. Soni learned counsel for the petitioner has argued that the judgments passed by both the learned courts below against the accused were not sustainable in the eyes of law as the same were perverse in view of the fact that the findings of conviction returned by both the learned courts below against the accused were not borne out from the records of the case. Mr. Soni argued that both the learned courts below erred in not appreciating that the prosecution had failed to prove its case against the accused beyond all reasonable doubt. Mr. Soni argued that both the learned courts below erred in not appreciating that the independent witnesses had not supported the case of the prosecution because no CDs were recovered from the accused in the mode and manner as the prosecution wants this Court to believe. He further argued that beside this there were major contradictions and inconsistencies in the statements of PW3 and PW6 which belied and falsified the entire case of the prosecution, however, both learned courts below gravely erred in not appreciating the testimonies of PW3 and PW6 in their correct perspective which had led to grave injustice to the petitioner. It was further argued by Mr. Soni that neither the documentary evidence was correctly appreciated by both learned courts below nor it was appreciated by both learned courts below that the petitioner was falsely implicated in the case by the prosecution. On these bases, Mr. Soni prayed that the judgments of conviction passed by both learned courts below against the petitioner were liable to be set aside and the petitioner deserved to be acquitted. Mr. Soni also drew attention of this Court to various documents purportedly prepared by the Investigating Officer at the spot and he argued that the factum of FIR number being mentioned in these documents in the same ink, handwriting and flow even before the FIR was lodged demonstrated that none of these documents was actually prepared at the spot and all these documents were concocted subsequently in the Police Station. Mr. Soni also argued that another perversity with the judgments passed by both learned courts below was that both learned courts below erred in not appreciating that the CDs which were allegedly recovered from the possession of the petitioner were never exhibited in accordance with Section 65B of the Indian Evidence Act.

13. Mr. Vikram Thakur learned Deputy Advocate General, on the other hand argued that there was no merit in the present revision petition as there was no perversity with the findings of conviction returned against the accused by both the learned courts below. Mr. Thakur argued that both PW3 and PW6 had proved and corroborated the case of the prosecution on all material aspects and both the learned courts below after taking into consideration the entire evidence had rightly found the accused guilty of the offence with which he was charged. Accordingly, it was prayed by Mr. Thakur that as there was no merit in the revision petition, the same be dismissed.

14. I have heard the learned counsel for the petitioner as well as learned Deputy Advocate General and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

15. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and undeserved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

16. Coming to the facts of this case, the case of the prosecution is that on 15.11.2006 a secret information was received from some unknown person at Police Station, Hamirpur at about 2:45 p.m. to the effect that in Nalti Bazar if raid is conducted in the shop of accused, pirated VCDs could be recovered which were kept by the accused for sale to consumers. This has come in the testimony of the Investigating Officer PW6 Guler Chand who also stated that after the receipt of the said information he entered Rapat No. 29 Ext. PW6/A and thereafter proceeded to the spot in a vehicle alongwith HC Manohar Lal and Constable Sanjeev Kumar and also associated witnesses Ramesh and Subhash Verma from near the Police Station itself. This witness has further deposed that after raid was conducted in the shop of the accused purportedly in the presence of independent witnesses namely, Ramesh Chand and Subhash Verma, and 19 pirated VCDs were recovered which included 10 VCDs containing pornographic material, a ruqua was sent to Police Station i.e. Ext. PW6/E through HC Manohar Lal. It has come in his testimony that ruqua was sent through HC Manohar Lal for the registration of the case. It has also come in the testimony of this witness that before ruqua was sent, the CDS so recovered in the raid from the shop of accused were sealed in a parcel and recovery memo was prepared at the spot which was signed by witnesses Ramesh, Subhash Verma and Sanjeev Kumar.

17. Memo of recovery is on record as Ext. PW1/A, FIR is Ext. PW5/B and ruqua is on record as Ext. PW6/E.

18. A perusal of ruqua demonstrates that the same was sent by Investigating Officer on 15.11.2006 at 4:15 p.m. This document further demonstrates that on the basis of this ruqua, FIR No. 418/06 was registered against the accused at Police Station and a perusal of FIR, Ext. PW5/B, demonstrates that the time of registration of the FIR is 4:45 p.m. This means that before 4:45 p.m. no one was aware about the FIR number. However, surprisingly recovery memo Ext. PW1/A which as per the Investigating Officer himself was prepared much before the ruqua was sent to the Police Station for the registration of the case, contains FIR No. 418/06 alongwith all the Sections under which the said FIR was lodged and that too in the same ink, same pen, same flow and same handwriting with which the remaining contents of this exhibit have been entered upon by the Investigating Officer. Similarly, FIR number is also recorded in the statements which were recorded under Section 161 of Cr. P.C. of witnesses Subhash Verma and witness Ramesh Chand. Statement of PW6 i.e. the Investigating Officer also reveals that these statements were recorded by the Investigating Officer before the ruqua was sent by him to the Police Station for the registration of the case.

19. The above facts in my considered view shroud the case of the prosecution with cloud of suspicion. During the course of arguments, Mr. Thakur, learned Deputy Advocate General could not explain as to how FIR number were already mentioned in the recovery memo and that too in the same pen, handwriting and flow in which the remaining contents of this documents were entered when admittedly this document was prepared much before the registration of the FIR. Now in this background when we peruse the statements of PW1 and PW2 who as per the prosecution were independent witnesses, there appears to be merit in the statement of these two witnesses who have deposed in the Court that they were never taken by

the police to Nalti and no recovery of VCDs took place from the shop of the accused in their presence at Nalti and in fact their signatures were obtained on the documents in the Police Station.

20. Not only this, a careful perusal of the statement of PW3 and PW6 also creates a serious doubt over the veracity of the prosecution case. This is for the reason that whereas PW3 has stated that witness Ramesh Chand was associated with the proceedings by the Investigating Officer at the spot itself, however, PW6, the Investigating Officer has stated that both the independent witnesses were taken alongwith by him (Investigating Officer) from around the Police Station itself. This contradiction in the testimony of PW3 and PW6 cannot be said to be a minor inconsistency. In my considered view it is a major contradiction taking into consideration other facts which have been enumerated by me above, which if taken together create serious doubt as to whether any pirated and pornographic VCDs were actually recovered from the premises of the accused which were allegedly kept by him for sale to the general public, as the prosecution wants this Court to believe.

21. A perusal of the judgments passed by both learned courts below demonstrates that they have not at all dealt with these issues and the documents on record having not been appreciated in their correct perspective leading to perversity in their respective judgments. The appreciation of the effect of non-joining of independent witnesses at the spot despite the fact that even as per PW3 and PW6 there were 25-30 shops at Nalti by both learned courts below can also not be termed to be sustainable. Though there is no doubt that it is not as if in each and every case it is only if independent witness corroborate the testimony of police witnesses then the testimony of police witnesses can be believed, however, in this case the prosecution has not been able to explain as to why independent local witnesses of the area concerned were not associated with the alleged raid conducted in the shop/premises of the accused and why PW1 and PW2 were associated by the Investigating Officer from the Police Station itself. However, this even if PW6 had taken PW1 and PW2 alongwith him as independent witnesses, there was no bar for him to have had associated any other local independent witness to give credence to the case of the prosecution. However, it is categorically stated by both PW3 and PW6 that no independent witness of the area was associated by them in the search and seizure. In addition, it has also come in the statement of both these witnesses that no personal search of theirs was given by them before they conducted the case, before they searched the premises of the accused. All these factors when taken together create a serious doubt about the truthfulness of the case of the prosecution and in my considered view, on the basis of material produced on record by the prosecution it could not be said that the prosecution was able to prove its case beyond all reasonable doubt and when the case of the prosecution is rendered doubtful then it is obvious that the benefit of doubt has to go to the accused.

22. As far as the contention of learned counsel for the petitioner qua the learned courts below not appreciating the factum of non-compliance of the provisions of Section 65-B of the Evidence Act is concerned, in my considered view there is considerable force in the same. There is no material on record from which it can be inferred that the requirements of Section 65-B of the Evidence Act were satisfied by the prosecution as there is neither any certificate in terms of Section 65-B of Evidence Act obtained nor there is any expert opinion on record under Section 45-A of the Evidence Act.

23. Recently the Hon'ble Supreme Court of India in **Harpal @ Chotta and others Versus State of Punjab** (Criminal Appeal No. 2539 of 2014/388 of 2015) decided on 21.11.2016 has held:-

> "Qua the admissibility of the call details, it is a mater of record that though PWs 24, 25, 26 and 27 have endeavoured to prove on the basis of the printed copy of the computer generated call details kept in usual ordinary course of business and stored in a hard disc of the company server, to co-relate the calls made from and to the cell phones involved including those, amongst others recovered from the accused persons, the prosecution has failed to adduce a certificate relatable

thereto as required under Section 65B(4) of the Act. Though the High Court, in its impugned judgment, while dwelling on this aspect, has dismissed the plea of inadmissibility of such call details by observing that all the stipulations contained under Section 65 of the Act had been complied within, in the teeth of the decision of this Court in Anvar P.V. ordaining an inflexible adherence to the enjoinments of Sections 65B(2) and (4) of the Act, we are unable to sustain this finding. As apparently the prosecution has relied upon the secondary evidence in the form of printed copy of the call details, even assuming that the mandate of Section 65B(2) had been complied with, in absence of a certificate under Section 65B(4), the same has to be held inadmissible in evidence.

> This Court in Anvar P.V. has held in no uncertain terms that the evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Act would have to yield thereto. It has been propounded that any electric record in the form of secondary evidence cannot be admitted in evidence unless the requirements of Section 65B are satisfied. This conclusion of ours is inevitable in view of the exposition of law pertaining to Sections 65A and 65B of the Act as above."

24. High Court of Kerala in **Konnadan Abdul Gafoor Vs. State of Kerala**, 2016 CRI.L.J. 2647 has held:-

> "9. The probative information stored in digital form in a compact disc can be used before court as digital evidence or electronic evidence. The digital evidence is highly fragile and can be easily altered, damaged or destroyed and also time sensitive. Therefore special precaution should be taken to this document to collect preserve and examine this evidence. No analysis of the compact disc (hereinafter referred as CD) was made by the investigating officer to discover the files in it. This includes normal files, deleted files and encrypted files. Therefore, for identification of the files in the CD digital evidence is necessary. Identification of the type of information stored in the disc is necessary, for this appropriate technology can be used to extract it. Without examining the digital data in a scientific manner, viewing of the CD by the Magistrate, Assistant Public Prosecutor and the Sub Inspector is unsustainable in law and their satisfaction is not an appreciation of electronics evidence in law. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, the same shall be accompanied by a certificate in terms of Section 65B obtained at the time of taking the documents, without which, the secondary evidence pertaining to that electronic record, is inadmissible. Moreover the expert opinion under Section 45A of the Evidence Act was not obtained relating to the stored data in electronic form. In the absence of such a certificate and opinion, the oral evidence to prove existence of such electronic evidence is not sufficient to prove authenticity thereof.
>
> 10. However, while considering the offence under Section 292(2)(a), the prosecution has to prove that the accused sold, distributed and publically exhibited the obscene materials. Simply certain CDs were seized from a shop on the basis of information, in cannot be taken for granted that the revision petitioner was guilty of such crime. It is the primary responsibility of the prosecution to prove that the accused was in possession of the shop and the seized articles are obscene articles. In a case for offence under Section 292 of the IPC, prosecution has to prove that the accused sells, let to hire, distribute, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper drawing, painting, presentation

or figure or any other obscene object whatsoever as alleged by the prosecution. There must be direct evidence with regard to the possession or sale of the obscene books or articles. There is no presumption with regard to possession, mere fact that some books were seized from a particular shop by a police officer. There may be exceptional cases, where the rule of presumption applies. In such cases, the proved facts and circumstances may speak for themselves and court may be justified in reaching a conclusion in the light of available evidence."

Therefore also, in my considered view, the judgment of conviction passed against the present petitioner by learned trial court and upheld by learned appellate court is not sustainable in law.

In view of discussion held above, this revision petition is allowed and judgment of conviction and sentence imposed upon the petitioner by the Court of learned Chief Judicial Magistrate, Hamirpur, in case No. 22-I of 2007/40-II of 2007, dated 5.4.2008, is set aside alongwith judgment passed in Criminal Appeal No. 27 of 2008, dated 10.9.2008 by the Court of learned Sessions Judge, Hamirpur. Petitioner is acquitted of the offences for which he was charged. Amount of fine deposited by the petitioner, if any, is directed to be refunded to him as per law. Pending miscellaneous application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Smt. Darshan Kaur & another ....Appellants

Versus

Smt. Vidya Thakur & others ....Respondents

FAO No. 310 of 2012
Reserved on : 16.12.2016
Decided on : 30.12.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was a TGT and was drawing gross salary of Rs. 27,000/- per month- he was to retire at the age of 58 years and was aged 56 years at the time of accident – 1/4th amount is to be deducted towards personal expenses- claimants have lost source of dependency of Rs. 20,000/- per month – the compensation has to be determined keeping in view the fact that deceased was to retire within two years and that thereafter he was to get pension for the rest of the life- keeping in view the age of the deceased, multiplier of 7 is applicable out of which multiplier of 2 has to be applied for assessing loss of salary and multiplier of 5 has to be applied for assessing loss of pension – claimants are entitled to Rs. 20,000 x 12 x 2= Rs. 4,80,000/- under the head loss of salary – the deceased would not have taken pension less than Rs. 12,000/- per month out of which 1/4th is to be deducted towards personal expenses and the loss of dependency will be Rs. 9,000/- per month – claimants are entitled to Rs. 9,000 x 12 x 5= Rs. 5,40,000/- under the head loss of pension- claimants are also entitled to Rs. 10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses – claimants are entitled to total compensation of Rs. 4,80,000 + 5,40,000 + 40,000= Rs. 10,60,000/- with interest @ 7.5% per annum. (Para-18 to 28)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation & another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, reported in 2013 AIR (SCW) 3120
T.T. Narayanan and another versus Mrs. P. Bridget and others reported in II (1991) ACC 120 (DB)
ICICI Lombard General Insurance Co. Ltd vs Smt. Satya Devi & others I L R 2016 (VI) HP 342
Munna Lal Jain & another versus Vipin Kumar Sharma & others, reported in 2015 AIR SCW 3105

For the Appellants : Mr. N.S. Chandel, Advocate.
For the Respondents: M/s Sudhir Thakur and Anirudh Sharma, Advocates.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to judgment and award, dated 12th April, 2012, made by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P. (for short 'the Tribunal') in MAC Petition No. 24-S/2 of 2008, titled as **Smt. Vidya Thakur & others versus Shri Raj Kumar and another**, whereby compensation to the tune of Rs. 11,30,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the appellants/owner and driver were saddled with liability (hereinafter referred to as 'the impugned award').

2. The claimants have not questioned the impugned award, on any count. Thus, it has attained finality, so far the same relates to them.

3. The owner and driver have questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellants/owner and driver argued that the accident was not caused by driver, namely, Raj Kumar and prayed that the impugned award be set aside.

5. The argument is mis-conceived and devoid of any force for the following reasons.

6. The claimants filed a claim petition before the Tribunal for grant of compensation to the tune of Rs. 25,00,000/, as per the break-ups given in the said petition.

7. Precisely, the case of the claimants was that on 21.04.2008, at about 5.50 a.m., driver, namely, Raj Kumar, had driven vehicle-truck bearing registration No. HP-11-B-0299, rashly and negligently and caused the accident, in which deceased Nardev Singh Thakur sustained injuries and succumbed to the same.

8. The respondents filed replies.

9. Following issues came to be framed by the Tribunal:

"1. Whether deceased expired in an accident caused due to the rash and negligent driving of respondent No. 1 while driving the vehicle of respondent No. 2? .....OPP

2. If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioners are entitled and from whom? ...OPP

3. Whether the petition is not maintainable? ....OPR

3-A Whether the petition is bad for non-joinder of necessary parties, as alleged? ....OPR

4. Relief."

10. The parties led evidence.

11. The Tribunal, after scanning the evidence, oral as well as documentary, held that driver, namely, Raj Kumar, caused the accident, while driving the offending vehicle, rashly and negligently, at the relevant point of time, in which deceased Nardev Singh Thakur lost his life.

Issue No. 1.

12. The claimants have examined HHC Kanshi Ram (PW-2), who stated that FIR (Ext. PW-2/A) was lodged against driver-Raj Kumar and after investigation, final report in terms of Section 173 of the Code of Criminal Procedure was presented against him before the Court of

competent jurisdiction. The other evidence, oral and documentary, is on record which is sufficient proof to hold that the accident was outcome of the rash and negligent driving of the driver.

13. Admittedly, appellant No. 1-Smt. Darshan Kaur is the registered owner of the offending vehicle and appellant No. 2-Raj Kumar is her son who was driving the offending vehicle at the relevant point of time. Thus, the Tribunal has rightly determined Issue No. 1.

14. Before I deal with Issues No. 2, I deem it proper to deal with Issues No. 3 & 3-A.

Issue No. 3.

15. It was for the respondents/owner and driver to prove how the claim petition was not maintainable, have failed to do so.

16. The Motor Vehicles Act, 1988, for short 'the MV Act' has gone through a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 of the MV Act have been added, whereby the Claims Tribunal can treat report of accident forwarded to it under Section 158 (6) of the MV Act as an application for compensation. Accordingly, the findings returned by the Tribunal on Issue No. 3 are upheld.

Issue No. 3-A.

17. It was for the respondents/owner and driver to prove how the claim petition was bad for non-joinder of necessary parties. Driver-Raj Kumar has caused the accident and FIR (Ext. PW-2/A) was lodged against him. Thus, the owner and driver were the necessary parties to the claim petition, as discussed hereinabove. Accordingly, the findings returned by the Tribunal on Issue No. 3-A are upheld.

Issue No. 2

18. The deceased was a TGT teacher and was drawing gross salary to the tune of Rs. 27,000/- per month, as per the salary certificate (Ext. PW-6/A), was 56 years of age at the time of the accident and had to retire at the age of 58 years.

19. Keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120,** 1/4th is to be deducted towards the personal expenses of the deceased. Thus, it can be safely said and held that the claimants have lost source of pendency to the tune of Rs. 20,000/-, per month till the age of retirement, i.e., for two years only.

20. The compensation under the head 'loss of income' was to be assessed while keeping in view the fact that the deceased had to retire within two years and thereafter for the rest period, the same was to be assessed while keeping in view the pension payable.

21. My this view is fortified by the judgment rendered by the Kerala High Court in case titled ***T.T. Narayanan and another versus Mrs. P. Bridget and others*** reported in ***II (1991) ACC 120 (DB).*** It is apt to reproduce para 3 of the said judgment herein:

> *"3. On the date of the occurrence and death deceased had 46 months more service left as headmaster. He was in a pensionable job and he would have drawn pension for fifteen years, namely, till he attains 70 years. The Tribunal computed pay and allowances due for 46 months and the pension due for 15 years and deducted 20% for personal expenses of the deceased and 10% for uncertainties of life and thus arrived at the compensation payable to the claimants. The only submission urged by learned Counsel for the appellants in this regard is that on account of premature death of U. Vincent, the amount of family pension for the period of 15 years has to be deducted from the amount awarded. This submission appears to be correct. Family would be entitled to maximum family pension of Rs. 150/- per month. Computing this for 15 years and deducting 30% the amount of family pension would be Rs. 18,900/-. This amount has to be deducted from Rs.*

1,28,688/- awarded by the Tribunal. The correct quantum payable therefore would be Rs. 1,09,788/-."

22. This Court in **FAO No. 171 of 2012,** titled as***ICICI Lombard General Insurance Co. Ltd versus Smt. Satya Devi & others*** and another connected matter**,** decided on 04.11.2016, has laid down the same principle.

23. The multiplier of '7' is applicable in this case while keeping in view of the age of the deceased, other attending circumstances and the 2nd Schedule appended to the MV Act read with the ratio laid down by the Apex Court in the judgments, *supra,* andthe judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

24. The multiplier of '2' was applicable for assessing loss of dependency/income under the head 'loss of salary' and multiplier '5' was applicable, i.e., (after deducting multiplier '2' out of multiplier '7') for assessing loss of dependency/income under the head 'loss of pension'.

25. The claimants have lost source of dependency and are entitled to compensation to the tune of Rs. 20,000/-x 12 x 2 =Rs. 4,80,000/-,under the head 'loss of salary'.

26. The Tribunal has rightly held that after retirement, he would not have taken pension less than Rs. 12,000/- per month. 1/4th is to be deducted keeping in view the 2nd Schedule of the MV Act read with judgments rendered by the Apex Court, *supra,* the loss of source of dependency comes to Rs.9,000/-. Thus, it can be safely held that the claimants have lost source of dependency to the tune of Rs. 9,000/-x 12 x 5= Rs. 5,40,000/- under the 'loss of pension'.

27. The claimants are also held entitled to a sum of Rs.10,000/- each, i.e. Rs.40,000/-, under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'.

28. Accordingly, the claimants are held entitled to total compensation to the tune of Rs. 4,80,000/- + Rs. 5,40,000 + Rs. 40,000/- = Rs. 10,60,000/- with interest at the rate of 7.5% per annum as awarded by the Tribunal.

29. Accordingly, the impugned award is modified as indicated hereinabove.

30. The respondents/owner and driver are directed to deposit the awarded amount within eight weeks from today. On deposit, the same be released in favour of the claimants through payees' account cheque or by depositing the same in their accounts.

31. The appeal is disposed of accordingly.

32. Send down the records after placing a copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Karam Chand and others ....Petitioners.

Versus

Manjeet Singh and another ...Respondents

CMPMO No.: 39 of 2015
Reserved on: 28.12.2016
Decided on: 30.12.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a civil suit pleading that suit land is owned and possessed by them – partition was ordered by AC 1st Grade but the order was set aside in appeal – the defendants were interfering with the suit land – an application for interim injunction for restraining the defendants was filed, which was dismissed by the Trial

Court- an appeal was preferred, which was also dismissed- held, that power under Article 227 of the Constitution of India is to be exercised sparingly and in appropriate cases for keeping Subordinate Courts within the bounds of their authority – the defendants are recorded owners in possession of the suit land- plaintiffs are not recorded to be the owners in possession of the suit land – in case injunction prayed for is granted, the defendants will suffer – the Courts had not committed any jurisdictional error while dismissing the application- petition dismissed.

(Para-7 to 17)

Cases referred:

Radhey Shyam and another Vs. Chhabi Nath & others, (2015) 5 Supreme Court Cases 423
Ouseph Mathai and others Vs. M. Abdul Khadir, (2002) 1 Supreme Court Cases 319
Waryam Singh and another Vs. Amarnath and another, A.I.R.1954 S.C. 215
Dalmia Jain Airways Ltd. V. Sukumar Mukherjee', AIR 1951 Cal 193 (SB) (B)
Zenit Mataplast Private Limited Versus State of Maharashtra and others, (2009) 10 Supreme Court Cases 388

For the petitioners. :Mr. Ajay Sharma, Advocate.
For the respondents :Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition filed under Article 227 of the Constitution of India, petitioners have prayed for the following reliefs.

> *"It is, therefore, respectfully prayed the present petition may kindly be accepted impugned orders dated 31.10.2014 in Civil Misc. Appeal No. 6-D/XIV-2013 passed by ld. Addl. District Judge-II, Kangra at Dharamshala, H.P., orders dated 1.6.2013 in Civil Misc. Appeal No. 76/2012 in Civil Suit No. 93/2012 passed by Ld. Civil Judge (Sr. Division), Kangra at Dharamshala, H.P., whereby application under Order 39 Rule 1 and 2 CPC filed by the petitioners/plaintiffs stands dismissed and appeal filed also stands dismissed, may very kindly be set aside and application filed by the petitioners/plaintiffs, under Order 39 Rule 1 and 2 CPC may very kindly be allowed, thereby respondents herein may very kindly be restrained from changing the nature, raising any boundary wall and construction on the suit land and also from interfering in the possession of the applicants/petitioners/plaintiffs with respect to the land detailed in the suit and application, during the pendency of the suit, in the interest of law and justice."*

2. Facts necessary for the adjudication of the present case are that vide order dated 01.06.2013, Court of learned Civil Judge (Sr. Divn.), Kangra at Dharamshala dismissed an application filed by the present petitioners/plaintiffs under Order 39 Rules 1 and 2 of the Code of Civil Procedure (hereinafter referred to as 'CPC') i.e. CMA No. 76/2012, in Civil Suit No. 93/2012, vide which petitioners/plaintiffs had prayed for issuance of interim injunction restraining the respondents/defendants from interfering in the peaceful possession of the petitioners/plaintiffs and changing the nature or raising any construction over the suit land, subject matter of Civil Suit No. 93/2012, which had been filed by petitioners/plaintiffs against the respondents/defendants. As per petitioners/plaintiffs, suit land which was recorded in the ownership and possession of respondents/ defendants was carved out of Khasra Nos. 223 and 224, which were owned and possessed the petitioners/plaintiffs, Manjeet Singh and other co-sharers jointly and respondents/defendants had filed an application for partition of the joint land before Assistant Collector 1st Grade, who had abruptly ordered the partition. However as per the petitioners/plaintiffs, appeal filed against the order so passed by the Assistant Collector 1st Grade

was accepted by the Appellate Authority i.e. learned Sub Divisional Collector, Dharamshala, who set aside the order of partition. As per the petitioners/plaintiffs, respondents/ defendants were still interfering in the peaceful possession of the petitioners/plaintiffs. On these bases, temporary injunction was prayed for in the civil suit which was so filed by the petitioners/plaintiffs against the respondents/defendants.

3. The application so filed for grant of temporary injunction was contested by respondents/defendants on the grounds that in fact they were owners in possession of the suit land and entries to this effect stood incorporated in revenue records and there was no joint-ness of land in between the parties and they were having no knowledge of the appeal filed against the order of partition.

4. Learned trial Court dismissed the application so filed by the petitioners/plaintiffs under Order 39 Rules 1 and 2 by holding that the suit land comprising Khasra No. is recorded as *'Gair Mumkin Rasta'*, whereas the land comprising Khasra Nos. 772/223, 1022/773/224, 1025/773/224, 1146/774/224 was recorded in the exclusive ownership and possession of plaintiffs, defendants and other co-sharers. Learned trial Court held that records demonstrated that respondent Manjit Singh had filed an application for partition before Assistant Collector 1st Grade which was allowed on 18.07.2002 and appeal filed against the said order was allowed by Collector, Dharamshala on 07.07.2009 who remanded back the case to Assistant Collector 1st Grade to examine the objections of the petitioners/ plaintiffs after affording an opportunity of being heard. Learned trial Court further held that order dated 23.03.2013 passed by Assistant Collector 1st Grade demonstrated that partition order dated 18.07.2002 in file No. 19/99 was given a final effect in the revenue record w.e.f. 21.05.2003 and entries to this effect had also been carried out in jamabandis for the year 2004-2005 and 2009-2010. On these bases, it was held by the learned trial Court that it was apparent that parties were no more having joint status and suit land stood partitioned by metes and bounds and appropriate remedy for plaintiffs was to approach the higher forum on the side of revenue courts for redressal of grievance. It further held that said application was fairly and squarely hit by Section 41 (h) of the Specific Relief Act, as well as Section 171 (2) (xvii) of H.P. Land Revenue Act. On these bases, learned trial Court held that there was no prima facie case in favour of plaintiffs and balance of convenience was rather in favour of respondents/defendants. Accordingly, learned trial Court dismissed the application so filed by the petitioners/plaintiffs.

5. Feeling aggrieved, petitioners/plaintiffs filed an appeal i.e. Civil Misc. Appeal No. 6-D/XIV/2013 which was dismissed by the Court of learned Additional District Judge-II, Kangra at Dharamshala vide order dated 31.10.2014. While dismissing the appeal it was held by the learned Appellate Court that suit land stood partitioned by Assistant Collector 1st Grade vide order dated 18.07.2002 and pursuant to partition order, suit land stood allotted to respondents/defendants and partition had been given effect to in the revenue record. Learned Appellate Court also held that petitioners/plaintiffs had assailed the partition order before Sub Divisional Collector, who has set aside order dated 18.07.2002 and remanded back the case to Assistant Collector 1st Grade and after remand, Assistant Collector 1st Grade did not interfere with the partition order already passed on 18.07.2002 on the ground that partition had already been given effect to in the revenue records. Learned Appellate Court further held that admittedly the said order passed by the Assistant Collector 1st Grade dated 23.03.2013 had not been assailed, meaning thereby that partition order had attained finality and the fact remained that suit land stood partitioned and respondents/defendants were in possession of the suit land. Learned Appellate Court further held that being owners in possession of the suit land, respondents had every right to use the same in the manner they intended to and petitioners/plaintiffs had no prima facie case in their favour. It also held that balance of convenience was also not in favour of petitioners/plaintiffs nor they were going to suffer any irreparable loss in any manner. On these bases, learned Appellate Court upheld the order passed by learned trial Court and dismissed the appeal so filed by the petitioners/plaintiffs.

6. Feeling aggrieved, petitioners/plaintiffs have filed this petition.

7. Before proceeding further, it is necessary to deal with the scope of this Court while exercising its supervisory jurisdiction conferred upon it under Article 227 of the Constitution of India.

8. A three-Judge bench of Hon'ble Supreme Court in ***Radhey Shyam and another Vs. Chhabi Nath and others, (2015) 5 Supreme Court Cases 423***, has held that all the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. The Hon'ble Supreme Court has further held that control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or Revisional powers or power of superintendence under Article 227. The Hon'ble Supreme Court has further held that while appellate or Revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional.

9. It is settled law that power under Article 227 is intended to be used most sparingly and only in appropriate cases for the purpose of keeping subordinate courts within the bounds of their authority and not for correcting mere errors.

10. The Hon'ble Supreme Court in ***Ouseph Mathai and others Vs. M. Abdul Khadir, (2002) 1 Supreme Court Cases 319***, has held that no doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said Article as a matter of right. In fact power under this Article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

11. A five-Judge bench of Hon'ble Supreme Court in ***Waryam Singh and another Vs. Amarnath and another, A.I.R.1954 S.C. 215***, has held that this power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in - ***'Dalmia Jain Airways Ltd. V. Sukumar Mukherjee', AIR 1951 Cal 193 (SB) (B)***, is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

12. Coming to the facts of this case. Mr. Ajay Sharma, learned counsel appearing for the petitioners argued that jurisdictional error which was committed by learned Additional District Judge-II, Kangra at Dharamshala while dismissing the appeal so filed by the petitioners against the order passed by the learned trial Court whereby it had refused to grant temporary injunction in favour of petitioners was that learned Appellate Court did not appreciate that the subsequent order passed by Assistant Collector 1st Grade dated 23.03.2013 stood assailed before the Appellate Authority. It was further urged by Mr. Sharma, that besides this, both the learned Courts below erred in not appreciating that as there was a prima facie case in favour of petitioners and balance of convenience was also in their favour, as such, it was incumbent for the learned Courts below to have had restrained the respondents/defendants from carrying out any construction over the suit land during the pendency of the civil suit, otherwise very purpose of filing the suit would have had frustrated. Mr. Sharma further argued that learned Courts below also erred in not appreciating that what stood allotted to the respondents by way of partition was in excess of what they were entitled to as per their share. Mr. Sharma relied upon the judgment passed by Hon'ble Supreme Court in case ***Zenit Mataplast Private Limited Versus State of Maharashtra and others, (2009) 10 Supreme Court Cases 388*** and on the strength of this judgment he urged that the impugned orders be set aside and during the pendency of the civil suit, respondents/ defendants be directed not to carry out any construction over the suit land.

13. Mr. Sanjeev Bhushan, learned Senior Counsel appearing for the respondents/defendants, on the other hand, argued that there was no merit in the present petition because fact of the matter was that in the appeal proceedings which had been preferred by the petitioners against the order passed by Assistant Collector 1st Grade, dated 23.03.2013, no stay order had been granted by the Appellate Authority and factum of filing appeal was never disclosed by petitioners before learned Appellate Court. Mr. Bhushan submitted that the arguments which were being advanced by learned counsel for the petitioner were in fact beyond the scope of plaint also and in fact there was no illegality in the orders which stood assailed before this Court because both the learned Courts below had rightly held that there was neither any prima facie case nor balance of convenience was in favour of petitioners nor they were to suffer any irreparable loss if temporary injunction, as prayed for, was not granted. Mr. Bhushan argued that had injunction been granted against the defendants, then that would have caused irreparable loss to the defendants because effect of the said order would have had been that true owners who are duly recorded as owners in possession of the suit land would have had been restrained from utilizing the same. Mr. Bhushan further argued that even otherwise whatever construction was to be carried out by the respondents/ defendants during the pendency of the suit was always subject to the decision of the civil suit and the defendants were ready to face the consequences. On these grounds, he argued that there was no merit in the present petition and the same be dismissed.

14. I have heard the learned counsel for the parties and gone through the records of the case as well as the orders passed by the learned Courts below.

15. It is settled law that any party which seeks interim injunction/protection in its favour has to prove three things. (1) Prima facie case, (2) Balance of convenience and (3) Irreparable loss. It is the own case of the petitioners/plaintiffs that the suit land as per revenue record is recorded in the ownership and possession of the respondents/ defendants. The contention of the petitioner is that said revenue entries are recorded on the basis of partition proceeding effected by Assistant Collector 1st Grade which stands challenged by them before the appropriate authority. Be that as it may, fact of the matter still remains that as per the revenue record it is the respondents/defendants who are owners in possession of the suit land and not the petitioners/ plaintiffs. Therefore, it cannot be said that there is a prima facie case in favour of the petitioners/plaintiffs. Learned counsel for the petitioners has not placed on record any stay granted by the Appellate Authority in the proceedings which stands initiated against the order of partition passed by learned Assistant Collector 1st Grade, meaning thereby that as of now the order of partition passed by the said authority is in force. In this view of the matter, even balance of convenience cannot be said to be in favour of petitioners/plaintiffs because the order of partition stands duly implemented in the revenue record and till the time same is set aside or stayed by the competent authority, its operation in law cannot be curtailed. Besides this, when as per revenue records, petitioners/plaintiffs are not owners in possession of the suit land, then it cannot be said that if temporary injunction is not granted in their favour and respondents are not restrained from carrying out construction, petitioners/plaintiffs will suffer irreparable loss and very purpose of filing the civil suit will be frustrated. This is for the reason that ordinarily injunction is not granted against the true owners. Besides this, as the petitioners/plaintiffs have already filed a suit against the respondents/defendants, which is pending adjudication, construction, if any, carried out over the suit land by the respondents/defendants would be subject to decision of the suit. In addition, there is no bar for petitioners to approach the Appellate Authority by way of an appropriate application for stay of operation of the partition order till the appeal filed by them is decided or for moving an application praying for any other appropriate relief in this regard. I also find merit in the contention of learned senior counsel appearing for the respondents/defendants that even otherwise injunction cannot be granted in favour of petitioners on contentions which are beyond the scope of plaint filed by the petitioners/plaintiffs.

16. The judgment passed by Hon'ble Supreme Court in case ***Zenit Mataplast Private Limited Versus State of Maharashtra and others, (2009) 10 Supreme Court Cases***

388 relied upon by the learned counsel for the petitioners/plaintiffs is also of no assistance to the case of petitioners in the peculiar facts and circumstances of this case because this Court has come to the conclusion that neither the petitioners have any prima facie case in their favour nor balance of convenience is in their favour nor it can be said that they would suffer from irreparable loss if temporary injunction is not granted in their favour. In fact, it has been held by the Hon'ble Supreme Court in the above judgment that grant of temporary injunction is governed by three basic principles, prima facie case, balance of convenience and irreparable loss, which are required to be considered in the appropriate proportion in the facts and circumstances of a particular case. Hon'ble Supreme Court held that it is not appropriate for any Court to hold a mini trial at the stage of grant of temporary injunction.

17. Therefore, in view of findings returned above, in my considered view, there is neither any jurisdictional error committed by the learned first Appellate Court while dismissing the application of the petitioner nor it could be said that findings returned by the learned Civil Judge (Sr. Divn.) Kangra at Dharamshala while dismissing the application under Order 39 Rules 1 and 2 of the petitioners/plaintiffs suffer from any perversity. However, it is clarified that dismissal of this petition shall not come in the way of petitioners for approaching the Appellate Authority before whom order dated 23.03.2013, passed by the Assistant Collector 1st Grade stands assailed for seeking appropriate interim relief from the said authority. Accordingly, as there is no merit in the present petition, the same is dismissed. It is made clear that findings returned in this case shall have no bearing on the merits of the Civil Suit and the Civil Suit shall be decided by the learned trial Court uninfluenced by the findings returned and observations made by this Court in this petition. Interim orders, if any, stand vacated. Pending miscellaneous applications, if any, also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. ...Appellant.
Versus
Smt. Brahmi and others ...Respondents.

FAO No. 29 of 2011
Reserved on: 16.12.2016
Decided on: 30.12.2016

Motor Vehicles Act, 1988- Section 166- Claimants specifically stated in the claim petition that deceased was driving the vehicle at the time of accident – owner also admitted this fact in the reply - it was specifically stated in the FIR that accident had taken place due to rash and negligent driving by the deceased- thus, it can be safely said that accident had taken place due to the negligence of the deceased – rashness and negligence have to be proved to get compensation under Section 166- the claim petition was therefore, not maintainable under Section 166 – since, the income of the deceased was proved to be Rs. 23,791/- per month; therefore, claim petition cannot be treated under Section 163-A – appeal allowed- award set aside. (Para-12 to 25)

Cases referred:

Minu B. Mehta and another versus Balkrishna Ramchandra Nayan & anr, AIR 1977 SCC 1248
Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai, (1987) 3 Supreme Court Cases 234
Oriental Insurance Co. Ltd. versus Meena Variyal and others, (2007) 5 Supreme Court Cases 428
Oriental Insurance Company Limited versus Premlata Shukla & others, 2007 AIR SCW 3591
Surinder Kumar Arora & another versus Dr. Manoj Bisla & others, 2012 AIR SCW 2241
United India Insurance Company Limited versus Sh. Mohan Lal and others, I L R 2016 (VI) HP 704

Ningamma and another versus United India Insurance Company Limited, (2009) 13 Supreme Court Cases 710
Oriental Insurance Company Ltd. versus Sihnu Ram and others, I L R 2016 (V) HP 1000 (D.B.)

For the appellant:	Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeevan Kumar, Advocate.
For the respondents:	Mr. Rajiv Rai, Advocate, for respondent No. 1. Nemo for respondents No. 2 to 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this appeal, the appellant-insurer has called in question award, dated 15th December, 2010, made by the Motor Accident Claims Tribunal, Fast Track Court, Chamba, District Chamba (HP) (for short "the Tribunal") in M.A.C. No. 17/2010, titled as Smt. Brahmi and others versus The Oriental Insurance Company Limited and another, whereby compensation to the tune of ₹ 29,98,432/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. The claimants and the owner-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has called in question the impugned award on the ground that deceased himself was driving the offending vehicle rashly and negligently at the time of the accident, the claimants are the parents and children of the deceased and the owner-insured is the wife of the deceased, thus, the claim petition was not maintainable.

4. Heard learned counsel for the parties.

5. The following points arise for determination in this appeal:

(i) Whether the legal representatives/ heirs of deceased-Desh Raj, who was driving the offending vehicle at the relevant point of time and caused the accident, can file a claim petition under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation? and

(ii) Whether the claim petition was maintainable?

6. In order to determine both these points, it is necessary to give a brief resume of the facts of the case herein.

7. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the MV Act for grant of compensation to the tune of ₹ 30,00,000/-, as per the break-ups given in the claim petition, on the ground that they lost their bread earner, namely Shri Desh Raj, in the vehicular accident, while driving the car, bearing registration No. HP-54-2475, on 16th February, 2010, at about 4.30 P.M., at place Nand Gram near Maredi, P.S. Chamba, on his way back from Government Senior Secondary School, Jadera.

8. The respondents in the claim petition, i.e. the insurer and the owner-insured of the offending vehicle, have filed the replies. The insurer has resisted the claim petition whereas the owner-insured, who is the widow of deceased-Desh Raj, has not resisted the claim petition.

9. On the pleadings of the parties, following issues came to be framed by the Tribunal:

"1. Whether Des Raj died on 16.2.2010, at about 4.30 PM at Nand Gram near Maredi within the jurisdiction of P.S. Chamba in a vehicular accident involving vehicle No. HP-54-2475? OPP

2. If issue No. 1 is proved in affirmative, whether the petitioners being dependant of deceased are entitled for the grant of compensation, if so, to what amount and from which of the respondents? OPP

3. Whether the respondent No. 1 is liable to indemnify the owner in respect of death of deceased, who is husband of owner of offending vehicle? OPR-2

4. Whether the petition is not maintainable? OPR-1

5. Whether the offending vehicle was not having valid registration certificate, fitness certificate, valid route permit etc. if so, its effect? OPR-1

6. Whether the driver of the offending vehicle was not holding a valid and effective driving licence? OPR-1

7. Whether the deceased was not third party? OPR-1

8. Relief."

10. In support of their claim, the claimants examined Dr. Davinder Kumar as PW-1, Shri Pankaj Kapoor as PW-2, HC Pawan Kumar as PW-4 and one of the claimants, namely Sh. Sarwan Kumar, himself stepped into the witness box as PW-3. The insurer examined Shri Ramesh Kumar, Branch Manager, as RW-1. The owner-insured has not led any evidence.

11. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants are the victims of the vehicular accident, which was caused by deceased-Desh Raj while driving car, bearing registration No. HP-54-2475, on 16th February, 2010, at about 4.30 P.M., at place Nand Gram near Maredi and decided issue No. 1 in favour of the claimants. The Tribunal determined issue No. 3 in favour of the owner-insured. Issues No. 2 and 4 to 7 came to be decided against the insurer and compensation to the tune of ₹ 29,98,432/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization was granted in favour of the claimants.

Issues No. 1 and 4:

12. The claimants in para 24 of the claim petition have specifically stated that the offending vehicle was being driven by deceased-Desh Raj himself at the time of the accident. The owner-insured of the offending vehicle has admitted the said factum. In the FIR, Ext. PW-4/A also, it has specifically been recorded that the accident had occurred due to the rash and negligent driving of the offending vehicle by deceased-Desh Raj. HC Pawan Kumar, while appearing in the witness box, has testified the contents of the FIR to be correct. Thus, it can be safely held that deceased-Desh Raj had caused the accident because of his own rash and negligent driving. The findings of the Tribunal that deceased-Desh Raj was not responsible for the accident, while deciding issue No. 1, are not legally sustainable and are accordingly set aside.

13. Had the claimants pleaded and proved that the accident was outcome of the rash and negligent driving, the claim petition under Section 166 of the MV Act would have been maintainable, as the rash and negligent driving is *sine qua non* for maintaining a claim petition seeking compensation in terms of the provisions of Section 166 of the Act.

14. My this view finds support from the judgment rendered by the Apex Court in the case titled as **Minu B. Mehta and another versus Balkrishna Ramchandra Nayan and another,** reported in **AIR 1977 Supreme Court 1248,** wherein it has been held that in a motor accident claim case, the proof of negligence is necessary for saddling the owner or the insurance company with liability. It is apt to reproduce para 36 of the judgment herein:

"36. In a recent judgment of Madras High Court a Division Bench in A. A. O. Nos. 607 of 1973 and 296 of 1974 M/s. Ruby Insurance Co. Ltd. v. V. Govindaraj, delivered on 13th December, 1976 has suggested the necessity of having social insurance to provide cover for the claimants irrespective of proof of negligence to a limited extent say Rs. 250 to Rs. 300 a month .It has also suggested that instead of a lump sum payment which does not often reach the claimants a regular monthly payment to the dependants by the nationalsied insurance company or bank would

be desirable. Unless these ideas are accepted by the legislature and embodied in appropriate enactments Courts are bound to administer and give effect to the law as it exists today. We conclude by stating that the view of the learned judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor accident claim case."

(Emphasis added)

15. The correctness of the judgment in **Minu B. Mehta's case (supra)** came up for consideration before the Apex Court in the case titled as **Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai,** reported in **(1987) 3 Supreme Court Cases 234,** wherein it was held that the observations made by the Apex Court in **Minu B. Mehta's case (supra)** were in the nature of *obiter dicta.*

16. Both these judgments, i.e. **Minu B. Mehta's and Gujarat State Road Transport Corporation's cases (supra),** came up for consideration and were re-examined by the Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Meena Variyal and others,** reported in **(2007) 5 Supreme Court Cases 428.** It would be profitable to reproduce paras 24 to 27 of the judgment herein:

"24. It was argued by learned counsel for the appellant that since on the finding that the deceased was himself driving the vehicle at the time of the accident, the accident arose due to the negligence of the deceased himself and hence the insurer is not liable for the compensation. Even if the case of the claimant that the car was driven by Mahmood Hasan was true, then also, the claimant had to establish the negligence of the driver before the insured could be asked to indemnify the insured. The decision in Minu B. Mehta & Anr. Vs. Balkrishna Ramchandra Nayan & Anr. (1977) 2 SCC 441 : (1977) SCR 886, of a three Judge Bench of this Court was relied on in support.

25. In that decision, this Court considered the question whether in a claim for compensation under the Motor Vehicles Act, 1939, proof of negligence was essential to support a claim for compensation. On the facts in that case, their Lordships found that the appeal was liable to be dismissed subject to certain directions issued therein. But their Lordships, in the light of the fact that the High Court had discussed the law on the question and it was of some importance, felt that it was necessary to state the position in law. Noticing that the liability of the owner of the car to compensate the victim in a car accident due to negligent driving of his servant is based on the law of tort, the court discussed the scheme of the Act of 1939 and the law on the question. Regarding the view of the High Court that it was not necessary to prove negligence, the court held: (Minu B. Mehta case, SCC pp. 455-56, para 33)

"33. The reasoning of the two learned judges is unacceptable as it is opposed to basic principles of the owner's liability for negligence of his servant and is based on a complete misreading of the provisions of Chapter VIII of the Act. The High Court's zeal for what it considered to be protection of public good has misled it into adopting a course which is nothing short of legislation."

Their Lordships also noticed that proof of negligence remained the lynch pin to recover compensation. Their Lordships concluded by saying: (Minu B. Mehta case, SCC pp. 456-57, para 37)

"We conclude by stating that the view of the learned Judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner or the insurance company could be held to

be liable for the payment of compensation in a motor accident claim case."

26. Learned counsel for the respondent contended that there was no obligation on the claimant to prove negligence on the part of the driver. Learned counsel relied on Gujarat SRTC v. Ramanbhai Prabhatbhai and another, 1987 (3) SCC 234 in support. In that decision, this Court clarified that the observations in Minu B. Mehta's case (supra) are in the nature of obiter dicta. But, this Court only proceeded to notice that departures had been made from the law of strict liability and the Fatal Accidents Act, 1855 by introduction of Chapter VIIA of the 1939 Act and the introduction of Section 92A providing for compensation and the expansion of the provision as to who could make a claim, noticing that the application under Section 110A of the Act had to be made on behalf of or for the benefit of all the legal representatives of the deceased. This Court has not stated that on a claim based on negligence there is no obligation to establish negligence. This Court was dealing with no-fault liability and the departure made from the Fatal Accidents Act, 1855 and the theory of strict liability in the scheme of the Act of 1939 as amended. This Court did not have the occasion to construe a provision like Section 163A of the Act of 1988 providing for compensation without proof of negligence in contradistinction to Section 166 of the Act. We may notice that Minu B. Mehta's case was decided by three learned Judges and the Gujarat State Road Transport Corporation case was decided only by two learned Judges. An obiter dictum of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But as far as this Court is concerned, though not binding, it does have clear persuasive authority. On a careful understanding of the decision in Gujarat State Road Transport Corporation (supra) we cannot understand it as having held that in all claims under the Act proof of negligence as the basis of a claim is jettisoned by the scheme of the Act. In the context of Sections 166 and 163A of the Act of 1988, we are persuaded to think that the so called obiter observations in Minu B. Mehta's case (supra) govern a claim under Section 166 of the Act and they are inapplicable only when a claim is made under Section 163A of the Act. Obviously, it is for the claimant to choose under which provision he should approach the Tribunal and if he chooses to approach the Tribunal under Section 166 of the Act, we cannot see why the principle stated in Minu B. Mehta's case should not apply to him. We are, therefore, not in a position to accept the argument of learned counsel for the respondents that the observations in Minu B. Mehta's case deserve to be ignored.

27. We think that the law laid down in Minu B. Mehta & Anr. Vs. Balkrishna Ramchandra Nayan & Anr. (supra) was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of Section 163A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163A of the Act, the

compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle." (Emphasis added)

17. The Apex Court, in the case titled as **Oriental Insurance Company Limited versus Premlata Shukla & others,** reported in **2007 AIR SCW 3591,** held that proof of rashness and negligence on the part of the driver of the vehicle is *sine qua non* for maintaining an application under Section 166 of the MV Act.It is apt to reproduce para 10 of the judgment herein:

"10. *The insurer, however, would be liable to re-imburse the insured to the extent of the damages payable by the owner to the claimants subject of course to the limit of its liability as laid down in the Act or the contract of insurance. Proof of rashness and negligence on the part of the driver of the vehicle, is therefore, sine qua non for maintaining an application under Section 166 of the Act."*

(Emphasis added)

18. The Apex Court in the case titled as **Surinder Kumar Arora & another versus Dr. Manoj Bisla & others,** reported in **2012 AIR SCW 2241,** while approving the principle laid down by the Apex Court in **Meena Variyal's case (supra),** held that once the victim of an accident or his legal dependants approached the Tribunal for grant of compensation in terms of the mandate of Section 166 of the MV Act, they have necessarily to establish the rash and negligent driving. It is worthwhile to reproduce paras 7 to 12 of the judgment herein:

"7. Having heard the learned counsel for the parties to the lis, the question that would arise for our consideration and decision is, whether the parents of the deceased are entitled to the payment of compensation under the provisions of the Act by the respondent Insurance Company. In order to answer the issue that we have framed for ourselves, the facts in brief requires to be noticed:

8. The claimants are the parents of the deceased person. The deceased was a doctor by profession. The deceased was travelling in the motor vehicle driven by respondent no.1, who happens to be a close associate/friend. It has come in the evidence of the claimants as well as respondent no.1 that the vehicle in question was not driven in a rash and negligent manner by respondent no.1.

9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent No.1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent No.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (AIR 2001 SC 485 : 2001 AIR SCW 85) (supra) would have come to the assistance of the claimants.

10. In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of Oriental Insurance Co. Ltd. (AIR 2007 SC 1609 : 2007 AIR SCW 2362) (supra). In the said decision the Court stated:

"…Therefore, the victim of an accident or his dependents have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded

in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

11. We are in agreement with the principles stated by this Court in the aforesaid decision.

12. In view of the above, in our opinion, neither the Tribunal nor the High Court has committed any error whatsoever which would call for our interference in the appeal filed by the parents of the deceased. Accordingly, we reject the appeal. However, we direct that the amount paid by the respondent Insurance Company by way of interim compensation under Section 140 of the Act, shall not be recovered from the appellants by the respondent Insurance Company. No order as to costs. Ordered accordingly."(Emphasis added)

19. This Court in the case titled as **United India Insurance Company Limited versus Sh. Mohan Lal and others,** being **FAO No. 281 of 2012,** decided on 18th November, 2016,has laid down the same principle.

20. In the case titled as **Ningamma and another versus United India Insurance Company Limited,** reported in **(2009) 13 Supreme Court Cases 710,** the Apex Court has held that when a claim is made by the legal representatives of the deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving.It is apt to reproduce pars 21, 24 and relevant portion of para 25 of aforesaid judgment herein:

"21. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike. We have already extracted Section 163A of the MVA hereinbefore. A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle.

22. .....

23. .....

24. However, the question remains as to whether an application for demand of compensation could have been made by the legal representatives of the deceased as provided in Section 166 of the MVA. The said provision specifically provides that an application for compensation arising out of an accident of the nature specified in Sub-section (1) of Section 165 may be made by the person who has sustained the injury; or by the owner of the property; or where death has resulted from the accident, by all or any of the legal representatives of the deceased; or by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be.

25. When an application of the aforesaid nature claiming compensation under the provisions of Section 166 is received, the Tribunal is required to hold an enquiry into the claim and then proceed to make an award which, however, would be subject to the provisions of Section 162, by determining the amount of compensation, which is found to be just. Person or persons who made claim for compensation would thereafter be paid such amount. <u>When such a claim is made by the legal representatives of the deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving</u>....."(Emphasis added)

21. Applying the test to the instant case, deceased-Desh Raj was himself driving the offending vehicle at the time of the accident, as is evident from the perusal of the FIR, Ex. PW-4/A and also admitted by the parties. The contents of the FIR have not been disputed by the claimants, rather, they themselves have proved the contents of the FIR, which is exhibited as Ext. PW-4/A.

22. The legal representatives of deceased-Desh Raj have not taken plea of rash and negligent driving for the reasons best known to them, which, as discussed hereinabove, is *sine qua non* for maintaining claim petition under Section 166 of the MV Act.

23. Having said so, the claim petition under Section 166 of the MV Act was not maintainable.

24. Had the claimants filed the claim petition under Section 163-A of the MV Act, then rashness and negligence was not required to be proved. The claimants were only required to prove that the death was outcome of the use of the motor vehicle. The claimants have not filed the claim petition under Section 163-A of the MV Act.

25. The Tribunal or the Appellate Court can treat the claim petition under Section 163-A of the MV Act, is not maintainable in the instant case in view of the fact that the income of the deceased has been proved to be ₹ 23,791/- per month and for maintaining the claim petition under Section 163-A of the MV Act, the income of the victim of a vehicular accident should be less than ₹ 40,000/- per annum, as has been held by a Division Bench of this Court, of which (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **Oriental Insurance Company Ltd. versus Sihnu Ram and others,** being **FAO No. 474 of 2010,** decided on 28th September, 2016, while replying upon the various judgments rendered by the Apex Court.

26. In view of the discussions made hereinabove, the claim petition was not maintainable. Viewed thus, the findings returned by the Tribunal on issues No. 1 and 4 are set aside.

Issues No. 2, 3 and 5 to 7:

27. In view of the findings returned hereinabove, it is useless to discuss and determine these issues.

28. Both the points, framed hereinabove, are determined accordingly.

29. Having glance of the above discussions, the appeal is allowed, the impugned award is set aside and the claim petition is dismissed.

30. Registry to release the deposited amount, if any, in favour of the appellant-insurer through payee's account cheque. It is made clear that in case the claimants have received any amount of compensation under “No Fault Liability”, the same shall not be recovered by the appellant-insurer.

31. Send down the record after placing copy of thejudgment on the Tribunal's file.

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BEFORE HON’BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO (MVA) No. 52 of 2014 a/w
FAO (MVA) No. 180 of 2014.
Reserved on: 16.12.2016
Date of decision: 30.12.2016.

1. FAO No.52 of 2014.

Oriental Insurance Company ....Appellant

Versus

Sh. Roop Singh and others ....Respondents.

2. FAO No 180/2014.

Sh. Roop Singh .....Appellant

Versus

Sh. Baldev Singh Thakur and others .....Respondents.

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 30% permanent disability- his right leg has been shortened – he cannot drive the vehicle the way he was driving before the accident – accident has affected earning capacity to the extent of 50% - monthly income of the claimant was Rs. 7,800/- per month and loss of earning will be Rs. 3,900/- per month– the claimant was 34 years at the time of accident and multiplier of 15 is applicable- thus, the loss of income is Rs. 3,900 x 12 x 15= Rs. 7,02,000/- - compensation of Rs. 50,000/- under the head pain and suffering during treatment, Rs. 50,000/- under the head loss of enjoyment of life, Rs. 60,000/- under the head loss of earning capacity during treatment, Rs. 83,000/- under the head special diet and attendant charges do not need any interference- claimant is entitled to Rs. 9,70,000/- as compensation – rate of interest reduced from 9% to 7.5% per annum.

(Para- 15 to 22)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant(s):	Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate, for the appellant in FAO No. 52 of 2014 and Mr. Lakshay Thakur, Advocate, for the appellant in FAO No. 180 of 2014.
For the respondent(s):	Mr.Lakshay Thakur, Advocate, for respondent No. 1 in FAO No. 52 of 2014.
	Mr. Rajiv Sood, Advocate, for respondents No. 2 and 3 in FAO No. 52 of 2014 and for respondents No. 1 and 2 in FAO No. 180 of 2014.
	Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate, for respondent No. 3 in FAO No. 180 of 2014.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice .

These two appeals are outcome of a common judgment and award dated 2.12.2013, passed by the Motor Accident Claims Tribunal (III), Shimla, H.P., hereinafter referred to as "the Tribunal", for short, in MAC Petition No.136-S/2 of 2012/10, titled *Sh. Roop Singh versus Sh. Baldev Singh Thakur and others,* whereby compensation to the tune of Rs.10,16,800/- alongwith 9% interest came to be awarded in favour of the claimant and insurer came to be

saddled with the liability, for short "the impugned award" on the grounds taken in the memo of appeal.

2. The insurer has filed appeal being FAO No. 52 of 2014, on the ground that the Tribunal has fallen in an error in saddling it with the liability and the claimant has filed appeal being FAO No. 180 of 2014, for enhancement of compensation, on the grounds taken in their respective appeals.

3. This judgment shall govern both these appeals.

4. The owner/insured and the driver have not questioned the impugned award on any ground, thus the same has attained finality so far as it relates to them.

5. Following two points are to be determined in these appeals.

(i) Whether the Tribunal has rightly saddled the insurer with the liability, and;

(ii) Whether the amount awarded is inadequate?

6. In order to determine both these points, it is necessary to give a brief resume of relevant facts herein.

7. The claimant/injured Roop Singh, being the victim of a vehicular accident, filed claim petition before the Tribunal for the grant of compensation to the tune of Rs.15,00,000/- as per the break-ups given in the claim petition on account of the injuries suffered by him on 31.3.2009 at 9.30 P.M. near Harabag Tehsil Sunder Nagar, District Mandi, H.P. in a motor vehicular accident caused by driver Khajana Ram while driving vehicle bearing registration No. HP-65-0644, rashly and negligently due to which he sustained grievous injuries on his right arm and right leg, i.e., compound fracture. He took first aid at Government Hospital, Sunder Nagar and thereafter referred to I.G.M.C. Shimla where he remained admitted w.e.f. 1.4.2009 to 13.4.2009 and from 22.10.2009 to 31.10.2009. He was operated upon his right leg and arm at IGMC Shimla. It is stated that he has spent a sum of Rs.3,20,000/- on his treatment at IGMC Shimla and an amount of Rs.1,50,000/- is required for his further treatment.

8. The claim petition was resisted by all the respondents by filing replies. The Tribunal, on the pleadings of the parties framed following issues.

1. *Whether petitioner suffered injuries on account of rash and negligent driving of respondent No.2 on 31.3.2009? OPP.*
2. *If issue No. 1 is proved to what amount of compensation the petitioner is entitled to and from whom? OPP.*
3. *Whether the respondent No. 2 was not holding valid and effective driving licence at the time of accident? OPR.*
4. *Whether truck No. HP-65-0644 was being plied in violation of RC, route permit? OPR.*
5. *Relief.*

9. The claimant/injured, in support of his case, examined as many as seven witnesses and respondents on the other hand examined as many as five witnesses.

10. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant/injured has proved that the driver, namely, Khajana Ram had driven the offending vehicle rashly and negligently. The driver has not questioned the said findings and insurer has no right to question the said findings.

11. I.O. HHC Durga Singh appeared in the witness-box as RW2 and has also stated that the driver of the offending vehicle has driven the same rashly and negligently. There is sufficient proof on the file indicative of the fact that the driver of the offending vehicle has driven

the said vehicle rashly and negligently. Having said so, the findings returned by the Tribunal on issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 and 4.

Issue No.3.

13. Driving licence Ext. RW3/A is on record, which does disclose that the driver was competent to drive the offending vehicle. The Tribunal has made discussion in para 29 of the impugned award and has rightly held that the driver was having a valid and effective driving licence at the time of accident. It is apt to record herein that the learned counsel for the insurer has not questioned the said findings. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No.4.

14. It was for the insurer to prove that the owner has committed willful breach, has not led any evidence. Insurance policy, registration certificate and other documents are on record. Tribunal has rightly made discussion in para 30 of the impugned award. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No.2.

15. Factum of insurance is not in dispute. Claimant/injured was driver by profession and was driving another vehicle No.HP-69-0819, which was hit by offending vehicle, as discussed hereinabove, thus, fall within the definition of third party and his risk is covered. Learned counsel for the insurer has not disputed the liability. Disability certificate Ext. PW1/C, is on the record, which does disclose that the claimant/injured has suffered 30% permanent disability which has affected his professional capability. His right leg has shortened, cannot drive the vehicle, the way he was driving before the accident. Thus, it can be safely held that it has affected his earning capacity to the extent of 50%. The Tribunal, after making discussion in paras 14 to 18 has rightly held that the injured has lost earning to the tune of Rs.7800/- per month.

16. The age of the claimant/injured was 34 years at the time of accident. The multiplier applicable is "15" in view of the 2nd Schedule attached to the Motor Vehicles Act, 1988 for short "the Act", read with ***Sarla Verma and others versus Delhi Transport Corporationand another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***. Thus, the Tribunal has fallen in an error in applying the multiplier of "16".

17. At the cost of repetition, claimant/Injured was driver by profession and he cannot drive the way he was driving before the accident. But it can be held that he can do the work as a labourer and can perform other jobs. Thus, the Tribunal has rightly deducted 50% towards the personal expenses of the claimant/injured and held that the claimant/injured has lost source of dependency to the tune of Rs.3900/- per month. Viewed thus, it can be safely held that the claimant/injured has lost source of dependency to the tune of Rs.3900/-x12x15= Rs.7,02,000/-.

18. The Tribunal has rightly awarded the amount on other heads, i.e., Rs.50,000/- under the head "pain and suffering during treatment", Rs.50,000/- "loss of enjoyments of life" Rs.60,000/- under the head "loss of earning capacity during treatment", Rs.83,000/- under the head "medical expenses" and Rs.25,000/- under the head "Special diet and attendant charges", needs no interference.

19. Thus, in all, the claimant/injured is held entitled to compensation to the tune of Rs.7,02,000/-+Rs.50,000+ Rs,50,000/-+Rs.60,000/-+ Rs.83,000/-+ Rs. 25,000/-. Total Rs. 9,70,000/-.

20. The Tribunal has awarded interest @9% per annum. However, the interest was to be awarded at the rate of 7.5% per annum, for the following reasons.

21. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

22. Accordingly, interest @7.5% per annum instead of 9% is awarded from the date of claim petition till realization of the amount.

23. Having glance of the above discussion, the appeal being FAO No. 52 of 2014, filed by the insurer is allowed, the impugned award is modified as indicated hereinabove and the appeal being FAO No. 180 of 2014, filed by the claimant/injured for enhancement of compensation is dismissed.

24. The points are answered accordingly.

25. Registry is directed to release the amount alongwith interest @ 7.5% per annum in favour of the claimant, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account or by depositing the same in his bank account and excess amount, if any, be released in favour of the insurer alongwith interest accrued thereon, through payees' cheque account, after proper verification.

26. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rakesh Kumar. .....Appellant.

Versus

State of Himachal Pradesh. .....Respondent.

Cr. Appeal No. 372 of 2016
Reserved on: 25.11.2016
Decided on: 30.12.2016

Indian Penal Code, 1860- Section 302- Deceased was married to the accused- two children were born – accused killed the deceased – he was tried and convicted by the Trial Court – held in appeal that daughter of the accused had witnessed the incident – the weapon of offence was got recovered by the accused – blood stains were found on the same – medical evidence showed that the injuries could have been caused with the weapon of offence- it was duly proved that there was altercation between the accused and the deceased after which the accused had killed the deceased – the oral and circumstantial evidence proved the guilt of the accused- appeal dismissed.(Para-10 to 25)

For the appellant: Mr. Rajesh Mandhotra, Advocate.
For the respondent: Ms. Meenakshi Sharma, Addl. AG, with Mr. J.S. Guleria, Asstt. AG.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal has been preferred by the appellant/accused/convict (hereinafter referred to as "the accused") laying challenge to the judgment, dated 02.01.2006, passed by the learned Additional Sessions Judge(I), Mandi, District Mandi, H.P. (Camp at Sarkaghat), in Trial No. 20 of 2014, whereby he was convicted for the commission of offence under Section 302 Indian Penal Code, 1860 (hereinafter referred to as "IPC") and was sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs. 20,000. In case of default in payment of fine, the accused was further ordered to undergo simple imprisonment for one year.

2. The factual matrix, as per the prosecution story, giving rise to the present appeal are that deceased/victim, Sumna Devi (hereinafter referred to as "the deceased") was married to the accused and out of said wedlock two children were born. The accused had suspicion upon the fidelity of the deceased. On 27.10.2013, Police Post Dharampur got information through Smt. Tambo Devi (PW-1), Pardhan, Gram Panchayat Binga, that the deceased had been murdered at village Dabrot. This information formed the basis for *rapat* No. 5, Ex. PW-19/A, which was recorded in Police Post, Dharampur. ASI, Nasib Singh alongwith other police officials went to the place of occurrence. Statement, under Section 154 Cr.P.C., of Smt. Tambo Devi (PW-1) was recorded, wherein she stated that on 27.10.2013, during day time, when she had gone to bring grass, around 4:30 p.m. she received a telephonic call from Anil Kumar, Ward Panch. The Ward Panch informed her that the mother of the accused, Smt. Gambhari Devi, divulged to him that her daughter-in-law had been killed by someone inside the house. Subsequently, she telephonically informed PW-2, Ravi Kumar, Vice President qua the incident and reached the spot around 4:45 p.m. She discovered the dead body of the deceased, with several injuries, lying in the room. Blood stained clothes, stones were also there on the bed. Minor daughter of the deceased, on being questioned by PW-1, divulged that the accused quarreled with her mother and killed her. Statement of PW-1, Ex. PW-1/A, formed the basis for *rukka,* which was sent by ASI Nasib Singh, through constable Baldev Singh (PW-9), to Police Station, Sarkaghat. SI Prashotam Dhiman made his endorsement over *rukka* and FIR, Ex. PW-9/A, was registered. As per the prosecution story, prior to rushing to the spot of occurrence, ASI Nasib Singh informed about the occurrence to the Superintendent of Police, Mandi, Deputy Superintendent of Police, Sarkaghat and Station House Officer, Police Station, Sarkaghat. Shri Desh Raj, Photographer, was also associated by the police, who took photographs of the spot as well as the dead body, which are Ex. PW-14/A1 to Ex. PW14/A6. ASI Nasib Singh examined the dead body, which was lying on double folding-bed in the ground floor. Subsequently, SHO and Dy. SP, Sarkaghat, also came on the spot.

3. ASI Nasib Singh filled form 25-35A, Ex. PW-1/H. The dead body was taken into possession and sent for post mortem examination at CH Sarkaghat, alongwith application, Ex. PW-13/A, under the supervision of Constables Hem Raj and Desh Raj. Spot map, Ex. PW-19/B, was prepared. Blood stained stones were also found over the bed. Blood stained *smeaj*, bra, shirt, *salwar*, blood stains from first floor, from stairs, bed sheet/*khind* (mattress), were collected vide memos, viz., Ex. PW-1/B to Ex. PW-1/G. The articles were wrapped in different parcels and sealed with seal impression 'S'. Facsimile of seal impression 'S', Ex. PW-1/G, was separately taken on a piece of cloth, which was witnessed by PW-1, Tambo Devi, and PW-2, Ravi Kumar. The parcels, alongwith seal impression, were taken into possession vide aforesaid memos. Statements of PW-1, Tambo Devi, and PW-2, Ravi Kumar, were recorded by ASI Nasib Singh.

4. The accused, who was present in the house, was interrogated and subsequently arrested vide memo, Ex. PW-9/H. Information qua his arrest was given to his uncle, Bahadur Singh. Case property was deposited with MC HHC Ramesh Kumar. On application, Ex. PW-12/A, the accused was medically examined at CH Sarkaghat, and his Medico Legal Certificate, Ex. PW-12/B, was obtained. ASI Nasib Singh handed over the case file to SI/SHO Satish Kumar for further investigation. On 28.10.2013, SI Satish Kumar (PW-20) started investigation and

visited the spot alongwith PW-5, Smt. Neela Devi alias Leela and Inder Singh (sister of deceased and her maternal uncle). PW-14, Desh Raj, Photographer, was also associated. Statement of Kumari Shiwani, Ex. PW-7/A, was recorded in presence of Neela Devi alias Leela, Inder Singh and the same was signed by the aforesaid persons and attested by PW-20, SI Satish Kumar, also did videography of the statement in association with Photorapher Desh Raj. On 30.10.2013, the accused was interrogated in the police station by PW-20 in presence of Ajay Chandel, Pardhan Gram Panchayat Ropari and Santosh Kumar brother of the deceased. The accused revealed that he had hidden a bamboo stick/*baint* in the room of his house below the bed and this fact is only known to him. Disclosure statement of the accused, Ex. PW-3/A, was recorded and *baint* was recovered at his instance in presence of aforesaid witnesses. Sketch of the *baint*, Ex. AS3, was prepared on a piece of paper in presence of Santosh Kumar and Ajay Chandel. Videography of the entire recovery proceedings was done. Recovered *baint* was wrapped in a cloth parcel and sealed with seal impression 'N' at six places. Facsimile seal, Ex. PW-3/C, was separately taken over a piece of cloth and the aforesaid *baint* was taken into possession vide memo, Ex. PW-3/B. Supplementary statement of the Photographer Desh Raj was also recorded. Spot map, Ex. PW-20/A, qua recovery of *baint,* was prepared.

5. On 01.11.2013, the accused, through his disclosure statement, Ex. PW-2/A, which was given in presence of Up Pardhan Ravi Kumar and Anil Kumar, disclosed that he can give demarcation of the place where he had beaten his wife. On the basis of statement of the accused, Ex. PW-2/A, *fard nishandehi,* Ex. PW-2/B was prepared and spot map, Ex. PW-20/B, was drawn. After receiving the result from RFSL, the case property, vide *rapat* No. 17(A), was taken from *malkhana* Incharge for showing the same to Medical Board Members, who conducted the post mortem of the deceased. Their opinion, Ex. PW-13/E, was also obtained. Vide memo, Ex. PW-20/D, the dead body, after post mortem, was handed over to Bahadur Singh. Further investigation was assigned to ASI Nasib Singh (PW-19). *Aks Sajra* and *jamabandi,* Ex. PW-15/B and Ex. PW-15/C, respectively, were obtained from the *Halka* Patwari, Gian Chand (PW-15). Copy of *Pariwar* register, Ex. PW-6/B, was obtained from the Secretary Gram Panchayat, Binga, on moving an application, Ex. PW-6/A. Statements of Constable Ramesh Kumar, Baldev Singh and Gambhari Devi were recorded.

6. In order to prove its case, the prosecution examined as many as twenty witnesses. The statement of the accused, under Section 313 Cr.P.C., was recorded. No defence was led by the accused.

7. The learned Court below, vide its judgment dated 02.01.2016, convicted the accused for the offence punishable under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life and to pay fine of Rs. 20,000/-. In case of default in payment of fine, the accused was also ordered to further undergo simple imprisonment for one year, hence the present appeal.

8. We have heard the learned Counsel for the respondent/accused and learned Additional Advocate General for the respondent/State.

9. The learned counsel for the appellant has argued that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt and the accused may be acquitted by setting aside the judgment of conviction, as recorded by the learned Court below. Conversely, the learned Additional Advocate General has argued that the findings of conviction, as recorded by the learned Court below are just, reasoned and deserves no interference, as the prosecution has proved the guilt of the accused beyond reasonable doubt. In rebuttal, the learned counsel for the accused has argued that the prosecution has failed to connect the accused with the offence and, thus the accused may be acquitted.

10. As per the prosecution, the accused gave beatings to the deceased with *baint* (bamboo stick) and stones on 27.10.2013 during day time due to which she died. The whole incidence was witnessed by minor daughter of deceased, Kumari Shiwani (PW-7) and minor son Rahul. Kumari Shiwani informed to her grand mother, Gambhari Devi, and she informed Ward

Panch, Anil Kumar. Ward Panch further informed about the incidence to PW-1 Pardhan, Tambo Devi, and PW-1 informed PW-2, Up Pardhan, Ravi Kumar. PW-1 also telephonically informed the police.

11. The statement of PW-7, Kumari Shiwani, is very vital. Being a minor witness, her awareness was verified by the learned Trial Court by putting questions of different nature and she was declared a competent witness. PW-7 has deposed that the deceased was her mother, accused is her father and Gambhari Devi is her grand mother. There are seven rooms in her house and she used to sleep with her grand mother in the room of first floor and her parents used to sleep in the ground floor. She has further deposed that there is window in each room and one can see inside the room through the gap of door and window. As per this witness, she was present alongwith her brother, Rahul, when her mother died. She has also identified the photographs of the deceased and admitted that there were injury marks on the person of the deceased. She heard the noise of cries of her mother and when she peeped inside, she noticed that her mother was lying unconscious on bed and blood was oozing from her body. She noticed blood stains on the spot and bed, which is also identifiable in the photographs. PW-7 has further deposed that her father had not visited their house after the death of her mother and she used to live with her grand mother. She has stated that when her mother was being given beatings by *baint*, she was in the courtyard. On the day of occurrence she did not go to school and was present in the house, as it was Sunday. She had given statement, Ex. PW-7/A, to the police, which bears her signatures. As per the version of this witness, nobody rescued her mother. She identified *baint,* Ex. AS2, and deposed that with the same *baint* her father gave beatings to her mother and the *baint* was on the ground floor. This witness was exhaustively cross-examined and during her cross-examination she deposed that cow barn is near to the house and at the time of occurrence her grand mother had gone to work in NREGA near Government School, Marhi. She denied that she alongwith her brother was with her grand mother at Marhi. She voluntarily stated that her brother was at home and she had gone to Marhi School with her grand mother, however, she further stated that she could reach Marhi School from her house in two minutes. She could not divulge name of her *mausi,* but she stated that she knows her by face. This witness denied that there was no *baint* in the hand of the accused and she had seen the *baint* in the Court. She voluntarily stated that *baint* was lying in the ground floor, which was earlier used by *dada (Jabra)*, who has expired. A very imperative Court question was put to this witness, ***"why she had gone to the place of work of her grand mother"?***She replied that ***"I had gone to call my grand mother by saying that my mother had died".*** The statement of PW-7 was recorded by the police in presence of her *mausi,* Leela Devi and Inder Singh and the same was videographed by IO. This fact is fortified by PW-14, Desh Raj (Photographer) and he tendered CD, which is Ex. CI. The videography is duly proved by PW-14, Desh Raj.

12. PW-5, Neela Devi, elder sister of the deceased stated that she, being an illiterate lady, did not remember the date, month and year. As per the version of this witness, the marriage of the deceased was solemnized with the accused and the deceased was having two children. The deceased alongwith her children during the month of *Sauj* (September) visited her house for 4-5 days and the deceased told her that accused is not keeping her well and suspecting upon her fidelity on which she advised the deceased to live properly in her in-laws' house. Subsequently, she came to know that her sister was murdered by the accused by using *baint* and stones. When she heard about the death of her sister, she alongwith Inder Singh, her maternal uncle, went to Sarkaghat and saw the dead body of the deceased. This witness has further stated that she and her maternal uncle were taken by the police to the place of occurrence where statement of PW-7, Kumari Shiwani, was recorded in their presence. Videography of the recording of the statement was also done and PW-7 stated that her mother was killed by her father with *baint* and stones. PW-5 in her cross-examination has admitted that the deceased married the accused by going against her parents. She also admitted that the accused loved the deceased, but later on their relations became strained and the accused started giving beatings to the deceased. She had denied that on the day of occurrence Kumari Shiwani (PW-7) had gone to school. She has further stated that she was present in the house, as it was Sunday.

13. PW-3, Ajay Chandel alongwith Santosh Kumar witnessed the recovery of weapon of offence, i.e., *baint,* Ex. AS2, which was recovered on disclosure statement made by the accused. PW-3 deposed that during the year 2011 he was Pardhan of Ropari Panchayat and on 30.10.2013 he alongwith brother of the deceased (Santosh Kumar) went to Police Station Sarkaghat. As per this witness, the accused, who is present in the Court, was being inquired by the police in the Police Station. The accused divulged to the police that he could get the *baint* recovered. The statement of the accused, Ex. PW-3/A, was recorded by the police, which bears his signatures and also the signatures of marginal witnesses. Subsequently, police took the accused alongwith witnesses to Dabrot/Marhi and the accused got recovered the *baint* from a room of ground floor, which was concealed under a folding double bed. Sketch of the *baint*, Ex. AS3, was prepared and it was packed, sealed with seal impression 'N' at four places. This witness has also identified parcel, Ex. AS-1 and *baint* Ex. AS-2, which were taken into possession vide memo, Ex. PW-3/C. As per this witness, whole process was also videographed. In cross-examination, this witness has deposed that he might have visited Police Station, Sarkaghat, between 9 a.m. to 10 a.m. and he was taken by brother of the deceased, being Pardhan of the Panchayat. He met the accused in the courtyard of police station as he was brought out of judicial lock up.

14. The weapon of offence, i.e., *baint* was sent for chemical analysis and as per report, Ex. PW-13/B, Assistant Director RFSL Centre Range Mandi, detected blood traces on the said *baint.* Dr. Ashish Guleria, (PW-13) deposed that on 27.10.2013, ASI Naseeb Singh, through application, Ex. PW-13/A, prayed for conducting postmortem on the dead body of the deceased. He alongwith Dr. Dharampal conducted the postmortem on 28.10.2013 and gave their report, Ex. PW-13/B, wherein they have opined as under:

> "Average built female body lying on PM table. PM Rigidity-fully developed upto fingers and toes. Subject was wearing red shirt (floral)-Purple shirt blood stained. Sacred thread around neck. No other clothes found.
>
> Abrasion of dimension 2x1 cm on neck, dark brown in colour, lacerated wound on chest 3x2 cm. Irregular margins, lacerated wound in right arm 3x1 cm left arm 2x1 cm, both on lateral aspect with irregular margins. No foreign bodies. Contusion round eye with swelling around parietal and temporal region with depression in frontal bone. Contusion on left lateral thigh with blood margin. Multiple abrasion around left elbow and right thigh lateral 4x6 cm 4x1 cm, 3x1.2 cm dark brown in colour. Abrasion on hip both sides extending from right to left wide on right and narrow on left side, 5.2 cm on right side and 3x1 cm on left side. Bark brown in colour, lacerated wound on Tibial side (front) on left side 3x2 cm dimension no foreign body detected. No injury seen on media thigh and around external genitals, abrasion around waist right side no visible frontal and prital region with depression on frontal bone. Fracture present on frontal bone, Membranes of brain tear with haematoma spinal cord not opened.
>
> Thorax-Plaura, Larynx and trachea, right lung and left lung Paricardium, heart large vessels-congested, walls, ribs and cartilages normal.
>
> Abdomens: Kidneys congested, walls, peritoneum mouth, pharymx and Oesophagus, stomach and its contents, small intestines and their contents, large intestines and their contents, liver spleen, bladder, organs of generation (external and internal) normal. No sign of pregnancy, Muscles bones joints-fracture frontal bone.
>
> Certificate of cause of death: With the best of our clinical knowledge, the subject died of subdural hematoma which leads to cardiopulmonary rest. Though the viscera had been preserved and sent for chemical examination and final opinion about any suspected chemical will be given after viscera examination from forensic laboratory.

> Probable time between injury and death was within one hour. The probable time between death and postmortem was within 24 hours."

Viscera containing spleen part of liver, one kidney, stomach, blood were sealed in separate Jars sealed with seal impression CH Sarkaghat, after taking facsimile seal impression, Ex. PW-13/C, on a separate piece of cloth was handed over the police. Police brought report No. 8578, Ex. PW-13/B, from RFSL Mandi, which was issued by Assistant Director RFSL Mandi. After perusal of the same, finally the Medical Board observed that no alcohol, no poison has been detected in viscera. Therefore, the opinion remained the same. On 27.12.2013, SHO, P.S. Sarkaghat, moved an application, Ex. PW-13/D, whereby the weapon of offence, i.e., *baint* was shown to the medical board. PW-13 alongwith Dr. Dharampal gave their opinion, Ex. PW-13/E, opining that injuries mentioned in postmortem report can be caused by bamboo stick/baint. Dr. Dharampal also identified stones, Ex. P1 to Ex. P4. According to this witness, injuries mentioned in postmortem report, Ex. PW-13/B, can be caused with the recovered stones and other bodily injuries, which were found on the body of the deceased, were sufficient to cause death in ordinary course. In his cross-examination, this witness admitted that time between injuries and death cannot be said with precision. He has also admitted that there should be three member board to conduct the postmortem. This witness denied that injuries, as mentioned in Ex. PW-13/B, can be caused in an accident. He has also denied that the injuries sustained by the deceased are possible by fall from stairs.

15. PW-4, Anil Kumar, stated that he was informed by the mother of the accused, Gambhari Devi, telephonically that the accused killed the deceased. He went to the spot and disclosure statement of the accused, Ex. PW-2/A, was recorded. On the basis of Ex. PW-2/A, police prepared the spot map, Ex. PW-2/B in his presence. This witness could not divulge the exact time when he received telephonic call from the mother of the accused. He admitted that he did not go through the contents of Ex. PW-2/A.

16. Smt. Tambo Devi, Pardhan, deposed as PW-1. Her statement, Ex. PW-1/A, under Section 154 Cr.P.C was recorded by the police. She deposed that when she reached the house of the deceased, Gambhari Devi, Rakesh Kumar and two minor children were weeping. She did not make any inquiry from Gambhari Devi. As per this witness, accused Rakesh Kumar disclosed that someone killed his wife and the children did not disclose anything. The minor daughter had gone to school. This witness was declared hostile and during her cross-examination she has admitted that blood stained shirt, *smeaj*, shirt, bra and *salwar* were taken into possession vide memo, Ex. PW-1/B, and were packed in a cloth parcel, which was sealed with seal impression 'S'. She admitted that soil stained with blood, broken bangles and soil stained with blood from the ground floor were taken into possession vide memos, Ex. PW-1/C to Ex. PW-1/E. In presence of PW-2, Ravi Kumar, *khind* (mattress) and bed sheet were recovered vide memo, Ex. PW-1/F. Ex. P-1 to Ex. P-9 (articles) were recovered in her presence. This witness in her cross-examination deposed that she met the accused on way when she was going to his house. She has denied that police did not recover anything from the spot and there was rumour that someone killed the deceased. She volunteered that accused was saying that his wife was killed by someone.

17. Shri Ravi Kumar, while appearing as PW-2 has deposed that accused divulged that someone had killed his wife. PW-2 has further stated that PW-1, Pardhan, telephonically informed the police. He has deposed that in presence of Tambo Devi, Pardhan, vide memo, Ex. PW-1/B, stone, *smeaj,* shirt, *salwar* and bra were taken into possession. As per this witness, in his presence, soil stained with blood was also taken into possession vide memo, Ex. PW-1/C. He has admitted the police took into possession cement pieces, Ex. P11, soil, Ex. P12, vide memo Ex. PW-1/D, *khind* (mattress), Ex. P13 and double bed sheet, Ex. P15, vide memo, Ex. PW-1/F. He has admitted that Investigating Officer filled form 25-35, Ex. PW-1/H, in his presence. He has also admitted that seal impression, Ex. PW-1/G, of seal 'S' was taken on piece of cloth. This witness was declared hostile, as he deposed that PW-7 Kumari Shiwani did not disclose any facts qua killing of her mother. PW-2 has denied that PW-7, Kumari Shiwani, divulged to the police

that her father killed her mother with stones. He has also denied that on the basis of Ex. PW-2/A accused identified the place of occurrence. During his cross-examination he has deposed that police came on the spot at about 6/6:15 p.m.

18. PW-6, Lalit Kumar, issued copy of *Pariwar* Register, Ex. PW-6/B, of the accused. PW-8, HHC Shyam Lal, deposed that MHC, Police Station, Sarkaghat, handed over 12 cloth parcels to him, which were sealed with different seal impressions and he deposited the same in proper condition at RFSL, Mandi. As per this witness, on his return he handed over the receipt to MHC. PW-9, Constable Baldev Singh, brought *rukka,* Ex. PW-1/A, from the spot and gave the same to SHO, Prashotam Dhiman, who registered the FIR, Ex. PW-9/A. PW-10, HHC Ramesh Chand, deposed that on 27.10.2013, ASI Naseeb Singh, around 11:55 p.m., deposited with him five parcels, which were sealed with seal impression 'S'. On 28.10.2013, he gave the above parcels to PW-9, Constable Baldev Singh vide RC No. 29/13, Ex. PW-10/A, with a direction to deposit the same in *malkhana.* No tampering had occurred during the time he possessed the said parcels. PW-11, Dharam Singh, Incharge of *malkhana, deposed* that on 28.10.2013 vide RC No. 29/13, Constable Baldev Singh, deposited ten cloth parcels, which were sealed with different seal impressions and one envelope of specimen seal impression CHK. He made entry in *malkhana* register at Sr. No. 1152/13. He also tendered the abstract copy of *malkhana* register, Ex. PW-11/A. He has further deposed that on 30.10.2013, SI Satish Kumar (PW-20), deposited a cloth parcel having seal impression 'N' at six places, which stated to have contained a *baint.* No tampering took place during the time he possessed the case property.

19. Dr. Dinesh, M.O. CH Sarkaghat (PW-12), conducted the medical examination of the accused and issued MLC, Ex. PW-12/B. According to him the accused was not under alcoholic influence. He has further stated that he did not take urine and blood samples of the accused. As per this witness, he has recovered pant and shirt containing blood stains and packed the same. He has denied that he did not preserve the clothes of the accused. PW-15, Gian Chand, Patwari, prepared the spot map, Ex. PW-15/B and issued *jamabandi*, Ex. PW-15/C depicting the location of the house of the accused. PW-16, HC Hoshiyar Singh, deposed that on 07.11.2013 he sent 12 parcels, as per list mentioned in RC, Ex. PW-16/C to RFSL Mandi for chemical analysis through HHC Shyam Lal. PW-17, Constable Sanjeev Kumar, had drawn *rapats,* Ex. PW-17/A and Ex. PW-17/B qua departure and arrival of Investigating Officer alongwith case property, which was to be shown to the medical board. PW-18, Parshotam Dhiman, registered FIR, Ex. PW-9/A. PW-19, ASI Nasib Singh, Investigating Officer, investigating the matter. PW-20 is SI/SHO Satish Kumar, partly investigating the matter.

20. The statement of PW-7, Kumari Shiwani, who is a minor witness, is very material evidence. The statement of a child witness is reliable and trustworthy, if the Court comes to the conclusion that the child witness is not tutored. PW-7, Kumari Shiwani, admittedly used to reside with her grand-mother, Gambhari Devi (mother of the accused). In her cross-examination, she could not divulge the names of her maternal grand parents, as she was not in touch with them. Evidently, the statement of PW-7, Ex.PW-7/A, was recorded in presence of Neela Devi alias Leela and Inder Singh and videography of the same was also done. In the video CD, Ex. C-1, which was played in the open Court by the leaned Trial Court, PW-7 unequivocally deposed that her father (accused) killed her mother. PW-7 meticulously stated that it was Sunday on 27.10.2013, so she did not go to school, thus tutoring of this witness is not probable. PW-7 was living under the care and custody of Smt. Gambhari Devi, her grand mother, who was given up by the prosecution, being won over by the accused. Thus, there is likelihood of pressurizing of this witness by her grand mother. After scrutinizing the statement of this witness coupled with the facts of the case, it is worth noticing that in fact the pressure is supposed to be on the child witness (PW-7) to depose in favour of the accused as she was living in the care and custody of her grand mother, who is mother of the accused. PW-7 was subjected to extensive cross-examination, but she has specifically stated that she had gone to call and tell her grand mother that her mother had died. She has specifically denied the suggestion put by the learned counsel for the accused that *baint* was not in hands of her father. She also denied that she had seen *baint,* Ex. AS2, for the first time in the Court. In fact, she has identified the *baint* as the one

which was used by her *dada* (grand father), locally called *Jabara.* In these circumstances, after exhaustively examining the statement of child witness (P'W-7), it can safely be held that there is no infirmity in her statement. It is correct that the competency of a child witness depends upon the degree of his/her understanding and in the case in hand the degree of understanding of Kumari Shiwani (PW-7), child witness, is in fact very good and par excellence, thus it can be inferred that she was not tutored.

21. As per prosecution story *baint,* Ex. AS2 was got recovered by the accused himself. Manifestly, CDs Ex. C2, Ex. C3 and the statement of PW-3, Ajay Chandel, reveal that accused made a disclosure statement, Ex. PW-3/A. The said statement was made in presence of PW-3, Ajay Chandel, and as per CD accused led the police party and witnesses inside the room and he got recovered a *baint* (Ex. AS2), which was hidden below a folding double bed. Now, if the recovery part is examined in conjunction with the statement of PW-7, Kumari Shiwani, then the story of the prosecution stands further fortified, as PW-7 deposed specifically that *baint* was in the ground floor and the same was recovered from the ground floor. As per the testimony of PW-7, the said *baint* belonged to her *Dada (Jabra)*, who is no more. Lastly, the recovery of *baint* has been further substantiated by PW-3, Ajay Chandel. Thus, the recovery of *baint* stands fully established by the prosecution.

22. It is emanating from the record that consequent upon the disclosure statement, Ex. PW-3/A, made by the accused, PW-20 SI Satish Kumar effected recovery of *baint,* vide recovery memo, Ex. PW-3/B. There no incriminating material available on record disproving disclosure statement, Ex. PW-3/A. Apparently, the recovery was effected after three days of occurrence, i.e., on 30.10.2013. The recovered *baint,* Ex. AS2, was sent to RFSL, Mandi, for chemical analysis and the report of Assistant Director RFSL, Ex. PW-13/B, depicts that blood was detected in traces over the *baint,* but the same was insufficient for the purpose of serological examination. Thus, the chemical analysis reveals that blood was found on the said *baint.* As per postmortem report, Ex. PW-13/A, Dr. Ashish Guleria (PW-13), opined that injuries mentioned in the postmortem report can possibly be caused by *baint,* Ex. AS2. Thus, the conspectus of the above discussion is that statement of PW-7, child witness, stands duly substantiated viz-a-viz disclosure statement, Ex. Pw-3/A, recovery memo, Ex. PW-3/B, RFSL report, Ex. PW-13/B and statement of Dr. Ashish Guleria, PW-13.

23. As per the prosecution story ASI Nasib Singh (PW-19) was asked to come on the spot by PW-1, Tambo Devi, Pardhan, Gram Panchayat, Binga. This fact also stands corroborated by PW-1, Tambo Devi, PW-2 Ravi Kumar and PW-4, Anil Kumar. PW-19 recovered four stones, Ex. P1 to Ex. P4, which were stained with blood. The recovery of stones has been admitted by PW-1, Tambo Devi, and PW-2, Ravi Kumar. Recovered stones were chemically examined at RFSL, Mandi, and as per report, Ex. PW-13/B, human blood was detected on the stones. PW-12, Dr. Dinesh, Medical Officer, C.H. Sarkaghat, handed over to police samples of blood and urine alongwith pant and T-shirt containing blood stains, which were sealed with seal impression CH. As per the testimony of PW-13, Dr. Ashish Guleria, the injuries mentioned in postmortem report can be caused by stones, Ex. P1 to P4, and *baint,* Ex. AS2. Admittedly, accused was arrested on 27.10.2013 and was medically examined by PW-12, Dr. Dinesh, on 28.10.2013. PW-12 preserved pant and T-shirt of the accused, which were stained with human blood, and he handed over the same to police. The defence did not give any explanation qua presence of blood on the clothes of the accused. The fact that the accused was suspecting fidelity of the deceased also stands substantiated by PW-5, Neela Devi alias Leela (sister of the deceased). As per her statement accused, when deceased and their children stayed in her house for 4-5 days, the deceased divulged to her that accused was suspecting on her character. Nothing incriminating has come on record to disbelieve her statement.

24. On meticulous analysis of the material on record, it can be held that on the day of occurrence there was an altercation between the accused and the deceased and accused taking help of stones, Ex. P-1 to Ex. P-4, *baint,* Ex. AS2, killed the deceased. The entire happening was witnesses by PW-7, Kumari Shiwani, and her younger brother Rahul. PW-7, Kumari Shiwani,

saw the occurrence through a window side that is why she deposed that her mother was crying for help. As her grand mother had gone to work in NREGA, nobody helped the deceased. Recovery of weapon of offence, that is, *baint,* Ex. AS2, and its identification by PW-7 demonstrates that the same was used as a weapon of offence by the accused.

25. Manifestly, blood traces were found on the recovered *baint* and pant and shirt of the accused were also stained with blood, which were preserved by PW-12, Dr. Dinesh, while medically examining him. The presence of human blood on Ex. AS2, *baint,* and stones, Ex. P-1 to Ex. P4, show that these were used for committing the offence. Thus, the chain of circumstances is complete. In these circumstances, this Court finds that the prosecution has proved the guilt of the accused conclusively and beyond the shadow of doubt, thus the judgment of conviction passed by the learned Court below deserves no interference. Accordingly, the appeal, being devoid of any merit, is dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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